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MANUAL
(Civil & Criminal)

2

BY
V. V. CHITALEY
AND
S. ADHI RAO

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The value of a decision as authority depends upon how it has been interpreted and how the principles therein announced have been limited or modified and applied, and to what extent it has been followed. — D. E. Hydrick, Justice of Supreme Court, South Carolina.

A more serious difficulty, and one likely to increase in future with the ceaseless growth of recorded cases, is that exact and comprehensive citation cannot be ensured. If the Judge is to be bound by precedents he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search. He must depend largely on the assistance of counsel, and since the industry and acumen of the Bar are also fallible, it is not uncommon to meet with cases which might have been decided otherwise, or are even overruled later, because pertinent decisions have not been taken into consideration. (Professor Allen in "*Law the Making*,")

Watch the latest Rulings. They are nearest to you and nearest to the Courts.

In one sense no reported case can ever be obsolete while the laws and judicial usages of English-speaking countries are what they are: that is, no man can say beforehand that any given case, however antiquated or trifling it may appear in itself to be, may not at some time have its use for the modern practitioner or text-writer. Every decision in the books is part of the history of the law, and no part of that history can be absolutely insignificant.—(Sir Frederick Pollock, Bart., LL.D., Corpus Professor of Jurisprudence in the University of Oxford.)

Accurate knowledge of the present state of the law upon any subject involves necessarily the history of the development of the law upon that subject, which can only be attained by following down the decision touching upon it. — (Francis M. Scott, Justice, Supreme Court, New York.)

The law is the last interpretation of the law given by the last Judge.

The enunciation of the most elementary principle of law is frequently met by a demand for "an authority in support of that proposition" No time spent upon providing oneself with a precedent is ever wasted even though the book may have to be judiciously hidden from view until required.—(The Hon'ble Sir Cecil Walsh, Kt., K.C., Ex-Offg., Chief Justice, Allahabad High Court.)

The last Judicial Interpretation of the law is the Law on which your case hangs.

To correctly appraise a Judicial decision, it is important to know later applications of its rules to varying states of facts by way of extension or qualification. — S. Shepard, Chief Justice, Court of Appeal, Washington (U. S. A.).

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THE A. I. R. MANUAL

UNREPEALED CENTRAL ACTS

(CIVIL AND CRIMINAL)

BY

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and the Indian Digest, 1931-1946.)

VOLUME II

CIVIL P. C. ORDER XXI TO COURT OF
CHANCERY ACT.

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PREFACE TO THE SECOND VOLUME

The object, plan and special features of this publication have been fully explained in the Preface to the first volume. As we think that it will be useful to reproduce here portions of the Preface dealing with these matters we make no apology for giving such portions again below :

“The aim of the present publication is to make available to the Bench and the Bar in a set of convenient volumes practically the entire statute law passed by the Central Legislature which is of general application to the whole of India. The Acts are given in the alphabetical order of their titles. This has the advantage of enabling an Act to be referred to without having to remember the year and number of the Act — which is the difficulty one feels when referring to the volumes of the Government publication, “Unrepealed Central Acts” in which the arrangement is according to the year and number of the Act. We also have not made any division into civil and criminal Acts as is sometimes done, as we felt that such a division is on the whole an inconvenience rather than an advantage to the profession. In numerous instances, sections of a penal nature are found in enactments which are mainly of a civil nature, e. g., the Stamp Act, Income-Tax Act, Cantonments Act, etc. In such cases it will be highly inconvenient to omit, in the portion that may be allotted to the civil section, the sections of a penal nature and print them in the criminal section. If such a course is adopted, it will detract from the utility of both the portions of the publication. Again, there are Acts like the Evidence Act which will have to appear in both sections. It was, therefore, considered, on the whole, to be the better course to just give all the Acts in their alphabetical order without labelling them as civil or criminal Acts.

Care has been taken to incorporate all the amendments in the various Acts up to date. Even provincial amendments have been given as completely as possible. In the case of the Civil Procedure Code, local amendments by the various High Courts are given. Letters Patent of the different High Courts are also given and also the rules of the Federal Court and the Judicial Committee of the Privy Council.

Besides the above, we have also given the more important of the Acts of the British Parliament applicable to India, such as the Government of India Act, 1935.

We need hardly say that all the Acts have been carefully edited and annotated. Not only have all the amendments been incorporated but also notes have been added giving particulars as to the date and other matters relating to the amendments. Full and copious extracts from Select Committee Reports, Statements of Objects and Reasons and Notes on Clauses have been given in appropriate places under each Act. Besides the above, each Act is preceded by a statement as to how the Act has been affected by subsequent legislation. Further, cognate Acts and provisions have been indicated under the respective enactments.

In addition to the above features, the case-law bearing on the different enactments has been given in the foot-notes under each section. We have taken care to see that the notes are full and it is hoped that the bulk of the relevant Indian case-law would be found summarised in the foot-notes. The notes have been divided into convenient headings of which a synopsis is given for each section. The matter under each heading is presented in a manner which is well adapted for easy and quick reference. It may also be mentioned that what may be treated as a special feature of A. I. R. publications, viz., the giving of the particular page of the report where the point occurs is also present in this publication.

There will be a consolidated subject index at the end of the last volume. This will practically be something more than a general subject index for the whole of the statute law which is of general application to India and the advantages of such an index to the profession are too obvious to require mention. It is also intended to give in the last volume the rules relating to interpretation of statutes."

We owe a word of apology for the delay in the publication of this volume. But we may assure our readers that the delay has been due to causes beyond our control. The public is quite aware of the **difficult** conditions in the paper market. Added to this, our management had to contend with labour troubles in our printing department - which again, the public can well understand, have been only a repercussion of the country wide labour unrest in India. The A. I. R. has an established reputation for promptness and regularity. We are sure that the public will appreciate our difficulties and extend to us their indulgence for such inconvenience as may have been caused by the abovesaid delay.

Owing to the non-availability, in sufficient quantity, of white printing paper, we have been compelled to print a portion of this volume on unbleached paper. We crave the forbearance of our readers in regard to this also.

V. V. C.

S. A. R.

ABBREVIATIONS

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|--|---|
| <p>A. O. ... Government of India (Adaptation of Indian Laws) Order, 1937, as modified by the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.</p> <p>A. O. (P) ... The Government of India (Adaptation of Acts of Parliament) Order, 1937.</p> <p>A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.</p> <p>All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.</p> <p>Agra. ... Agra High Court Reports.</p> <p>All. L. Jour. ... Allahabad Law Journal.</p> <p>All. W. N. ... Allahabad Weekly Notes.</p> <p>All. W. R. ... Allahabad Weekly Reporter.</p> <p>App. Cas. ... Law Reports, Appeal Cases (England).</p> <p>Beng. L. R. ... Bengal Law Reports.</p> <p>B. R. ... Bihar Reports.</p> <p>Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.</p> <p>Bom. H. C. R. ... Bombay High Court Reports.</p> <p>Bom. L. R. ... Bombay Law Reporter.</p> <p>Bom. P. J. ... Bombay Printed Judgments.</p> <p>Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.</p> <p>Cal. L. Jour. ... Calcutta Law Journal.</p> <p>Cal. L. Rep. ... Calcutta Law Reports.</p> <p>Cal. W. N. ... Calcutta Weekly Notes.</p> <p>C. P. L. R. ... Central Provinces Law Reports.</p> <p>Cri. L. Jour. ... Criminal Law Journal.</p> <p>E. R. ... English Reports (England).</p> <p>Ind. App. ... Law Reports, Indian Appeals.</p> <p>Ind. Cas. ... Indian Cases.</p> <p>Ind. Rul. ... Indian Rulings.</p> | <p>Kar. (I. L. R.) ... Indian Law Reports, Karachi Series.</p> <p>K. B. ... Law Reports, King's Bench (England).</p> <p>Knapp ... Knapp's Reports.</p> <p>Lah. or I. L. R. Lah. ... Indian Law Reports, Lahore Series.</p> <p>L. J. ... Law Journal (England).</p> <p>L. R. ... Law Reports (England).</p> <p>L. R. A. ... Law Reporter, Allahabad.</p> <p>Low. Bur. Rul. ... Lower Burma Rulings.</p> <p>Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.</p> <p>Luck. Cas. ... Lucknow Cases.</p> <p>Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.</p> <p>Mad. H. C. R. ... Madras High Court Reports.</p> <p>Mad. Jur. ... Madras Jurist.</p> <p>Mad. L. Jour. ... Madras Law Journal.</p> <p>Mad. L. Tim. ... Madras Law Times.</p> <p>Mad. L. W. ... Madras Law Weekly.</p> <p>Mad. W. N. ... Madras Weekly Notes.</p> <p>Moo. Ind. App. ... Moore's Indian Appeals.</p> <p>Nag. (I. L. R.) ... Indian Law Reports, Nagpur Series.</p> <p>Nag. L. Jour. ... Nagpur Law Journal.</p> <p>Nag. L. R. ... Nagpur Law Reports.</p> <p>N.-W. P. H. C. R. ... North-West Provinces High Court Reports.</p> <p>Oudh Cas. ... Oudh Cases.</p> <p>Oudh L. Jour. ... Oudh Law Journal.</p> <p>Oudh L. R. ... Oudh Law Reports.</p> <p>Oudh S. C. ... Oudh Select Cases.</p> <p>Oudh W. N. ... Oudh Weekly Notes.</p> <p>Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.</p> |
|--|---|

Pat. H. C. C. ... Patna High Court Cases.	Rang. L. R. ... Rangoon Law Reports.
Pat. L. Jour. ... Patna Law Journal.	R. R. ... Revised Reports (England).
Pat. L. Tim. ... Patna Law Times.	Sind L. R. ... Sind Law Reporter.
Pat. L. R. ... Patna Law Reporter.	Suth. W. R. ... Sutherland's Weekly Reporter.
Pat. L. W. ... Patna Law Weekly.	Times L. R. ... Times Law Reports (England).
Pat. W. N. ... Patna Weekly Notes.	U. P. L. R. ... United Provinces Law Reports.
Pun. L. R. ... Punjab Law Reporter.	Upp. Bur. Rul. ... Upper Burma Rulings.
Pun. Re. ... Punjab Records.	Weir. ... Weir's Criminal Rulings.
Pun. W. R. ... Punjab Weekly Reporter.	W. R. (Eng.) ... Weekly Reporter (England).
Q. B. ... Law Reports, Queen's Bench (England).	
Rang. ... Indian Law Reports, Rangoon Series.	

Other Abbreviations.

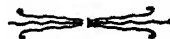
Art. ... Article.	O. ... Order.
B. R. ... Board of Revenue.	P. ... Page.
Civ. ... Civil.	P. C. ... Privy Council.
C. A. ... Court of Appeal.	Pre. ... Preamble.
Cl. ... Clause.	Rev. ... Revenue.
Cr. ... Criminal.	R. ... Rule.
D. B. ... Division Bench.	R. S. C. ... Rules of Supreme Court.
F. B. ... Full Bench.	S. ... Section.
F. C. ... Federal Court.	S. B. ... Special Bench.
F. N. ... Foot-Note.	S. C. R. ... Select Committee Report.
G. I. ... Government of India Act, 1915.	S. O. R. ... Statement of Objects and Reasons.
Jour. ... Journal.	U.P.B.R. ... United Provinces Board of Revenue.
L. P. ... Letters Patent.	
N. ... Note.	

Note :— The mark * indicates that citation of a different case begins.



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(I. L. R.) Allahabad

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20					
1892	1893	1894	1895	1896	1897
1898					
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1899	1900	1901	1902	1903	1904
1905					
28	29	30	31	32	33
34					
1906	1907	1908	1909	1910	1911
1912					
35	36	37	38	39	40
41					
1913	1914	1915	1916	1917	1918
1919					
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1933					
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1911	1912	1913	1914	1915	1916	1917
16	17	18	19	20	21	22
23						
1918	1919	1920	1921	1922	1923	1924
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Allahabad Weekly Reporter

1935 AWR
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1875						

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(I L. R.) Bombay

1	2	3	4
1875-1877	1877-1878	1878-1879	1879-1880
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9	10		
1880-1881	1881-1882	1883	1884
1885	1886		
11	12	13	14
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1887	1888	1889	1890
1891	1892	1893	
18	19	20	21
22	23	24	
1894	1895	1896	1897
1898	1899	1900	
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1901	1902	1903	1904
1905	1906	1907	
32	33	34	35
36	37	38	
1908	1909	1910	1911
1912	1913	1914	
39	40	41	42
43	44	45	
1915	1916	1917	1918
1919	1920	1921	
46	47	48	49
50	51	52	
1922	1923	1924	1925
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57	58	59	60
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1933	1934	1935	1936
From 1937 citation by year.			

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9	10		
1868-1869	1869	1870	1871
1872	1873		
11	12		
1874	1875		

Bombay Law Reporter

1	2	3	4	5	6	7
1899	1900	1901	1902	1903	1904	1905
8	9	10	11	12	13	14
1906	1907	1908	1909	1910	1911	1912
15	16	17	18	19	20	21
1913	1914	1915	1916	1917	1918	1919
22	23	24	25	26	27	28
1920	1921	1922	1923	1924	1925	1926

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1927	1928	1929	1930	1931	1932	1933	1934
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44	45	46	47	48			
1942	1943	1944	1945	1946			

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1922	1923	1924	1925	1926	1927

Burma Law Times

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8	9	10	11	12	13	
1915	1916	1917	1918	1919	1920	

(I. L. R.) Calcutta

1	2	3	4	5
1875-1876	1876-1877	1877-1878	1879	1880
6-7	8	9	10	11
1881	1882	1883	1884	1885
12-13	14	15	16	17
1886	1887	1888	1889	1890
18	19	20	21	22
1891	1892	1893	1894	1895
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1896	1897	1898	1899	1900
28	29	30	31	32
1901	1902	1903	1904	1905
33	34	35	36	37
1906	1907	1908	1909	1910
38	39	40	41	42
1911	1912	1913	1914	1915
43	44	45	46	47
1916	1917	1918	1919	1920
48	49	50	51	52
1921	1922	1923	1924	1925
53	54	55	56	57
1926	1927	1928	1929	1930
58	59	60	61	62
1931	1932	1933	1934	1935
63	64	65	66	67
1936	1937	1938	1939	1940
68	69	70	71	72
1941	1942	1943	1944	1945
73	74	75	76	77
1946				

From 1937 citation by year.

Calcutta Law Journal

1-2	3-4	5-6	7-8	9-10	11-12	13-14
1905	1906	1907	1908	1909	1910	1911
15-16	17-18	19-20	21-22	23-24	25-26	
1912	1913	1914	1915	1916	1917	
27-28	29-30	31-32	33-34	35-36	37-38	
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63-64	65-66	67-68	69-70	71-72	73-74	
1936	1937	1938	1939	1940	1941	
75-76	77	78	79-80	81-82		
1942	1943	1944	1945	1946		

Calcutta Law Reports

1-2	3-4	5-6	7-8	9-11	12-13
1878	1879	1880	1881	1882	1883

Calcutta Weekly Notes

1	2	3	4	5	6	7
1897	1898	1899	1900	1901	1902	1903
8	9	10	11	12	13	14
1904	1905	1906	1907	1908	1909	1910
15	16	17	18	19	20	21
1911	1912	1913	1914	1915	1916	1917
22	23	24	25	26	27	28
1918	1919	1920	1921	1922	1923	1924
29	30	31	32	33	34	35
1925	1926	1927	1928	1929	1930	1931
36	37	38	39	40	41	42
1932	1933	1934	1935	1936	1937	1938
43	44	45	46	47	48	49
1939	1940	1941	1942	1943	1944	1945
50	51	52	53	54	55	56
1946						

Central Provinces Law Reports

1	2	3	4	5	6	7
1888	1889	1890	1891	1892	1893	1894
8	9	10	11	12	13	14
1895	1896	1897	1898	1899	1900	1901
15	16	17				
1902	1903	1904				

Criminal Law Journal

1	2	3-4	5-6	7-8	9-10	11
1904	1905	1906	1907	1908	1909	1910
12	13	14	15	16	17	18
1911	1912	1913	1914	1915	1916	1917
19	20	21	22	23	24	25
1918	1919	1920	1921	1922	1923	1924
26	27	28	29	30	31	32
1925	1926	1927	1928	1929	1930	1931
33	34	35	36	37	38	39
1932	1933	1934	1935	1936	1937	1938
40	41	42	43	44	45	46
1939	1940	1941	1942	1943	1944	1945
47	48	49	50	51	52	53
1946						

Hyde's Reports

1-2
1897

(L. R.) Indian Appeals

1	2	3	4
1873-1874	1874-1875	1875-1876	1876-1877
5	6	7	8
1877-1878	1878-1879	1879-1880	1880-1881
9	10	11	12
1881-1882	1882-1883	1883-1884	1884-1885
13	14	15	16
1885-1886	1886-1887	1887-1888	1888-1889
17	18	19	20
1890	1891	1892	1893
21	22	23	24
1894	1895	1896	1897
25	26	27	28
1898	1899	1900	1901
29	30	31	32
1902	1903	1904	1905
33	34	35	36
1906	1907	1908	1909
37	38	39	40
1910	1911	1912	1913

(L. R.) Indian Appeals (*contd.*)

38	39	40	41	42	43	44
1911	1912	1913	1914	1915	1916	1917
45	46	47	48	49	50	51
1918	1919	1920	1921	1922	1923	1924
52	53	54	55	56	57	58
1925	1926	1927	1928	1929	1930	1931
59	60	61	62	63	64	65
1932	1933	1934	1935	1936	1937	1938
66	67	68	69	70	71	72
1939	1940	1941	1942	1943	1944	1945
73	74	75	76	77	78	79

Indian Cases

1-4	5-8	9-12	13-17	18-21	22-25
1909	1910	1911	1912	1913	1914
26-31	32-36	37-42	43-48	49-53	54-58
1915	1916	1917	1918	1919	1920
59-64	65-70	71-77	78-84	85-91	92-98
1921	1922	1923	1924	1925	1926
99-106	107-112	113-120	121-128	129-134	135-140
1927	1928	1929	1930	1931	1932
141-146	147-152	153-158	159-165	166-172	173-178
1933	1934	1935	1936	1937	1938
179-184	185-190	191-196	197-203	204-209	210-215
1939	1940	1941	1942	1943	1944
216-221	222-227	228-233	234-239	240-245	246-251

Indian Jurist

1	2	3	4	5	6	7
1877	1878	1879	1880	1881	1882	1883
8	9	10	11	12	13	14
1884	1885	1886	1887	1888	1889	1890
15	16	17	18	19	20	21
1891	1892	1893	1894	1895	1896	1897

Indian Rulings

IR 1929	IR 1930	IR 1931	IR 1932	6
1929	1930	1931	1932	1933-1934
7	8	9	10	11
1934-1935	1936-1937	1938-1939	1940-1941	1942-1943
12	13	14	15	16
1943-1944	1945-1946	1947-1948	1949-1950	1951-1952

(I. L. R.) Karachi

ILR 1939 Kar	Citation by year.
1939	1940

Knapp's Reports, Privy Council

1	2	3
1829-31	1831-34	1834-36

(I. L. R.) Lahore

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940

From 1937 citation by year.

Lahore Law Journal

1	2	3	4	5	6	7
1919	1920	1921	1922	1923	1924	1925
8	9	10	11	12	13	14

1926

Law Reporter, Allahabad

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940

Lower Burma Rulings

1	2	3	4
1900-1902	1903-1904	1905-1906	1907-1908
5	6	7	8
1909-1910	1911-1912	1913-1914	1915-1916
9	10	11	12
1917-1918	1919-1920	1921-1922	1923-1924

(I. L. R.) Lucknow

1	2	3	4	5	6	7
1926	1927	1928	1929	1930	1931	1932
8	9	10	11	12	13	14
1933	1934	1935	1936	1937	1938	1939
15	16	17	18	19	20	21
1940	1941	1942	1943	1944	1945	1946

(I. L. R.) Madras

1	2	3	4-5	6
1876-1878	1878-1880	1881	1882	1883
7	8	9	10	11
1884	1885	1886	1887	1888
13	14	15	16	17
1889	1890	1891	1892	1893
18	19	20	21	22
1894	1895	1896	1897	1898
23	24	25	26	27
1899	1900	1901	1902	1903
28	29	30	31	32
1904	1905	1906	1907	1908
33	34	35	36	37
1909	1910	1911	1912	1913
38	39	40	41	42
1914	1915	1916	1917	1918
43	44	45	46	47
1919	1920	1921	1922	1923
48	49	50	51	52
1924	1925	1926	1927	1928
53	54	55	56	57
1929	1930	1931	1932	1933
58	59	60	61	62
1934	1935	1936	1937	1938

From 1937 citation by year.

Madras High Court Reports

1	2	3	4
1862-1863	1864-1865	1866-1868	1868-1869
5	6	7	8
1869-1870	1870-1871	1871-1874	1874-1875

Madras Law Journal

1	2	3	4	5	6	7
1891	1892	1893	1894	1895	1896	1897
8	9	10	11	12	13	14
1898	1899	1900	1901	1902	1903	1904

Madras Law Journal (*contd.*)

15	16	17	18	19	20	21
1905	1906	1907	1908	1909	1910	1911
22-23	24-25	26-27	28-29	30-31	32-33	
1912	1913	1914	1915	1916	1917	
34-35	36-37	38-39	40-41	42-43	44-45	
1918	1919	1920	1921	1922	1923	
46-47	48-49	50-51	52-53	54-55	56-57	
1924	1925	1926	1927	1928	1929	
58-59	60-61	62-63	64-65	66-67	68-69	
1930	1931	1932	1933	1934	1935	
70-71	From 1937 citation by year.					
1936						

Madras Law Times

1	2	3-4	5-6	7-8	9-10	11-12
1906	1907	1908	1909	1910	1911	1912
13-14	15-16	17-18	19-20	21-22	23-24	
1913	1914	1915	1916	1917	1918	
25-26	27-28	29	30-31	32-33	34-35	
1919	1920	1921	1922	1923	1924	

Madras Law Weekly

1	2	3-4	5-6	7-8	9-10	11-12
1914	1915	1916	1917	1918	1919	1920
13-14	15-16	17-18	19-20	21-22	23-24	
1921	1922	1923	1924	1925	1926	
25-26	27-28	29-30	31-32	33-34	35-36	
1927	1928	1929	1930	1931	1932	
37-38	39-40	41-42	43-44	45-46	47-48	
1933	1934	1935	1936	1937	1938	
49-50	51-52	53-54	55	56	57	
1939	1940	1941	1942	1943	1944	
58	59					
1945	1946					

Madras Weekly Notes

1910 MWN	Citation by year.
1910	

Moore's Indian Appeals

1	2	3	4
1836-1837	1837-1841	1841-1846	1846-1851
5	6	7	8
1851-1854	1854-1857	1857-1859	1859-1861
9	10	11	12
1861-1863	1863-1866	1866-1867	1867-1869
13	14		
1869-1870	1870-1872		

(I. L. R.) Nagpur

ILR 1936 Nag	Citation by year.
1936	

Nagpur Law Journal

1	2	3	4	5	6	7
1918	1919	1920	1921	1922	1923	1924
8	9	10	11	12	13	14
1925	1926	1927	1928	1929	1930	1931
15	16	17	18	19	20	
1932	1933	1934	1935	1936	1937	From 1938
citation by year.						

Nagpur Law Reports

1	2	3	4	5	6	7
1905	1906	1907	1908	1909	1910	1911
8	9	10	11	12	13	14
1912	1913	1914	1915	1916	1917	1918
15	16	17	18	19	20	21
1919	1920	1921	1922	1923	1924	1925
22	23	24	25	26	27	28
1926	1927	1928	1929	1930	1931	1932
29	30	31				
1933	1934	1935				

North-West Provinces High Court Reports

1	2	3	4	5	6	7
1869	1870	1871	1872	1873	1874	1875

Oudh Cases

1	2	3	4	5	6	7
1898	1899	1900	1901	1902	1903	1904
8	9	10	11	12	13	14
1905	1906	1907	1908	1909	1910	1911
15	16	17	18	19	20	21
1912	1913	1914	1915	1916	1917	1918
22	23	24	25	26	27	28
1919	1920	1921	1922	1923	1924	1925
29						
1926						

Oudh Law Journal

1	2	3	4	5	6	7
1914	1915	1916	1917	1918	1919	1920
8	9	10	11	12	13	
1921	1922	1923	1924	1925	1926	

Oudh Law Reports

1934 OLR	Citation by year.
1934	

Oudh Weekly Notes

1	2	3	4	5	6	7
1924	1925	1926	1927	1928	1929	1930
8	9	10	11			
1931	1932	1933	1934	From 1935 citation by year.		

(I. L. R.) Patna

1	2	3	4	5	6	7
1922	1923	1924	1925	1926	1927	1928
8	9	10	11	12	13	14
1929	1930	1931	1932	1933	1934	1935
15	16	17	18	19	20	21
1936	1937	1938	1939	1940	1941	1942
22	23	24	25			
1943	1944	1945	1946			

Patna High Court Cases

1917 PHCC	Citation by year.
1917	

Patna Law Journal

1	2	3	4	5	6
1916	1917	1918	1919	1920	1921

Patna Law Reports

1	2	3
1923	1924	1925

Patna Law Times

1	2	3	4	5	6	7
1920	1921	1922	1923	1924	1925	1926
8	9	10	11	12	13	14
1927	1928	1929	1930	1931	1932	1933
15	16	17	18	19	20	21
1934	1935	1936	1937	1938	1939	1940
22	23	24	25	26	27	
1941	1942	1943	1944	1945	1946	

Patna Law Weekly

1	2-3	4-5
1916	1917	1918

Patna Weekly Notes

1936 PWN	Citation by year.
1936	

Punjab Law Reporter

1900 PLR	Citation by year upto 1923 and then
1900	
27	28
29	30
31	32
33	34
35-36	37
38	39
40	41
1933	1934
1935	1936
1937	1938
1939	1940
42	43
44	45
46	47
48	49
1940	1941
1942	1943
1944	1945
1946	

Punjab Records

1872 PR	Citation by year.
1872	

Punjab Weekly Reporter

1905 Pun W R	Citation by year
1905	

(I. L. R.) Rangoon

1	2	3	4	5	6	7
1923	1924	1925	1926	1927	1928	1929
8	9	10	11	12	13	14
1930	1931	1932	1933	1934	1935	1936

Rangoon Law Reports

1937 RLR	Citation by year.
1937	

Sind Law Reporter

1	2	3	4	5	6	7
1907	1908	1909	1910	1911	1912	1913
8	9	10	11	12	13	14
1914	1915	1916	1917	1918	1919	1920
15	16	17	18	19	20	21
1921	1922	1923	1924	1925	1926	1927
22	23	24	25	26	27	28
1928	1929	1930	1931	1932	1933	1934
29	30	31	32			
1935	1936	1937	1938			

Sutherland's Weekly Reporter

1	2-4	5-6	7-8	9-10	11-12	13-14
1864	1865	1866	1867	1868	1869	1870
15-16	17-18	19-20	21-22	23-24	25	26
1871	1872	1873	1874	1875	1876	1877

United Provinces Law Reports

1	2	3
1919	1920	1921

Upper Burma Rulings

1 Cri	2 Civ	From 1904	Citation
1892-1903	1892-1903		
by year upto 1913 and then			2
3	4		1914-1916
1917-1920	1921-1922		

TO THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

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THE A. I. R. MANUAL

Unrepealed Central Acts

(CIVIL AND CRIMINAL)

Volume II`

THE CODE OF CIVIL PROCEDURE, 1908 (*Contd.*)

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ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

PAYMENT UNDER DECREE

Modes of paying money under decree. 1. (1) All money payable under a decree shall be paid as follows, namely —

- (a) into the Court whose duty it is to execute the decree, or
- (b) out of Court to the decree-holder, or
- (c) otherwise as the Court which made the decree directs.

2. Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree holder

[1882—S 257; 1877—S 257, 1959—S. 206. See sections 36 to 74]

PROVINCIAL AMENDMENTS

Calcutta

(1). For clause (a) of sub-rule (1), *substitute* the following clause :

“(a) By deposit in or by postal money order sent to the Court whose duty it is to execute the decree, or”

(2). In sub-rule (2) :

(i) Read the number 2 as 2 (a)

(ii) After the words “the decree-holder,” *add* the words “or the person in whose favour the order is made”

ORDER 21, RULE 1.

Synopsis.

1. Scope.
2. Payment into Court.
3. Who should make payment.
4. Effect of payment.
5. Decree directing payment to decree-holder.
6. Payment out of Court to decree-holder.
7. Notice of payment.

1. Scope.—[1] Payments need not be due under executable decree - Payment made under preliminary decree is within this rule. (Vol. 22) 1935 Pat 385 (393) : 14 Pat 488 (DB).

[2] Judgment-debtor cannot be required to pay the money to a third party who has got an unregistered assignment of the decree merely because he happened to know it (Vol. 20) 1933 Mad 523 (524)

[3] This rule does not apply to orders though the same may be executable as decrees. Therefore where a party is ordered to pay costs of the day to the opposite side he cannot deposit the costs in Court under this rule. (1889) 12 Mad 120 (122)

2. Payment into Court.—[1] Where payment under a decree is to be made *only* in Court and the Court is closed on the last day of making such payment, the payment can be made on the day the Court reopens. (Vol. 12) 1925 All 687 (687) (DB).

[2] The above rule applies even where the decree amount may be paid to the decree-holder into Court inasmuch as the judgment-debtor is entitled to choose the method of payment. (Vol. 22) 1935 Lah 369 (370) * (Vol 26) 1939 Mad 814 (816) * (Vol 12) 1925 Mad 743 (743, 744).

[But see (Vol 16) 1929 All 207 (207) : 51 All 527 (DB) * Compromise decrees - Option to pay direct or deposit in Court - Advantage cannot be taken of Courts being closed on date of payment.] * (Vol 25) 1938 All 199 (200) : ILR (1938) All 837 (DB). * (Vol 33) 1946 Oudh 166 (158) DB.]

[3] An arbitrator is not an officer of the Court and a payment made to him is not a payment into Court (Vol 11) 1924 Rang 263 (264) (DB).

[4] Receiver in administration suit not authorised to receive payments to be made by X - X making payments to receiver who misappropriated them - X held not discharged from liability by reason of such payments. (Vol 19) 1932 P. C. 191 (193) : 59 Ind App 311 : 7 Luck 382 (PC).

[5] Words “all money payable under a decree” do not mean entire amount payable under the decree. Hence even if a portion of the decretal amount is paid into Court it will be valid payment and decree-holder can take out execution only for balance. (Vol 20) 1933 Pat 89 (89, 90) : 11 Pat 796 (DB).

[6] Deposit by judgment-debtor of decretal amount under O. 21, R. 89 to prevent confirmation of sale though made after 30 days of sale can be treated as payment under O. 21, R. 1 for certification. (Vol 12) 1925 Nag 17 (19).

3. Who should make payment.—[1] A payment into Court under this rule can be made only by the judgment-debtor, his agent or his representative. A payment made by a stranger will not have the effect of satisfying the decree unless the decree-holder consents thereto. (Vol 4) 1917 Mad 739 (740, 741), (DB).

4. Effect of payment.—[1] Payment under O. 21, R. 1 according to Court's direction absolves judgment-debtor. (Vol 16) 1929 Oudh 231 (234) : 5 Luck 80 (FB).

[2] Judgment-debtor depositing decretal amount into Court but preventing that sum reaching decree-holder—Judgment-debtor is liable for interest until money is available to decree-holder. (Vol 16) 1929 Nag 227 (228) * (Vol 30) 1943 Mad 834 (835) (DB).

5. Decree directing payment to decree-holder.—[1] In absence of special direction Judgment-debtor can choose between O's (a) and (b) of O. 21, R. 1 (1). (Vol 22) 1935 Lah 369 (370).

(iii) *Add* the following as clause (b) :

"(b) the costs of giving such notice shall be borne by the person making payment who shall have the option of having the notice served either by a process-server of the Court or by a registered post. No such notice shall issue until the said cost shall have been paid."

[3-2-1938.]

Lahore

Add the following explanation to sub-rule (1) :

"*Explanation.*—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose."

[11-7-1933]

Nagpur

Substitute—

- (a) "decree or order" for "decree" wherever it occurs in the rule and in the marginal note ;
- (b) "by deposit in, or by postal money order to," for the word "into" occurring in clause (a) of sub-rule (1) ; and
- (c) "shall be given by the judgment-debtor to the decree-holder either through Court or direct by registered post" for "shall be given to the decree-holder" occurring in sub-rule (2).

[29-6-1943.]

Patna

For Rule 1 *substitute* the following :

"1. (1) All money payable under a decree or order shall be paid as follows, namely :

- (a) by deposit in or by special postal money order to the Court whose duty it is to execute the decree or order ; or
- (b) out of Court to the decree-holder ; or
- (c) otherwise as the Court which makes the decree or order shall direct.

(2) Where a judgment-debtor makes any payment under clause (a) of sub-rule (1), he may give notice thereof to the decree-holder —

- (a) either through the Court, on payment of the fees laid down in the rules framed by the High Court under clause (1) of S. 20 of the Court-Fees Act, 1870 (Act VII of 1870), or
- (b) Notwithstanding anything contained in Order 48 Rule 2, by registered post direct.

Where interest is payable under the decree or order, such notice shall, if duly proved, operate as a bar to the accrual of such interest, upon the amount so paid, after the date of receipt of such notice by the decree-holder."

[28-7-1938.]

O. 21 R. 1 (contd.)

6. Payment out of Court to decree-holder.—[1] Person attaching decree is entitled to take money out of Court and to certify payment. (Vol 17) 1930 All 659 (661) (DB).

[But see (Vol 12) 1925 All 123 (124). (Payment out of Court to the decree-holder's attaching creditor cannot satisfy decree).]

[2] Pre-emption decree directing the plaintiff to deposit the amount to the credit of the vendee within 30 days—Payment out of Court certified by the vendee within the period allowed was enough. (Vol 8) 1921 All 159 (160) (DB).

[3] See also O. 21 R. 15.

7. Notice of payment.—[1] The question of notice of payment into Court to the decree-holder is material only where decree awards interest. Where no interest is awarded by decree payment of decretal amount into court discharges the decree even if no notice is given to the decree-holder. (Vol 11) 1924 Pat 118 (119) : 2 Pat 754 (DB).

[2] Where decree awards interest the decree-holder is entitled to interest till the date of notice to him of the payment into Court. (Vol 90) 1943 Mad 334 (335) (DB). * (Vol 19) 1932 Cal 111 (111). * (Vol 6) 1919 Mad 445 (445) ; 42 Mad 576 (DB).

[But see (Vol 26) 1939 Nag 191 (192). (Decree awarding interest until payment—Sum paid into Court —Interest ceases from date of payment).]

[3] Notice of payment in court must be served on decree-holder like summons. (Vol 12) 1925 Nag 52 (54).

[4] Payment into Court—Judge should order notice to decree-holder *suo motu*—Notice not issued due to judgment-debtor's failure to pay process fees—Still the Court should inform decree-holder of the payment when he next asks for sale of property (Vol 8) 1921 Nag 148 (149).

[5] O. 21, R. 1 (2) does not apply to redemption decrees. They are governed by O. 34, R. 8 which does not require any notice of payment into Court to be given to decree-holder. (Vol 11) 1924 Mad 102 (102) (DB).

ORDER 21, RULE 2

Synopsis.

1. Legislative changes.
2. Scope and applicability.
3. "Money payable under decree."
4. "Decree of any kind."
5. "Is paid out of Court."
6. "Or the decree is otherwise adjusted."
7. Adjustment in part.
8. Oral adjustment.
9. When and with whom payment or adjustment should be made.
10. "The decree-holder shall certify."
11. Effect of certifying without payment or adjustment being made.
12. "The judgment-debtor also may inform the Court...and apply."
13. "Judgment-debtor", meaning of.

2. (1) Where any money payable under a decree³ of any kind⁴ is paid out of Court⁵ or the decree is otherwise adjusted⁶ in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify¹⁰ such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same¹⁸ accordingly.

(2) The judgment-debtor also may inform the Court¹² of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

a(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised¹⁸ by any Court executing the decree.

[1882—S. 258; 1877—S. 258; 1859—S. 206.]

a Sub-Rule (3) is omitted by the Punjab Relief of Indebtedness Act, 1934 ([VII] of 1934.)

Objects and Reasons.

"The Committee have omitted certain words from the last paragraph of Section 258 of the Code in order to make it clear that the Court cannot recognise a payment or adjustment which has not been certified for any purpose whatsoever. It follows that an uncertified payment or adjustment cannot operate to prolong the period of limitation for applying for execution under the Limitation Act." S. O. R.

O. 21 R. 2 (contd.)

14. Certification, form of.
15. Limitation for certification.
16. "Shall record the same."
17. Notice.
18. Uncertified payment or adjustment not to be recognised by Court executing the decree.
19. Court acting under Order 21, Rule 16.
- 19a. Court dealing with application under O. 21, Rr. 90, 95, 97 and 98.
20. Suit by judgment-debtor based upon an uncertified payment or adjustment.
21. Suit by decree-holder based on uncertified payment or adjustment.
22. Effect of fraud.
23. Effect of limitation.
24. Operation as estoppel.
25. Remedies of the judgment-debtor.
26. Suit for damages.
27. Restitution of uncertified payment on reversal of decree in appeal.
28. Criminal proceedings.
29. Appeal and revision.

1. Legislative changes.—[1] The effect of amendment to the rule is that the legality of arrangements between parties after decree must be treated like other agreements. (Vol I) 1914 Cal 697 (698) (D B) * (1912) 22 Mad L. Jour. 166 (168) * (Vol 12) 1925 Oudh 364 (365) : 28 Oudh Cas 255 (D B).

2. Scope and applicability of the rule.—[1] The object of this rule is to avoid disputes regarding uncertified payment or adjustments. (Vol 9) 1922 Bom 380 (380, 381) : 46 Bom 226 (DB).

[2] The object of certification appears to have been to the benefit of the judgment-debtor. (Vol 30) 1943 Pat 7 (9) : 21 Pat 481 (DB).

[3] In the case of an application by the judgment-debtor notice is to be given to the decree-holder and the Court should give a judicial decision whether the payment or adjustment should be recorded as certified. (Vol 16) 1929 PC 19 (22, 23) : 3 Luck 684 : 56 Ind App 30 (PC).

[4] Sub-rule (3) bars the executing court from recognising any payment or adjustment which has not been certified or recorded as certified. (Vol 16) 1929 PC 19 (22) : 3 Luck 684 : 56 Ind App 30 (PC). * (Vol 12)

1925 Bom 309 (309) : 49 Bom 548 (FB). (34 Bom 575 overruled.) * (Vol 15) 1928 Oudh 195 (198) : 3 Luck 170 (FB).

[5] Sub-rule (3) applies only where parties satisfying or adjusting the decree are at the date of such transaction. (Vol 18) 1931 Mad 399 (400) : 54 Mad 184 (DB). * ('11) 35 Mad 659 (662, 665) (DB) (Per Sundara Iyer. J.) * (Vol 14) 1927 Cal 694 (696) (DB).

[See however (Vol 24) 1937 Cal 31 (36).]

[6] This rule does not limit the payment to the decree-holder only. (Vol 10) 1923 All 271 (271) : 45 All 304 (DB).

[7] This rule does not apply to a compromise which is entered into between the parties to a mortgage suit after a final decree, and pleaded in bar of an application for a personal decree against the mortgagor under O. 34 R. 6. (Vol 28) 1941 Rang 316 (317) : 1941 Rang L R 774 (DB). * (Vol 23) 1936 Mad 34 (37) : 59 Mad 188 (FB).

(8) The rule does not apply to payment out of Court coming under S. 71 of the Deccan Agriculturists Relief Act (now see Bombay Debtors' Relief Act, 1939). (Vol 8) 1921 Bom 142 (142, 143) : 45 Bom 1128 (DB). * (Vol 26) 1939 Bom 255 (256) (Section applies only to payments and not to adjustments). * (Vol 29) 1942 Bom 80 (81).

[9] Sub-rule (3) of this rule has no force in Punjab. (Vol 25) 1938 Lah 602 (603) * (Vol 25) 1938 Lah 126 (127) : ILR (1938) Lah 26 (DB). [(Vol 23) 1936 Lah 842 dissented from.]

[10] The Court conducting an inquiry under S. 19 of the Madras Agriculturists' Relief Act of 1938 is not subject to the prohibition contained in sub-r. (3) of this rule. (Vol 29) 1942 Mad 597 (598) : ILR 1943 Mad 138 (DB).

[11] Where a third party's interests intervene in the proceedings the rule cannot be invoked to disregard such interests. (Vol 15) 1928 Nag 265 (272) : 24 Nag L R 127 (FB). [(Vol 9) 1922 Nag 248 : 18 Nag L R 184 overruled] * (Vol 18) 1931 PC 33 (35) : 27 Nag L R 95 : 58 Ind App 50 (PC). [Overruling (Vol 9) 1922 Nag 248 : 18 Nag L R 134]

[12] Where an adjustment is made before the third party acquired any interest the adjustment

PROVINCIAL AMENDMENTS

Madras

Substitute the following for the existing sub-rule (2) :

"Any party to the suit or his legal representatives or any person who has become surety for the decree-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified ; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

[R. O. C. No. 4955 of 1930.]

Patna

In sub-rule (2) for the words "and if after service of such notice," *substitute the following :*

"and where certification has been made by an endorsement of such payment or adjustment by the decree-holder or by any person authorized by him in that behalf upon the process issued by the Court, the Court shall issue such notice of its own motion. If after service of the notice,"

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can be recorded and such party's interests may be disregarded. (Vol 26) 1939 Lah 326 (326, 327).

[13] An adjustment under this rule cannot be recorded when it will defeat the rights of the Government to court fees. (Vol 22) 1935 Sind 111 (112) : 29 Sind L R 317.

[14] Collusive adjustment entered into with the object of depriving his lien for costs - Court will interfere and protect him. (Vol 22) 1935 Cal 168 (172) : 61 Cal 1005.

[15] Sale held after decree has been certified to be satisfied is void and can be set aside. ('11) 9 Ind Cas 452 (452) (Low Bur)

[16] Sale held in pursuance of a decree not certified as satisfied cannot be impeached. (Vol 16) 1929 Cal 374 (376) : 57 Cal 403 (FB).

[But see] (Vol 5) 1918 Oudh 109 (111)].

[17] The rule does not apply to the adjustment of claim for restitution under S. 144 before such claim is allowed by the Court. (Vol 23) 1936 Mad 840 (841).

[18] The executing Court can recognise a compromise between the parties after the decree, though such a compromise does not amount to an adjustment of the decree. ('37) 32 Sind L R 415 (424) (PC).

3. "Money payable under a decree."— [1] A mortgage decree though containing a direction for sale of property on default of payment is decree for payment of money. ('08) 30 All 248 (249, 250) * ('10) 12 Cal L. Jour 65 (70) (DB). * ('12) 16 Cal L. Jour 169 (172, 173) (DB). * (Vol 17) 1930 Lah 814 (815) * (Vol 7) 1920 Pat 731 (733) : 5 Pat L. Jour 672 (DB). * (Vol 10) 1923 Nag 20 (20) (DB).

[2] Where a mortgagee decree - holder is in possession under the original contract of mortgage or by virtue of the terms of the decree, income received from the mortgaged property is not "money payable under a decree." (Vol 5) 1918 Mad 1154 (1155) : 39 Mad 1026 (DB). * (Vol 20) 1933 Lah 831 (832) * ('07) 30 Mad 255 (265) (DB).

[3] "Money payable under a decree" does not mean money which is recoverable by a party in execution against the party liable to pay it. (Vol 13) 1926 Mad 749 (751) : 49 Mad 716 (DB).

[4] This rule applies to adjustments of awards under Arbitration Act, 1899, filed in Court. (Vol 14) 1927 Sind 66 (75). * (Vol 8) 1921 Sind 182 (134) : 16 Sind L R 245 (DB). * (Vol 22) 1935 Nag 250 (257) : 81 Nag L R Sup 43 (FB).

4. "Decree of any kind."— [1] The addition of the words "of any kind" after the word "decree" makes this rule applicable to every kind of decree. (Vol 9) 1922 Bom 380 (380, 381) : 46 Bom 226 (DB) (Decree for partition) * (Vol 15) 1928 Cal 715 (716, 717) (DB). * (Vol 23) 1936 Lah 842 (843) * (Vol 22) 1935 Pat 385 (389) : 14 Pat 488 (DB). * (Vol 30) 1943 Nag 339 (340).

[(See however) (Vol 13) 1926 Mad 749 (750, 751) : 49 Mad 716 (DB). * ('13) 25 Mad L. Jour 586 (591).]

[2] Where the decree provides for payment of money as well as other reliefs, an adjustment of such a decree cannot be recognised unless certified in the manner provided by this rule. (Vol 7) 1920 Mad 469 (470) : 43 Mad 476 (DB). * (Vol 1) 1914 Mad 360 (360) (DB). * (Vol 5) 1918 Mad 751 (754) (DB). (Adjustment in respect of possession also cannot be recognised unless certified.)

5. "Is paid out of Court."— [1] Where a judgment-debtor pays the amount decreed to the officer of the Court under process the payment does not require to be certified ('68) 9 Suth W R 462 (462) (DB).

(2) Contention that decree has been adjusted from the usufruct of the property which was in possession of the decree - holder is an adjustment out of Court. (Vol 27) 1940 Pat 56 (57) (DB).

[3] Payment in Court by third person from whom the decree-holder was authorised to realise the debt is not a payment out of Court. (Vol 25) 1938 All 141 (143) : ILR (1938) All 294 (DB).

[4] Payment deposited by pre-emptor in Court and notice issued to vendee. - The rule does not apply to such payment. (Vol 21) 1934 Oudh 135 (136, 137) (DB).

6. "Or the decree is otherwise adjusted."— [1] An adjustment of a decree is an agreement which extinguishes the decree as such in whole or in part as satisfaction of the decree to that extent results. (Vol 29) 1942 Rang 57 (58) : 1941 Rang LR 767 (DB). * (Vol 3) 1910 Mad 604 (604) (DB). * (Vol 20) 1933 Lah 806 (807) : 14 Lah 668 * (Vol 20) 1933 Pat 576 (577) (DB). * (Vol 20) 1933 Pesh 53 (55, 56) (DB). * ('85) 7 All 424 (431) (DB) * ('11) 7 Nag L R 136 (144) * (Vol 18) 1931 Sind 42 (43) : 25 Sind LR 279 (DB). * (Vol 25) 1938 Rang 353 (354) (DB). * (Vol 23) 1936 Pat 253 (256) (Agreement between judgment-debtor and decree-holder that balance of decree remaining after part payment would be paid by instalments and that decree-holder will not be entitled to interest, amounts to adjustment. * (Vol 26) 1939 Nag 107 (109) Pre-Emption decree-Execution of a security bond by surety for decree holder during pendency of appeal filed by him is not

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adjustment.) * (Vol 25) 1938 Lah 602 (604) (Compromise making over certain decrees owned by judgment-debtor to decree-holder.—Balance agreed to be paid by instalments. In default decree-holder to execute decree for each instalment—as it fell due.—Agreement does not amount to substitution of new decree but is an adjustment.) * (Vol 26) 1939 Cal 569 (578) (DB). (Agreement to pay a certain sum immediately and a certain other sum by instalments in discharge of larger decretal amount.—Property conveyed to decree-holder—Agreement is adjustment.) * (Vol 22) 1935 Bom 303 (305) (Oral agreement to accept part of decree amount in instalments in full satisfaction is an adjustment.) * (Vol 13) 1926 Mad 184 (185) (Decree-holder agreeing to receive a percentage of the judgment debt in full satisfaction—Agreement is adjustment).

[2] An agreement to vary the mode of realising the decree in execution or the time when the decree is to be executed is not an adjustment of the decree. (Vol 15) 1928 Cal 527 (529) (DB). * (Vol 18) 1931 Lah 608 (609) (DB). [Note—This case is overruled on another point in (Vol 28) 1941 Lah 149: ILR (1941) Lah 383 (F B).] * (Vol 14) 1927 Mad 911 (913): 50 Mad 897 (DB). * (Vol 22) 1935 All 364 (365). * (Vol 22) 1935 Mad 429 (430) (DB). (Mortgage decree against A and B directing A's property to be sold first and then B's property—Compromise between decree-holder and A that B's property to be sold first—B not party to it—Compromise is not adjustment).

[See also (Vol 24) 1937 PC 256 (259): 64 Ind App 302: ILR (1938) 1 Cal 66: 31 Sind LR 637 (F.C.).]

[3] In the following cases the Courts seem inclined to treat an arrangement affecting the mode of realising the decree or the time at which it is to be executed as an adjustment. * (Vol 14) 1926 Oudh 385 (387): 20 Oudh Cas. 26. * (Vol 23) 1936 Cal. 518 (519) (DB). * (Vol 22) 1935 All 155 (156) * (Vol 29) 1942 Pat 68 (70) (DB). * (Vol 29) 1942 Rang 56 (57) (DB). * (Vol 28) 1941 Lah 149 (151, 152): ILR (1941) Lah 383 (F B). * (Vol 24) 1937 Cal 236 (237) (DB).

[4] Where an agreement touching the manner or time of enforceability of a decree is entered into it can be recorded under this rule provided it is held as an adjustment. (Vol 29) 1942 Pat 68 (70) (DB). * (Vol 24) 1937 Cal 236 (237) (DB). * (Vol 16) 1929 Cal 687 (689): 57 Cal 789 (DB) * (Vol 23) 1936 Sind 191 (195): 30 Sind LR 249.

[5] A completed contract by which the judgment-debtor promises to do something at a future date can be accepted by the decree-holder as a legal and immediate adjustment in satisfaction of his decree. But as inchoate agreement which if completed would bar the execution of the decree, is not an adjustment. (Vol 29) 1942 Rang 56 (57) (DB). * (Vol 28) 1941 Lah 149 (151, 152): (1941) Lah 383 (F B). (Affirming (Vol 22) 1935 Lah 589: (Vol 18) 1931 Lah 608 overruled). * (Vol 26) 1939 Sind 343 (346): ILR (1939) Kar 725 (DB). * (Vol 22) 1935 Bom 303 (305) * (Vol 20) 1933 Mad 28 (30): 56 Mad 198 (DB). * (Vol 22) 1935 Lah 589 (590) (DB). (Vol 20) 1933 Lah 732 reversed.) * (Vol 25) 1938 Rang 202 (203): 1938 Rang LR 385 (F B). * (Vol 23) 1936 Bom 277 (280): 60 Bom 729 (DB). * (Vol 24) 1937 Nag 217 (220) (DB). * (Vol 24) 1937 Cal 222 (224). * (Vol 23) 1936 Pat 619 (620): 15 Pat 390 (DB).

[But see (Vol 12) 1925 Mad 206 (207): (Vol 17) 1930 Mad 410 (411) (DB) (Dissented from in (Vol 20) 1933 Mad 28: 56 Mad 198). * (Vol 23) 1936 Sind 191 (195): 30 Sind LR 249 (DB). * (Vol 20) 1933 Pesh 53 (55) (DB). * (Vol 9) 1922 All 13 (15): 44 All 258 (DB)]

[6] An agreement to do certain act in satisfaction of the decree is not complete as an adjustment till these acts are done. (Vol 25) (1938 Rang 202 (203) 1938 Rang LR 385 (F B). * (Vol 22) 1935 Lah 973 (973). * (Vol 22) 1935 Mad 581 (582) (DB) * (Vol 23) 1936 Rang 289 (290) (DB). * (Vol 31) 1944 Pat 251 (252).

[7] The award of arbitrators where disputes in execution proceedings are referred to them may amount to an adjustment of the decree which can be recorded. (Vol 28) 1941 Bom 20 (22) (DB).

[8] Transfer of decree to one of judgment-debtors is not an adjustment. (Vol 25) 1938 Oudh 106 (106) (DB). * (Vol 29) 1942 Sind 83 (85): ILR (1942) Kar 168 (Merely because the assignee of a decree is the son of the defendant and is a benamidar for the defendant, the assignment cannot be said to be an adjustment of the decree).

[9] To determine whether a compromise amounting to an adjustment the executing court should decide the compromise as a fact and its effect as adjustment upon the decree. (Vol 27) 1940 Oudh 381 (381): 15 Luck 712 (DB). * (Vol 25) 1938 Nag 49 (49). * (Vol 17) 1930 Lah 334 (335) * (Vol 24) 1937 Oudh 298 (300) (DB). (Adjustment certified by Collector.)

[10] An arrangement amounts to an adjustment only when it is accepted by the decree-holder. (Vol 22) 1935 All 513 (514) * (Vol 24) 1937 Cal 211 (212): ILR (1937) 1 Cal 781 (DB).

[11] An arrangement which binds the decree-holder by operation of law irrespective of his consent cannot be an adjustment. (Vol 24) 1937 Cal 211 (212): ILR (1937) 1 Cal 781 (DB).

[12] An adjustment of a decree pending an appeal from it is not a 'pre-decree' arrangement but an 'adjustment' within the meaning of this rule. (Vol 23) 1936 Mad 494 (495).

7. Adjustment in part.—[1] A decree may be adjusted in part and the judgment-debtor is entitled to apply for a certificate of part satisfaction. (80) 5 Cal 448 (449, 450) (DB). * (Vol 22) 1935 Lah 973 (973).

[2] Where there is a money decree against two or more defendants, an agreement discharging one or some only of the judgment-debtors in a money decree is an adjustment in part and should be certified. (80) 31 Mad 467 (468) (DB). * (Vol 4) 1917 Pat 433 (434) (DB). * (Vol 20) 1933 Pat 576 (577) (DB).

[3] Where a decree has been adjusted in part, it can be executed as to the remaining portion. (Vol 20) 1933 Bom 100 (101) (DB).

[4] Prohibition regarding recognition of uncertified payment or adjustment applies also to a case of partial discharge. (Vol 32) 1945 Mad 80 (81).

8. Oral adjustment.—[1] Evidence to prove an oral adjustment subsequent to the decree is not inadmissible by reason of S. 92 of the Evidence Act as that section is restricted to dispositive documents alone and that a decree is not such an instrument. (Vol 30) 1943 Cal 634 (634 635): ILR (1943) 1 Cal 195. * (Vol 28) 1941 Lah 149 (151): ILR (1941)

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Lah 383 (FB). * (Vol 16) 1929 All 79 (81) * (Vol 13) 1926 Cal 643 (644) (DB) * (Vol 7) 1920 Nag 198 (199) : 16 Nag LR 204 (DB). * (Vol 18) 1931 Sind 42 (43) : 25 Sind LR 279 (DB). * (Vol 23) 1936 Pat 619 (620) : 15 Pat 390 (DB). * (Vol 22) 1935 Bom 308 (305).

[See also (Vol 22) 1935 Mad 424 (425)].

[But see (Vol 9) 1922 All 13 (15, 16) : 44 All 258 (DB) (Per Walsh J.) * (Vol 14) 1927 Mad 911 (912, 913, 915). : 50 Mad 597 (DB) * (Vol 17) 1930 Mad 673 (673)]

9. When and with whom payment or adjustment should be made.

[1] An adjustment to which the decree-holder is not a party cannot be recorded by the executing Court. (Vol 28) 1941 Cal 252 (253) (DB). * (Vol 26) 1939 Pat 411, (412-413) : 18 Pat 318 (DB).

[2] An assignee of the decree-holder is included within the words "decree-holder" and he can certify a payment even before his transfer is recognised under O. 21 R. 16. ('12) 12 Mad L. T. 592 (593) (DB).

[But see (Vol 22) 1935 Nag 230 (234) : 31 Nag L. R. Sup 111 * (Vol 24) 1937 Mad 605 (606).]

[3] The judgment-debtor also can apply to record a payment made by him to the transferee. ('12) 14 Ind Cas 702 (703) (DB) (Mad.).]

[4] A decree that has been recorded by Court as satisfied cannot be attached by any creditor of the decree-holder alleging the adjustment as collusive. ('09) 5 Mad L. T. 72.

[5] The rule does not prevent entering of satisfaction of the decree after the attachment, if the payment or adjustment had been made before the attachment. (Vol 6) 1919 Mad 198 (199).

[6] A decree-holder attaching a decree in execution of another cannot certify satisfaction of the decree by accepting a smaller amount than that payable under the decree. (Vol 27) 1940 P C 167 (170, 172) : ILR (1940) 2 Cal 493 : 87 Ind App 360 : ILR (1940) Kar P C 321 (PC). (Certificate-holder under Bengal Demands Recovery Act (III) of 1913) attaching a decree cannot report satisfaction by accepting a smaller amount.)

10. "The decree-holder shall certify."—[1] It is the duty of the decree-holder to report any payment or adjustment made out of Court. (Vol 14) 1927 Mad 947 (948). * ('80) 2 Mad 216 (218) (DB). * (Vol 13) 1926 Nag 164 (166). (As per O. 21 R. 11.)

[2] Decree-holder should not be permitted to withdraw his petition for recording satisfaction—The Court must make enquiry whether decree was satisfied (Vol 6) 1919 Mad 198 (199) [Following (Vol 3) 1916 Mad 795.]

[But see (Vol 29) 1942 Bom 59 (61) : ILR (1942) Bom 132 (DB).]

[3] Where a joint decree-holder does not apply for and no certification has been entered on his behalf the court cannot recognise the adjustment so far as he is concerned. (Vol 32) 1945 Nag 95 (97) : ILR (1945) Nag 242 (DB).

11. Effect of certifying without payment or adjustment being made.—[1] Execution on a decree admitted and certified as satisfied cannot be applied for on the ground that the admission was due to coercion or fraud or the certification was due

to mistake. (Vol 21) 1934 Nag 143 (144) : 31 Nag L. R. 21. * (Vol 7) 1920 Lah 73 (74) (Mistake) * (Vol 4) 1917 Low Bur 164 (165).

12. "The judgment-debtor also may inform the Court...and apply."—(1) Judgment-debtor paying the amount due out of Court may himself inform the court of the payment and apply for the certification. (Vol 4) 1917 Mad 409 (410, 411) (DB).

[2] The judgment-debtor to apply for recording the payment need not wait till the decree-holder fails to certify. (Vol 27) 1940 All 441 (441) * ('02) 12 Mad L. Jour 94 (95).

[3] Judgment-debtor need not wait till the decree is drawn to apply for certificate of satisfaction. (Vol 11) 1924 Cal 1064 (1065) (DB).

[4] Where such application is resisted by the decree-holder the court cannot straightway dismiss the application. (Vol 4) 1917 Mad 409 (410, 411) (DB).

[5] The investigation and decision on any question upon which the parties may not be agreed must be upon such materials as they may legally place before the court. (Vol 16) 1929 All 79 (80) * (Vol 6) 1919 All 303 (304) : 41 All 443 (DB). (Question whether adjustment was fraudulent.) * (Vol 14) 1927 Lah 544 (545) * (Vol 9) 1922 Pat 276 (277, 278) : 1 Pat 644 (DB). * (Vol 15) 1928 Rang 62 (63) : 5 Rang 833.

(6) The question whether there was adjustment is a question of fact and the question whether it should be recorded is a question of law. ('43) ILR (1943) Kar 83 (84.) (PC)

[7] An application dismissed for default is no bar to a second application and the decree holder can take objection open to him in respect of it. (Vol 18) 1931 Lah 505 (505.)

[8] A certificate of payment or adjustment should be filed in the executing Court. ('13) 25 Mad L. Jour 586 (589) (DB) * (Vol 22) 1935 Bom 158 (159, 160) : 59 Bom 345 (DB). * (Vol 9) 1922 Pat 276 (277) : 1 Pat 644 (DB). * (Vol 6) 1919 Sind 92 (92) : 13 Sind L. R. 180.

[9] The fact of payment or adjustment brought to the notice of the appellate Court during the pendency of an appeal against the decree so adjusted is sufficient compliance with this rule. (Vol 15) 1928 Cal 527 (530) (DB). * ('12) 16 Cal. L. Jour 174.

[But see ('13) 25 Mad L. Jour 586 (589) (DB).]

[10] Where a decree has been transferred to another court for execution, the transferee Court is the only Court which has power to enquire into an application under this rule by the judgment-debtor. (Vol 27) 1940 Rang 236 (238) : 1940 Rang LR 856. * (Vol 19) 1932 Bom 202 (203) * ('94) 16 All 228 (231) * (Vol 22) 1935 Bom 303 (304)

- [11] A Collector to whom a decree is transferred for execution under S. 68 is not a "Court whose duty it is to execute the decree" within the meaning of this rule. (Vol 23) 1936 Bom 277 (279) : 60 Bom 729 * (Vol 24) 1937 Nag 217 (219) * (Vol 31) 1944 Nag 231 (232) : ILR (1944) Nag 746.

13. "Judgment-debtor," meaning of.—[1] The word "judgment-debtor" includes persons claiming through him like a transferee of the equity of redemption in the suit property from a judgment-debtor in a mortgage decree. ('07) 30 Mad 537 (540) (DB) * (Vol 6) 1919 Mad 558 (559.)

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[2] A surety for a judgment-debtor can plead an uncertified payment or adjustment made by him (the surety) with the decree-holder. (Vol 13) 1926 Sind 105 (106, 107): 20 Sind L R 362 * (Vol 15) 1928 Lah 61 (63.)

[3] A surety cannot plead an uncertified satisfaction or adjustment by the judgment-debtor. (Vol 10) 1923 Cal 313 (313) (DB) * (Vol 19) 1932 Cal 729 (730) : 59 Cal 1354 * (Vol 13) 1926 Mad 674 (675) : 49 Mad 325

14. Certification, form of.—Certification by decree-holder. (1) There is no particular form in which the decree-holder is required to certify a payment or adjustment. ('40) 21 Pat L T 650 (652) (DB). * (Vol 3) 1916 Mad 795 (799) * (Vol 11) 1924 Lah 676 (677) * (Vol 24) 1937 Mad 511 (513, 514) (DB.)

[2] The certification may be done orally. (Vol 4) 1917 Cal 466 (467) (DB). * (Vol 4) 1917 Low Bur 164 (165).

[3] Certification may be by way of a statement. ('40) 21 Pat L Tim 650 (652) (DB). * (Vol 11) 1924 Lah 676 (677) * (Vol 21) 1934 Bom 370 (374) : 58 Bom 610 (DB). * (Vol 21) 1934 Pat 380 (381) (DB). * (Vol 6) 1919 Mad 123 (125) (DB). * (Vol 8) 1921 Sind 159 (160) : 16 Sind L R 207 (FB).

[4] Certification may be by way of admission. (Vol 7) 1920 Lah 73 (74) * (Vol 22) 1935 Lah 194 (196) : 15 Lah 910. * (Vol 16) 1929 Mad 783 (789), * (Vol 24) 1937 Mad 511 (513, 514) (DB). (Confirming on Letters Patent appeal, (Vol 23) 1936 Mad 472.)

[5] An intimation by the decree-holder to the Court that the decree is satisfied is also a sufficient certification. ('11) 35 Bom 516 (523) (DB). (Collector held a court.) * (Vol 5) 1918 Cal 62 (63) (DB).

[6] Expression of intention to certify is sufficient though the amount of payment is not specified or the terms of adjustment are not mentioned which may be ascertained by enquiry. (Vol 3) 1916 Mad 795 (799, 800) (DB).

[See however (1900) 2 Bom L R 901 (905) (DB).]

[7] Certification must be of money due under the decree and not money paid on an independent Contract. (Vol 26) 1939 All 581 (583, 584.)

[See however (Vol 16) 1929 Mad 783 (783).]

[8] Application by judgment-debtor.—Where there is no prayer for the issue of a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified, the application is not in order. (Vol 16) 1929 All 674 (675.)

[See however ('02) 24 All 85 (89, 90) (DB). (Though did not ask for notice, it was in fact served-Held, application may be enquired into.)]

[9] A statement of objection to execution on the ground of payment or adjustment filed within 90 days of it can be treated as an application under Sub-Rule (2). (Vol 11) 1924 All 297 (298) * (Vol 26) 1939 All 581 (583.)

[But see ('91) 1891 All W N 11 (11). (Cannot be treated so.) * (Vol 22) 1935 Bom 303 (304) * (Vol 15) 1928 Rang 62 (63) : 5 Rang 833. * (Vol 25) 1938 Rang 328 (329) (DB). * (Vol 17) 1930 Pat 526 (527, 528) : 9 Pat 521. * ('12) 15 Cal L Jour 88 (88, 89) * ('12) 24 Mad L Jour 88 (89, 90) (DB).]

[10] Contention of payment or satisfaction cannot be

set up in pending execution proceedings. (Vol 25) 1938 Pat 204 (203.) * (Vol 23) 1936 Pat 253 (254.)

15. Limitation for certification.—(1) The period of limitation for an application by the judgment-debtor is 90 days from the time when the payment or adjustment was made and the time cannot be extended on the allegation of the judgment-debtor that he was delayed by the promise of the decree-holder to certify. (Vol 2) 1915 Cal 73 (73) (DB). * ('12) 16 Cal L Jour 174 (177, 178) (DB). * (Vol 10) 1923 Rang 103 (106):11 Low Bur Rule) 363. * (Vol 6) 1919 Upp Bur 26 (27) : 3 Upp Bur Rul 169. * (Vol 23) 1936 Pat 270 (273) : 15 Pat-422 (DB.).

[2] An order granting a time-barred application to record satisfaction is not a nullity and is valid till set aside. (Vol 4) 1917 Low Bur 164 (165).

[3] Certification by the decree-holder is not an application within the meaning of Art. 181 of the Limitation Act and therefore can be made at any time. (Vol 27) 1940 Cal 317 (320) : ILR (1940) 2 Cal 41 (DB) * (Vol 27) 1940 Mad 893 (896) * ('40) 21 Pat L Tim 650 (652). * (Vol 16) 1929 PC 19 (22, 23) : 3 Luck 684 : 56 Ind App 30 (PC). (Mere form in the nature of a petition cannot make it an application within the meaning of Art 181 of Limitation Act.) * (Vol 15) 1928 All 629 (631, 632) : 51 All 237 (FB),

[4] A certification by the decree-holder is not an application to the Court to take some step-in-aid of execution within the meaning of Art. 182, Cl. (5) of the Limitation Act. (Vol 30) 1943 Pat 7 (9, 10) : 21 Pat 481 * (Vol 29) 1942 Bom 17 (17, 18) : ILR (1942) Bom 11 (DB). [(Vol 1) 1914 Bom 238 : 38 Bom 47, Held overruled by (Vol 16) 1929 PC 19 : 3 Luck 684 : 56 Ind App 30 (PC)] ; (Vol 18) 1931 Cal 719 : 59 Cal 760 (FB) followed] * (Vol 18) 1931 Cal 719 (725) : 59 Cal 760 (FB) (Overruling (Vol 6) 1919 Cal 677 : 46 Cal 22; (Vol 3) 1916 Cal 356 : 6 Ind Cas 43 : 10 Cal L Jour 467 : 20 Cal 696 and 12 Cal 603) * (Vol 17) 1930 Rang 64 (65) * (Vol 19) 1932 Oudh 148 (151) : 7 Luck 590 (FB). * (Vol 20) 1933 All 364 (365, 366) : 55 All 393. * (Vol 23) 1936 Mad 118 (119) : 59 Mad 424.

[But see (Vol 12) 1925 Rang 26 (27) : 2 Rang 393] * (Vol 6) 1919 Low Bur 117 (118) : 10 Low Bur Rule 34.]

[5] When certain alleged payment or adjustment has not been certified or recorded under this rule the executing Court must refuse to recognise such payment or adjustment and the defect cannot be cured by the decree-holder subsequently certifying the payment or adjustment. (Vol 15) 1928 All 629 (632) : 51 All 237 (FB). * (Vol 21) 1934 All 534 (535) : 56 All 921 (DB).

[See also A. I. R. commentaries on the Limitation Act, 2nd (1942) Edn, Notes on Art 174, Art. 181 Note 18 and Art. 182 Note 124.]

16. "Shall record the same."—[1] The Court has no power to enquire into the truth of the statement of the decree-holder regarding the payment or adjustment but must record it according to it. (Vol 18) 1931 Rang 332 (333). * (Vol 20) 1933 Mad 523 (524). * (Vol 21) 1934 Nag 143 (144) : 31 Nag L R 21. * (Vol 7) 1920 Lah 73 (74). * (Vol 5) 1918 Oudh 460 (461) : 21 Oudh Cas 161 * (Vol 12) 1925 Pat 822 (823) (DB). * (Vol 25) 1938 All 116 (118).

[See however (Vol 23) 1936 Mad 468 (468).]

[2] The legality of the adjustment must be decided by the Court before recording it. (Vol 29) 1942 Bom 59 (60) : ILR (1942) Bom 132 (DB).

[3] Where some of the judgment-debtors are minors,

O. 21 R. 2 (contd.)

the Court is bound to satisfy itself that the compromise is for the benefit of the minors. (Vol 29) 1942 Bom 59 (80) : ILR 1942 Bom 132 (DB).

[4] The judgment-debtor will be entitled to show when an application for execution is made that no such payment or adjustment was made or that it did not operate to extend the period of limitation. (Vol 5) 1918 Oudh 460 (462) : 21 Oudh Cas 161.

[5] Where the judgment-debtor pleads adjustment the failure of decree-holder to appear and oppose does not compel the Court to record satisfaction without proof (Vol 15) 1928 Rang 185 (186) : 6 Rang 218.

[6] Recording of satisfaction does not make the drawing a fresh or amended decree necessary. (Vol 28) 1941 Bom 20 (22) (DB). * (Vol 12) 1925 Oudh 136 (137) * (Vol 12) 1925 Nag 49 (49) : 20 Nag LR 122.

[7] There is no special form for recording satisfaction. (Vol 28) 1941 Bom 20 (22) (DB).

[8] Sub-rule (3) does not require both certification and recording of payments. Where the Court fails to record the judgment-debtor does not lose his protection merely because the Court fails to perform the duty to make the record. (Vol 2) 1915 Cal 744 (745) (D.B.). * (Vol 14) 1927 Mad 155 (155, 156) * (Vol 12) 1925 Mad 230 (231) * (Vol 6) 1919 Pat 290 (291). * (Vol 25) 1938 All 116 (118) * (Vol 24) 1937 Rang 507 (507) (DB) * (Vol 27) 1940 Mad 893 (896). (If the decree-holder has really certified at one stage, the judgment-debtor is entitled to take advantage of it and request the Court to record satisfaction to that extent).

[But see (Vol 29) 1942 Bom 59 (61) : ILR (1942) Bom 132 (DB).]

[9] The court can act under its inherent powers and vacate an order brought about by the fraud of one party upon another. (Vol 2) 1915 Mad 281 (282) (DB).

[10] The inherent powers can be invoked only when there is prejudice to one of the parties. (Vol 7) 1920 Pat 750 (751) : 5 Pat L Jour 379 (DB).

[11] Noting of satisfaction on the register of the Civil suit on report from Collector to whom the decree was sent for executing does not amount to recording. (Vol 31) 1944 Nag 231 (232) : ILR (1944) Nag. 746.

17. Notice.—[1] Notice of proceedings under Sub-Rule 1 to judgment-debtor is not necessary. (Vol 5) 1918 Oudh 460 (461) : 21 Oudh Cas 161. * (Vol 6) 1919 Pat 136 (137) : 4 Pat L Jour 159.

[2] Where the judgment-debtor applies for recording satisfaction notice to the decree-holder is indispensable. (Vol 10) 1923 Nag 20 (20) * (Vol 31) 1944 Pat 251 (252) * (Vol 31) 1944 Nag 231 (232) : ILR (1944) Nag 746.

[3] An order allowing a certification without notice to the decree-holder is bad in law. An application will lie to set aside order passed without notice to decree-holder. (Vol 17) 1930 Lah 113 (114) * ('97-01) 2 Upp Bur Rule 254.

18. Uncertified payment or adjustment not to be recognised by Court executing the decree.—[1] Prohibition in sub-rule (3) is limited to a "Court executing the decree" and will not extend to a Court which is not executing the decree, when dealing with such matter. (Vol 30) 1943 Bom 246 (248) : ILR (1943) Bom 282. * (Vol 29) 1942 Mad 597 (598) : ILR (1943) Mad 138 (DB). * (Vol 6) 1918 Bom 105 (108) : 43 Bom 240 * (Vol 10) 1923 Rang 44 (44). * (Vol 22) 1935 Pat 385 (390) : 14 Pat 488 (DB).

[2] The object of the prohibition is to make the

judgment-debtor careful in getting his payment recorded. ('95) 17 All 42 (45.)

[3] The prohibition prevents false claims of payments by the judgment-debtor being presented to the Court. (Vol 28) 1941 Bom 302 (302) : ILR (1941) Bom 596 (FB).

[4] Where the liability of the judgment-debtor under a decree is only conditional one, the decree-holder can prove on taking out execution that the condition has been complied with and sub-rule (3) has no application to such a case. (Vol 13) 1926 Lah 641 (642). * (Vol 15) 1928 Lah 816 (816) (DB).

[See however (Vol 25) 1938 Pat 465 (466) : 17 Pat 128.]

19. Court acting under Order 21 Rule 16.—(1) A judgment-debtor debarred from pleading satisfaction under this rule cannot plead the same while opposing an application for recognition by an assignee decree-holder. (Vol 30) 1943 P C 66 (68) : 70 Ind App 50 : ILR (1943) Kar (PC) 77 : ILR (1944) Mad 1 (PC) [(Vol 10) 1923 Bom 404 : 47 Bom 643 overruled.] * (Vol 28) 1941 Bom 302 (303). ILR (1941) Bom 596 (FB). [(Vol 11) 1924 Bom 394 ; (Vol 10) 1923 Bom 404 : 47 Bom 643 overruled.] * (Vol 19) 1932 Mad 372 (374) : 55 Mad 720 (FB). [Following (Vol 17) 1930 Mad 429 and (Vol 7) 1920 Mad 416.] * (Vol 32) 1945 Bom 542 (543) (DB).

19a. Court dealing with application under Order 21 Rules 90, 95, 97 and 98.—[1] Court dealing with an application under O. 21 R. 90 is not an executing Court and therefore cannot record satisfaction. (Vol 16) 1929 Lah 886 (887). * (Vol 8) 1921 Pat 107 (108) : 6 Pat L Jour. 253 (DB). * (Vol 16) 1929 Pat 400 (400) (DB).

[2] Proceedings under O. 21 R. 95, 97, 98 are not execution proceedings and the Court can recognise uncertified adjustments while dealing with them. (Vol 17) 1930 Bom 375 (377) : 54 Bom 479 (DB). * (Vol 32) 1945 Mad 1 (1, 2, 3) : ILR (1945) Mad 848.

20. Suit by judgment-debtor based upon an uncertified payment or adjustment.—[1] A suit based upon an uncertified payment or adjustment is not barred. (Vol 30) 1943 Bom 246 (248) : ILR (1943) Bom 382. * (Vol 7) 1920 Nag 265 (265) * ('93) 25 Cal 718 (722, 724).

[See also (Vol 30) 1943 Bom 246 (248) : ILR (1943) Bom 382. (A surety for judgment-debtor can rely upon such adjustment in suit by surety) * ('85) 157 Ind Cas 26 (28) (Rang.)

21. Suit by decree-holder based on uncertified payment or adjustment.—(1) Uncertified adjustment of decree can be proved in a suit based upon a bond executed in satisfaction of a decree. ('85) 7 All 124 (129, 130) (DB). * ('92) 16 Bom 589 (592) (DB). * ('01) 25 Bom 252 (262) (DB) * (1900) 10 Mad L Jour 213 (214). * (Vol 24) 1937 Nag 217 (219) (DB.)

[2] In a suit under O. 21 R. 63 to raise the plea that property attached had been transferred in satisfaction of a decree the transfer need not have been certified. ('91) 13 All 339 (342).

22. Effect of fraud.—[1] Where satisfaction of decree is not reported by the decree-holder who takes out execution and fraudulently omits to state in the application the payments or adjustments as required by O. 21 R. 11 (e) the judgment-debtor is not entitled to ask for an investigation of the question under S. 47. (Vol 6) 1919 Lah 13 (14) : 1919 Pun Re No. 135. * (Vol 10) 1923 Rang 103 (105) : 11 Low Bur Rule 363 (DB). * (Vol 12) 1925 Bom 309 (309, 310) : 49 Bom

O. 21 R. 2 (*contd*)

548 (FB) * (Vol 8) 1916 Bom 217 : 40 Bom 333 34 Bom 575 overruled.) * (Vol 10) 1923 Cal 342 (343) : 50 Cal 468 (DB) * (Vol 15) 1928 Cal 527 (529, 530) (DB) * ('11) 36 Mad 357 (359, 361) (DB) * (Vol 15) 1928 Oudh 195 (198) : 3 Luck 170 (FB.) * (Vol 7) 1920 Pat 833 (335) : 5 Pat L Jour 70 (DB.) * (Vol 8) 1921 Pat 135 (137, 138) : 6 Pat L Jour 337 (DB.) ('97-01) 2 Upp Bur Rule 256.] * (Vol 12) 1925 Sind 140 (142) : 18 Sind L R 51 (DB.) * (Vol 8) 1921 Sind 10 (11) : 15 Sind L R 77 (DB.) * (Vol 22) 1935 Mad 257 (257) (DB.).

[2] Suit for possession of property sold under a decree of which satisfaction out of Court has not been certified cannot be resisted on the plea of such satisfaction irrespective of the question "whether there was fraud or no. (Vol 32) 1945 Mad 161 (164) : ILR (1945) Mad 827 (FB.) (21 Mad 356 and other similar decisions overruled.)

23. Effect on limitation.—[1] The executing court cannot recognise an uncertified payment or adjustment for any purpose whatever under the present rule. (Vol 30) 1943 Pat 7 (9) : 21 Pat 481 (DB.) * (Vol 27) 1940 Pat 594 (595) * ('12) 16 Cal W N 396 (397) (DB.) * (Vol 5) 1918 Cal 977 (978) : 45 Cal 630 (DB.)

[2] An application for execution presented more than three years after the decree or after the last starting point of limitation, containing a statement as to part payment is a sufficient certificate. (Vol 5) 1918 Mad 620 (621, 622) : 41 Mad 251 (DB.) * (Vol 22) 1935 Mad 922 (923) * (Vol 12) 1925 Cal 1012 (1013) 1014 : 54 Cal 143 (DB.) * (Vol 8) 1921 Bom 411 (412) : 45 Bom 91 (DB.) * (Vol 11) 1924 Lah 676 (677) * (Vol 30) 1943 Pat 7 (10) : 21 Pat 481 (DB.) * (Vol 27) 1940 Pat 594 (594) * (Vol 6) 1919 Pat 136 (137) : 4 Pat L Jour 159 (DB.) * (Vol 17) 1930 Rang 329 (331) : 8 Rang 310 * (Vol 12) 1925 Rang 26 (27) : 2 Rang 393. * (Vol 23) 1936 Nag 281 (282) : ILR (1937) Nag 106 * (Vol 18) 1931 Sind 28 (30) : 25 Sind L R 360. * (Vol 6) 1919 Sind 70 (75) : 13 Sind L R 37 (FB.) * (Vol 15) 1928 All 629 (631, 632) : 51 All 237 (FB.).

[3] To recognise a payment stated in an application filed after 3 years from the decree or the last starting point of limitation the payment should have been actually made and it should have complied with the requirements of S. 20 of Limitation Act. (Vol 30) 1943 Pat 7 (10) : 21 Pat 481 (DB.).

[But see (Vol 11) 1924 Oudh 392 (392).]

24. Operation as estoppel.—[1] The general law of estoppel cannot be allowed to override the special law contained in the Sub-rule (3). Therefore the executing court cannot enquire into the fact of payment or adjustment not certified or recorded within time. ('10) 34 Bom 575 (578) * (Vol 1) 1914 Cal 253 (254) (DB.) * (1912) 15 Cal L Jour 451 (452) (DB.) * (Vol 12) 1925 Sind 140 (142) : 18 Sind L R 51 (DB.).

25. Remedies of the judgment-debtor — [1] Where in spite of an uncertified satisfaction of the decree, the decree-holder takes out execution a suit to declare the decree as satisfied and therefore incapable of execution does not lie. (Vol 22) 1935 Rang 225 (226) * (Vol 4) 1917 Mad 177 (177) (DB.) * ('94) 21 Cal 437 (445, 449, 460) (FB.) * ('04) 31 Cal 480 (485) (SB.) * ('92) 15 Mad 302 (302, 303) (DB.) * (Vol 9) 1922 Lah 428 (431) : 3 Lah 319 (FB.) (Overruling 1910 Pun Re No. 16 and 1913 Pun L. R. No. 380.) * (Vol 1) 1914 Low Bur 267 (268) : 7 Low Bur Rule 367 (DB.).

[2] A separate suit to set aside a sale in execution of a decree which has been satisfied out of Court but not recorded as satisfied will not lie. ('92) 19 Cal 683 (688, 689) : 19 Ind App 166 (PC).

26. Suit for damages.—[1] Money paid out of Court but not certified can be recovered by way of damages where the decree is executed. (Vol 30) 1943 Pesh 13 (15) * (Vol 26) 1939 Mad 499 (500) * ('08) 30 All 464 (466) (DB.) * ('81) 3 All 538 (540) (DB.) * (Vol 10) 1923 Bom 253 (253) (DB.) * ('99) 23 Bom 394 (396) (DB.) * ('12) 16 Cal L Jour 174 (179) * ('11) 11 Ind Cas 1 (1, 2) (Cal) * (Vol 4) 1917 Lah 90 (91). * ('85) 8 Mad 277 (283) (FB.) * ('82) 5 Mad 397 (400) (FB.) (Overruling 3 Mad H C R 188) * (Vol 18) 1926 Oudh 482 (483) * (Vol 16) 1929 Rang 269 (270) : 7 Rang 310 * (Vol 15) 1928 Rang 316 (316) : 6 Rang 573. * (Vol 26) 1939 Pat 156 (157).

[2] A suit to recover money paid out of Court where the decree-holder recovers the amount due under the decree by executing it relates to a contract which is independent of the enquiry in suit and the execution proceedings and therefore is not barred by S. 47. ('82) 5 Mad 397 (400) (FB.).

[3] The cause of action for a suit to recover as damages money paid out of Court arises only when damage is actually sustained, the money being recovered a second time. (Vol 20) 1933 All 511 (512) * (Vol 26) 1939 Pat 156 (157) * (Vol 10) 1923 Nag 219 (222) (DB.) * ('10) 7 Mad L. T. 351 (352) * ('06) 16 Mad L Jour 54 (55, 56).

[But see ('07) 30 Mad 545 (546) * (Vol 6) 1919 Mad 773 (775) (DB.) (Filing of execution petition gives a cause of action.) * (Vol 22) 1935 Pat 65 (66). * ('98) 21 Mad 410 (410) * (Vol 30) 1943 Pesh 13 (15).]

[4] Mere failure to certify payment made out of Court does not give a cause of action for a suit for damages. (Vol 26) 1939 All 495 (496) * (Vol 22) 1935 Mad 961 (964) This case is reversed on another point in (Vol 25) 1938 Mad 493.

[5] Assignee of decree which has been satisfied out of court but not certified need not return the money realised by him in execution even though he had knowledge of the satisfaction of the decree. (Vol 6) 1919 Mad 424 (426) : 42 Mad 338.

[6] Dismissal of an application under sub-rule (2) on merits operates as res-judicata upon a subsequent suit to recover money alleged to have been paid twice. ('95) 18 Mad 26 (27) (DB.) * (1907-09) Upp Bur Rul C.P.C. 31. (Suit to set aside order entering satisfaction of decree, on ground of mistake was held maintainable.)

[7] Suit to set aside order entering satisfaction of decree on ground of mistake was held maintainable. ('35) 39 Cal WN 966 (969).

[8] Application for execution by decree-holder along with application to set aside order entering satisfaction was held maintainable. (Vol 7) 1920 Cal 543 (544).

27. Restitution of uncertified payment on reversal of decree in appeal.—[1] An uncertified payment made pending appeal can be recovered when the decree is reversed in appeal. ('87) 11 Bom 724 (726) (DB.) * (Vol 26) 1939 Mad 176 (176) (DB.).

28. Criminal proceedings.—[1] Where a Criminal Court is investigating a charge under S. 210 of the Penal Code of fraudulently executing a decree Sub-rule (3) does not apply. ('86) 10 Bom 288 (299) (DB.) (Case under Amending Act XII of 1879 : see Note 22.) * ('89) 16 Cal 126 (127) (DB.) (Do.) * ('86) 9 Mad 101 (101) (Do.)

COURTS EXECUTING DECREES

3. Where immoveable property forms one estate or tenure situate within the local limits of Lands situate in more the jurisdiction of two or more Courts, any one of such Courts may attach and than one jurisdiction. sell the entire estate or tenure.

[See Ss. 38 to 46]

Objects and Reasons.

"The Committee have inserted this rule to provide for cases, which they are told are not uncommon, of an estate being situated within the jurisdiction of two or more Courts. There are decisions on this point but they are not harmonious, and the Committee think it well to determine the law definitely."—S. C. R.

4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which as regards its subject-matter, is not expected by the law for the time being in force from the cognizance of either a Presidency or Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras^a [or Bombay], such Court may send to the Court of Small Causes in Calcutta, Madras^a [or Bombay], as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[882-S. 223, para 5; 1877-S. 223, para 5.]

a. Substituted by A. O. for "Bombay or Rangoon."

O. 21 R. 2 (contd.)

[2] The sub-rule does not prohibit the executing Court from holding an enquiry under S. 476 of the Criminal P. Code with a view to file a complaint against the decree-holder for an offence under S. 210, Penal Code. (Vol 18) 1931 Rang 148 (150) : 9 Rang 104. * ('82) 4 Mad 325 (327) (DB).

[3] Where the Court dismisses an application for execution on the ground that the decree has been satisfied by a payment out of Court, the decree-holder is not guilty of an offence under S. 210, Penal Code. ('96) 23 Cal 971 (975) (DB).

29. Appeal and revision.—[1] An order recording or refusing to record satisfaction under Sub rule (2) is appealable. ('89) 1889 All W N 95 (96) (DB). * ('94) 16 All 129 (129, 130). * ('87) 11 Bom 57 (58, 59) (DB) * ('03) 7 Cal WN 172 (174) (DB) * ('91) 14 Mad 99 (100) (DB) * (Vol 4) 1917 Low Bur 164 (165) * (Vol 26) 1939 Bom 255 (256) * (Vol 5) 1918 Cal 551 (552) (DB).

[2] Order refusing to set aside dismissal of an application is not appealable. ('97) 2 Upp Bur Rul 254 * (Vol 18) 1931 Lah 505 (505) * (Vol 7) 1920 Cal 914 (915) (DB).

[3] Order refusing to review an order rejecting an application is not appealable. (Vol 14) 1927 Lah 809 (810).

[4] Order directing execution to proceed in spite of decree-holder certifying payment out of Court is revisable. (Vol 18) 1931 Rang 332 (333).

[5] Order declining to execute on the ground that decree has been satisfied by an uncertified payment is open to revision. (Vol 22) 1935 Rang 481 (481).

ORDER 21 RULE 3 Note 1.

[1] The only case in which a court is entitled to sell immoveable property beyond the local limits of its jurisdiction is that provided in O. 21 R. 3. (Vol 10) 1928 Cal 619 (621).

[2] See also the following cases decided before this rule was enacted holding that property situate within territorial jurisdiction of two or more courts could be sold by any one of them. (1886) 12 Cal 307 (312) (DB). (1888) 12 Cal L.R. 404 (406) (DB). (1875) 23 South W. R. 154 (155) (DB).

ORDER 21 RULE 4 Note 1.

[1] O. 21, R. 4 applies equally to decrees of foreign courts. (Vol 5) 1918 Mad 645 (647).

[2] Small Cause Court cannot execute High Court decree on plaint valued at over Rs. 2,000 though subject-matter is not excepted from cognizance of Small Cause Courts. (Vol 30) 1943 Mad 271 (272).

[3] Where a decree is transferred for execution under O. 21, R. 4, to a Small Cause Court the transferee Court is not entitled to question the validity of the order of transfer. (1936) 165 Ind Cas 625 (626) (Cal).

[4] Decree transmitted for execution does not become decree of Court to which it is transmitted. (Vol 5) 1918 Mad 645 (647).

ORDER 21 RULE 5 Note 1.

[1] Where District Munsiff transmitted his decree directly to the Sub-Judge of the same district for execution, held, that the transfer did not contravene the provisions of O. 21 R. 5. (1892) 15 Mad 345 (346, 347) (DB). * (Vol 23) 1936 Cal 571 (572).

[2] Decree has to be sent to the District Court under O. 21, R. 5 only for transmission. (Vol 27) 1940 Mad 214 (214) (DB).

[3] Decree sent direct to another court instead of through District Court—Procedure is merely irregular—Irregularity must be deemed to have been waived if no objection is taken for long time. (Vol 33) 1946 Pat 801 (804) : 25 Pat 50 [(Vol 6) 1919 Pat 324 : 4 Pat L. Jour. 49 held overruled by (Vol 15) 1928 P. C. 162 : 55 Ind App 227 : 3 Luck 314 (PC).]

* [(Vol 30) 1943 Lah 129 (135) * (Vol 27) 1940 Lah 394, reversed.] * (Vol 24) 1937 Lah 174 (175) * (Vol 23) 1936 Lah 891 (894). * (Vol 23) 1936 Lah 765 (765).

[But see (Vol 1) 1914 Cal 786 (786) (DB) * (1895) 22 Cal 764 (766) (DB). * (Vol 20) 1933 Lah 839 (840) * (Vol 8) 1921 Pat 152 (156) 6 Pat L. Jour 304 (DB).]

[4] Decree sent to District Court for transmission—Order of transfer takes effect from date on which it is passed. (Vol 27) 1940 Mad 214 (214).

[5] Order of District Court transferring a decree for execution, signed by Sheristadar "by order" of the

5. Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

[1882-S. 223, para 6; 1877-S. 223.]

PROVINCIAL AMENDMENTS

Allahabad

For the word "district," where it occurs *after* the words "same" and "different" read "Province."

Bombay

Same as that of Allahabad.

[9-8-1940.]

Lahore

In the last sentence after the words "the District Court" and before the words "of the district" insert the words "or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive plaints has been delegated by the District Judge."

[23-3-1933.]

Oudh

Same as that of Allahabad.

Procedure where Court desires that its own decree shall be executed by another Court.

6. The Court sending a decree for execution shall send —

(a) a copy of the decree ;

O. 21 R. 5 (contd.)

District Judge, is a valid endorsement (1910) 7 Mad L Tim 132 (132) (DB).

[6] Decree papers should be handed over to Judgment-creditor on his applying for same unless he is a person not fit to be trusted with such papers. (Vol 20) 1933 Sind 343 (344) : 27 Sind L. R. 312.

[7] Transferee Court can entertain execution application even though copy of decree has not been received by it. (Vol 20) 1933 Mad 627 (627, 628) : 56 Mad 692 (DB).

ORDER 21 RULE 6 Note 1.

[1] Certificate wrong - Court to which decree is transferred should construe the decree itself and proceed - It need not get the certificate amended by the Court transferring the decree. (Vol 12) 1925 Pat 807 (809, 810) : 4 Pat 440 (DB).

[2] Order of transfer of decree for execution passed-Transferee Court can entertain application for execution even before receipt of necessary papers. (Vol 33) 1946 Mad 169 (169). * (1912) 35 Mad 588 (590, 591).

[But see (Vol 15) 1928 Mad 496 (497).]

[3] The executing court cannot proceed with the application for execution in the absence of the documents referred to in O. 21, r. 6 (b) and (c). when there is nothing to show that the decree-holder made any efforts to obtain the necessary certificates. (Vol 30) 1943 Pesh 67 (69).

[4] Second application to the court to which decree has been transferred for execution is not necessary if decree holder has already made an application in the Court which passed the decree. (Vol. 11) 1924 Pat 120 (121) : 2 Pat 909 (DB).

[5] Omission to send certificate does not affect jurisdiction of court to entertain application for execution. (Vol. 18) 1931 Cal 649 (649) * (Vol. 32) 1945 Cal 141 (142).

[6] Number of case and names of judgment-debtors not correctly given in certificate of non-satisfaction - it is mere irregularity and does not affect jurisdiction of Court to which decree is transferred to execute it. (Vol. 25) 1938 Pat 513 (513, 514) (DB).

[7] It is not necessary to transfer the decree where two Courts are presided over by the same Judge. (Vol. 15) 1928 Rang 15 (16) : 5 Rang 613.

[8] Small Cause court decree passed by Munsif exercising Small Cause court powers - Application for execution to the Munsif with affidavit addressed to Small Cause Court - R. 6 is in effect complied with - Execution by the Court is in capacity of Munsif and appeal from his order lies to Subordinate Judge. (Vol. 14) 1927 Cal 782 (783) (DB).

[9] The meaning of the words "a copy of any order for the execution of the decree" in cl. (c) is a copy of any "subsisting" order, and not a copy of an order for execution in the previous execution application. (1889) 13 Bom 371 (373) (DB).

[10] Before ordering transfer the court should order notices to issue on the judgment-debtors so that they may have an opportunity of showing cause.

[But see (Vol 22) 1935 Cal 268 (270). * (Vol. 26) 1939 Bom 258 (260). * (Vol. 30) 1943 Pesh 87 (88) DB. It is not necessary to issue notice to the judgment-debtors in the transfer proceedings and the omission to do so does not vitiate those proceedings.]

ORDER 21 RULE 7 Note 1.

[1] Executing Court cannot question jurisdiction of court passing decree. (Vol. 24) 1937 Bom 19 (22) (DB). [Overruling (Vol. 18) 1931 Bom 295 (296) * (Vol. 1) 1914 Bom 27 (27) : 38 Bom 194 (DB). * (Vol. 19) 1932 Lah 601 (601). * (Vol 6) 1919 Lah 294 (295) : 1919 Pun Be No. 22. * (Vol 18) 1931 Pat 27 (29, 30) : 9 Pat 829 (DB). * (Vol. 18) 1931 Rang 252 (259) : 9 Rang 480 (FB).]

[Overruling (Vol 17) 1930 Rang 337 : 8 Rang 544 * (Vol 3) 1916 Upp Bur 1 (2) : (1916) 2 Upp Bur Rule 119.

[But see (Vol 30) 1943 Bom 404 (405, 406) : I. L. R. (1943) Bom 665. (Decree passed without jurisdiction is a nullity and the executing court, whether it is the Court which passed the decree or is a court to which decree has been transferred for execution can go into the question of jurisdiction)]

[But see * (Vol 20) 1933 Nag 211 (212, 213) (DB). Executing Court can refuse execution if decree is

(b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied ; and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1882-S. 224 ; 1877-S. 224 ; 1859-S. 286]

PROVINCIAL AMENDMENTS

Allahabad

Rule 6 shall be re-numbered as 6 (1) and *add* the following sub-rule (2) :

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent,"

N.-W.F.P.

Read Rule 6 as Rule 6 (1) and *add* the following sub-rule (2) :

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

Oudh

To Rule 6, *add* the following as sub-rule (2) and re-number 6 as 6 (1) :

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

Patna

Insert the following words after the word "decree" in clause (a) :

"And a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree-holder subsequent to the passing of the decree."

O. 21 R. 7 (*contd.*)

passed without jurisdiction—But want of jurisdiction must be patent.]

[2] Decree against dead person - Court to whom decree is transferred can also refuse to execute decree being nullity. (Vol 21) 1934 Lah 117 (118) * (Vol 5) 1918 All 226 (227) : 40 All 423 (DB).

See Also * (Vol 19) 1932 Mad 7 (8) If a decree is apparently a nullity so that without going behind it executing court can see from its face that it is void, the executing court is *not* bound to execute it.

[3] General powers of Court to which decree is transferred for execution are same as those of Court that passed the decree. (Vol 21) 1934 Lah 652 (657) (DB).

[4] If Rr. 6 and 7 of O. 21 be read together and in the light of defining section Viz. S. 2, it is clear that R. 7 dispensing with further proof of jurisdiction that the certificate of the transmitting court applies to decrees of British Court and not to foreign court. (Vol 8) 1916 Bom 307 (308) : 40 Bom 551 (DB) Per Batchelor, J.)

* (1913) 14 Mad L. Tim 96 (109) (DB).

[5] British Indian Court competent to execute foreign decree can enquire jurisdiction of court passing decree. (Vol 2) 1916 Mad 486 (489) : 39 Mad 24 (FB).

ORDER 21 RULE 8 Note 1.

[1] The decree under O. 21, R. 5 has to be sent to the District Court for mere transmission to the transferee Court, and therefore no application for execution lies to the District Court. O. 21, R. 8 does not apply to such a case as under that rule the decree is transferred to District Court for *execution* which the District Court may transfer to another court. (Vol 27) 1940 Mad 214 (214) (DB).

[2] Order under S. 226 (now O. 21, R. 8) transferring a decree to another Subordinate Court need not bear the signature of the District Judge himself. The absence of his signature does not vitiate the proceedings, provided the order is issued under his authority. (1896) 23 Cal 480 (482) (DB).

[3] A court subordinate to the District Court has no power to transfer execution to another court. (Vol 20) 1933 Lah 839 (841).

[4] "Court of competent jurisdiction" refers to territorial competence. (Vol 5) 1918 Mad 17 (17) (DB).

[But see * (Vol 21) 1934 Mad 573 (574, 575) (DB) (Per Jackson, J.—The words 'competent jurisdiction' in O. 21, R. 8, do not necessarily refer to territorial jurisdiction, but mean 'competent to sell in execution.')]

ORDER 21, RULE 9, Note 1.

[1] Decree passed by Small Cause Court transferred to High Court for execution—High Court cannot make decree payable by instalments. (Vol 21) 1934 Rang 197 (198) (DB).

ORDER 21, RULE 10.

Synopsis.

1. Scope of the Rule
2. Application for execution.
3. Successive applications for execution.
4. Who can apply for execution.
5. Time of presentation.

Note 1. Scope of the Rule

[1] Mode of execution—Procedure-Substantive right.

7. The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the same without proof. hand of the Judge, requires such proof.

[1882-S. 225 ; 1877-S. 225 ; 1859-S. 286]

Objects and Reasons.

After the word 'thereof' section 225 of the 1882 Code contained the words 'or of the jurisdiction of the Court which passed it'. "The words 'or of the jurisdiction of the Court which passed it' have been omitted. In our opinion a Court executing the decree of another Court ought not to go into any question as to the jurisdiction of the Court which passed it."—S. C. R.

8. Where such copies are so filed, the decree or order, may, if the Court or order by Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

[1882-S. 226 ; 1877-S. 226 ; 1859-S. 287.]

O. 21 R. 10 (contd.)

The right as to the method of executing a decree is one of procedure and not a substantive right. (1911) 9 Ind Cas 800 (801) (All).

[2] The scope of O. 21 seems to be that where R. 10 applies, the word 'court' alone is used, whereas in R. 16, R. 26 and R. 50, when it is intended that the application should be restricted to one court that one court is specifically referred to. (Vol 29) 1942 Mad 501 (502) : ILR (1942) Mad 688.

[3] Appellate decree alone is capable of execution and fresh execution application is necessary.—Practice—Execution. (Vol 17) 1930 Bom 225 (227) (DB).

[4] O. 2, R. 2 does not apply to application for execution. (Vol 20) 1933 Bom 364 (365) : 57 Bom 468 (DB).

Note 2. Application for execution.—[1] An application made to the court which passed the decree for transmission of the decree to another Court is not a substantive application for execution. The transmission order is a ministerial and not a judicial order. (Vol 22) 1935 Lah 508 (509, 510) : 17 Lah 13 (DB). (Such an order can be passed *ex parte* and the Court passing it has no jurisdiction to decide whether a subsequent application in the transferee Court will be within limitation or not. (Reversing A. I R. 1930 Lah 118 : 125 IC 55.) * (Vol 13) 1926 All 473 (474) (DB). (Application for transfer of decree is step-in-aid under Limitation Act) * (Vol 19) 1932 Pat 309 (311) : 11 Pat 785 (DB). (Application for transfer of decree to Court not having jurisdiction is not step-in-aid).

[2] In case where decree is transferred application for execution must be made to transferee Court and not to parent Court. (Vol 18) 1931 Lah 14 (14, 15).

[3] But where the decree-holder has already made an application for execution in the court which passed the decree, second application to Court to which decree has been transferred for execution is not necessary. (Vol 11) 1924 Pat 120 (121) : 2 Pat 909 (DB).

[4] Order of transfer of decree for execution passed—Transferee Court can entertain application for execution even before receipt of necessary papers. (Vol 33) 1946 Mad 169 (169) * (Vol 20) 1933 Mad 627 (627, 628) : 56 Mad 692 (DB). [(Vol 15) 1929 Mad 496 dissented from.]

[But see (Vol 18) 1931 Mad 103 (104) (Decree-holder applying for execution in anticipation, three days before arrival of decree at transferee Court—Such application is incompetent.)]

[5] Decree transferred for execution to another Court—Application for execution initiates proceedings in execution—Receipt of decree on transfer is there

ministerial act—Decree transferred to Burma Court becoming foreign decree at the date of application for execution, by reason of separation of Burma—Burma Court cannot execute it—S. 10, Government of Burma Adaptation of Laws Order of 1937 does not apply. (Vol 25) 1938 Rang 385 (386, 387) : 1938 Rang LR 355 (DB).

[6] Transfer of decree to another Court for execution—Execution application in transferee Court dismissed—Subsequent application to the transferring Court—Decree not sent back to the transferring Court—Application is not a proper one. (Vol 3) 1916 PC 16 (17, 18) : 43 Ind App 238 : 39 Mad 640 (PC).

Note 3. Successive applications for execution.—

[1] There is no provision in the Civil Procedure Code, (1882), directing that an application for execution must be when possible, with reference to the entire decree. (1910) 11 Cal. L. Jour. 83 (84) (DB) * (Vol 2) 1915 Mad 811 (812) : 38 Mad 199 (DB). (Successive applications can be made).

[2] When a decree gives reliefs of a different character, such as a decree for possession and decree for costs, there is nothing in the Code which prevents separate and successive applications for execution as regards each of them. (1891) 18 Cal 515 (516) (DB).

[3] Attachment ordered in execution—Application undisposed—Subsequent application for sale beyond time not barred—Decree-holder not disabled by laches—Subsequent application only a continuation. (Vol 3) 1916 Mad 728 (728) (DB).

[4] There is nothing in the Civil PC which authorises piecemeal execution. A party having a right to execute a decree for money presently payable must enforce the whole decree at the same time. He cannot execute it first for the amount of the decree, and, secondly, for the interest due from date of decree to date of payment. (Vol 20) 1933 Bom 364 (365) : 57 Bom 468 (DB).

[5] It is obviously more convenient for the purposes of attachment and sale that for the execution of a single decree there should be a single application, a single procedure of attachment and a single procedure of sale ; otherwise there would be considerable confusion if there were multiplicity of applications, and attachments and sales. (Vol 22) 1935 All 402 (403).

Note 4. Who can apply for execution.—[1] The rule is confined to holders of a decree and there is no difference between the holder of a decree and decree-holder. The holder of a decree under O. 21, Rule 10 must be a person in whose favour a decree has been passed. (Vol 27) 1940 Pat 472 (473) (DB).

Execution by High Court of decree transferred by other Court. jurisdiction.

9. Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

[1882-S 227 ; 1877—S. 227 See S. 42]

APPLICATION FOR EXECUTION

10. [S. 230, para. 1.] Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

[1882-S. 230, para 1 ; 1877-Ss. 230, 231; 1859-S. 207.]

PROVINCIAL AMENDMENT

Lahore

Add the following proviso :

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under Section 39."

[7-4-1932]

O. 21 R. 10 (contd.)

[2] The decree-holder within the meaning of the Code is the person whose name appears on the record, as the person in whose favour the decree was made, or some persons whom the court has by order recognised as the decree-holder from the original plaintiff or his representatives. (1878) 2 Mad 216 (217) (DB).

[3] The decree-holder who appears upon the face of the decree is entitled to execute, unless it be shown by some other person under S. 232 (now O. 21, R. 16) that he has taken the decree-holder's place. (1891) 18 Cal 639 (641) (DB).

[4] There is no provision in the Code which allows a person to come forward and say that the decree-holder is a mere non-entity and a *benamidar* of the applicant and that he (the applicant) is in substance and in fact the holder of the decree. (Vol 27) 1940 Pat 472 (473) (DB).

[5] Decree-holder applying for execution is not required to satisfy Court that provision in decree sought to be enforced is provision in his favour. (Vol 19) 1932 Bom 378 (384) (Obiter).

[6] Compromise decree granting allowance to some parties and one stranger—Execution application by all—*Held* stranger to suit cannot execute though he can sue on it. Decree-holder alone can make the application for execution. (Vol 4) 1917 Oudh 182 (184) (DB).

[7] Application for execution by several persons—one of them can withdraw and application can be continued in name of others. (Vol 22) 1935 All 402 (404).

[Decree in favour of three persons awarding them separate costs—joint application for execution by two is maintainable.]

[8] S. 230 (now O. 21, R. 10) applies to all holders of decrees and does not reserve or except a case of a decree-holder attaching property before judgment under S. 480 (now O. 38, R. 11 C.P.C. (1888) 12 Bom 400 (406).

[9] Joint family of father and sons—Partition by arbitration—(Decree ou award)—Father subsequently getting decree in respect of joint family debt—Execution application by one of sons—Application is proper as sons can come forward and say that they have an

interest in the decree and are holders of the decrees (Vol 24) 1937 Pat 607 (608) (DB).

[10] If minor ratifies application made by his next friend within three years of his attaining majority, such ratification renders application valid. (Vol 18) 1931 Lah 600 (601) (DB).

[11] Where an application for execution was presented by an agent without a power of attorney, who on objection filed a power of attorney subsequently, *held*, that the Court should accept it and treat the application as having been presented on the date of production of the power. (1913) Pun L. R. No. 86 page (327) : 1912 Pun Re. No. 118.

[12] Decree-holder's disappearance—Nothing known as to death—Pleader can apply. (Vol 12) 1925 Pat 369 (372) : 4 Pat 378 (DB).

[13] Pleader authorized to appear in suit is also deemed as authorized to appear in execution proceedings. (Vol 12) 1925 Pat 692 (693) (DB).

[14] Execution application presented by vakil is in accordance with law though *vakalat* is not dated. (1903) 26 Mad 197 (199).

Note 5. Time of presentation.—[1] Where an execution application is presented to the Deputy Clerk of Court who is an officer appointed to receive such applications, beyond office hours on the last day of limitation and is accepted by him, the presentation is proper and valid. In such a case the ratification by the Judge for such presentation is not necessary. (Vol 25) 1938 Nag 46 (47) : ILR (1938) Nag 451. Application presented not during usual Court hours but on the last day of limitation prevailing upon the officer of Court to accept the presentation on that day. (Discretion is not improperly exercised).

ORDER 21, RULE 11.

Synopsis.

1. Scope of the Rule.
2. Execution of decrees under other Acts.
3. Verification of application.
4. Names of the parties.
5. Date of decree to be given.
6. Payment or other adjustment.
7. Previous applications and their results.

11. (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;

O. 21 R. 11 (contd.)

8. Amount due upon decree.

9. Amount of costs awarded.

10. Against whom execution is to issue.

11. Mode in which the assistance of the Court is required.

12. Certified copy of decree to be filed.

1. Scope of the Rule.—[Execution petitions are as important as suits themselves—Court must bestow proper amount of care and caution. (Vol. 29) 1942 Mad 495 (497).]

[2] 'In accordance with law' means that application though defective in some particular is one upon which execution can lawfully be ordered (Obiter) (Vol 21) 1934 Bom 307 (310) : 59 Bom 1 (DB).

[3] Whether the application for execution is or is not according to law, would depend on the facts of each case depending upon whether the executing Court would or would not issue execution on the application for execution as preferred to it (Obiter) (Vol 21) 1934 Bom 307 (310) : 59 Bom 1 (DB). * (1891) 18 Cal 462 (465) : (DB). (Only a technical irregularity—in form rather than in substance—application one in accordance with law). * (Vol 16) 1929 Mad 703 (704) : 52 Mad 760 (FB). (Application for execution defective in not giving particulars under O. 21, R. 11. but for practical purposes sufficient for S. 73—Application held to be one in execution and legal for purposes of S. 73). * (Vol 15) 1918 Pat 547 (548) : (DB). (Application is in accordance with law if particulars required on date of filing are given.) * (Vol 8) 1921 Low Bur 37 (39) : 11 Low Bur Rul 163 (DB). (The fact that the execution petition was not in a tabular form is not in itself sufficient ground for rejection.) * (Vol 9) 1922 Sind 29 (30) : 15 Sind LR 156 (DB). (Informalities of an immaterial character in an execution application will not vitiate an application).

[4] Defective execution application should not be regarded as one in accordance with law. (Vol 5) 1918 Mad 1090 (1092, 1093) : 40 Mad 949 (DB). (Application may start fresh limitation if defects removed.) (Vol 18) 1931 All 722 (723). (Application not in accordance

with law does not save limitation.) * (Vol 6) 1919 Cal 466 (467) (DB). Defective application is not step-in-aid of execution).

[5] An executing court must ascertain whether an application for execution complies with the requirements of the rules and if it does not, it must either reject the application or allow it to be amended then and there, or within a fixed time. (Vol 7) 1920 Lah 122 (122). * (Vol 30) 1943 Pat 127 (129) ; 21 Pat 838 (DB)

[6] Application for execution not complying with provisions of O. 21, R. 11—defective thereby—Court should abstain from deciding whether or not the decree is capable of execution. (1911) 11 Ind Cas 696 (696) (Cal) (DB).

[7] Where an application for execution in substantial compliance with the law is preferred to the court such an application will be effectual to stay the progress of limitation, whether the court admits or rejects or returns the application or allows such application to be amended (Obiter) (Vol 21) 1934 Bom 307 (310) ; 59 Bom 1 (DB). * (Vol. 5) 1918 Mad 1090 (1092, 1093) : 40 Mad 949 (DB). (Application substantially in accordance with law—Failure to re-present after necessary correction does not affect saving of statutory bar—Wrong computation of pleader's fees or non production of encumbrance certificate or draft proclamation does not make application not in accordance with law) * (Vol 30) 1943 Nag 296 (297) : ILR (1943) Nag 584 (DB). (Court rejecting application for execution for default of decree-holder to correct defects therein—Order of rejection is not adjudication that application is not in accordance with law) * (Vol 11) 1924 Pat 23 (24) : 2 Pat 809 (DB). (Application conforming with O. 21, R. 11 to 14 but returned for some other reason is not invalid).

[See also (Vol 13) 1926 Pat 533 (534) (DB) (Heading and column 8 blank—No correct entry in column 6—No list of properties—Sheet No. 2 blank—No copy of decrees attached—Names of decree-holders not given—Application returned—Time given for supplying defects—Defects supplied beyond time—Application is barred.)]

[8] Application headed as one under R. 11, but not

- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether —
 - (i) by the delivery of any property specifically decreed ;
 - (ii) by the attachment and sale, or by the sale without attachment, of any property ;
 - (iii) by the arrest and detention in prison of any person ;
 - (iv) by the appointment of a receiver ;
 - (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

[1882-Ss. 235, 256 ; 1877-Ss. 235, 256 ; 1861-S. 13 ; 1859-S. 212. See Ss. 38 and 51 and 135 and O. 40 R. 1.]

Objects and Reasons.

Section 256 began like this : "When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, . . ."

"The Committee have omitted the limitation imposed under the existing Code on oral applications for immediate execution. They see no reason why this limitation should be preserved.

Rule 11 (e).—The Committee have not given effect to the suggestion that this should be limited to payments and adjustments which the creditor executing the decree is bound by law to recognise, as this would remove a valuable incentive to state truly, what payments have been made."—S. C. R.

PROVINCIAL AMENDMENTS

Allahabad

- (1) For clause (f) of sub-rule (2), *substitute* the following :

"(f) The date of the last application, if any," and,

- (2) *Add* the following proviso to sub-rule (2) :

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application."

O. 21 R. 11 (*contd.*)

in proper form—Court acting thereon and granting relief—Application is one in execution and order is legal. (Vol 15) 1928 Mad 129 (130, 131, 132) (DB). (Per Devadoss J., Contra Jackson J.).

[9] Question of *bona fide* intention of the person in applying for execution of a decree does not arise in the execution proceedings. (Vol 18) 1931 Sind 160 (161) : 25 Sind LR 528.

[10] When a conditional decree is made, the plaintiff on default by the defendant, should apply to the court which passed the decree on notice to the defendant for absolute order. Then if and when such order is obtained, application may be made in the usual way for execution of that order according to the provisions of O. 21. R. 11 (1906) 10 Cal WN 306 (310).

[11] Preliminary decree for foreclosure and subsequent passing of final decree without knowledge of mortgagee—Application by mortgagee for passing decree absolute and for possession is not execution application according to law. (Vol 4) 1917 Nag 172 (173).

2. Execution of decrees under other Acts.—

[1] Wife and husband arriving at arrangement under proceedings under Guardians and Wards Act with regard to maintenance of their children—Consent order passed under which husband was to pay expenses of maintenance and schooling of children to wife or schooling authorities as the case may be—Wife taking out summons for leave to execute consent order as if it were decree for payment of money—Although order did not fall within terms of Guardians and Wards Act, still it was valid being within ordinary jurisdiction of Court and as parties were properly before the Court—

It could not however be regarded as decree for payment of money. (Vol 26) 1939 Bom 367 (368, 369) (DB).

[2] Immediate execution on oral application as enacted in sub-rule (1) can be ordered under S. 198 (3) of the Orissa Tenancy Act, (II of 1913) and under S. 192 (g) of the Madras Estates Lands Act, (I of 1908).

[3] Execution of decree against immovable properties of judgment-debtor under Bengal Tenancy Act (VIII of 1885) and the Orissa Tenancy Act (II of 1913)—For the particulars to be supplied in the application see Secs. 162 and 216 of those Acts respectively.

[4] Execution of decree relating to immovable property under the Chota Nagpur Tenancy Act, VI of 1908—Application should be accompanied by a certified copy of the decree.

3. Verification of application.—[1] Although O. 21, R. 11 permits the signing and verification of an application for execution by some person other than the decree-holder, the application itself must be that of the decree-holder or his recognised agent or pleader. (Vol 24) 1937 Mad 760 (761). ✕ (1904) 26 All 154 (155) (DB). (Application verified by the general attorney of the decree-holder who satisfies the Court that he is acquainted with the facts of the case is properly verified).

As a pleader who represented party in a case out of which proceedings in execution have arisen must be held to be a person acquainted with the facts of the case, an application in execution signed and verified by him is a compliance with the provisions of O. 21, R. 11 (2). (Vol 21) 1934 Nag 224 (225). (Verification by pleader representing party in the original case held proper.) ✕ (Vol 16) 1929 Bom 196 (196) (DB) (Do).

Madras

- (1) In sub-rule (2) *between* clauses (f) and (g), insert the following new clause :

"(ff) whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer."

[P. Dis. No. 776 of 1929]

- (2) Add the following to sub-rule (2) (j) :

"In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of Rule 53 of this Order, there shall not be included any other relief mentioned in this clause."

- (3) Add the following proviso at the end of sub-rule (2) :

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application."

[2-9-1936 and 13-10-1936]

Nagpur

Add the following proviso to sub-rule (2) :

"Provided that, when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b), (c) and (h) need not be given in the application."

[29-6-1943.]

Oudh

For clause (f) of sub-rule (2), substitute the following :

"(f) the date of the last application, if any."

Patna

- (1) Add the following as sub-rule (1A) :

"(A) Where an order has been made under Section 39 for the transfer of a decree for the payment of money for execution to a Court, within the local limits of the jurisdiction of which the judgment-debtor resides such Court may, on the production by the decree-holder of a certified copy of the decree and an affidavit of non satisfaction, forthwith order immediate execution of the decree by the arrest of the judgment-debtor."

- (2) Substitute the words and figures "sub-rules (1) and (1-A)" for the word and figure "sub-rule (1)" in sub-rule (2).

Sind

Add the following as clause (ff) to sub-rule (2) :

"(ff) Whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer,"

O. 21 R. 11 (*contd.*)

* (Vol 17) 1930 Lah' 603 (604). (Application for execution by pleader who had been acting as next friend of decree-holder in original suit—Decree-holder major on date of application—Application is valid without power-of-attorney when pleader acts *bona fide* in the matter.) * (1931) 61 Mad L. Jour. 516 (517) (DB). (Execution application neither signed nor verified by decree-holder, but signed by his pleader only, who is not acquainted with facts—The application is not in accordance with law.)

[2] Where the son of the decree-holder presented an application for execution on his father's behalf and the Court returned it for amendment under O. 21, R. 11 (2) and there was nothing upon the record to show that the son who signed and verified this application was a "person acquainted with the facts of the case" within the provisions of Sub-R. (2) of R. 11 of O. 21: *Held*, that the application was rightly returned as not complying with the provisions of O. 21, R. 11, Sub-R. (2). It could not be said to be pending in Court when it was not filed subsequently after making proper amendment. (Vol 24) 1937 Sind 108 (110) : 31 Sind LR 14.

[3] Application verified by decree-holder's son and presented on last date of limitation—Pleader by oversight omitting to sign it and consequently rejected—Decree-holder cannot be made to suffer for omission of Court to give him opportunity of putting in proper application. (Vol 7) 1920 Lah 123 (122).

[4] Application for execution—Friend making an application as guardian for another who is found to be major at the time—Application, held, to be not in accordance with law. (1905) 28 Mad 396 (398) (DB).

[5] It would be straining the language of the rule too far to say that where there are more applicants than one, the verification should be signed by all although they are not acquainted with the facts of the case or that where one or more are acquainted with the facts of the case their verification is not sufficient. (Vol 11) 1924 Pat 23 (25) : 2 Pat 809 (DB).

[6] Execution application not signed by decree-holder is not void, but can be amended. (Vol 7) 1920 Pat 636 (638) (DB).

[7] Application by person other than decree-holder—Verification need not be in Court's presence. (Vol 11) 1924 Cal 811 (811) (DB).

[8] Time and place of verification omitted—Defect held trivial and application not bad thereby. (Vol 23) 1936 Pat 62 (63) (DB).

4. Names of the parties.—[1] Omission to state names of all persons interested in the decree does not invalidate execution proceedings. (Vol 13) 1926 Cal 811 (812) (DB), * (1932) 33 Pun LR 549 (550).

[2] All that R. 11 (2) (b) requires is that the names of the parties should be specified. It says nothing about the addresses. Consequently the application not specifying addresses of judgment-debtors, is not invalid. (Vol 28) 1941 Nag 152 (154).

5. Date of decree to be given.—[1] Mistake in entering date of decree is not material defect. (Vol 6) 1918 Pat 41 (51) ; 4 Pat L Jour 213 (DB).

[2] Showing date of decree wrongly does not affect validity of application. (Vol 18) 1931 Sind 160 (160) : 26 Sind LR 528.

O. 21 R. 11 (contd.)

[3] Omission to mention the ground of extension of the period of limitation in the application for execution is not fatal. (Vol 27) 1940 Lah 178 (179).

[4] Burden of proving that an application for execution is not time barred and is in accordance with law is on the applicant. (Vol 18) 1931 Sind 160 (161): 25 Sind LR 528.

6. Payment or other adjustment.—[1] The applicant for execution is bound to mention in the application any payment or adjustment made between the parties after decree, whether payments are certified or not by the court, (1886) 10 Bom 288 (297, 298) (DB). (Intentional omission to make statement about adjustment after decree amounts to an offence under S. 193 I.P.C.) * (Vol 13) 1926 Nag 164 (166) * (Vol 11) 1924 Nag 185 (187). (Non-mention of prior adjustment renders execution application illegal.) * (Vol 3) 1916 Bom 217 (218): 40 Bom 333 (DB). (Decree satisfied out of Court—Payment not certified—Application for execution filed containing false statement that there was no adjustment—Court cannot permit unjust order in execution).

[2] All that sub-cl. (e) of R. 11, O. 21, requires is that the payments made should be specified in the application it says nothing about the dates of these 'payments.' Therefore, application not specifying such dates is in accordance with law. (Vol 28) 1941 Nag 152 (154).

[3] Notice of deposit served on decree-holder—Sufficiency of deposit admitted by decree-holder. He cannot again take out execution. (Vol 20) 1933 Pat 89 (90): 11 Pat 796 (DB).

[4] A certification of payment made by decree-holder, after the decree is statute barred is not a step-in-aid execution and cannot revive limitation. (Vol 20) 1933 Sind 365 (366) (DB).

[5] Application for execution not mentioning money realized by attachment of decree obtained by judgment debtor—Omission does not vitiate application. (Vol 21) 1934 Cal 465 (466) (DB).

7. Previous applications and their results.—[1] Order 21, R. 11 (2) (f) would be complied with if in a further application for execution, the result of a previous application was stated whatever the result might have been as for instance that it has been completely infructuous. (Vol 28) (1941) Bom 37 (39): I.L.R. (1941) Bom 89.

[2] Previous application—Date not mentioned—Defect is not material, where number is given—Cross decree need not be mentioned where it could not be set off: (Vol 11) 1924 Cal 398 (399) (DB).

[3] Omission to specify all the previous applications with date and results is not illegality vitiating proceedings—Whether irregularity is material or not depends on facts of each case. (Vol 13) 1926 Cal 1146 (1147-1148) (DB).

[4] An application for execution which failed to mention, as required by O. 21, R. 11 (b), the previous application, was such a material defect as to render the application not in accordance with law and will not save limitation. (Vol 9) 1922 Sind 29 (30): 15 Sind L.R. 156 (DB). (omission held material.)

[5] Application for execution—Previous application within limitation, defective so far as it failed to mention details as required by O. 21, R. 11 (f)—Returned for amendment but amendment not made within time

allowed—Held omission not a material defect—Application one in accordance with law. (1893) 16 Mad 142 (143) (DB).

8. Amount due upon decree.—[1] Amount to be recovered not known—Execution cannot be entertained. (Vol 8) 1921 Nag 90 (91) (DB).

[2] An application for execution which does not show the amount of the decree and the amount of costs is not in accordance with law. (1922) 65 Ind Cas 120 (120) (Pat). (Is not a step-in-aid of execution so as to save limitation.) * (Vol 29) 1942 Pat 295 (296) (Amount of costs entered in the column for amount due and column for costs left blank—Error arose from entry in Civil Suit Register—Application was allowed to be amended.)

[3] Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application, execution may be ordered on future interest also upto the date of sale, even though it is not specifically included in the application. (Vol 19) 1932 Cal 555 (557) (DB).

[4] Particulars of interest due are not required by O. 21, R. 11 (g), or by any other provision of the code, and these particulars can be furnished by the decree-holder at any time after issue of notice to the judgment-debtor, when evidence is taken, or before orders are passed, for the purpose of ascertaining the amount due. (Vol 26) 1939 Rang 345 (346) (DB). * (Vol 9) 1922 Pat 409 (411): 1 Pat 149 (DB). (Interest wrongly mentioned in execution application—Court is not bound to verify correctness of amount but to see if form is correct.)

[See also * (Vol 20) 1933 Mad 872 (874) (Mere omission of particulars under cl. (d) and (g) is not sufficient to render execution application not in accordance with law.)]

9. Amount of costs awarded. [1] If the decree-holder asks for more costs than are actually due to him, that might be another matter, but where, when he asks for something less and the difference is of a trivial character, it is impossible to hold that the application is so vitiated as to be incapable of execution at all. (Vol 28) 1941 Nag 152 (154) (DB).

[2] The omission to mention the amount of costs in the execution application is a defect of such an immaterial character as could hardly be said to render the application one not according to law. (Vol 9) 1922 Sind 29 (30): 15 Sind L.R. 156 (DB).

[3] If costs are awarded in the course of execution proceedings, separate execution may be taken out for costs, (1910) 5 Ind Cas 480 (481, 482) (Cal) (DB).

10. Against whom execution is to issue.

[1] Money-decree—Execution can be taken out without judgment-debtor or his representative being made party—Property attached before judgment—Property sold to stranger during attachment—Subsequent adjudication of judgment-debtor—Execution application by sale of attached property against purchaser is maintainable without joining Official Assignee. (Vol 30) 1943 Mad 179 (180, 181): I.L.R. (1943) Mad 659 (DB). (Rules as to joinder of parties in suits do not apply to execution proceedings).

[2] Application for execution—It would not be sufficient to say that the decree is sought to be enforced against the judgment-debtors; the names must be given (1872) 18 Suth WR 55 (56) (DB). (Per Couch, J.).

[3] Application for execution—Where decrees is to be executed against minor's property, the proper course is

Application for attachment of moveable property not in judgment-debtor's possession.

12. Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

[1882-S. 236; 1877-S. 236; 1859-S. 214 See Ss. 2 (13) and 60.]

Application for attachment of immovable property to contain certain particulars.

13. Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

[1882-S. 237; 1877-Ss. 237, 238; 1859-S. 213.]

O. 21 R. 11 (contd.)

to include in the application description of property to be sold, the name of the defendant against whom decree was obtained etc., to make it distinctly clear that the property of the minor is about to be sold. (1872) 18 Sutr WR 55 (56, 57) (DB).

[4] Wrong mention of defendants' names does not render application invalid. (Vol 17) 1930 Mad 172 (173).

11. Mode in which assistance of the court is required.—[1] An execution application which does not specify the manner in which the assistance of the Court is sought is not an application in accordance with law. (1895) 19 Bom 34 (35) (DB). * (1911) 11 Ind Cas 696 (696) (DB) (Cal). * (Vol 19) 1932 Lah 534 (534) : 14 Lah 6 (DB). (Held on the facts that the mode of execution was sufficiently described.)

[2] Application for execution—Relief to sell property not situated within jurisdiction of Court cannot be granted—Application is however in accordance with law if *bona fide*. (Vol 18) 1931 Sind 160 (161) : 25 Sind LR 528.

[3] Mode of execution—Decree-holder asking for removal of building, something court was not competent to give—*Held*, application presented under O. 21, R. 11 should have asked for that particular assistance which under O. 21, R. 32 could have been granted. (1882) 8 Cal 174 (177) (DB).

[4] Where property cannot be voluntarily sold on the one hand and cannot be compulsorily sold in execution on the other, as when S. 16, C. P. Land Alienation Act is applicable, mere attachment can have no meaning and so court has no jurisdiction to attach it. (Vol 22) 1935 Nag 133 (135) : 31 Nag LR 239.

[5] Any method suggested by the decree-holder for the satisfaction of his decree which method is not actually prohibited by law falls within the purview of R. 11(2) (j) (v). (Vol 15) 1928 Lah 7 (9).

[6] Rateable distribution is not a form of execution, (Vol 16) 1 29 Nag 148 (150) : 25 Nag LR 94 (DB).

[7] Sale without attachment is one method of execution; attachment of a decree of a debt is another, falling under the general heading "Otherwise as the nature of the relief may require." An application for execution by one method cannot be converted into one for execution by the latter method. (1911) 9 Ind Cas 240 (241) (Oudh).

[8] O. 21, R. 11(2) makes no mention of a temporary alienation of land, the reason probably being that the court of execution when refusing to order the

sale of the property, is expected to direct instead, a temporary alienation thereof without any specific prayer to that effect. (Vol 7) 1920 Lah 117 (118) (DB).

[9] If the property is already attached or the attachment is unnecessary. Hence a mere reference in the *darkhast* application on that the property sought to be sold is attached already is a sufficient specification of that property, and if merely its sale is asked for in execution of the decree, the requirements of O. 21, R. 11, Sub-R. (2), Cl. (j), are sufficiently complied with. (Vol 27) 1940 Bom 250 (251). Such a *darkhast* is in accordance with the law.

[See also (1891) 18 Cal 462 (465) (DB). (Application for execution not complete in itself so as to show in what manner execution is to be taken out is still capable of being acted on where it refers to the former application in which the mortgaged properties were set out, and where it is prayed that the decree may be executed by sale of those properties.)]

[10] Execution application—Omission to state form of notice wanted does not make application one not in accordance with law. (Vol 20) 1933 Rang 87 (89). * (Vol 30) 1943 Bom 238 (239). (The application for execution containing the words "a notice be issued under O. 21, R. 22" in the last column is not irregular.)

[11] Application not showing particulars of movables to be attached is in accordance with law. (Vol 28) 1941 Nag 152 (155).

[12] Mortgage decree—Property described in plaint and decree—Application for execution need not be in form prescribed under R. 11—Court shall sell the property after getting necessary particulars from decree-holder. (Vol 21) 1934 Lah 58 (59).

12. Certified copy of decree to be filed.—

[1] Application for execution correct—Dismissal for failure to file copy of decree—Application is in accordance with law and saves limitation—Limitation Act (9 of 1908), Art. 182. (Vol 5) 1918 Rat 547 (548) (DB).

[2] Application fulfilling requirements of R. 11—Application is good if copy of decree is subsequently filed and saves limitation—Limitation Act (9 of 1908), Art. 182. (Vol 5) 1918 All 242 (243) : 40 All 209 (DB).

[3] *Held*, (1) (Where a copy of decree is inordinately lengthy a copy of the entire decree is wholly needless if the court in which the application for execution was made was the very Court which had made the decree and if any reference to the decree was needed, the original could easily have been examined). (Vol 17) 1930 Cal 804 (805) : 57 Cal 996. (Copy of ordering part held sufficient).

14. Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietor.

[1882-S. 238; 1877-Ss 237, 238; 1859-S. 213.]

Application for execution by joint decree-holder.

15. (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

[1882-S. 231; 1877-Ss. 230, 231; 1859-S. 207.]

ORDER 21, RULE 12, NOTE 1

[1] Third person having some movables belonging to himself and others belonging to judgment-debtor—Inventory is necessary—(Vol 17) 1930 Bom 65 (66).

[2] Rule requires only a reasonably accurate description of property—Wrong mention of date of bond sold does not affect purchaser's title. (1911) 1 Mad W N 133 (134) (DB).

[3] Decree under S. 52 C.P.C. against legal representative of deceased debtor—Moveable property attached in possession of legal representative—O. 21, R. 12 does not apply. (Vol 14) 1927 Bom 52 (52) (DB).

[4] No inventory of articles to be attached is necessary where the property sought to be attached is in the possession of judgment-debtor himself. (Vol 25) 1938 Cal 235 (235) (DB).

[5] This rule does not contemplate any enquiry before the court from which the execution is to issue whether the property sought to be seized belongs to the judgment-debtor or not. (1869) 12 Suth WR 329 (330) (DB).

ORDER 21, RULE 13, NOTE 1.

[1] The rule applies only to execution of money decrees and not to decrees made upon a charge or mortgage. (Vol 3) 1916 Pat 373 (373).

[2] The object of requiring boundaries and numbers to be specified is to easily identify the property. (Vol 30) 1943 Pat 127 (130); 21 Pat 838 (DB). * (1886) 12 Cal 161 (164) (DB). * (1869) 12 Suth WR 488 (488) (DB).

[3] Cl. (b) imposes a duty on the decree-holder to specify the judgment-debtor's share or interest to the best of his belief. (Vol 14) 1927 Mad 1142 (1142) * (1892) 14 All 190 (192). (Where the share is undivided it should be so specified.) * (Vol 18) 1931 Nag 116 (118); 27 Nag LR 318. * (Vol 25) 1938 Rang 433 (434) (DB). (Property attached specified as owned by judgment-debtors. Share of each of judgment-debtors in property not mentioned—There is no material irregularity).

[4] Decree-holder has the right to choose the property against which he will proceed. (Vol 15) 1928 Mad 713 (717) (FB).

[5] Executing court closing execution petition on decree-holder's failure to furnish particulars under this rule—Execution "closed" is not "dismissed." Subse-

quent application is a continuation of the former one (Vol 32) 1945 Mad 236 (236, 237).

[6] The provisions of this rule are mandatory. (Vol. 28) 1941 Nag 152 (155).

[7] Limitation Act (1908), Art. 182—Application failing to describe properties as required by O. 21, R. 13 is not one in accordance with law unless the defects are remedied by amendment under R. 17. (Vol 18) 1931 Bom 128 (128) * (Vol 3) 1916 Lah 316 (316) (DB). * (1940) 1 Mad L Jour 477 (477).

[8] Application for execution—Supplementary list of property can be allowed after registration of application—Fresh application if necessary, it can be treated as one in continuation of first application—No question of limitation arises. (Vol 5) 1918 Cal 73 (74) (DB).

ORDER 21, RULE 14, NOTE 1.

[1] The rule is permissive. The Court may at its discretion require the applicant to produce the required extract. (Vol 30) 1943 PC 98 (101); 70 Ind App 83 : ILR (1943) Nag 669 : ILR (1943) Kar 109 (PC).

[2] In the case of an application for sale in pursuance of a mortgage decree, a preliminary attachment of the mortgaged property is not necessary and therefore this rule does not apply to such a case and the Court cannot dismiss the application for failure to produce the certified extract. (Vol 24) 1937 Oudh 233 (234) : 13 Luck 162: * (Vol 33) (1946) Bom 105 (106). * (Vol 5) 1918 Oudh 418 (418).

[3] An order dismissing execution petition for default in compliance with direction of Court under this rule requiring filing of patta extracts is a final order within the meaning of Art. 182 (5), Limitation Act. (Vol 32) 1945 Mad 154 (155) : ILR (1945) Mad 684 (FB).

[4] Where a decree holder for the purpose of enabling him to obtain a copy of the Collector's register made an application to the Court which passed the decree to grant him a certificate that such a copy was necessary, it was held that such an application was a step-in-aid of execution. (1882) 5 Mad 141 (143, 144) (DB).

ORDER 21, RULE 15.

Synopsis.

1. Scope.
2. Joint decree.
3. Persons who may apply.

O. 21 R. 15 (*contd.*)

4. Execution by one decree-holder in respect of his share.

4a. Sub-rule (2)

5. Payment by judgment-debtor to one decree-holder out of court.

6. Appeal.

1. Scope. [1] Rule applies when decree has been passed jointly in favour of more persons than one—It does not apply to decree passed in favour of one person only. (Vol 21) 1934 Pat 627 (628). * (Vol 18) 1931 Lah 5 (6).

[But see—Assumed that Rule applies to legal representatives of deceased decree-holder.]

[2] Surviving decree-holders can execute the decree for the benefit of the legal representative of the deceased decree-holder also. (Vol 5) 1918 Mad 56 (56) (DB).

[3] This rule is not applicable where the execution of decree is made dependant upon all the decree-holders joining in application. (1884) 6 All 69 (70) (DB).

[4] Non-compliance with R. 15 can be remedied by amendment of application. (Vol 17) 1930 All 188 (191) (DB).

[But see (Vol 6) (1919 Pat 286 (288) : 4 Pat L Jour 575 (DB)).

2. Joint decree. [1] Decree specifying shares of several decree-holders is not joint decree. (1870) 13 Suth WR 244 (245) * (Vol 9) 1922 Mad 456 (457) (DB). (Petition decree).

[But see (Vol 19) 1932 Pat 261 (265) : 11 Pat 445 (DB). (One decree determining rights of several parties is joint decree).]

[2] Decree for firm is in favour of partners jointly. (Vol 21) 1934 Mad 380 (381) : 57 Mad 696 (DB). * (Vol 18) 1931 Lah 507 (508) (Execution can be taken out by some partners).

[See however (Vol 15) 1928 Sind 37 (38) (Decree in favour of firm—Names of all partners not disclosed—Decree is not joint).]

[3] Decree assigned jointly to more than one person—Assignees may be deemed to be joint decree-holders for purposes of R. 15. (Vol 32) 1945 Bom 380 (382) : ILR (1945) Bom 463. * (Vol 29) 1942 Bom 29 (31) : ILR (1942) Bom 1 (Decree-holder assigning decree to two persons—One assignee applying for execution of whole—Application is in accordance with law and acts as step-in-aid).

[4] Portion of decree transferred by assignment or by operation of law—Transferee is in position of joint decree-holder. (Vol 8) 1921 Mad 599 (601) : 44 Mad 919 (FB). * (1912) 34 All 72 (77) (DB). * (Vol 6) 1919 Lah 429 (430) : 1917 Pun Re No. 15. * (1891) 14 Mad 252 (254) (DB) : (1890) 13 Mad 347 (overruled).

[5] Joint Hindu family—Coparcener of decree-holder cannot execute decree as decree-holder—He may become transferee by operation of law; and if there are other coparceners in whose favour also decree becomes transferred, he may apply as one of assignees. (Vol 33) 1946 Bom 27 (29).

[But see (Vol 14) 1927 Bom 123 (124, 125) : 51 Bom 143 (DB).

[6] Partition suit by father against two sons—One of the sons absent—Decree in favour of father for one-third share—Possession of remaining two-third share

cannot be given to son remaining present as partition decree cannot be regarded as passed jointly in favour of the two sons. (Vol 26) 1939 Lah 302 (302, 303).

3. Persons who may apply.—[1] Under this rule if there are more than one decree-holder any one or more of them may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. (Vol 3) 1916 Cal 577 (579) (DB). * (Vol 16) 1929 All 953, (955, 957) : 51 All 998 (DB). (Deposit of pre-emption money is proceeding in execution and R. 15 applies—Per Boys, J., Sulaiman, J., *Contra*), * (Vol 32) 1945 Bom 380 (381, 382) : ILR (1945) Bom 463 (DB). (Decree assigned jointly to more than one person—O. 21, Rr. 15 and 16 can be applied—One assignee can execute decree). * (Vol 6) 1919 Mad 123 (126) (DB). (Assignment of decree by only some decree-holders—Assignee must apply for execution under R. 15 for benefit of himself and other joint decree holders and not for his individual benefit alone). * (Vol 24) 1937 Pat 253 (256). * (Vol 7) 1920 Pat 672 (673) (DB).. (Some decree-holders who have obtained permission under R. 15, O. 45, can execute decree on behalf of others also). * (Vol 21) 1934 Pesh 76 (77). (Decree in favour of joint family—One member can file execution for benefit of all).

[2] Decree-holders members of joint family—Death of one leaving other as sole survivor—Survivor can apply for execution to Court executing decree—Non-mention of death of coparcener is not sufficient to reject application if Court knows in subsequent proceedings of fact of death—(Vol 19) 1932 Pat 359 (360) : 12 Pat 42 (DB).

[3] Court has discretion to allow one of several decree-holders to execute the whole decree only if the court sees sufficient cause. (1913) 36 Mad 357 (361) (DB). * (Vol 20) 1933 Mad 157 (158) : 56 Mad 316 (DB). (Execution application by one of joint decree-holders—Objection by other decree-holders that application is a fraud—Court can disallow execution). * (1902) 25 Mad 431 (436) (FB) (Order under this rule cannot be asked as of right). * (Vol 22) 1935 Nag 25 (27) : 31 Nag LR 271. (Joint decree—Two out of four applying—Third admitting payment—Fourth taking no interest in proceedings—Court is justified in allowing execution to applicants). (Vol 30) 1943 Pat 188 (189). (A and B joint decree-holders—Application by A for permission under O. 21, R. 15 to execute entire decree—A deliberately ignoring fact of B having entered satisfaction—Permission held should be refused). * (Vol 9) 1922 Pat 597 (597, 598) : 1 Pat 609. (Even if the application is not allowed that fact will not make it one not in accordance with law).

[4] Court can allow other decree-holders to intervene in pending execution, if it is not being properly conducted. (Vol 8) 1921 Mad 599 (601) : 44 Mad 919 (FB).

[5] Issue of notice to other joint decree-holders on an application under this rule, is discretionary. (1906) 33 Cal 306 (310, 311) (DB). (Notice is not necessary where decree grants injunction). * (Vol 13) 1926 Cal 811 (812). * (Vol 20) 1933 Lah 655 (656) : 14 Lah 212.

[6] Execution by one of the joint decree-holders enures for the benefit of all unless there is direction in the decree or by the Court, permitting execution for his share only—Payment may be made of the whole or part in Court or outside—Another decree-holder can claim his share by a suit. (Vol 15) 1928 Mad 800 (801, 802) (DB). * (Vol 2) 1915 PC 81 (82) : 37 All 545 : 42 Ind App 177 (PC). (Mortgage-decree—One of several

O. 21 R. 15 (*contd.*)

decree-holders executing and purchasing property him self—He cannot prevent others recovering their share) * (Vol 11) 1924 All 813 (814). (Purchase by one decree-holder in execution enures for all), * (1911) 33 All 563 (565) (DB). * (Vol 22) 1935 Lah 484 (486) : 17 Lah 115 (DB). (Decree in favour of two brothers—Execution application signed by one alone—Purchase made by him in his name—Other brother is also entitled to share in such property).

[7] It is not necessary to state in execution application that application by one of decree-holders is being made for benefit of all—(Vol 17) 1930 Lah 603 (604). * (Vol 20) 1933 Lah 655 (656) : 14 Lah 212. * (Vol 18) 1931 Lah 600 (601) (DB) * (Vol 28) 1941 Pat 499 (500) (One of two decree-holders alone applying for execution without stating that he is applying for benefit of others also—Name of other decree-holder stated in application—Other decree-holder actually appearing in proceedings—Application held maintainable under O. 21, R. 15). * (Vol 27) 1940 Sind 230 (232) : ILR (1940) Kar 461. (No particular words need be used to express that execution application is joint—Application by one of two decree-holders stating that other decree-holder will be produced at time of recovery of money—Application is on behalf of both).

[See (Vol 26) 1939 Mad 278 (279, 280) : ILR (1939) Mad 338 (DB). (One of several decree-holders applying for execution of decree as result of arrangement arrived at between them—Omission to state expressly that applicant is only one of decree-holders does not invalidate application—Court can allow application to be amended to bring it into compliance with O. 21, R. 15).

[But see (Vol 32) 1945 Pat 459 (459) : 24 Pat (485) (Vol 25) 1938 Pat 457 (460) : 17 Pat (223). (Vol 6) 1919 Pat 286 (287, 288) : 4 Pat L Jour 575 (DB).

4. Execution application by one decree-holder in respect of his share—[1] One of the several joint decree-holders cannot take out execution for his share of the decree. (1883) 5 All 27 (31) (DB). * (1891) 15 Bom 242 (244, 245) (DB). * (1895) 18 Mad 464 (465). * (Vol 13) 1926 Oudh 605 (605) : 2 Luck 259 (DB).

[2] Some of joint decree-holders applying for execution of portion of decree giving up the rest—Other decree-holders not objecting—Execution may be allowed—Other decree-holders cannot subsequently apply for execution. (Vol 15) 1928 Cal 559 (560) : 56 Cal 12. * (Vol 21) 1934 Cal 465 (467) (DB). (Rule does not apply where joint decree has been satisfied in part before application for execution—Notice given to other joint decree-holders—No objection to execution—Application for share is not illegal).

[See also (Vol 21) 1934 Bom 216 (218) : 58 Bom 428 (DB). (Two Decree-holders—Execution application by one of them alleging that other had relinquished his right during pendency of suit—Other decree-holder stating on objection that he had no objection to execution—Statement held did not amount to relinquishment of his interest in decree).

[3] One joint decree-holder applying for execution as regards his share of immoveable property on payment of proportionate amount—Withdrawal by other co-decree-holders of their application not amounting to agreement never to execute—Defect of partial deposit of amount of purchase money is not cured, (Vol 21) 1934 Pesh 40 (42).

[4] Where a portion of decretal rights devolves either by inheritance or otherwise upon judgment-debtor, the

decree does not become incapable of execution, but extinguished only *pro tanto*. The other decree-holder can execute the decree in respect of his share. (1888) 10 All 570 (574, 575). * (1883) 5 All 27 (34) (DB).

[5] Decree awarding separate costs against separate defendants—Separate applications for execution can be made as they are really one application split up into several for convenience. (Vol 7) 1920 Pat 672 (673).

[6] Joint decree-holder without having recourse to R. 15 executing entire decree and entering satisfaction of whole decree—Other decree-holder, ignoring fact of satisfaction, can execute for his share. (1942) 8 Cut. L. Tim. 86 (87).

[7] Trial Court passing decree for costs severally—Appellate Court giving a joint decree—Application for execution made by one of the joint decree-holders for his share only and entertained by the Court keeps alive the entire decree. (Vol 15) 1928 Cal 861 (862) (DB).

4-a. Sub-rule (2).—[1] The object of Sub-rule (2) is to protect the interests of the non-applicant decree-holders. (Vol 28) 1941 Pat 499 (501).

[2] Court has to see interests of all decree-holders—If they appear and consent, their interests are sufficiently safeguarded. (Vol 13) 1926 Cal 811 (812) (DB).

[3] Where a decree is passed in favour of the plaintiff and of certain *pro forma* defendants who are co-sharers with the plaintiffs the Court can allow execution of the decree at the instance of the *pro forma* defendants providing safeguards for the rights of the plaintiff. (Vol 5) 1918 Cal 153 (154) (DB).

[4] Heirs of deceased decree-holder themselves parties to execution application—There is no question of any order having to be made under Sub-R. (2) (Vol 20) 1933 Pat 609 (610, 611).

[5] Court need not determine who are the other decree-holders before making order under R. 15—Order safeguarding interests of heirs of deceased decree-holder—Notice to heirs not necessary. (Vol 12) 1925 Pat 591 (592).

[6] Execution application by one of several decree-holders without objection by others—Judgment-debtor cannot object that interest of other decree-holders have not been safeguarded. (Vol 28) 1941 Pat 499 (501). * (Vol 26) 1939 Mad 278 (280) : I. L. R. (1939) Mad 338 (DB). * (Vol 7) 1920 Nag 40 (41). * (41) 1941 Pat W. N. 183 (185).

[7] No objection raised by judgment-debtor to execution by some of many decree-holders in executing Court—Objections cannot be raised in appeal. (Vol. 13) 1926 Mad 1198 (1198, 1199).

5. Payment by judgment-debtor to one decree-holder out of court. [1] Several joint decree-holders—Payment to one out of court does not bind others unless he represents them in some way. (Vol 28) 1941 Oudh 336 (336). * (Vol 16) 1929 Lah 462 (463). * (Vol 2) 1915 Lah 155 (155). (Discharge given by manager of joint Hindu family is binding on other members.) * (1892) 15 Mad 343 (345) (DB). * (Vol 22) 1935 Nag 25 (27) : 31 Nag I. R. 271. * (Vol 27) 1940 Sind 230 (232) : I. L. R. (1940) Kar 461. (Decree-holder applying for execution undertaking to produce joint decree-holder at time of recovery of money—Adjustment out of court—Joint decree-holder not produced as undertaken—Satisfaction of decree to the extent of share of decree-holder applying for execution only can be recognised.)

[2] Joint decree-holders—One cannot give discharge for decretal amount to detriment and without knowledge of others. (Vol 29) 1942 Pesh 58 (59). * (Vol

16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred¹ by assignment in writing² or by operation of law,³ the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed⁹ in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice¹² of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections¹³ (if any) to its execution:

Provided also that, where a decree for the payment of money¹⁵ against two or more persons has been transferred to one of them,¹⁴ it shall not be executed against the others.

[1882-S. 232; 1877-S. 232; 1859-S. 203. See S. 49.]

PROVINCIAL AMENDMENTS

Bombay

The following explanation shall be added to Rule 16:

"*Explanation*—In an application under this rule, any payment of money made under a decree, or any adjustment in whole or in part of the decree arrived at to the satisfaction of the decree-holder, which payment or adjustment has not been certified or recorded by the Court under Rule 2 of this Order, shall not be recognised by the Court entertaining the application." [9-8-1940.]

O. 21 R. 15 (contd.)

10) 1923 All 494 (495): 45 All 401 (DB). ✕ (1903) 26 All 318 (320) (DB). ✕ (Vol 15) 1928 Cal 759 (760.) ✕ (Vol 32) 1945 Nag 95 (97): I. L. R. (1945) Nag 242 (DB.) ✕ (Vol 30) 1943 Pat 188 (188). ✕ (Vol 27) 1940 Sind 230 (232): I. L. R. (1940) Kar 461.

[3] Certificate by one decree-holder given on behalf of all—If there is in fact discharge of decree, other decree-holders cannot execute same. (Vol 6) 1919 Mad 123 (126.)

[4] Execution by one of joint decree-holders on behalf of all—Payment made of a whole or part in Court or outside—Another decree-holder can claim his share by suit. (Vol 15) 1928 Mad 800 (803) (DB.)

[5] Decree in favour of joint Hindu family—Managing member can enter up a satisfaction of decree which will be binding on family. (1913) 35 All 380 (384). ✕ (1912) 25 Mad L. Jour 442 (443, 444) (DB). ✕ 16 Oudh Cas 146 (147). ✕ (Vol 14) 1927 Pat 329 (330). ✕ (Vol 4) 1917 Mad 988 (989) (DB.) (Joint decree—Payment to some of decree-holders cannot be treated even as part satisfaction of decree.)

[But see (Vol 21) 1934 Mad 330 (332): 57 Mad 696 (DB.) ✕ (Vol 32) 1945 Nag 95 (97): I. L. R. (1945) Nag 242 (DB.)

[6] Decree owned by joint Hindu family—Payment to member other than karta does not operate as satisfaction wholly or in part of decree or of share of that member. (Vol 30) 1943 Pat 10 (12): 21 Pat 322.

[7] Decree in favour of a firm—One partner can receive payment of decretal amount and notify satisfaction. (Vol 13) 1926 Sind 167 (169). (Vol 14) 1927 Lah 385 (387).

[But see (Vol 29) 1942 Pesh 58 (59).]

6. Appeal.—[1] Appeal from order under the rule lies only if case comes under S. 47. (Vol 11) 1924 Mad. 518 (519) (DB.)

[2] Execution application by one of joint decree-holders—Others not served—Execution referred—District Judge setting aside order and remanding case—No appeal lies from order of refusal—Revision is competent. (Vol 27) 1940 Pesh 24 (25).

ORDER 21, RULE 16.

Synopsis.

1. Where a decree has been transferred.
2. Transfer by assignment in writing.
3. Transfer by operation of law.
4. Benamidar.
5. Part transfer of a decree.
6. Pledge of decree.
7. Assignment of rent decrees under the Tenancy Acts.
8. Transfer when takes effect.
9. Rights of the transferee.
10. Application for execution must be made to the Court which passed the decree.
11. Award.
12. Notice to transferor and judgment-debtor.
13. Objections to be heard.
14. Transfer of decree for payment of money against two or more persons to one of them.
15. "Decree for the payment of money."
16. Attachment of decree by co-judgment-debtor.
17. Application for substitution by transferee.
18. Transfer of decree against company in liquidation.
19. Appeal.
20. Suit by assignee for declaration of right or for refund of price.

1. Where a decree has been transferred.—[1] No one can execute a decree except the decree-holder or a person to whom the decree has been transferred by assignment in writing or by operation of law. (Vol 27) 1940 Bom 5 (6) ✕ (Vol 9) 1922 All 98 (99) ✕ (Vol 24) 1937 Nag 30 (30): ILR (1937) Nag 82.

[2] A third person cannot execute a decree unless there is a transfer to him of the decree. ('77) 2 Cal 327 (334): 4 Ind App 66 (PC).

[3] The rule applies to cases where the person who applies for execution as a transferee and not as one whose name appears on the decree. (Vol 25) 1938 Pat 462 (464): 17 Pat 206 (DB).

[4] The rule does not apply to a joint decree holder seeking to enforce execution as the surviving decree-holder on the death of the other. ('32) 13 Pat L. Tim 579 (580, 581) (DB).

Calcutta

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words :

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections."

Nagpur

After the words, "which passed it, *insert* the words "or to any Court to which it has been sent for execution". [29-6-1943.]

N.-W. F. P.

For the first proviso, *substitute* the following proviso :

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution."

Patna

Add the words "or to the Court to which the decree has been sent for execution," as the case may be' after the words "to the Court which passed it."

Delete the words "and the judgment-debtor" from the first proviso, and in the said proviso after the word "transferor," *insert* the words "unless an affidavit of the transferor admitting the transfer is filed with the application," and *substitute* the word "his" for the word "their" and the word "objection" for the word "objections."

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[5] Preliminary decree for mesne profits transferred—Transferee satisfied—Final decree passed—Execution by transferee not governed by the rule. (Vol 25) 1938 Pat 462 (464) : 17 Pat 206 (DB). (Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by O. 21 R. 16 or the provisos thereto.)

[6] Transferee of property dealt with by the decree cannot apply under this rule. (Vol 14) 1927 Mad 240 (241) * ('08) 30 All 28 (30) (DB). * (Vol 9) 1922 All 98 (99) * (Vol 11) 1924 Bom 426 (427) (DB). * (Vol 7) 1920 Lah 324 (325) (DB). * ('03) 32 Bom 181 (184) (DB).

[Also see S. 146 Note 4.]

[See however (Vol 17) 1930 Rang 308 (311, 312) (DB).

[7] The assignee of the decree to be subsequently passed cannot apply for execution under this rule. (Vol 29) 1942 Mad 21 (22) (DB). * ('07) 17 Mad L. Jour 391 (391) (DB). * (Vol 11) 1924 Cal 661 (665) : 51 Cal 708 (DB). * (Vol 13) 1926 Bom 406 (406, 407) (DB). * (Vol 14) 1927 Sind 78 (83) : 22 Sind L R 1 * (Vol 27) 1940 Pat 270 (271) (DB). * (Vol 17) 1930 Rang 308 (311).

[But see ('87) 11 Bom 506 (512).]

[Also see S. 47 Note 24.]

[8] Transferee of the property which is the subject matter of the suit cannot under this rule execute the decree subsequently passed unless he has been impleaded in the place of the vendor. (Vol 11) 1924 Cal 661 (665) : 51 Cal 703. (Dissenting from (Vol 8) 1921 Cal 74) * (Vol 19) 1932 Cal 439 (439) : 59 Cal 297 (DB). * (Vol 9) 1922 Pat 563 (564) (DB).

[9] Assignee of preliminary decree omitting to get impleaded in the suit will be debarred from executing the final decree. (Vol 13) 1926 Mad 1129 (1129) (DB). * (Vol 4) 1917 Mad 844 (845) (DB).

[10] An assignment of the decree of the trial Court carries with it the right to execute the decree passed in

appeal. (Vol 27) 1940 Pat 270 (271) * (Vol 5) 1918 Mad 279 (280) (DB).

[11] Where the transferor and transferee jointly apply for execution the rule does not apply. (Vol 32) 1945 Cal 387 (394).

2. Transfer by assignment in writing.—[1] Assignee under an oral transfer cannot apply for execution under this rule. (Vol 11) 1924 Cal 661 (662) : 51 Cal 703. * ('12) 16 Ind Cas 807 (807) Mad. * ('11) 10 Mad L. Tim 532 (532).

[2] To allow a transferee to apply the transfer must be by instrument in writing. A mere contract for sale of a decree without an assignment in writing in favour of the purchaser is not enough. (Vol 3) 1916 P C 147 (147) : 43 Cal 990 : 43 Ind App 108 (PC). (Mere contract for sale of decree without assignment in writing is not enough.) * (Vol 12) 1925 Bom 472 (472) (DB). (A person entitled to obtain an assignment of a decree under another decree cannot apply.)

[3] A release by the decree-holder of his rights in favour of another does not operate as an assignment. (Vol 14) 1927 Pat 170 (171).

[See however (Vol 20) 1933 All 188 (189).]

[4] A consent decree does not amount to an assignment in writing. (Vol 31) 1944 Sind 230 (232) : ILR (1944) Kar 281.

[5] A decree for sale of immovable property is itself not immovable property and therefore, an assignment of such a decree does not require to be registered. ('13) 35 All 524 (526) (DB). * ('91) 13 All 89 (91, 92) (DB). * ('96) 23 Cal 450 (453, 454) (DB). * ('08) 12 Cal W N 625 (627) * (Vol 15) 1928 Lah 70 (71).

[But see ('83) 9 Cal 839 (842) (DB). (Entitled to execute it only as a money decree. * (Vol 27) 1940 Mad 610 (611) (Assignment of mortgage-decree requires registration.)]

[6] A personal decree against a defendant is transferable without registration even though it may be a mortgage-decree as against the other defendants. (Vol 15) 1928 Mad 142 (142) (DB).

[7] The rule does not require any particular form of writing. (Vol 23) 1936 Mad 543 (545) (DB). * (Vol

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26) 1939 Bom 221 (225) : ILR (1939) Bom 271 (DB.)
 * (Vol 31) 1944 Sind 230 (232) : ILR (1944) Kar 281.

[8] Court's order directing sale by auction of the decree is sufficient to constitute an assignment in writing. (Vol 23) 1936 Mad 543 (545) (DB.)

[9] Assignment of funds recoverable under decree is not assignment of the decree. (Vol 24) 1937 Cal 570 (572.)

3. Transfer by operation of law.—[1] Transfer of decree by operation of law takes place on the death of the decree-holder to his legal representative and on his insolvency to the official assignee or official receiver or to the purchaser of a decree in court sale. ('77) 2 Cal 327 (334) : 4 Ind App 66 (PC.) * (Vol 27) 1940 Bom 5 (6) (Legal representative.) * (Vol 17) 1930 Cal 614 (615) : 57 Cal 1137. (do) * (Vol 11) 1924 Cal 661 (662, 663) : 51 Cal 703. * (O3) 31 Mad 77 (79) (Legal representative) * (Vol 23) 1936 Mad 543 (545) * (1900) 4 Cal W N 785 (787) (Decree in favour of insolvent transferred to surety on annulment of adjudication.) * ('12) 22 Mad L. Jour 161 (164.) (Purchaser of decree in Court sale)

[See also (Vol 26) 1939 Bom 221 (224) : ILR (1939) Bom 271 * (Vol 31) 1944 Sind 230 (231, 232) : ILR (1944) Kar 281.

[2] The following are also some of the instances of transfer by operation of law:—

[a] Son who obtains decree for partition of his share in a decree held by his father becomes an assignee by operation of law to that decree to the extent of his share ('91) 14 Mad 252 (254) (Reversing 13 Mad 347.)

[b] Original owner of trust properties after the trust has been declared incapable of execution becomes assignee to the decrees obtained by the trustee while he was such. (Vol 11) 1924 Pat 343 (345) (DB.)

[c] Minor son succeeding to estate after revocation of probate of will can execute decree obtained by the executor. ('89) 16 Cal 347 (349) (DB.) * (09) 9 Cal L. Jour 443 (447.) (Minor beneficiary attaining majority—Authority of executor terminated—Beneficiary is a transferee.)

[d] Mortgagee with final decree for foreclosure can execute without assignment a decree for possession of the mortgage properties obtained by the mortgagor ('05) 1 Nag L R 49 (51).

[e] Decree holder for pre-emption becomes an assignee to a decree for foreclosure on a mortgage of the properties. (Vol 14) 1927 Oudh 358 (359) : 2 Luck 710 (DB)

[f] Widow becoming a convert and remarried thereby forfeiting her right to her late husband's estate—Her deceased husband's heir becomes transferee to any decree obtained by her while representing the estate (Vol 22) 1935 Bom 298 (302) : 59 Bom 417 (DB.)

[g] Manager of joint family missing and lost for a number of years—His eldest son as manager becomes transferee to a decree passed in favour of the family. (Vol 25) 1938 All 256 (258) : ILR (1938 All 425) (DB.)

[h] Decree devolving on son on the death of father who was the sole decree-holder is a transferee by operation of law. (Vol 27) 1940 Mad 89 (90) : ILR (1940) Mad 79 (DB.)

[3] In the following cases it was held that the person who held the decree did not become transferee by operation of law:—

[a] Owner of decree by a transaction inter vivos (Vol 23) 1936 Mad 543 (544) (DB.)

[b] Member of joint family getting the decree allotted to him in partition. ('12) 16 Ind Cas 807 (807) Mad (DB) * ('11) 13 Bom L R 22 (28.)

[But see] (Vol 20) 1933 Lah 432 (432, 433) (DB.)

[c] Obtaining another decree against the decree holder does not operate to transfer the decree held by such decree holder. (Vol 13) 1926 Pat 320 (320) : 5 Pat 511 (DB.) * (Vol 21) 1934 Mad 471 (472) * (Vol 20) 1933 Bom 367 (368) : 57 Bom 513.

[d] Declaration of title to a decree does not operate to transfer the decree to person in whose favour the declaration was made. (Vol 25) 1939 Bom 221 (225) : ILR (1939) Bom 271 (DB.) * (Vol 31) 1944 Sind 230 (231, 232) : ILR (1944) Kar 231. * (Vol 24) 1937 Oudh 471 (473) : 13 Luck 549 (DB.)

[e] The Official Liquidator of a company is merely an agent of the Court for the purposes of the liquidation of the company, he is not a transferee of any decree that may have been passed in favour of the company. (Vol 23) 1936 Lah 152 (153)

[f] A receiver appointed by a foreign court does not become transferee in the absence of an assignment. (Vol 28) 1941 Bom 381 (381, 382) : ILR (1941) Bom 635 (DB)

4. Benamidar.—[1] A transferee on record though Benami alone can apply to execute the decree. (Vol 12) 1925 Mad 701 (702) : 48 Mad 553 (DB.) Dissenting from 21 Mad 388.) * (Vol 22) 1935 Mad 140 (141) (DB)

[But see] (Vol 26) 1939 Mad 210 (214) : ILR (1939) Mad 1004 (DB.) * (Vol 14) 1927 Lah 110 (110) : 8 Lah 35 (DB) * (Vol 26) 1939 Pat 411 (412) : 18 Pat 318. * (Vol 25) 1938 Pat 457 (459) : 17 Pat 223. * (Vol 17) 1930 Sind 1 (2).

[2] Benami transferee can apply. (Vol 2) 1915 All 264 (265) : 37 All 414 (DB) * (Vol 7) 1920 Low Bur 118 (120) : 10 Low Bur Rul 230. * ('35) 163 Ind Cas 618 (619) (Cal) (DB)

[But see] ('89) 16 Cal 355 (363.)

[3] Court can enquire into the question of benami in the execution proceeding where there is a contest between the heirs of the deceased transferee and a person who alleges the transfer was benami. (Vol 29) 1942 Mad 688 (690) : ILR (1943) Mad 164 (FB.) [(Vol 14) 1927 Mad 903 : 51 Mad 219 followed. Conflict between 21 Mad 388 and (Vol 12) 1925 Mad 701 : 48 Mad 553 held still to remain.] * (Vol 14) 1927 Mad 903 (905, 907) : 51 Mad 219 (DB.)

[4] Decree obtained by the benamidar himself can be executed by him. (Vol 18) 1931 Oudh 69 (69)

[But see] ('14) 25 Ind Cas 555 (556) (Cal) (DB.)

[5] A person who is neither decree-holder nor a transferee of the decree cannot apply on the ground that the decree-holder is benamidar for him. (Vol 27) 1940 Pat 472 (473) (DB.)

5. Part transfer of a decree.—[1] Transferee of part of a decree can apply for execution. ('90) 17 Cal 341 (343) (DB.) * (Vol 13) 1926 All 346 (348) : 48 All 432 (DB.) * (Vol 15) 1928 Lah 70 (71) (Dissenting from (Vol 6) 1919 Lah 429 : 1917 Pun Re No. 15) * (Vol 8) 1921 Mad 599 (601) : 44 Mad 919 (FB.) (Assignee of a portion of a decree allowed to continue pending execution.) * ('13) 85 All 204 (206) (DB.) * (Vol 15) 1928 Mad 713 (716) (FB.) * (Vol 20) 1938 Lah 478 (473.)

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[But see] (Vol 7) 1920 Lah 324 (325) (DB.)

[2] Transferee of part of decree is in the position of joint decree-holder and can execute it only subject to provision of law analogous to that in R. 15. (Vol 8) 1921 Mad 599 (601) : 44 Mad 919 (FB.) * ('13) 35 All 204 (206) (DB.)

[Also see] O. 21, R. 15 Note 3.

[But see] (Vol 21) 1934 Bom 59 (62) : 58 Bom 226.

[3] A preliminary decree with costs in a partition suit-decree for costs can be assigned and executed. (Vol 31) 1944 Oudh 280 (280) : 20 Luck 271.

6. Pledge of decree.—[1] The mortgagee of a decree is entitled to apply under this rule. (Vol 13) 1926 All 346 (348) : 48 All 432 (DB.) * [(Vol 9) 1922 All 101, Dissented from] * (Vol 16) 1929 Cal 676 (679) : 57 Cal 549 (DB.) * ('09) 34 Mad 442 (449) (DB.)

7. Assignment of rent decrees under the Tenancy Acts.—[1] See S. 148 of the Bengal Tenancy Act (VIII of 1885), S. 198 (k) of the Orissa Tenancy Act (11 of 1913), and Sch II, List II of the U. P. Tenancy Act (XVII of 1939.)

[2] See also the following cases under the Bengal Tenancy Act. (1913) 40 Cal 462 (464) (FB.) * (Vol 1) 1914 P C 111 (114) : 41 Cal 926 : 41 Ind App 91 (PC).

8. Transfer, when takes effect.—[1] The transfer of a decree made by an instrument in writing takes effect from the date of such instrument. ('87) 9 All 46 (51) (DB.) * ('94) 16 All 483 (492) (DB.) * ('99) 26 Cal 250 (253) (DB.) * ('09) 33 Mad 62 (64) (DB.) * ('09) 5 Mad L. Tim 260 (260) (DB.) * (Vol 15) 1928 Rang 25 (26) : 5 Rang 595 (DB.) (Reversing) * (Vol 14) 1927 Rang 55 : 4 Rang 426. * (Vol 15) 1928 Sind 71 (73) : 26 Sind LR 153.

[But see] ('80) 5 Cal 869 (870, 871.)

[2] The rule merely regulates the procedure and does not affect substantive rights. So an assignee gets only the right to make an application under R. 16 and till he is recognised the decree-holder can execute the decree. (Vol 15) 1928 Rang 25 (26) : 5 Rang 595 (DB.) * (Vol 32) 1945 Oudh 225 (226, 227) : 20 Luck 414 (DB.)

9. Rights of the transferee.—[1] The transferee's right to execution does not depend upon the discretion of the Court. ('10) 38 Cal 13 (21) (DB.) * (Vol 19) 1932 Cal 439 (440) : 59 Cal 297 (DB.) * (Vol 21) 1934 Lah 648 (651) : 16 Lah 63 (DB.) * (Vol 24) 1937 Bom 365 (367) : ILR (1937) Bom 691.

[2] Transferee is entitled to execute the decree as if the application were made by the original decree-holder after the transfer is recognised. (Vol 21) 1934 All 209 (211) : 56 All 694 (DB.) * ('13) 13 Mad L. Tim 145 (148.)

[3] Absence of consideration is no bar to the execution of decree provided the assignment is not a sham transaction. (Vol 15) 1928 Mad 458 (459) (DB.) * (Vol 6) 1919 Mad 123 (125) (DB.)

[4] Court is bound to allow execution at the instance of transferor till the transfer is recognised (Vol 14) 1917 Mad 691 (692) (DB.) * (Vol 20) 1933 Lah 638 (639) : 14 Lah 744. * (Vol 21) 1934 Pesh 40 (48) * (Vol 20) 1933 Sind 119 (120) (DB.) * ('91) 18 Cal 639 (641) (DB.) * (Vol 18) 1931 Lah 116 (117) * ('13) 16 Oudh Cas 70 (73.) * (Vol 8) 1921 Low Bur 37 (39) : 11 Low Bur Rule 163 (DB.) *

(Vol 22) 1935 Nag 230 (233, 234) : 31 Nag LR (Sup) 111 (DB.) * (Vol 28) 1939 Cal 482 (483.) * (Vol 22) 1935 Mad 383 (384) (DB.) * (Vol 26) 1939 Rang 245 (246) : 1939 Rang LR 152 * (Vol 22) 1935 All 1001 (1001) (DB.)

[5] The assignee of a decree can transfer it to another although the name of such assignee has not been substituted on the record. ('86) 9 All 46 (51) (DB.) * (Vol 4) 1917 Mad 853 (854) (DB.)

[6] Assignee of an *ex parte* decree who did not get the transfer recognised cannot after the decree has been set aside under O. 9, R. 13 apply for its execution until he got the order so setting aside the *ex parte* decree cancelled. (Vol 3) 1916 Cal 323 (324) (DB.)

[7] Where there are more than one assignee of a decree anyone of them may be allowed to execute it on behalf of himself and the others. (Vol 32) 1945 Bom 380 (381, 382) : ILR (1945) Bom 463.

10. Application for execution must be made to the Court which passed the decree.—[1] An application under this rule can be entertained only by the court which passed the decree and not a transferee Court. (Vol 28) 1941 Bom 190 (191) * (Vol 28) 1941 Oudh 512 (514) (DB.) * (Vol 21) 1934 Lah 648 (650) : 16 Lah 63 (DB.) * ('03) 25 All 443 (445) (DB.) (Application for rateable distribution to the transferee Court is bad.) * ('79) 2 All 283 (283) (DB.) * (Vol 18) 1931 Lah 690 (690, 691.) * (Vol 31) 1944 Mad 363 (364, 365) (Legal representative must apply to be brought on record.) * ('03) 26 Mad 258 (259) * (Vol 7) 1920 Nag 174 (175) * (Vol 19) 1932 Pat 168 (169) : 11 Pat 94 (DB.) (Do.) * (Vol 24) 1937 Bom 365 (369) : ILR (1937) Bom 691. * (Vol 24) 1937 Oudh 111 (112) : 12 Luck 755 (DB.) * (Vol 24) 1937 Cal 31 (34) (DB.) * (Vol 32) 1945 Cal 303 (305.)

[2] Where the transferee Court recognises the transfer it is only an irregularity which can be cured by acquiescence by the party. (Vol 21) 1934 Lah 648 (651) : 16 Lah 63 (DB.) * ('07) 17 Mad L. Jour 300 (301) (DB.)

Also see S. 42, N. 1.

[But see] (Vol 27) 1940 Bom 5 (8).

[3] Official liquidator of a company is not a transferee and so he can apply for execution in the Court to which the decree is transferred. (Vol 23) 1936 Lah 152 (153.)

[4] A Civil Court to which an award under the Madras Co-operative Societies Act of 1932 has been transmitted for execution can recognise the assignment of the award. (Vol 27) 1940 Mad 38 (40.)

11. Award.—[1] For the purpose of recognising the assignment of an award, the Court in which it is filed is the Court which should be deemed to have passed the decree. (Vol 11) 1924 Cal 117 (118) * (Vol 26) 1939 Cal 482 (483, 484.)

[2] Share and rights under award transferred—Subsequent decree in terms of award in favour of transferor—Transferee can execute the decree. (Vol 33) 1946 Bom 272 (275) (FB.)

12. Notice to transferor and judgment-debtor.—[1] The giving of notice of the application, to the assignor and to the judgment-debtor, is an indispensable condition of jurisdiction and failure renders all the proceedings in execution void as against them. (Vol 14) 1927 Cal 781 (782) : 54 Cal 624 (DB.) * (Vol 8) 1921 Lah 143 (144) : 2 Lah 230 (DB.) * (Vol 7) 1920 Lah 251 (253) * (Vol 18) 1931 Mad 192 (193) (DB.) * (Vol 8) 1921 Pat 76 (77) : 5 Pat L Jour 390 (DB.) * (Vol 24) 1937 Bom 365 (367) : ILR (1937) Bom 691. * (Vol 25) 1938 Cal 734 (736.) * (Vol 31) 1944 Nag 80

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(82) : ILR (1943) Nag 734. (Application by legal representative—All judgment debtors should be notified.) (Vol 20) 1933 Lah 432 (433) (DB.)

[See however] ('87) 9 All 46 (49) (DB).

[2] Notice under this rule can be waived; if so done non-compliance with the rule regarding notice will not invalidate the execution. (Vol 26) 1939 Cal 419 (421) * (Vol 21) 1934 Pat 9 (10) * (Vol 31) 1944 Cal 328 (330).

[3] Notice to the judgment-debtor is not necessary according to the amendment of Lahore High Court (Vol 24) 1937 Lah 465 (467) : ILR (1937) Lah 162 (DB.)

[4] Notice of assignment and warrant for attachment in execution should not be issued simultaneously. ('11) 36 Bom 58 (61) (DB.)

[5] Where no notice under this rule is given to the subsequent mortgagee who was also a judgment-debtor by the assignee of the mortgage-decree he will not be bound by the execution or the sale in such execution. (Vol 17) 1930 All 627 (627, 628) : 52 All 898 [Reversing. (Vol 16) 1929 All 487.]

[6] The notice that is to be given under this rule is of the application for execution and not of the assignment. (Vol 11) 1924 Pat 576 (578, 580) : 3 Pat 596 (DB.) * (Vol 8) 1921 Pat 180 (182). 6 Pat L Jour 358 (DB)

[7] Written notice is not necessary. Knowledge of the judgment-debtor of the order on the application is enough. (Vol 11) 1924 Pat 576 (580) : 3 Pat 596 (DB.)

[8] A combined notice under this rule and R. 22 will be sufficient. (Vol 29) 1942 Bom 134 (135) : I L R (1942) Bom 190 * [(Vol 20) 1933 Pat 658 : 13 Pat 86 and (Vol 21) 1934 Pat 9 relied on.] * (Vol 20) 1933 Pat 658 (662) : 13 Pat 86 (DB.)

[9] Notice need not be issued on every subsequent application by the transferee under this rule. (Vol 14) 1927 Cal 694 (696) (DB.) * (Vol 21) 1934 Rang 101 (103) (DB.)

[10] Object of giving notice is to acquaint the judgment-debtor of the fact that the applicant purports to execute the decree as the assignee of it. (Vol 29) 1942 Bom 134 (135) : ILR (1942) Bom 190. * ('30) 1930 Mad W N 166 (168.)

[11] Transferee Court must presume that the Court passing the decree where it has substituted the name of the assignee has acted correctly. (Vol 23) 1936 Sind 191 (193) : 30 Sind LR 249 (DB.)

[12] The notice required by this rule may be served on the legal representatives of a deceased judgment-debtor. ('87) 11 Bom 727 (730) (DB.) * ('07) 30 Mad 541 (543) (DB.)

[13] If the original decree-holder becomes insolvent, the Official Receiver will be entitled to notice. (Vol 15) 1928 Mad 360 (361).

[14] In the case of a transfer by operation of law notice is not necessary. (Vol 21) 1934 Pat 627 (628) (DB.) * (Vol 25) 1938 All 256 (257) : ILR (1938) All 425 (DB.)

[15] Notice to judgment-debtors who are exonerated from liability by the decree-holder is not necessary. (Vol 32) 1945 Mad 243 (244) : I L R (1945) Mad 882.

13. Objections to be heard.—[1] The Court is bound to hear the objections if any, of the transferor and of the judgment-debtor. (Vol 18) 1931 Lah 545

(546). * [Vol 1] 1914 Mad 86 (87) (DB.) * (Vol 25) 1938 Mad 78 (79.)

[2] Objection that the assignment is not supported by consideration is not valid. (Vol 1) 1914 Cal 60 (64) * (Vol 19) 1932 Mad 327 (327, 328) * (Vol 2) 1915 Mad 1138 (1140) (DB.)

[3] Plea that the decree is not valid cannot be taken ('91) 15 Bom 307 (308) (DB.) * (Vol 3) 1916 Low Bur 36 (36) (DB.)

[4] Benami nature of the assignment or that it was in fraud of him can be shown by the judgment-debtor. (Vol 30) 1943 PC 66 (68) : 70 Ind App 50 : ILR (1943) Kar (PC) 77 : ILR (1944) Mad 1 (PC.) * (Vol 32) 1945 Bom 542 (543, 544.)

[5] Wherever a notice under O. 21, R. 22 is necessary an application under this rule should be heard along with it. (Vol 28) 1941 Bom 190 (191) * [(Vol 24) 1937 Bom 365 : ILR (1937) Bom 691 relied on.]

[6] A attaching B's decree against him in execution of his decree against B—Transfer of decree by B pending attachment to C—A can object to assignment as void being one made while under attachment. (Vol 24) 1937 All 63 (64.)

[7] An assignment of a decree is not valid as against the judgment-debtor until he had notice of the assignment and any payment made before that to assignor of decree will bind the assignee. (Vol 11) 1924 Pat 118 (119) : 2 Pat 754 (DB.)

[8] Objection as to validity of assignment not put forward in the proceedings under the rule cannot be taken up at any subsequent stage. (Vol 29) 1942 Bom 134 (135, 136) : ILR (1942) Bom 190 * (Vol 30) 1943 Bom 455 (456) * (Vol 12) 1925 All 117 (118) : 47 All 86 (DB.) * (Vol 3) 1916 All 219 (219) : 38 All 239 (DB.) * ('08) 12 Cal W N 625 (627) (DB.) * (Vol 24) 1937 Cal 4 (6) (DB.)

Also see S. 11 Note 23.

[9] Objection that decree is nullity is barred by *Res judicata*. (Vol 12) 1925 All 662 (662, 663) (DB.)

[10] Objection as to transferee's right to execution cannot be taken up before the Court to which decree is transferred. (Vol 19) 1932 Pat 168 (169) : 11 Pat 94 (DB.)

[11] The provision that an objection not taken up in the proceedings under this rule cannot be taken up in the later proceeding does not take away any right to object given by a special or local law. (Vol 20) 1933 Cal 919 (922) : 60 Cal 1181 (DB.)

14 Transfer of decree for payment of money against two or more persons to one of them.—[1] Where one of the co-judgment-debtors becomes both a decree-holder and judgment-debtor under the same decree, the liability of the other judgment-debtors gets extinguished. (Vol 30) 1943 Mad 641 (642) * ('68) 9 Suth W R 230 (234) (FB.) * (Vol 13) 1926 Mad 1141 (1142.)

[2] Where the interest of one of the joint decree-holders devolves upon the judgment-debtor the decree becomes extinguished. (Vol 30) 1943 Mad 641 (642.)

Also see O. 21 R. 15 Note 5.

[3] Assignee of decree for money found to be benamidar for one of several judgment-debtors—Execution of decree by him should be refused. (Vol 29) 1942 Mad 28 (28) : ILR (1942) Mad 225 (DB.) * (Vol 4) 1917 Mad 590 (591) : 40 Mad 296 (DB) [This case must be deemed to be overruled by (Vol 19) 1932 Mad 372: 55 Mad 720 (FB.) in so far as it

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decides that benami can be proved by relying on uncertified payment.] * (Vol 7) 1920. Lah 431 (432, 433) * (Vol 11) 1924 Nag 41 (42): 19 Nag L R 151.

[4] Transfer of decree to relative of judgment-debtor does not amount to transfer to judgment-debtor. (Vol 16) 1929 All 792 (792) (DB.)

[5] Assignment to benamidar for the estate of one of the debtors—Proviso applies: (Vol 30) 1943 Mad 641 (642) * (Vol 26) 1939 Rang 82 : 1938 Rang LR 699 distinguished.]

[6] Objection that assignee is benamidar for one of the judgment-debtors not taken when notice was issued cannot be taken later on. (Vol 24) 1937 Oudh 111 (112) : 12 Luck 755 (DB.)

[See however] (Vol 25) 1938 Oudh 106 (106) (DB) * (Vol 6) 1939 Rang 245 (247) : 1939 Rang LR 152.

[7] Agreement between decree-holder and some judgment-debtors that the latter will pay off the decree and that decree will be executed only against others and the money realised shall be paid to them—Execution allowing it is not barred. (Vol 14) 1927 Mad 322 (326) (DB.)

[8] An assignment to one of judgment-debtors is not invalid in law; the rule prohibits only the enforcement of the rights. (12) 13 Mad L Tim 227 (229.)

[9] Assignee judgment-debtor can sue his co-judgment-debtors for contribution. (08) 32 Bom 195 (197) (DB.) * (Vol 1) 1914 Cal 208 (209) (DB.)

[10] The words "decree for the payment of money against two or more persons" mean a decree against two or more persons jointly. (08) 32 Bom 195 (197) (DB.)

[11] The second proviso does not apply to a case where the decree-holder acquires a share of the estate of judgment-debtor though he must credit the decree proportionately. (Vol 25) 1938 Mad 814 (815) : ILR (1939) Mad 73 (DB). [Following (Vol 19) 1932 All 704 : 54 All 448 and (Vol 14) 1927 Mad 937 and dissenting from (Vol 13) 1926 Mad 1141.] * (Vol 22) 1935 Oudh 449 (450) : 11 Luck 409 (DB.)

[12] The proviso applies both to a transfer by act of parties and by operation of law. (Vol 25) 1938 Mad 814 (814) : ILR (1939) Mad 73 (DB.)

[13] Legal representative of one of several judgment-debtors is not a judgment-debtor and a transfer to him is not affected by the proviso. (Vol 26) 1939 Rang 82 (84) : 1938 Rang LR 699.

[14] Assignment to a defendant in the suit in which decree is passed but not against him—Execution not barred. See (Vol 29) 1942 Sind 83 (85) : ILR (1942) Kar 168.

15. "Decree for the payment of money"—[1] Second proviso does not apply to decree other than money decrees. (13) 13 Mad L. T. 227 (232) (DB.) * (Vol 23) 1938 Pat 462 (463) : 17 Pat 206 (DB.)

[2] Mortgage decrees are not governed by this rule and are not extinguished on assignment to one of judgment-debtors. (11) 14 Cal L Jour 639 (643) (LB.) * (Vol 13) 1926 Mad 623 (623, 624) : 49 Mad 508 (DB.) * (Vol 26) 1939 Cal 425 (426) (DB.) * (Vol 24) 1937 Sind 112 (113) : 31 Sind LR 47 (DB.) * (Vol 7) 1920 All 129 (131) : 42 All 544 (DB.) (Though right to execute the decree is not extinguished the transferee cannot recover the whole debt from the other portion of property which has not been acquired by him.) * (37) 1937 Mad W N 384 (385) (do).

[3] The proviso is confined to cases of personal decrees and not where a person has been directed to pay the debt out of the assets in his hands. (Vol 19) 1932 All 704 (707) : 54 All 448 (DB.)

[But see (Vol 11) 1924 Nag 41 (41) : 19 Nag LR 151 * (Vol 30) 1943 Mad 641 (642, 643).]

[4] For meaning of "decree for payment of money" see Note 6 on section 73.

16. Attachment of decree by co-judgment-debtor.

[1] Decree against several defendants—One of the judgment-debtors attaching the decree under another decree he obtained against the decree-holder does not become the assignee thereof and can execute it. (1909) 6 All L. Jour 564 (566) (DB.)

17. Application for substitution by transferee.

[1] An application contemplated by the rule is one for execution and not merely for leave to execute. (Vol 28) 1941 Bom 302 (303) : ILR (1941) Bom 596 (FB).

[2] An application by transferee merely for recognising him as transferee is legally incompetent and must be rejected. (Vol 30) 1943 Nag 296 (298) : ILR (1943) Nag 584 (DB.) * (Vol 28) 1941 Oudh 512 (513) (DB.) * (39) ILR (1939) 2 Cal 825 (328). * (13) 14 Mad L. Tim 513 (514) (DB.) * (Vol 20) 1933 Mad 797 (797, 798) * (Vol 22) 1935 Sind 26 (26) * (Vol 20) 1933 Sind 341 (342) : 27 Sind L R 314. * (Vol 14) 1927 All 165 (167) : 49 All 509 (FB). * (Vol 15) 1928 Oudh 30 (31) : 3 Luck 126 (DB) * (Vol 24) 1937 Bom 365 (367) : ILR (1937) Bom 691.

[3] Actual substitution of the transferee's name is not necessary for the execution. (Vol. 29) 1942 All 150 (151) : ILR (1942) All 144. * (09) 10 Cal L Jour 396 (401) (DB.) * (09) 36 Cal 543 (558) (DB.)

[4] A transferee should merely file the execution application setting out in it or by an affidavit the fact of such transfer. (Vol 30) 1943 Nag 296 (298) : ILR (1943) Nag 584 (DB.) * (Vol 29) 1942 All 150 (151, 152) : ILR (1942) All 144. * (Vol 12) 1925 Mad 701 (702) : 48 Mad 553 * (Vol 25) 1938 Bom 309 (310) (DB.)

[See however (Vol 24) 1937 Bom 365 (368) : ILR (1937) Bom 691.]

[5] A prayer for substitution is implied in an application for execution made under O. 21, Rule 16 and generally the substitution is made before execution is proceeded with. (Vol 22) 1935 Nag 230 (233) : 31 Nag L R Sup 111 (DB).

[6] If the application under R. 16 is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred for execution. (Vol 27) 1940 Bom 5 (8).

[7] Where a person dies pending an execution application by him and his legal representatives apply for substitution such an application is sufficient for continuing the execution and no fresh application is necessary.

For whether an application under this rule merely for substitution is a step-in-aid of execution—See Arts. 182 and 183 of the Limitation Act. (Vol 33) 1946 Oudh 154 (154, 155).

18. Transfer of decree against company in liquidation. [1] Transferee of decree against a limited company since gone into liquidation should apply for substitution only to the executing Court. (Vol 6) 1919 All 337 (337) : 41 All 432 (DB.)

17. (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2) the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

[1882-S. 245.]

O. 21 R. 16 (contd.)

19. Appeal.—[1] An order allowing or dismissing an application made under this rule is appealable as a decree ('94) 16 All 483 (492) (DB). * ('87) 11 Bom 506 (512) (DB). * ('72) 9 Bom H C R 49 (52) (DB). * (Vol 15) 1928 Cal 835 (836) (DB). * (1900) 27 Cal 670 (672, 673) (DB). * (Vol 4) 1917 Mad 605 (605, 606) (DB). * ('01) 25 Mad 545 (546) (DB). * (Vol 24) 1937 All 63 (64) * (Vol 26) 1939 Rang 376 (377).

[But See ('98) 20 All 539 (542) (DB) * (Vol 20) 1933 Lah 478 (478) * (Vol 22) 1935 Lah 609 (611) (DB) (Reversing on Letters Patent Appeal) (Vol 21) 1934 Lah 328].

20. Suit by assignee for declaration of right or for refund of price.—[1] A suit raising the question whether the transfer of a decree is valid. (Vol 30) 1943 Bom 455 (456) * (Vol 12) 1915 Mad 799 (799, 800) (DB). * (Vol 25) 1938 Mad 78 (80).

[But see (Vol 16) 1929 Lah 51 (52) (DB)].

[2] Where the dispute as to the validity of the assignment of the decree is one purely between the decree-holder and the person claiming to be the assignee, a separate suit to agitate the question is not barred. (Vol 24) 1937 Lah 465 (467) : ILR (1937) Lah 162 (DB).

[3] A suit to recover money paid for the transfer lies where the assignment is not recognised. ('93) 16 Mad 325 (326) (DB). * ('97) 20 Mad 157 (158) (DB).

[4] Assignee cannot treat assignment ineffectual and maintain a suit unless he has failed to get the transfer recognised. ('09) 33 Mad 62, (64, 65) (DB).

ORDER 21, RULE 17.

Synopsis.

1. Procedure on receiving application for execution.
 2. Amendment and Limitation.
 3. Non-compliance with order of amendment within time fixed.
 4. Procedure on admission of application.
 5. Execution of maintenance decree.
 6. Value of property attached.
1. Procedure on receiving application for execution.—[1] It is the duty of the Court to see whether all requirements under O. 21, Rr. 11 to 14 have been complied with (Vol 29) 1942 Mad 495 (497).

[See also] (Vol 9) 1922 Pat 409 (410) : 1 Pat 149 (DB.) [It does not impose upon the Court the duty to see that the amount entered in the application as due by way of interest under rule 11 (2) (g) is correct.]

[2] Parties should not be made to lose by reason of Court's failure to check the correctness of their entries in their execution application. (Vol 15) 1928 Mad 24 (25) (DB) * (Vol 11) 1924 Mad 367 (368) (DB).

[3] Where an execution application, complying with requirements of O. 21, Rr. 11 and 14, instead of being admitted is returned by the Court, the order returning the application is illegal, and the application must be treated either as pending or as disposed of along with the next application with which it was presented. (Vol 29) 1942 Mad 495 (497, 498).

[4] Under O. 21, R. 17, the executing court has a discretion to allow the amendments. (Vol 20) 1933 P. C. 68 (70) : 60 Ind App 83 : 60 Cal 662 (P.C.) * (Vol 13) 1926 Mad 260 (260).

[5] Requirements of O. 21, Rr. 11 to 14, not complied with—Court can either reject the application at once or allow defect to be remedied then and there or within time fixed. (Vol 20) 1933 Oudh 75 (75, 76). Mere application for rateable distribution is not a proper application for execution of the decree within the meaning of O. 21, R. 11. But the court may allow the defect to be remedied.

[6] Court can allow only formal defects to be amended under O. 21, R. 17. (Vol 19) 1932 All 484 (484) (DB). * (Vol 28) 1941 Cal 156 (157) : ILR (1940) 2 Cal 277 Execution application not accompanied by an affidavit and certified under R 66 (3)—defect can be remedied. (Vol 6) 1919 Lah 95 (96). * Number of suit not correctly mentioned and showing decretal amount incorrectly—defect can be remedied. (Vol 32) 1945 Pat 459 (459) : 24 Pat 485 (DB) * Application for execution signed by N describing himself as khas mukhtar of G, son of decree-holder—Special power of attorney filed—G found to be decree-holder's attorney and Court directed that G should be described as such—Application refiled after necessary amendments—Mere fact that G's power-of-attorney was not filed did not render application void—Omission to state whether any money was realised or whether any execution was sought was not material. * (Vol 30) 1943 Pat 127 (129, 130) : 21 Pat 838 (DB). * Several decree-holders—Execution by only some—Subsequent amendment by joining all decree-holders—Amendment should

PROVINCIAL AMENDMENTS

Allahabad

Between the words "been complied with" and "the Court may" insert the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court."

Calcutta

In sub-rule (1), *cancel* the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and *substitute* therefor the following :

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed, the Court may reject the application."

Lahore

For the words "and, if they have not been . . . to be fixed by it" in sub-rule (1) *substitute* the following words :

"and, if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application." [7-4-1932]

Madras

(1) For the words "or may allow . . . fixed by it" in sub-r. (1) *substitute* the words "if the defect is not remedied within a time to be fixed by it."

(2) *Add* the following proviso at the end of the rule :

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under Rule 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount." [13-10-1936]

O. 21 R. 17 (contd.)

not be allowed. * (Property described in execution application—If description is defective, details for its identification can be called for and allowed—But another property cannot be allowed to be substituted in place of one described in execution petition. * (Vol 28) 1941 Pat 635 (637) (Name of judgment-debtor against whom execution had become barred under S. 48, was not allowed to be added by amendment under this rule.)

[7] Defects in execution application having no reference to Rr. 11 to 14—Court can amend such defects under its general powers (Vol 25) 1938 Bom 405 (407, 408); ILR (1938) Bom 708 * (Vol 29) 1942 Cal 306 (307); ILR (1941) 2 Cal 251. * (Vol 19) 1932 Cal 766 (768) : 59 Cal 1266 (DB.)

[See also] (Vol 1) 1914 Mad 663 (664) (DB.) (Amendment of execution application should be allowed for bona fide mistake.)

[8] Rule 17 does not empower amendment of defects in the requirement of R. 15. (Vol 6) 1919 Pat 286 (286); 4 Pat L. Jour 575. (As to whether they can be amended under general powers, see under O. 21, R. 15 Note 1.)

[9] Rejection of application under O. 21, R. 17 is not equivalent to dismissal under R. 57. (Vol 27) 1940 Mad 615 (616.)

[10] Defective application—If no order is passed by Court, it should be deemed to be pending. (Vol 21) 1934 All 481 (489) : 56 All 791 (FB.)

2. Amendment and Limitation.—[1] R. 17 does not apply where the defect in the execution application is one which has no reference to Rr. 11 to 14. (Vol 30) 1943 Pat 127 (129) : 21 Pat 638.

[See] (Vol 20) 1933 Oudh 288 (289). [Execution application filed within time illegally returned by Court for correction—Application filed after some months is not fresh but same application.]

[2] As to whether the Court, which overlooks the defects in execution application and registers the application, can subsequently amend during pendency of application, see Limitation Act, Article 182.

[3] Defective application subsequently amended to be deemed applications "in accordance with law" with effect from date of first presentation. (Vol 4) 1917

Mad 836 (836) (DB.) * (Vol 24) 1937 Bom 365 (370) : ILR (1937) Bom 691. * (1910) 7 Ind Cas 19 (20, 21) Cal (DB.) * (Vol 30) 1943 Mad 297 (300) : ILR (1943) Mad 357 (DB.) * (Vol 29) 1942 Mad 216 (218) (DB.) * (Vol 27) 1940 Mad 893 (894.) * (Vol 22) 1935 Mad 161 (163) * (Vol 17) 1930 Oudh 65 (66, 67) : 5 Luck 458. * (1946) 12 BR 562 (563) (DB.) * (Vol 32) 1945 Pat 182 (183) : 23 Pat 923 (DB.) * (Instalment decree—Execution application for recovery of whole of decretal amount—Last two instalments alone recoverable at date of application—Amendment of application by inserting amounts covered by last two instalments allowed though more than 12 years after they became due—Amendment relates to date of original application * (Vol 29) 1942 Pat 295 (296) * (Vol 19) 1932 Pat 222 (223) : 11 Pat 546 (DB.) * (Vol 21) 1934 Pesh 40 (42.)

[4] Object of R. 17 (2) is to preclude any question of validity being raised at subsequent stages. (Vol 15) 1928 Mad 440 (443) (DB.)

[5] Application rejected without giving opportunity to amend—Application cannot be considered as one in accordance with law. (Vol 5) 1918 Cal 245 (246). * (Vol 10) 1923 Nag 236 (237).

3. Non-compliance with order of amendment within time fixed.—[1] If amendment is not made within the time fixed unless time has been extended, the application must be rejected. (1890) 17 Cal 631 (989) (FB.) * (1911) 11 Ind Cas 696 (696) Cal (DB.) * (1931) 61 Mad L. Jour 516 (517) (DB.)

[2] When a court rejects an application under this rule, the legal position is that no application is deemed to have been filed. (Vol 27) 1940 Mad 615 (616).

[3] If, notwithstanding the decree-holder's failure to amend the defect within the time fixed the court does not reject the application, it is not precluded from allowing a fresh application for amendment at a subsequent stage. (1882) 8 Cal 479 (481) (DB.)

[4] As to whether an application returned for amendment of defects and not represented within time, saves limitation, see A.L.R. Commentaries on the Limitation Act (2nd) 1942 Edition Art. 182 Notes 52 and 86 (a) and the undermentioned cases. (1896) 23 Cal 17 (223) (DB.) (Case decided under the Code of 1882 which did not contain any provision correspond-

Nagpur

In sub-rule (1) for the words "the Court may reject, . . . within a time to be fixed by it," *substitute* the words "the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application." [29—6—1943]

Oudh

In sub-rule (1) *delete* the last sentence beginning with the words "and, if they . . ." and ending with the words "to be fixed by it," and *substitute* the following sentence in lieu thereof :

"and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied; and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."

Patna

In sub-rule (1) *substitute* the following for the words "the Court may reject the application etc." to the end of the sub-rule :

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it, and, if the decree-holder fails to remedy the defect within such time, the Court may reject the application."

18. (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court then—

Execution in case
of cross-decrees.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees ; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum, as well as satisfaction of the decree for the smaller sum.

O. 21 R. 17 (*contd.*)

ing to Sub-rule (2) of this rule. ✕ (Vol 15) 1928 Mad 440 (443) ✕ (Vol 2) 1915 Mad 1042 (1043) (DB). Return of execution application for correction—If correction not material it does not affect validity of presentation.

4. Procedure on admission of application.—

[1] Where an application for execution is duly registered under O. 21, R. 17 (4) and the judgment-debtor takes no steps to have this order for registration set aside the order must be regarded as a legal and valid order. (Vol 28) 1941 Cal 156 (158) : ILR (1940) 2 Cal 277.

5. Execution of maintenance decree.—[1] Where a decree declares a person's right to maintenance at a certain rate and directs the payment of such maintenance in future, the maintenance when due can be recovered in execution of that decree without further suit. (1892) 19 Cal 139 (145, 146) (FB).

6. Value of property attached.—[1] Under R. 17 (proviso) Court can call decree-holder to specify approximate value of land to be attached with a view to see whether the value corresponds as nearly as may be with the amount due under decree. (Vol 16) 1929 Nag 305 (308).

[See] (Vol 22) 1935 Pat 143 (144). [Execution of money decree—Decree-holder attaching whole of judgment-debtor's land—Judgment-debtor objecting—Court finding property worth more and ordering sale of only part of the property—Order is not without jurisdiction.]

[2] Sale of part of attached properties—Proceeds sufficient to satisfy decree—Subsequent sale of other lots is not invalid. (Vol 6) 1919 Cal 1095 (1096) (DB).

ORDER 21, RULE 18.

Synopsis.

1. Scope.
2. Cross-decrees for payment of two sums of money.
3. Cross-decrees in separate suits.

4. Between same parties.

5. Same character in both suits necessary.

6. Decrees must be capable of execution at the same time.

7. Decrees must be in same Court for execution.

8. Execution can be had of decree for larger sum.

9. Assignment of decree.

10. Sub-rule (4).

11. Appeal.

1. Scope.—[1] Rules 18 and 19 of O. 21, do not exhaust the cases in which set-off may be allowed in execution proceedings. Apart from Rr. 18 and 19 of O. 21, the Court has inherent jurisdiction on equitable principles to allow a set-off of claims arising at different stages in the same suit or proceedings and this even if the right to recover the claim sought to be set-off, is barred by limitation. (Vol 25) 1938 Sind 31 (32) : 32 Sind LR 162.

[But see (Vol 24) 1937 Pesh 83 (84) The provisions of the Code regarding a set-off are contained in Rr. 18 and 19, of O. 21. These rules have been specially restricted in their application and unless a case can be brought strictly within the terms of these provisions, no set-off can be allowed. Where a case does not come under these rules the provisions of S. 151, also cannot be applied.]

[2] A right to set-off under this rule cannot be defeated by an attachment of either decree by the other decree-holder. (Vol 16) 1929 All 502 (502) (DB).

[3] Right to set-off under this rule cannot be defeated by an attachment of either decree by a stranger. (Vol 27) 1940 PC 173 (173, 175, 176) : ILR (1940) Kar (PC) 312 : 67 Ind App 350 : ILR (1941) Mad 1 (PC). ✕ (Vol 24) 1937 All 422 (422) (DB). ✕ (1878-30) 2 All 866 (868) (DB).

[See however (Vol 22) 1935 Mad 587 (588). Attachment of one of cross-decrees by various other decree-holders made it incapable of execution without their concurrence. It was not therefore capable of

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations.

(a) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C. and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this rule.

(c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule.

(d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F. singly and applies for execution to the Court in which the joint decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

[1882-S. 246; 1877-Ss. 233, 243, 246; 1859-S. 209. See S. 49 and O. 21 Rr. 19, 20 and 29.]

Objects and Reasons.

Rule 18 (4) and illustration (d)—“This addendum has been introduced in accordance with the views of the Calcutta and Allahabad High Courts as expressed in the cases of *Hurry Doyal Guho v. Din Doyal Guho*. (I.L.R. 9 Cal. 479 and *Ram Sukh Dass v. Tota Ram* (I. L. R. 14 All 339).”—S. O. R.

O. 21 R. 18 (contd.)

execution at same time and so no set-off could be allowed.]

[4] Rules 18 to 20 of O. 21. Set-off of decree is not discretionary matter depending upon equitable considerations—Circuity of proceedings can be and should be avoided. (Vol 24) 1937 PC 39 (41): 64 Ind App 67: 16 Pat 127 (PC).

2. Cross-Decrees for payment of two sums of money.—[1] A decree directing recovery of money by sale of immovable property is a decree for money to which provisions of this rule will apply. (1906) 29 Mad 318 (319) (DB).

[2] A court can set-off a simple money decree against a decree for recovery of money by enforcement of a charge on immovable property. (1911) 33 All 240 (242).

[3] Simple money decree can be set-off against a mortgage-decree even if there is no personal decree under the mortgage-decree. (Vol 31) 1944 Mad 149 (150).

[But see (Vol 23) 1936 All 639 (640): 58 All 907 (DB). Decree obtained on mortgage cannot be set-off against simple money decree.]

[4] A decree for mesne profits of which the amount has not been ascertained cannot be set off under this rule as the amount is not definite. (1888) 10 All 188 (198) (DB).

3. Cross decrees in separate suits.—[1] Rule 18 applies even though one decree is in a suit and the other is in a miscellaneous proceeding under S. 144, Civil P. C. (Vol 12) 1925 Cal 102 (108) (DB).

[2] The rule applies to cross-decrees passed in separate suits. Cross claims in the same suit do not

fall within this rule but come under R. 19. (1933) 5 All 272 (273) (DB).

[3] Partition suit between A and B—Receiver appointed—B successfully applying for his removal and awarded costs against A—In partition suit A getting costs against B—B transferring his decree—Transferee applying for execution—A cannot set-off his decree for costs against B's under O. 21, R. 18 or S. 151 Civil P. C. (Vol 19) 1932 Lah 537 (537).

4. Between same parties.—[1] For a set-off under this rule, the parties must be same and the sum due under each decree must be definite. (1866) 5 Suth W. R. (Mis) 12 (12) (DB).

[2] Claim for set-off under this rule cannot be defeated merely because the holder of one decree alleges that he is only a benamidar. (1893) 3 Mad L. Jour 220 (221) (DB).

5. Same character in both suits necessary.—[1] A holds a decree against B personally—B filing suit on mortgage executed by C impleading A as purchaser of portion of equity of redemption and obtaining decree—Decree cannot be set-off. (Vol 3) 1916 All 290 (292): 38 All 669 (DB).

[2] A decree obtained against the assets in the hands of the heir of a deceased person and a decree obtained by such heir against the holder of the former decree personally cannot be set-off against each other. (Vol 26) 1939 All 25 (27).

[3] Firm is identical with individuals constituting it—Decree in favour of partners individually can be set off against the firm composed of same individuals. (Vol 14) 1927 Bom 255 (256).

6. Decree must be capable of execution at the same time.—[1] Decrees to be adjusted by set off should be capable of execution at time of adjustment. (Vol 20) 1933 Lah 372 (373).

PROVINCIAL AMENDMENT

Nagpur

Substitute the following for the existing Rule 18 :—

"18. (1) Where decree-holders apply to a Court for execution of cross-decrees in separate suits between the same parties for the payment of two sums of money passed and capable of execution at the same time by such Court, then

(a) if the two sums are equal, satisfaction shall be entered upon both decrees;

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum :

Provided that—

(i) each party fills the same character in both suits, and

(ii) the sums due under the decrees are definite.

(2) This rule shall be deemed to apply where either applicant is an assignee of one of the decrees as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself ;

Provided that—

(i) where the decrees were passed between the same parties, each party fills the same character in each suit ; and

(ii) where the decrees were not passed between the same parties the decree-holder in one of the suits is the judgment-debtor in the other suit and fills the same character in both suits ; and

(iii) the sums due under the decrees are definite.

(3) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons."

[29-6-1943.]

O. 21 R. 18 (*contd.*)

[2] Execution of one of the decrees time-barred—there can be no set-off. (Vol 5) 1918 Cal 631 (632) (DB).

[3] Execution of one of the decrees expressly postponed till happening of certain contingency—Contingency not happened—No set-off can be allowed (1867) 7 Suth WR 535 (536) (DB).

[4] M obtaining decree against G—G depositing in Court decretal amount and then obtaining a decree against M—Decrees cannot be set-off. (Vol 22) 1935 Lah 914 (915).

[5] The fact that the judgment-debtor under one decree intends appealing against the decree will not make it inexecutable so as to prevent a set-off being allowed. (1866) 5 Suth WR 52 (52) (DB).

[6] Set-off can be allowed under inherent jurisdiction of claims arising at different stages of same proceedings even if such claims are time-barred. (Vol 26) 1939 Lah 85 (86).

7. Decrees must be in same court for execution

[1] In order that set-off of cross-decrees may be allowed under this rule it is essential that applications should have been made for execution of both decrees. (1902) 24 All 481 (482, 483) ✕ (1913) 11 All L. Jour 763 (764) ✕ (1887) 9 All 64 (68) (DB). ✕ (Vol 22) 1935 Mad 587 (588) (DB). ✕ (1909) 32 Mad 336 (337).

[See also (Vol 21) 1934 Bom 307 (309) : 59 Bom 1 (DB). (Cross suits—Agreement that party entitled to larger amount should pursue execution for excess amount—Excess could be determined only on final decree—Set-off as contemplated in O. 21, R. 18 does not apply—Limitation for execution of excess amount runs from final decree.

[2] For claiming a set-off under this rule it is necessary that applications for execution of the cross decrees should be pending in one and the same Court, either as the Court which passed the decrees or as the

Court to which the decree or decrees have been transferred for execution. (Vol 27) 1940 Mad 534 (536) ✕ (Vol 21) 1934 Cal 820 (821) ✕ (1871) 16 Suth W R 303 (303) (DB). ✕ (Vol 17) 1930 Lah 508 (510) ✕ (Vol 20) 1933 Mad 215 (216).

[3] When in the case of cross-decrees, on an application for execution of one decree, an order was passed directing execution but allowing it to be stayed to enable the other decree-holder to apply for the execution of his cross-decree, and the other party files an execution application, both decrees, may be taken up together and satisfaction of the larger decree may be entered to the extent of the smaller. (Vol 1) 1914 Mad 2 (3) (DB).

[4] Where one of the decrees expressly stipulates that execution shall not issue till the amount under the other decree is ascertained, a set-off can be ordered even though no application for execution of the latter decree may have been filed. (Vol 6) 1919 Pat 312 (312) (DB).

[5] Merely filing two applications for executing cross-decrees does not effect adjustment, until orders adjusting decrees are made by the Court. Hence where application under S. 20, Madras Agriculturists' Relief Act (4 of 1938) is made before such orders are passed by the executing Court, the executing Court is bound to stay the applications for adjustment of the decrees. (Vol 31) 1944 Mad 255 (256).

8. Execution can be had only of decree for larger sum.—[1] If the amounts due under two cross-decrees are not equal, execution of the decree for the smaller sum becomes incapable of being issued. (Vol 29) 1942 Mad 399 (400). ✕ (Vol 5) 1918 Cal 133 (134) (DB).

[2] If the sums due under two cross-decrees are not equal, execution can only issue under the decree for the larger amount and only in respect of the balance due after the set-off. (Vol 21) 1934 Cal 140 (142) (DB). (Attachment of decree by judgment-debtor—Decree-holder can still execute his decree after giving

Execution in case 19. Where application is made to a Court for the execution of a decree of cross-claims under which two parties are entitled to recover sums of money from each other, same decree. then,—

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree ; and,
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

[1882-S. 247, 1877-S. 247].

O. 21 R. 18 (contd)

set-off to judgment-debtor's decree) ✕ (Vol 18) 1931 Cal 23 (24) : 57 Cal 855 (DB). ✕ (1911) 12 Ind Cas 205 (206) (Burma).

[3] The mere existence of a cross-decree for higher amount in favour of judgment-debtor, would not invalidate an auction sale held in execution of the decree for smaller amount against the judgment debtor. (1887) 14 Cal 18 (25) : 13 Ind App 106 (PC).

9. Assignment of Decree.—[1] An assignment of one of two cross-decrees cannot defeat a claim of set-off under this rule. (1868) 10 Suth WR 32 (33) (FB) ✕ (Vol 25) 1938 All 180 (181). R holding decree against T—T becoming assignee of persons holding decrees against R—Execution of R's decree against T—T can claim set-off under R. 18. (Vol 21) 1934 Cal 820 (821) (DB.) A assigning his decree against B to C—C applying for execution—B's decree against A for a larger amount pending—B is entitled to set-off as against C. (A holding decree against B for Rs. 5,000—B holding decree against A for Rs. 3,000—A assigning his decree to C—B can claim set-off for Rs. 3,000 against C—C can execute decree only for Rs. 2,000 (1868) 10 Suth W R 32 (33) (FB.) ✕ (1903) 26 Mad 428 (429) (DB.)

[2] A holding decree against B assigning it to C—Before assignment B had filed suit against A which resulted in decree—B can set-off decree against C. (1889) 16 Cal 619 (622) (DB.)

[3] The right to set-off will be available even though the judgment-debtor had filed an appeal against the assigned decree and the assignee had not been made a party to the appeal. (1897) 7 Mad L. Jour 227 (229) (DB.)

[4] The rule will not apply unless persons claiming set-off had already secured the assignment before execution application. (37) 20 Nag L. Jour 70 (72) [(Vol 20) 1933 Cal 865 followed.]

[5] An attaching decree-holder is an "assignee" within the meaning of this rule. (Vol 12) 1925 Cal 102 (103, 104) (DB.)

[But see (Vol 22) 1935 Mad 587 (588) (An attaching decree-holder cannot be treated as an assignee of the decree within the meaning of O. 21, R. 18) (Vol 12) 1925 Cal 102 dissented from.]

10. Sub-Rule (4)—[1] A person may set-off against the amount of a decree obtained against him singly by a decree-holder, the amount of a decree which has been obtained by him jointly and severally against such decree-holder and certain others. (1892) 14 All 339 (341.) ✕ (1888) 9 Cal 479 (480, 481) (DB.)

[2] A mortgage decree can never be termed a "joint" and "several" decree within O. 21, R. 18 (4) and, therefore, there cannot be a set-off of two mortgage decrees not between the same parties; but if they are between the same parties it is doubtful whether they can be set-off against each other. (Vol 4) 1917 All 308 (308) (DB.)

[3] X and two others obtained a decree for costs against Y—Decree not specifying interest of each decree holder under it—Y holding decree for money against X—X not being the sole decree-holder under his decree, held no set-off could be allowed under this rule. (1878-80) 2 All 91 (92.)

11. Appeal.—[1] The question of set-off under O. 21, R. 18 is a question relating to execution or satisfaction of a decree within the meaning of S. 47 and an appeal lies from an order refusing to allow set-off. (Vol 29) 1942 Pat 197 (198.)

ORDER 21 RULE 19.

Synopsis.

1. Scope and object of the rule.
2. Two parties.
3. Two sums unequal—Procedure.

1. Scope of the Rule.—[1] The principles upon which the Court will proceed under O. 21, R. 18, 19, Civil P.C., are substantially those upon which the Court proceeds under O. 8, R. 6 Civil P. C. (Vol 18) 1931 Cal 23 (24) : 57 Cal 855.

[2] The words "a decree under which two parties are entitled" suggest the simultaneous birth of two sets of rights under one decree. (Vol 17) 1930 All 726 (727) (A judgment-debtor objected to attachment of certain property, and obtained decree for costs against the decree-holder. When the judgment-debtor sought to execute his decree for costs, the decree-holder asked for a set-off for decree for costs against amount due to him under his decree in the suit. Held that R. 19 would not apply as the two claims were not under one decree.) (Vol 24) 1937 Pesh 83 (84) (Parties entitled to recover sums of money under different decrees.)

[3] Object of O. 21, R. 19 is to avoid multiplicity of proceedings (Vol 23) 1941 Sind 49 (50) : ILR (1941) Kar 129.

[4] Rule 19 is not limited in application to cross claims which are of precisely the same nature or cases where the parties fill the same character. (Vol 1) 1914 Oudh 416 (417) (Costs awarded to mortgagor can be set off against mortgage-money.)

[5] A plaintiff in a redemption suit after paying the total amount required for redemption can execute the decree for costs awarded to him. (Vol 31) 1944 Oudh 247 (247, 248) (DB.)

[6] Orders awarding costs to both parties—Set-off is allowable. (Vol 4) 1917 Pat 239 (260) (DB.)

[7] Where the High Court varies a decree for costs passed by the trial Court and the appeal to the Privy Council is dismissed with costs, the judgment-debtor is entitled in execution of the decree for costs of the Privy Council, to set off the costs realised before three years by the decree-holder in execution of the trial Court's decree. (Vol 22) 1935 Cal 225 (227) : 62 Cal 298 (DB.)

[8] Order 21, R. 19, applies to a case where a party gets a decree for the sale of property for the amount

O. 21 R. 19 (*contd.*)

claimed as arrears of rent and the opposite party is entitled under the same decree to costs. The party entitled to smaller sum is not entitled to execute decree. (Vol 25) 1938 Mad 638 (640) (DB.)

[9] Order 21, R. 19 applies even to a case of a claim by a defendant against a plaintiff personally and a claim by a plaintiff against the defendant as legal representative of another deceased defendant. The mere fact that there has to be some inquiry under the provisions of S. 50, Civil P. C. as to the extent of the property of the deceased in the hands of his legal representative or that the sum may be limited by the provisions of S. 50, does not remove a case out of the scope of R. 19 of O. 21. (Vol 28) 1941 Sind 49 : ILR (1941) Kar 129.

[10] Suit for pre-emption—Decree passed conditional on plaintiff depositing particular sum—Costs and mesne profits granted to plaintiff till delivery—Amount of costs and mesne profits can be set-off against amount of deposit. (Vol 17) 1930 All 413 (418) * (Vol 9) 1922 Lah 142 (143) : 2 Lah 294 (DB.)

[11] Pre-emption suits under Ss. 14 and 15, Oudh Laws Act—Purchase money must be deposited—In such suits costs cannot be set-off against pre-emption amount. (Vol 11) 1924 Oudh 104 (105) : 26 Oudh Cas 345.

[12] Preliminary decree for sale by prior mortgagee against mortgagor and subsequent transferee—Decree awarding costs to subsequent transferee against plaintiff—Plaintiff applying under R. 19 to set off costs decree against his decree—Final decree passed accordingly—Costs decree of the subsequent transferee held could not be set-off—R. 19 had no application—Proper remedy held to be amendment of his decree. (Vol 21) 1934 All 8 (10.)

[13] X having decree against A—A and B having decree against X—A incurring debt on behalf of himself and B—A and B asking for set-off against X—Set off should not be refused to A and B—Under Rr. 18 to 20 of O. 21 set off decree is not discretionary matter depending upon equitable considerations. (Vol 24) 1937 PC 39 (41) : 64 Ind App 67 : 16 Pat 127 (PC.)

[14] On general principles and in the exercise of its inherent power, an executing Court can entertain and give effect to a claim to set-off even in cases which do not come strictly under O. 21, R. 19. (Vol 23) 1936 Cal 409 (412) : ILR (1937) 1 Cal 57 (DB.) * (Vol 22) 1935 Cal 225 (226) : 62 Cal 298 (DB.)

(Vol 26) 1939 Lah 85 (86) (Set-off can be allowed under inherent jurisdiction of claims arising at different stages of same proceedings even if such claims are time-barred.) (Vol 23) 1936 Mad 626 (628) : ILR (1937) Mad 59 (DB.) (Decree directing plaintiff to deposit into Court certain amount—Defendant to execute deed of re-conveyance to plaintiff—Defendant also to pay costs—Plaintiff depositing amount deducting costs. Claims held to be in nature of cross demands—Doctrine of equitable set-off applied. * (Vol 25) 1938 Sind 31 (32) : 32 Sind L R 162 (DB.) (Rules 18 and 19 are not exhaustive.)

[15] Redemption decree against several persons—Appeal by one of them dismissed with costs—Decree-holder depositing full amount of redemption-decree and taking execution of decree for costs against such persons—O. 21, R. 19 held did not apply nor could such person claim set-off of costs decreed against him on principles of equity. (Vol 29) 1942 Oudh 177 (178).

[16] The conjoint effect of Rr. 19, 132, 133 and 139 of O. 21, (as added by the Allahabad High Court) is that if the garnishee is ordered to pay a certain sum of money to the decree-holder, such order is a decree which virtually becomes part and parcel of the original decree passed in the suit. It cannot be contended, in these circumstances, that R. 19 does not apply for the reason that "the parties" are not entitled to recover sums of money from each other under the decree sought to be executed. (Vol 21) 1934 All 1056 (1057).

[17] Suit *in forma pauperis* to recover property—Decree in favour of plaintiff for certain sum—Government for recovery of Court fee to be paid by plaintiff under decree—Defendant objected that certain costs were payable to him under the same decree and that some money was payable to him by plaintiff under a decree in cross-suit and that such sums should be set off—No execution was made either by plaintiff or defendant of their respective decrees—Held that Rr. 18 and 19 had no application to this case and that the decrees of plaintiff and defendant not having reached a stage to which the rules 18 and 19 apply, no question of set-off arose. (1887) 9 All 64 (67) (DB.)

2. Two Parties.—[1] Redemption decree against several persons—Appeal by one of them dismissed with costs—Decree-holder depositing full amount of redemption decree and taking execution of decree for costs against such person—Held O. 21, R. 19 did not apply nor could such person claim set-off under general principles. (Vol 29) 1942 Oudh 117 (118) : 17 Luck 435 (DB.)

[2] Joint and several money decrees against two judgment-debtors individually awarded costs exceeding decree in aggregate—Execution—Decree-holder can execute decree against only one judgment-debtor without deducting costs of both. (Vol 4) 1917 Mad 226 (228) (DB.)

[3] Venkatasubba Rao, J.—The section does not exclude the case of a decree-holder on whose death his interest devolves on two different individuals. "Two parties" referred to in R. 19 are the parties to the suit. The words do not refer to two different representatives of the same party. (Vol 10) 1923 Mad 638 (640) (DB.)

[4] R. 19 deals with a case in which only two parties are entitled to recover sums of money from each other. It does not cover a case in which the creditors of one of the parties are also concerned. (Vol 25) 1938 Oudh 169 (171) : 14 Luck 106 (DB.)

3. Two sums unequal—Procedure.—[1] Execution of decree for smaller sum cannot be issued against party to whom larger sum is payable. (Vol 5) 1918 Cal 133 (134) (DB.) (Vol 25) 1938 Mad 638 (639, 640) (DB.) (Decree in favour of one party for sale of property for recovery of arrears of rent—Same decree granting opposite party costs—O. 21, R. 19 applies.

[2] Where the decree for specific performance directs the plaintiff to deposit certain amount (Rs. 825) and the defendant to pay as costs to the plaintiff certain amount (Rs. 473) the creditor holding a decree against the defendant can attach only the balance (Rs. 352.) (42) 1942 Nag L. Jour 346 (347, 348).

[3] Court has to decide first what each party owed to the other and allow execution for difference. (Vol 5) 1918 Cal 153 (154) (DB.)

(4) Decree in cross-claims is indivisible and can be executed for balance—Bar of limitation to execution of larger amount does not authorise execution of decree

Cross-decrees and 20. The provisions contained in rules 18 and 19 shall apply to decrees for cross-claims in mortgage sale in enforcement of a mortgage or charge. gage suits.

Objects and Reasons

"This rule is new. It is inserted in order to make it clear that the provisions as to cross-decrees and cross claims apply to the case of mortgage decrees. The rule also makes it clear that the expression "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge."—S. C. R.

Simultaneous execu- 21. The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

[1882-S. 230, para 2; 1877-Ss. 230, 231; See S. 51 and O. 21 R. 30]

Notice to show cause against execution in certain cases.

22. (1) Where an application for execution is made---

(a) more than one year after the date of the decree, or

O. 21 R. 19 (*contd.*)

for smaller amount (Vol 2) 1915 Bom 226 (226) : 40 Bom 60 (DB.) * (Vol 28) 1941 Mad 662 (663) (DB.) (Limitation cannot run against party entitled to lesser decree at time when it is not executable by reason of O. 21, R. 19).

[5] Execution of cross-decrees—If execution is taken out without deducting amount of cross-decrees—Court has inherent power to refund excess amount recovered. (Vol 7) 1920 Cal 438 (439) (DB.)

[6] Decree for pre-emption—Plaintiff awarded costs—Defendant also awarded smaller amount as costs—Plaintiff not directed to deposit costs of defendant also in Court—Deposit by plaintiff deducting his costs and without giving credit for defendant's costs is not bad—O. 21, R. 19 (b) does not strictly apply. (Vol 26) 1929 All 228 (229, 230) : ILR (1939) All 261 (DB.) (Vol 24) 1937 All 756 Reversed.

[7] N given decree to recover property on payment of Rs 350 within three months—N was however to recover amount for cos's etc, from opposite side in excess of Rs. 350—N not depositing amount of Rs. 350 within three months, but claiming possession after setting off amount due to him against Rs. 350—Held, N did not lose benefit of decree by non-payment. (Vol 30) 1943 Mad 667 (669) : ILR (1944) Mad 118 (DB.)

ORDER 21, RULE 20, Note 1

[1] The principle of set-off is applicable to mortgage decrees, but both the decrees need not be mortgage decrees. (Vol 20) 1933 Pat 210 (214) (DB.) * (Vol 24) 1937 PC 39 (40) : 64 Ind App 67 : 16 Pat 127 (PC.) * (Vol 31) 1944 Mad 149 (150).

(A obtaining mortgage decree against B—B obtaining money decree against A for larger amount—In execution B can ask A's decretal amount should be set off against his own decretal amount—Fact that there is no personal liability under mortgage decree is immaterial.

[But see (Vol 23) 1936 All 639 (641) : 58 All 907 (DB.) O. 21, R. 20 does not apply where one party holds money decree and the other decree for sale or for enforcement of charge.]

[2] The words of R. 20 "decree for sale in enforcement of a mortgage or charge" cannot be restricted to personal judgment such as may be given under O. 34, R. 6. (Vol 24) 1937 PC 39 (41) : 64 Ind App 67 : 16 Pat 127 (PC.) * (Vol 32) 1945 Cal 1 (5, 6) : (Vol 20) 1933 Pat 210 (216, 217) (DB.) (O. 21, R. 20 applies if personal remedy is legally available—It is not necessary that personal liability should exist under decree.

[But see (Vol 17) 1930 Rang 68 (69, 70, 71) : 7 Rang

505(DB). (No personal liability under mortgage-decree—Set-off cannot be allowed).

[3] Rule applies to decrees for sale but not for possession in enforcement of mortgage or charge. (Vol 1) 1914 Oudh 416 (417).

[4] Mortgage decree for sale imposing personal liability in case of deficiency—Set-off can be given even before sale. (Vol 20) 1933 Mad 63 (64) : 56 Mad 339 (DB.)

[5] The Court should be slow to give effect to a rule of set-off so as to alter substantive rights or to produce consequences beyond the scope of an intention to avoid circuity of proceedings. (Vol 24) 1937 PC 39 (41) : 64 Ind App 67 : 16 Pat 127 (PC).

[6] Right of set-off is not lost merely because Court is asked to notify encumbrance of decree (Vol 20) 1933 Pat 210 (218) (DB.)

[7] Court has ample discretion and where it is properly exercised High Court will not interfere (Vol 18) 1931 Bom 247 (249, 250) (DB.)

[8] Cross-decree-Test—Substance of the decrees must be looked into and not the form. (Vol 20) 1933 Pat 210 (215) (DB.)

[9] Costs awarded to judgment-debtor may be set-off against a mortgage decree obtained against him in the suit, if the other conditions in O. 20, R. 19 are satisfied. (Vol 1) 1914 Oudh 416 (417). * (Vol 32) 1945 Cal 1 (5, 6.)

ORDER 21, RULE 21, Note 1.

[1] Under O. 21 R. 21, the Court cannot compel the decree-holder to adopt any particular mode of execution. (Vol 14) 1927 Lah 153 (153.)

[2] Court cannot refuse execution against person on ground that execution against property was not sought for in first instance. (Vol 16) 1929 Lah 86 (87) * (Vol 21) 1934 Nag 140 (141).

(Court refusing choice must give reasons—Existence of property available is no ground to refuse personal remedy.)

[3] Simultaneous attachment and arrest is discretionary with Court both in execution and before judgment though discretion is limited by O. 38 in latter case. (Vol 11) 1924 Rang 361 (361) : 2 Rang 362 (DB.)

ORDER 21, RULE 22.

Synopsis.

1. Scope and object of the rule.
2. Legal representative.

- (b) against the legal representative of a party to the decree, *a* [or where an application is made for execution of a decree filed under the provisions of section 44A], the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

[1882-S. 248; 1877-S. 248; 1859-S. 216. See Ss. 48 and 50.]

a. Inserted by the Code of Civil Procedure (Amendment) Act 8 [VIII] of 1937, section 8.

Objects and Reasons

"The Committee have omitted the reference to a decree passed on appeal, for that is ordinarily the decree to be executed: *Kristo Kinkur Roy v. Rajah Burrodacount Roy* (14 Moo Ind App 465) and *Muhammad Sulaman Khan v. Muhammad Yar Khan* (I.L.R. 11 All. 267)."—S. C. R.

O. 21 R. 22 (*contd.*)

3. "Shall issue Notice."
4. Proof of Notice.
5. Effect of omission to give notice.
6. Notice to wrong person.
7. Irregular service of notice.
8. Objection as to notice, when may be taken.
9. More than one notice, if contemplated by the rule.
10. Remedy when property has been sold without notice under this rule.
11. Date of the decree.
12. Notice, when not necessary.
13. Notice and limitation. See A. I. R. Commentaries on the Limitation Act, 2nd (1942) Edn., Art. 182 Notes 116 and 129 and Art. 183 Note 10.
- 13a Failure to show cause why decree should not be executed—Effect.
14. Court executing the decree.
15. Sub-rule (2)
16. Appeal.

1. Scope and object of the rule:—[1] The object of the notice under this rule is to furnish an opportunity to the person concerned to urge any objection to the execution application, to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him. ('97) 21 Bom 424 (432) (FB.) * (Vol 20) 1933 Lah 826 (827) * (Vol 20) 1933 Pat 658 (662) : 13 Pat 86 (113.) * ('09) 36 Cal. 543 (552) (DB.)

[2] The period of one year prescribed by this rule has been varied by various Local Amendments.

[3] An amendment, after one year, of an application for execution made within one year, does not render the application one made after one year for the purposes of this rule. See Order 21, Rule 17 (2).

[4] Notice in an application for execution against the legal representatives of the judgment-debtor is

necessary or where execution is taken out against them in the first instance, as well as where execution had been previously taken against the judgment-debtor himself and, on the death, the execution is sought to be taken out against the legal representatives. (Vol 19) 1932 Pat 199 (200, 201) : 11 Pat 241 (DB.) * (Vol 23) 1936 Mad 205 (211, 212) : 59 Mad 461 (FB.)

(5) Notice under O. 21, R. 16 given—Assignment or right to assign not disputed—Other objections raised—Notice under this rule necessary—The objection cannot be entertained at the stage of notice under R. 16 (Vol 28) 1941 Bom 190 (191.)

[6] Notice to the guardian of a minor judgment-debtor given—No presumption of his appointment as guardian by the Court arises. (Vol 12) 1925 Cal 23 (25) (DB.)

[But see ('07) 5 Cal L. Jour 434 (438) (DB.)]

[7] The rule does not apply to summary proceedings like those contained in S. 111 of the Madras Estates Land Act. (Vol 16) 1929 Mad 517 (519).

2. Legal representative:—[1] For the definition of "Legal representatives" see S. 2 Cl. (11).

[2] Adjudication of a person as an insolvent—Official Receiver is not his 'Legal Representative'. (Vol 30) 1943 Pat 297 (298) : 22 (Pat 256 (DB). * (Vol 23) 1936 Mad 205 (207) : 59 Mad 461 (FB.)

[But see (Vol 22) 1935 Cal 503 (505) : 62 Cal 457 (DB.) (assumed to be "Legal Representative")].

[See however (Vol 1) 1914 PC 129 (181) : 42 Cal 72 : 41 Ind App 251 (PC) (Decision under the Code of 1882 which did not contain definition of "Legal Representative.")]

[3] Under the amendment of the rule by the Madras High Court, notice to the Official Receiver is necessary. (Vol 30) 1943 Mad 260 (261) * (Vol 28) 1941 Mad 606 (607) (DB) * (Vol 22) 1935 Mad 151 (152) : 58 Mad 403 (DB.)

* 3. "Shall issue notice."—[1] The provisions of this rule are mandatory. (Vol 4) 1917 Cal 728 (731) : 44 Cal 954 (DB.)

PROVINCIAL AMENDMENTS

Allahabad

- (1) For the words "one year", wherever they occur in this rule, read the words "three years."
 (2) To sub-rule (2) of this rule shall be added the following proviso :

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

Bombay

The words "two years" shall be substituted for the words "one year" wherever they occur.

[9-3-1926]

Calcutta

Add the following sub-rule (3) :

"(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree."

Lahore

- (1) The words "two years" shall be substituted for the words "one year" wherever they occur.
 (2) Add the following at the end of the rule :

"Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction." [7-4-1932]

Madras

- (1) In sub-rule (1) the words "two years" shall be substituted for the words "one year" wherever they occur.
 (2) In sub-rule (1) after clause (b), insert the following :

"or (c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in Insolvency."

O. 21 R. 22 (contd.)

[2] The issue of the notice is a condition precedent to the validity of the execution proceedings. (81) 3 All 424 (426) (DB.) * (Vol 1) 1914 PC 129 (131): 42 Cal 72 : 41 Ind App 251 (PC.)

[3] The Court must issue the notice even where the decree-holder has not asked for it and the failure to do so will render the proceedings null and void. (Vol 4) 1917 Cal 728 (731) : 44 Cal 954 (DB.) * (Vol 5) 1918 Cal 913 (915, 916) (DB.) * (Vol 11) 1924 Mad 431 (436) : 47 Mad 288 (FB.)

[4] Notice given to persons who sufficiently represented the interested minors for whom guardians were not appointed is sufficient compliance with this rule. (Vol 8) 1921 Cal 476 (478) (DB.)

[5] Court executing the decree as also the Court which passed the decree. A combined notice under this rule and Rule 16 may be issued. (Vol 29) 1942 Bom 134 (135) : ILR (1942) Bom 190 * (Vol 20) 1933 Pat 658 (663) : 13 Pat 86 (DB.)

[6] Minor attaining majority pending execution is not entitled to a fresh notice. (Vol 12) 1925 Mad 153 (159) (DB.)

[7] The notice should be specifically to show cause why the decree should not be executed. (Vol 19) 1932 Pat 199 (201, 203) : 11 Pat 241 (DB.) (Notice to show cause why name should not be substituted in the place of the judgment-debtor not enough.)

4. Proof of notice:—[1] The onus of proving the want of notice will be on the party setting it up. (02) 29 Cal 580 (582) (DB.)

[See (Vol 21) 1934 Pat 211 (211) (DB.) (Judgment-debtor can show that provisions of Code were not complied with.)]

[2] An entry on the order sheet that notice has been served is *prima facie* evidence of the service of

notice (Vol 4) 1917 Cal 84 (86) (DB.) * (Vol 19) 1932 Cal 627 (628) (DB.)

5. Effect of omission to give notice.—[1] Whether the failure to give notice under this rule rendered an execution sale void was a controversial question before the decision of the Privy Council. (1901) 25 Bom 337 (348) : 27 Ind App 216 (P. C.). After this decision there ensued controversy about its interpretation. The position was made clear by the Privy Council in (Vol 1) 1914 P. C. 129 (132) : 42 Cal 72 : 41 Ind App 251 (PC.) (The Privy Council opined that a notice under this rule was essential to give jurisdiction to the Court to sell property. It has since been held that an execution sale is, in the absence of the notice, void and not merely voidable.) (Vol 29) 1942 Cal 436 (437, 438) : ILR (1942) 2 Cal 262 * (Vol 32) 1945 Pat 1 (17, 32) : 23 Pat 528 (FB). (Meredith, J. dissenting) * (Vol 28) 1941 Pat 481 (481) (DB.) * (Vol 27) 1940 Cal 23 (23) * (Vol 15) 1928 All 74 (76) : 49 All 830 (DB.) * (Vol 20) 1933 Pesh 41 (43) (DB.) * (Vol 8) 1921 Nag 126 (127). * (Vol 16) 1929 Rang 161 (161) : 7 Rang 110 * (Vol 20) 1933 Rang 52 (53) : 11 Rang 79 (DB.) (Notice implied) * (Vol 11) 1924 Mad 431 (436) : 47 Mad 288 (FB.) * (Vol 23) 1936 Mad 205 (214, 219) : 59 Mad 461 (FB.) * (Vol 11) 1924 Mad 130 : 47 Mad 63 overruled.

[See however (Vol 25) 1938 Nag 308 (308) (Failure to bring legal representatives of the judgment-debtor does not render the execution proceedings null and void—Submitted incorrect.)]

[2] Omission to issue notice renders the sale void.

(a) It is immaterial whether the property is immovable or movable. (94) 21 Cal 19 (22) (DB.)

(b) The fact that the purchaser is the decree-holder himself is immaterial. (Vol 4) 1917 Cal 728 (731) : 44 Cal 954 (DB.) * (Vol 8) 1921 Cal 609 (610, 611) (DB.)

[3] If, though no notice is served on a person, he appears and contests the application, the object of the

(3) *Between* sub-rules (1) and (2), *insert* the following :

"(1a) Where from the particulars mentioned in the application in compliance with Rule 11 (2) (*ff*), *supra*, or otherwise the Court has information that the original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer."

(4) *Add* the following proviso to sub-rule (2) :

"Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment-debtor has sustained substantial injury as the result of such omission."
[2-9-1936 and 13-10-1936]

Nagpur

(1) For the words "one year" wherever they occur, *substitute* the words "three years."

(2) To sub-rule (2), *add* the following proviso :

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."
[29-6-1943]

N.-W.F. P.

For the words "one year" wherever they occur, *read* "two years."

Oudh

(1) For the words "one year," wherever they occur in this rule, *read* the words "three years".

(2) To sub-rule (2) of this rule *add* the following proviso :

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment-debtor has sustained substantial injury by reason of such omission."

Patna

For sub-rule (1) *substitute* the following :

"Where an application for execution is made in writing under Rule 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him."

O. 21 R. 22 (*contd.*)

rule is achieved and the proceedings are valid. (Vol 27) 1940 Cal 23 (23) * (Vol 18) 1931 Cal 476 (478) (DB.) * (Vol 16) 1929 Pat 79 (80) : 7 Pat 790 (DB.) * (Vol 23) 1936 Mad 99 (100) (DB.)

[See also (Vol 25) 1938 Nag 308 (308)]

[See however (Vol 27) 1940 Pat 142 (144) : 18 Pat 761 (DB.)]

[4] The omission to issue notice does not render the sale in execution of a mortgage decree void (Vol 5) 1918 Oudh 379 (388) (DB.)

[5] Guardian of minor judgment-debtor submitting report that he is not in a position to contest execution proceedings and Court accepting report—Failure to issue notice under this rule not material irregularity. (Vol 5) 1918 Oudh 379 (388) (DB.) * (Vol 26) 1939 Cal 403 (406) : 11LR (1939) 1 Cal 493 (DB.)

[6] Money decree against legal representatives of deceased Mahomedan limited to assets in their hands—One of judgment-debtors dying during execution proceedings—His legal representatives not substituted—Sale is not void *in toto* but only as regards deceased judgment-debtor's legal representatives. (Vol 31) 1944 Mad 370 (371).

6. Notice to wrong person.—[1] If a notice is, as a fact, issued but served on a wrong person and on the objection of the latter the Court decides that he is the right legal representative, it acts only in the exercise of jurisdiction and the sale is only voidable and not void ('01) 25 Bom 337 (347, 352) : 27 Ind App 216 (PC).

[See also (Vol 25) 1938 Mad 945 (946)]

[2] In the above case proper legal representatives are equally bound by the execution proceedings, though they were not parties thereto. (Vol 13) 1926 Oudh 613 (614). * (Vol 25) 1938 Pat 372 (374) (DB.)

[3] Where both the decree-holder and the Court being not aware of the true age of the judgment-debtor, a notice is issued to a major judgment-debtor as if he were a minor, the issue of such notice only amounts to an irregularity. (Vol 26) 1939 Mad 5 (6) (DB.)

[See also (Vol 27) 1940 Pat 303 (304) : 19 Pat 393 (DB.)]

[4] If the decree-holder is aware of the proper legal representatives and deliberately gets notice served on a wrong person and there is no adjudication by the Court as to who is the legal representative, the sale is void. (Vol 27) 1940 Pat 62 (64) : (25 Bom 337 : 27 Ind App 216 (PC.) distinguished. * (Vol 8) 1921 Bom 385 (387) : 45 Bom 1186 (DB.) (Per Shah J.—Macleod C. J. held sale voidable.)

7. Irregular service of notice.—[1] The notice issued under this rule must be in accordance with law and must satisfy the requirements laid down in sub-r. (1). (Vol 3) 1916 Cal 511 (512, 513) (DB.) * ('09) 37 Cal 122 (126) (Day must be specified for appearance). * (Vol 15) 1928 Mad 1052 (1054) (DB.) (Sufficient time must be given). * ('85) 7 All 506 (508, 509) (PC.) (Notice to be signed by Judge or other officer.)

[2] An irregularity in the service of notice will not make the subsequent proceedings void. (Vol 8) 1921 Pat 145 (147) : 6 Pat L. Jour 319 (DB.) * (Vol 21) 1934 Pat 274 (278, 279) : 13 Pat 467 (DB.) * (Vol 33) 1946 Pat 270 (272) (DB.) (On death of a person his minor sons brought on record as majors—Notice against them as minors—Subsequent sale not invalid.)

[3] The irregularity may also furnish a ground for avoiding a sale under R. 90 (Vol 17) 1930 Pat 153 (154).

O. 21 R. 22 (*contd.*)

[4] It is for the Court to determine whether there has been sufficient service; every departure from the prescribed mode of service does not invalidate the service. (Vol 23) 1936 Pat 593 (594) (DB.)

[5] Executing Court ordering to "proclaim and sell"—Held that the Court must be deemed to have considered notice sufficient—Omission to declare notice sufficient does not mean that there was no due service of notice. (Vol 31) 1944 Mad 193 (194.)

8. Objection as to notice, when may be taken.—

[1] An objection that no notice was issued entertainable at any time, even in appeal. (11) 13 Cal L. Jour 162 (165) * (Vol 25) 1938 Pat 162 (164) (DB.)

[See also (Vol 22) 1935 Rang 42 (43, 44) (DB.)]

[2] Objection in appeal—No opportunity to meet objection to other party—Objection not maintainable (Vol 7) 1920 Pat 735 (736) : 4 Pat L. Jour 645 (DB.)

9. More than one notice, if contemplated by the rule.—[1] The provisions of the rule as to notice apply to the first execution application as well as to every subsequent application. (Vol 12) 1925 Pat 474 (476) : 5 Pat 1 (FB.)

[See however (Vol 16) 1929 Mad 275 (279, 280) (DB.)]

[2] The only executions are contained in the proviso. (Vol 12) A I R. 1925 Pat 474 (476) : 5 Pat 1 (FB) (Overruling (Vol 11) 1924 Pat 111 : 2 Pat 916.)

[3] The expression "the last order against the party" includes order which has been rated (Vol 17) 1930 Pat 536 (538) : 9 Pat 499 (DB.)

[4] An order directing the execution proceedings to be struck off for the default of the decree-holder does not furnish a fresh starting point. (Vol 25) 1938 Pat 162 (164) (DB.)

[5] Where the proceedings are only a continuation of a prior execution case, no notice is necessary. (Vol 15) 1928 Cal 241 (242) (DB) * (Vol 18) 1931 Bom 425 (427, 428) (DB.) * (Vol 29) 1942 Oudh 1 (8) : 17 Luck 249 (DB.) * (Vol 7) 1920 Mad 1084 (1035) : 43 Mad 57 (DB.) (Property attached—Application for execution dismissed—Attachment left existing—Subsequent application for Sale—Notice unnecessary.)

10. Remedy when property has been sold without notice under this rule.—[1] Sale without notice—Party aggrieved is entitled to have the sale declared void and to damages. (1865) 3 Suth W R 120 (122) (DB)

[2] Damages may be claimed by means of an application under S. 47 ('08) 32 Bom 572 (574) (DB.) * ('11) 13 Cal L. Jour 162 (164) (DB)

[See also (Vol 25) 1938 Rang 292 (293) (DB.)]

11. Date of the decree.—[1] Decree of the first Court is affirmed or modified in appeal—Date of decree is the date of appellate decree. If the appeal is dismissed for default, date of decree is that of the decree appealed against. (Vol 4) 1917 Cal 728 (730) : 44 Cal 954 (DB.)

[2] Decree amended—Starting point is the date of the amended decree and not the original decree. (Vol 27) 1940 Pat 5 (6) (DB.)

[3] Instalment decree—Period runs from the date of the decree and not from the date of default in pay-

ment of the instalment. (Vol 8) 1921 Lah 384 (385) (DB.)

[See also ('43) 1943 Mad W N 420 (421) (DB.)]

12. Notice, when not necessary.—[1] In cases falling under cl. (a) of sub-r. (1), no notice need be issued to a judgment-debtor who has no interest in the property against which execution is sought. (Vol 13) 1928 Cal 86 (86, 87) (DB)

[2] In cases falling under cl. (b) of sub-r. (1), notice to an adult legal representative capable of representing the estate is sufficient; notice to the other legal representatives is not essential (Vol 16) 1929 Mad 275 (282) (DB.)

[3] Where the legal representative is already a party on the record, though in another capacity, no notice need be given. (Vol 12) 1925 Cal 1227 (1228) (DB.) * ('04) 14 Mad L. Jour. 342 (343) (DB.)

[See also (Vol 23) 1936 Pat 253 (254).]

13. Notice and limitation:—See A I R. Commentaries on the Limitation Act, 2nd (1942) Edn., Art 182, Notes 116 and 129 and Art. 183, Note 10.

13a. Failure to show cause why decree should not be executed—Effect.—[1] No constructive *res judicata* as to a point as to which there is no direct notice to the judgment-debtor—Judgment-debtor not appearing in response to notice under R. 22. He is not precluded from raising point as to the partial satisfaction of decree. (Vol 30) 1943 Bom 252 (254, 255) (DB.)

[2] Failure of judgment-debtor to appear on date fixed in notice under Rule 22—Court ordering notice under Rule 66 and fixing a certain date—Judgment-debtor appearing on such date and objecting that decree was barred by limitation—Held that as period of limitation for appeal or review against the previous order against the judgment-debtor had not expired the Court could go into his objection. (Vol 22) 1935 Cal 306 (307) (DB.)

[3] Court proceeding to execute declaratory decree—Failure of judgment-debtor to appear and object in answer to notice under this rule is not a bar to his raising objection subsequently as Court's action is without jurisdiction. (Vol 21) 1934 Pesh 64 (67) (DB.)

[4] Execution application—Notice served on judgment-debtor—Question of limitation not raised—Question can be raised on subsequent application (Vol 30) 1943 Oudh 385 (386.)

14. Court executing the decree.—[1] Where the decree is transferred for execution, the transferee Court can, and is the only Court competent to, issue the notice. (03) 12 Cal W N 897 (899) * (Vol 5) 1918 Mad 580 (584, 585) : 40 Mad 1069 (FB.) * (Vol 9) 1922 Cal 3 (4) (DB.) * (Vol 12) 1925 Oudh 448 (450) : 28 Oudh Cas 330 (DB.)

[2] An application to execute against the legal representatives must be made to the Court which passed the decree. ('93) 18 Bom 224 (226) (DB.) * (Vol 12) 1925 Oudh 448 (450) : 28 Oudh Cas 330 (DB.)

[3] In the above case notice under the rule will be issued by the transferee Court. ('05) 28 Mad 466 (469) (FB.)

15. Sub-rule (2).—[1] Sub-rule (2) does not abrogate the mandatory character of the rule. (Vol 1) 1928 Cal 60 (62) : 55 Cal 96 (DB.) * (Vol 11) 1924 Mad 481 (486) : 47 Mad 288 (FB) * (Vol 23) 1936 Mad 205 (207) : 59 Mad 461 (FB.)

[2] The Court has discretion to dispense with the notice under certain circumstances. (Vol 20) 1933 Cal

Procedure after issue of notice.

23. (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

[1882-S. 249 ; 1877-S. 249 ; 1859-S. 247. See Ss. 38, 47, 51 and Rr. 24 and 57 below.]

PROCESS FOR EXECUTION

Process for execution. **24.** (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

[1882-Ss. 250, 251, para 1; 1877-Ss. 250, 251 (1), 343; 1859-Ss. 221, 222. Cf. R. S. C., O. 42 Rr. 14 and 16. See S. 51.]

O. 21 R. 22 (Contd.)

560 (561) (DB.) * (Vol 22) 1935 Cal 125 (126) (DB.) (Judgment-debtor in previous execution application objecting to execution in answer to notice under this rule—Notice dispensed with.)

[3] The reasons should be recorded if the notice is dispensed with. (Vol 5) 1918 Mad 645 (647).

[But see (Vol 16) 1929 Rang 161 (161) : 7 Rang 110. * (Vol 22) 1935 Rang 42 (43) (DB.)]

[4] The omission to record reasons for not issuing notice is a mere irregularity and the proceedings will not be totally invalid merely by reason of the omission. (Vol 19) 1932 Bom 509 (511). ("No reason to issue notices"—Held, sufficient compliance.) * (Vol 18) 1931 Cal 443 (444) : 58 Cal 940 (DB.) * (Vol 11) 1924 Mad 431 (436) : 47 Mad 288 (FB.) * (Vol 16) 1929 Mad 718 (719) * (Vol 23) 1936 Pat 37 (38) : 37 Cr. L. Jour 319 * (Vol 11) 1924 Oudh 120 (120) : 26 Oudh Cas 288.

[But see (Vol 16) 1929 Rang 161 (161) : 7 Rang 110 * (Vol 22) 1935 Rang 42 (43) (DB.)]

[5] Under the rule as amended by the Lahore High Court, a failure to record reasons is only an irregularity not affecting jurisdiction. (Vol 26) 1939 Lah 473 (474) : ILR (1940) Lah 231.

16. Appeal.—[1] An order on a question of notice falls under S. 47 and is, therefore, appealable. (Vol 13) 1926 Pat 397 (397) (DB.) * (Vol 13) 1926 Cal 539 (539, 540) (DB.)

[2] An order of arrest without notice is not a final order and is not appealable. (Vol 16) 1929 Mad 718 (720.)

[3] Even in the above cases the High Court will interfere in revision in extreme cases. (Vol 16) 1929 Rang 161 (162) : 7 Rang 110.

[4] An order allowing or refusing an application to set aside a sale for want of a notice falls under S. 47 and is, therefore, appealable. ('08) 32 Bom 572 (574) (DB.) * ('12) 40 Cal 45 (49) (DB.) * (Vol 11) 1924 Mad 431 (432) : 47 Mad 288 (FB.) * (Vol 8) 1921 Pat 145 (149) : 6 Pat L. Jour 319 (DB.)

ORDER 21 RULE 23 Note 1.

[1] Execution—Notice of Execution—Judgment-debtor not appearing—Court should order execution without considering possible objections, (Vol 22) 1935 All 727 (729) : 57 All 965.

[2] Order under R. 23 (1) passed on judgment debtor's failure to appear in response to notice and object—Order precludes judgment-debtor from raising plea of limitation in subsequent proceedings. (Vol 28) 1941 Mad 440 (441, 442, 443) (DB.) * (1909) 1 Ind Cas 284 (284, 285) (Cal.) * (Vol 9) 1922 Oudh 117 (118) : 25 Oudh Cas 13. (Failure of judgment-debtor to raise the plea of limitation in a previous execution application will preclude him for raising it later on.)

[But see (Vol 4) 1917 Nag 172 (173) (Order passed as a matter of course under O. 21, R. 23 does not operate as final adjudication.)]

[3] Dismissal of execution application under R. 57 cancels order under R. 23 to proceed against legal representative. (Vol 3) 1916 Mad 886 (886).

[4] Notice issued to judgment-debtor—Both parties absent on day fixed—Execution application can be dismissed. (1896) 20 Bom 541 (542).

[5] Registrar of High Court has no power to pass order under O. 21, R. 23—Such order has to be passed by the Court itself. (Vol 3) 1916 Cal 488 (492) : 43 Cal 903 (FB).

[6] The power of Court executing a decree to order execution against the legal representative of the deceased judgment-debtor after issue of notice is not cut down by the provisions of S. 50. (1895) 22 Cal 558 (561).

[7] Mere issue of notice under R. 22 does not, but the order for execution under R. 23 does operate as revivor. (Vol 3) 1916 Cal 488 (494) : 43 Cal 903 (FB).

[8] Person appearing in pursuance of notice—Objections put forward—Court is bound to consider them. (1910) 5 Ind Cas 546 (547) (All) * (Vol 6) 1919 Sind 49 (50) : 13 Sind L R 138 (Court has discretion to pass an order on judicial principles including equitable consideration.)

[9] Judgment-debtor can raise objection that former application is not according to law and does not save limitation. (Vol 22) 1935 All 727 (729) : 57 All 965.

ORDER 21 RULE 24 Note 1.

[1] No appeal from decree filed within limitation—Court cannot refuse to issue process of execution. (1884) 10 Cal 817 (819) (DB).

[2] Process signed by amin but not bearing seal of Court—Attachment is illegal—Hence removal of such property is not offence. (Vol 22) 1935 All 214 (214) :

PROVINCIAL AMENDMENTS.

Allahabad

After the words "be executed," at the end of sub-rule (3) *add* the words "and a day shall be specified on or before which it shall be returned to Court."

Bombay

Add the following proviso to sub-rule (2) :

"Provided that a First Class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court,"

[15-10-1930]

Calcutta

Add the following to sub-rule (3) :

"and a day shall also be specified on or before which it shall be returned to the Court."

Madras

Delete the full stop at the end of sub-rule (3) and *add* the following words :

"and a day shall be specified on or before which it shall be returned to Court."

[13-10-1936.]

Nagpur

In sub-rule (3), for the word "executed," occurring at the end, *substitute* the words "returned to the Court."

[29-6-1943]

Oudh

In sub-rule (3) after the words "be executed", at the end of the sub-rule, *add* the words "and a day shall be specified on or before which it shall be returned to Court,"

Sind

Add the following proviso to sub-rule (2) :

"Provided that a First Class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

25. The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in which it was executed, and, if the process. latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[1882-Ss. 251, last para and 343 ; 1877-S. 251, last para; 1859-S. 222 last para.]

PROVINCIAL AMENDMENTS.

Allahabad

Substitute the following for paragraph (2) :

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

O. 21 R. 24 (*contd.*)

57 All 680 : 36 Cr L Jour 340. * (Vol 13) 1926 Pat 237 (238) : 5 Pat 216 : 27 Cr L Jour 418. (Provision as to seal is mandatory). * (Vol 6) 1919 Pat 404 (405) : 3 Pat L Jour 636 : 20 Cr. L. Jour 189. (Seal—Absence of Restitution to the attachment is not an offence.) * (Vol 26) 1939 Rang 320 (320) : 1939 Rang L R 445 : 40 Cr L Jour 845. (Warrant not bearing seal—Resistance to arrest is no offence).

[3] Process not signed by Judge is illegal. (1885) 7 All 508 (508) (Process not signed by Judge but by Munsarim—Attachment held illegal).

[4] Warrant of execution not bearing a date, on or before which it should be executed, is not a good warrant. (Vol 9) 1916 Pat 272 (272, 273) : 1 Pat L Jour 550 : 18 Cr. L. Jour 39.

[5] There is nothing to prevent an officer to whom a warrant is issued from delegating his authority to some subordinate officer for executing the warrant. (Vol 19) 1932 All 227 (227) : 33 Cr L Jour 887. (Delegation defective—Resistance to execution is no offence. * (1895) 22 Cal 596 (604, 605). Nazir has power to delegate the execution of warrant to the peon).

* (Vol 27) 1940 Lah 30 (31) (Nazir can delegate execution of process to his subordinates.) * (Vol. 32) 1945 Nag 210 (212) : 1 L R (1945) Nag 685 : 47 Cr L Jour 175. (Warrant addressed to Naib Nazir can be executed by process-server.) * (Vol 27) 1940 Rang 112 (113) : 1940 Rang L R 253 : 41 Cr L Jour 567. (Bailiff can delegate the execution of warrant to process-server)

[6] Nazir has no authority to execute a warrant directed to a bailiff. (Vol 9) 1916 Pat 272 (272) : 1 Pat L Jour 550 : 18 Cr. L Jour 39 (DB).

[7] Date for return fixed—subsequent attachment is not lawful. (Vol 20) 1933 All 46 (47) : 55 All 119. * (1884) 10 Cal 18 (19).

[8] Applies to warrants under C. P. Land Rev. Act. S. 131. (Vol 11) 1924 Nag 68 (69) : 19 Nag L R 183 : 25 Cr L Jour 223.

. ORDER 21 RULE 25 Note 1.

[1] Warrant issued by Court and directed to bailiff - Nazir directed it to peon fixing an early date—Execution by peon within time is right and the officer entrusted with the execution is the peon and not Nazir. (1913) 40 Cal 849 (852) : 14 Cr L Jour 274 (DB).

Bombay

The following proviso shall be added to sub-rule (2) of Rule 25 :

"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this rule."

[9-8-1940.]
Madras

(1). *Substitute* the following in the place of the present sub-rule [2] :

"(2) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree-holder."

(2). *Add* the following as sub-rule (3) :

"(3) Where the endorsement of such officer is to the effect that he is unable to execute the process, the Court shall examine him or cause him to be examined by any other Court touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.

[Dis. No. 2282 of 1916]

Where the inability to execute the process is stated to be due to the satisfaction of the decree and such satisfaction has been endorsed on the process as mentioned in sub-rule (2) above, the Court shall issue notice to the decree-holder to show cause, on a day to be fixed by the Court, why such satisfaction should not be recorded as certified: and if, after service of such notice, the decree-holder fails to show cause why the satisfaction should not be recorded as certified, the Court shall record the same accordingly.

A record of satisfaction under the provisions of this sub-rule shall have the same effect as one under the provisions or Order 21 Rule 2, sub-rule (2)."

Oudh

For the existing sub-rule (2), *substitute* the following :

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

STAY OF EXECUTION

26. (1) The Court to which a decree has been sent for execution shall, upon When Court may sufficient cause being shown, stay the execution of such decree for a reasonable stay execution. time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

ORDER 21 RULE 26 Note 1.

[1] Section 2 and Order 21 Rule 26 should not be read as giving the Court which passed the decree and the Court to which the decree is sent for execution, concurrent jurisdiction to determine questions affecting the validity of a proceeding in the former Court. (Vol 24) 1937 Rang 477 (479) : 1937 Rang L R 287 (DB).

[2] Under this rule, Court cannot stay execution except temporarily. (1885) 7 All 330 (333) (DB).

[3] Under Order 21, Rule 26, the transferee Court can only stay execution in order to enable the judgment-debtor to apply to the Court by which the decree was passed for an order to stay execution or for any other order relating to the decree or its execution. (Vol 18) 1931 Lah 690 (691).

[4] The judgment-debtor cannot have stay of execution of the decree when his grounds for stay are not those that are mentioned in O. 21, R. 26. (Vol 14) 1927 Cal 581 (589) (DB).

[5] Decree transferred to another Court for execution—Objections by judgment-debtor under S. 65—Sufficient cause shown against execution—Executing Court should stay execution under this rule. (1880) 5 Cal 736 (737).

[6] Transferee Court may adjourn execution to enable party interested to move proper Courts questioning the jurisdiction of the Court passing the decree. (1883) 7 Bom 481 (483).

[7] Court is bound to stay execution when acquainted with the fact that decree is not existing. (Vol 14) 1927 Rang 104 (105) : 4 Rang 562 (DB).

[8] Executing Court should stay execution to enable the judgment-debtor to get the decree passed against him set aside on the ground of fraud. (1882) 4 Mad 324 (325) (DB)

[9] Sub-rule 3 entitles Court to demand security before making order for stay. (Vol 12) 1925 Lah 552 (554).

[10] A Court is justified in refusing the security of one over whose property or person it has no jurisdiction. (Vol 16) 1929 Lah 161 (161).

[11] Judgment-debtor applying for stay on the ground that his property is tied up for the moment—Execution should not be stayed unconditionally or by merely requiring defendant to give security for small amount in six months' time for appearance. (Vol 12) 1925 Mad 908 (909) (DB).

[12] Court requiring security for mesne profits—Security should be for indefinite amount to be determined subsequently. (Vol 16) 1929 Lah 161 (162).

[13] An order granting stay of execution is not appealable as a decree under S. 47 Civil P. O. (Vol 11) 1924 All 808 : 46 All 733 (DB).

[14] An appeal lies against an order requiring security for stay of execution. (1886) 12 Cal 624 (626) (DB).

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

Power to require security from, or impose conditions upon, judgment-debtor.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

[1882-Ss. 239, 240. 1877-Ss. 239, 240; 1859-Ss. 290, 291. Cf. R. S. C., O. 42 R. 17 cl. (b). See Ss. 42 and 47].

PROVINCIAL AMENDMENTS.

Allahabad

In sub-rule (3) for the words "the Court may" read the words "the Court shall, unless good cause to the contrary is shown."

Calcutta

In sub-rule (3) cancel the words "the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit" and substitute therefor the following words :

"the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary."

Lahore

In sub-rule (3) for the words "the Court may", substitute the words "the Court shall, unless sufficient cause is shown to the contrary." [7-4-1932.]

Nagpur

In sub-rule (3), for the word "may", substitute the words "shall, unless good cause to the contrary is shown." [29-6-1943.]

N. W. F. P.

In sub-rule (3), for the words "the Court may", substitute the words "the Court shall, unless good cause to the contrary is shown."

Oudh

In sub-rule (3) for the words "the Court may", read the words "the Court shall, unless good cause to the contrary is shown."

Patna

In sub-rule (3) substitute the words "shall, unless sufficient cause is shown to the contrary," for the word "may."

Liability of judgment debtor discharged.

27. No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

[1882-S. 241; 1877-S. 241; 1859-S. 293. See S. 53, sub-s. (2) and O. 21, R. 40, sub-rule (4).]

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

[1882-S. 242; 1877-S. 242; 1859-S. 292. See S. 42 and O. 21 R. 26.]

Stay of execution pending suit between decree-holder and judgment-debtor.

29. Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

[1882-S. 243; 1877-S. 243, 1859-S. 209.]

ORDER 21, RULE 28—Note 1.

[1] Rule 28 indicates that Court which passed the decree can pass orders relating to the execution of a decree transferred to another Court for execution and the latter Court is bound by such orders. (Vol 17) 1930 Oudh 305 (308) (DB). & (Vol 23) 1936 Pesh 97 (100).

[2] Transmitting Court must order execution—Failure—Its effect is that executing Court can only proceed against property charged in decree. (Vol 2) 1915 Oudh 142 (143).

ORDER 21, RULE 29.

Synopsis.

1. Scope of the Rule.
2. Holder of a decree.

3. Such Court.

4. "Until the pending suit has been decided".

5. Execution of award, if can be stayed under this rule.

6. Appeal and Revision.

1. Scope of the rule.—[1] The object of this rule is two-fold :—

(1) To enable the judgment-debtor and the decree-holder to adjust their claims against each other and,

(2) To prevent a multiplicity of execution proceedings. (Vol 15) 1928 Cal 222 (224) : 55 Cal 512 (DB).

[2] O. 21, R. 29 and O. 41, R. 6 (2) not applicable to case—Court has inherent power to order stay of execution, but not without putting the unsuccessful claimant upon terms. (Vol 21) 1934 Pat 637 (637).

PROVINCIAL AMENDMENTS

Allahabad

Add "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "the Court may."

Rule 29A N.-W. F. P.

After Rule 29 the following rule shall be added :

"29A. When a suit under Rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided."

O. 21 R. 29 (contd.).

[3] The rule relates to execution proceedings only and therefore does not apply to proceedings for restitution. (Vol 17) 1930 Lah 961 (968).

[4] The executing Court has no power to stay the execution under O. 21, R. 29, if at that time no suit is pending before it against the decree-holder on the part of the judgment debtor; but the Court has an inherent power under section 151 of the Civil Procedure Code to stay execution on the ground that the ex parte decree was obtained by fraud. (Vol 10) 1923 Lah 514 (515).

[5] Suit for declaration against decree-holder that decree is satisfied by uncertified adjustment out of Court—Stay of execution cannot be granted. (Vol 10) 1923 Cal 645 (646) (DB).

[6] Order 21, R. 29, is not an imperative one and the Court has a discretion either to grant the relief asked for, namely, stay of execution, or to refuse it. (Vol 22) 1935 Rang 389 (390) (DB). * (Vol 22) 1935 Rang-151 (152) : 13 Rang 351 (DB).

[7] O. 21, R. 29, embraces every kind of suit which is maintainable. There is no limitation in the rule. Once it is conceded that a suit is maintainable the procedure laid down in this rule is at once attracted. (Vol 23) 1936 Mad 102 (103).

[8] Court can stay execution under R. 29 only before operation of R. 29 takes place, i.e., before sale of property. (Vol 22) 1935 Rang 151 (152) : 13 Rang 351 (DB).

[9] Rule 29 has no application to granting of interim injunction and applicant cannot be asked to furnish security. (Vol 20) 1933 Nag 153 (154, 155).

[10] Execution of decree stayed by injunction—Court passing order that attachment is to subsist till decision of suit by judgment-debtor and that application is to stand dismissed for time being—Order is not warranted by law—It is merely a suspensory order keeping execution case pending. (Vol 23) 1936 Cal 239 (240) : 63 Cal 56 (DB).

2. Holder of a decree.—[1] Plaintiff sued an assignee of a decree obtained against the plaintiff. The claim of the plaintiff was for damages for breach of an agreement with the defendant whereby the decree against the Plaintiff was to be satisfied. Plaintiff applied for stay of execution of decree by the defendant against the plaintiff—Held that the suit was maintainable and was a suit within O. 21, R. 29, and stay could be granted within the discretion of the Court. (Vol 23) 1936 Mad 102 (103).

[2] Set off—Equitable—A. holding decree against B. Suit by B. against A—Pending suit, A assigning decree to C—During execution proceeding B obtaining decree against A in his suit—B can claim equitable set off for amount due to him under this decree against C's claim. Held C took the decree subject to B's equitable right to have execution stayed until his suit has been decided and therefore to set off his decree. (Vol 25) 1938 Bom 253 (256) : ILR (1938) Bom 263 (DB).

3. Such Court.—[1] Where application to stay execution is made to Court which did not pass decree O. 21, R. 29 does not apply. (Vol 17) 1930 All. 121 (121) (DB).

[2] The words 'decree of such Court' include also the decree passed on appeal from the decree of that Court. (1888) 10 All 389 (393, 394).

[3] Court to which decree is transferred has power to stay execution. (Vol 21) 1934 Cal 4 (4, 5) : 60 Cal 1119 (DB). * (1888) 10 All 389 (393, 394).

[4] O. 21, R. 29, has no reference to personality of judge presiding over a Court—Execution proceedings need not be in Court in which suit is pending. It is sufficient if suit is pending in any Court against the holder of a decree of such Court. (Vol 18) 1931 Bom 247 (248, 249) (DB). (Two judges—Execution before one judge can be stayed).

4. Until the pending suit has been decided. [1] Words "pending suit has been decided" mean "finally decided" and include an appeal. (Vol 15) 1928 Cal 222 : 55 Cal 512.

[But see (Vol 31) 1944 Mad 73 (74) (DB).]

[2] Stay can be given even after a suit has been dismissed provided that an appeal is pending. (Vol 22) 1935 Rang 389 (390) (DB).

[3] Execution stayed under inherent powers and not under R. 29—Order operates till disposal by Court making order and not till disposal of appeal. (Vol 19) 1932 Cal 19 (20) : 58 Cal 1113. (Vol 15) 1928 Cal 222 : 55 Cal 512. (Dissented from.)

[4] Under its inherent powers, appellate Court can stay execution of original decree pending the decision of the appeal. (10) 1910 Pun L R 149 page 406 (408) : 1910 Pun Re. No. 82.

5. Execution of award, if can be stayed under this rule. [1] An award under the Arbitration Act (IX of 1899), though it can be enforced as a decree under S. 18 of the Act, is nothing more than an award and its execution cannot be stayed under O. 21, R. 29. (1911) 35 Bom 196 (198).

6. Appeal and Revision.—[1] An appeal lies from an order passed under O. 21, R. 29, staying or refusing to stay execution. (1888) 10 All 389 (391). (Order staying execution.) * (1897) 20 Mad 366 (367) (DB). (Refusing to stay execution.)

[But see (1883) 9 Cal 214 (215) (DB). (Order staying execution is neither one under S. 47 nor an appealable order.)]

[2] O. 21, R. 29—Court has ample discretion in passing an order in which the execution of the decree could be stayed, until the pending suit has been decided and where it is properly exercised, High Court will not interfere. (Vol 18) 1931 Bom 247 (249, 250) (DB).

[3] Security for full amount of decree under O. 21, R. 29, being discretionary, High Court will not interfere in revision, unless discretion was improperly used. (Vol 16) 1929 Sind 110 (111) (DB).

[4] [See also S. 47, Note 36.]

MODE OF EXECUTION.

30. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

[1882-S. 254; 1887-S. 254, 1859-Ss. 201, 232. See S. 51]

31. (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit and shall pay the balance (if any) to the judgment-debtor on his application.

ORDER 21, RULE 30.

Synopsis.

1. Scope.
2. Option as to mode of execution.
3. Attachment and sale.

1. **Scope** :—[1] Rule 30 is not exhaustive as to modes of execution of money decrees. (Vol 13) 1926 Oudh 616 (617) : 1 Luck 569 (DB.)

[2] Execution of a money-decree by ejectment of a tenant is a method provided by S. 61 of the Oudh Rent Act in addition to the particular method of execution provided by the Code. (1912) 15 Oudh Case 381 (382) (DB.)

[3] An order directing a party to refund money wrongly drawn out by him in land acquisition proceedings could be enforced under order directing a party to pay money, as compensation for costs or otherwise; and directing that such decree or order may be enforced by the imprisonment of the judgment-debtor, or by sale and attachment of his property, or by both. (1905) 32 Cal 921 (928) (DB)

2. **Option as to mode of execution.** [1] O. 21, R. 30 shows sufficiently that the holder of a money decree is not to be restricted to one mode of execution. (Vol 29) 1942 Sind 83 (85) : ILR (1942) Kar 168 (DB). * (Vol 30) 1943 Lah 166 (168) (Decree-holder wishing to avail of two remedies open to him—Court should ordinarily grant both.) * (Vol 17) (1930) Lah 220 (221) (Execution against person—Court cannot compel him to accept payment by instalments.) * (Vol 26) 1939 Pat 380 (381) : 18 Pat 366 (DB).

[2] Judgment-creditor is to decide whether execution should be taken against the person or property of judgment-debtor—Court, though it has discretion for refusing simultaneous execution against both, cannot decline to order execution against person in the first instance. (Vol 13) 1926 Lah 110 (111) : 6 Lah 548 (DB). (Refusal should be an exception and not rule.) * (1883) 5 All 86 (88, 89) (FB).

[See also (Vol 14) 1927 Lah 131 (132) (DB). (Notice to surety by Court under the proviso to S. 145 along with the warrant for his arrest is not invalid.)

[See however (Vol 2) 1915 Lah 174 (174). (Other modes available—Decree-holder not justified in proceeding against person.)

[3] Application for execution of money decree by attachment and sale—Part of property hypothecated to decree-holder as security bond—Objection by judgment-debtor that suit on bond should be instituted first is not maintainable. (Vol 22) 1935 All 179 (180).

[4] Where a judgment-debtor conceals himself arrest and attachment of his property can simultaneously be made in execution of a decree against him, even though he owns considerable property. (Vol 20) 1933 Lah 307 (308).

[5] Execution—Simultaneous execution by two or more methods is reasonable and feasible—Security sufficient for realising decree—Decree-holder's procedure showing harassment and not desire to realise decree—Court may refuse relief against judgment-debtor's person. (Vol 23) 1936 Pat 28 (29) (DB).

[6] Decree for maintenance creating charge on specific property—In case charged property was not available charge to shift on other property of judgment-debtor—Execution against person of judgment-debtor without first proceeding against charged property—Application held could not be allowed as it was made mala fide. (Vol 33) 1946 All 385 (387) (DB).

3. **Attachment and sale** :—[1] This rule does not apply to decree charging property. Decree directing sale of specific property - No attachment is necessary. (Vol 11) 1924 Pat 258 (258) : 2 Pat 768 (DB.) * (Vol 23) 1936 Lah 573 (578) (Decree directing property to be considered as under mortgage and judgment-debtor prevented from alienating it - Attachment before sale is not necessary.)

[2] Attachment - Money decree payable by instalments - Security given by judgment-debtor of certain property - Default in payment - For sale of property charged, no attachment is necessary. (Vol 21) 1934 Pat 608 (609) : 13 Pat 387 (DB)

[3] In the case of mortgage-decrees direction for sale in the decree is the authority to sell and therefore no attachment is necessary. (1880) 4 Bom 515 (520) (DB.)

[4] Sale of judgment-debtor's property without attachment is valid and there is no irregularity which can vitiate the same. The effect of rules 30 and 64 of O. 21 was not to limit the power given by S. 51 to sell without attachment, the absence of which does not vitiate such a sale nor make the judgment-creditor guilty of any irregularity. (Vol 26) 1939 Bom 277 (278) : ILR (1939) Bom 420 (DB).

[5] See also under S. 51,

ORDER 21, RULE 31 Note 1.

[1] In the present Civil Procedure Code the reference to suits for recovery of a wife has been omitted from O. 21, R. 31. (Vol 1) 1914 Mad 219 (221) (DB.)

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1882-S. 259; 1877-Ss. 259, 260; 1859-S. 200]

PROVINCIAL AMENDMENTS

Allahabad

For the words "six months", wherever they occur in each sub-rule, *read* the words "three months, or such extended time as the Court may for good cause direct."

Calcutta

In sub-rules (2) and (3), *substitute* the words "three months" for the words "six months."

Lahore

(1) In sub-rule (2), for the word "six" *substitute* the word "three."

(2) *Add* the following proviso after sub-rule (2) :

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all."

(3) In sub-rule (3), for the words "six months" *substitute* the following words "three months or such other period as may have been prescribed by the Court."

[7-4-1932]

Madras

In sub-rules (2) and (3), for the words "six months", *substitute* the words "three months", and *add* the following as sub-rule (4) :

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit."

[13-10-1936]

Nagpur

In sub-rules (2) and (3) for the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."

[29-6-1943.]

N.-W. F. P.

In sub-rules (2) and (3), for the words "six months", *substitute* the words "three months", and *add* the following as sub-rule (4) :

"(4). The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in all as it may think fit."

Oudh

In sub-rules (2) and (3), for the words "six months", *substitute* the words "three months", or such further time as the Court may, in any special case, for good cause shown, direct."

Patna

In sub-rules (2) and (3), for the words "six months", *substitute* 'three months', and *add* the following as sub-rule (4) :

"(4). The Court may, for sufficient cause, extend the period of three months mentioned in sub-rules 2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

32. (1) Where the party against whom a decree for the specific performance of a contract, or (Decree for specific performance, for restitution of conjugal rights, or for an injunction. for restitution of conjugal rights, or for an injunction. specific performance of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both.

O. 21 R. 31 (contd.)

[2] The words 'Specific moveable' in the rule do not include 'money' and therefore a money decree cannot be executed under this rule (Vol 25) 1938 Cal 471 (474) (DB.) * (Vol 1) 1914 Mad 572 (573) : 37 Mad 381 (DB.)

[3] A decree for delivery of specific moveable property which can be enforced by the stringent method in this rule can be passed only in a suit where the plaintiff alleges and proves facts which give him a right to compel its delivery under the provisions of S.11, Specific Relief Act, 1877. (Vol 25) 1938 Cal 471 (474) (DB.) * (Vol 3) 1916 Mad 314 (317) : 39 Mad 1 (DB.)

[4] Order 21, Rule 31 (as amended in Madras)—Decree for return of moveable - Question of compensation in alternative arises only when the Court acting under O. 21. R. 31, makes every reasonable attempt to execute the decree and such endeavour has proved fruitless. (Vol 30) 1943 Mad 716 (716, 717.)

[5] Holders of a decree in terms of O. 20, R 10 cannot execute the money-portion of it without having recourse to the procedure prescribed by O. 21, R. 31 (Vol 14) 1927 Cal 711 (DB.) (Non-delivery of specific moveable - Damages need not be assessed only on the footing of wilful neglect or devastavit.) * (1908) 13 Mad L. Jour 444 (444) (DB.) (The alternative amount in the decree comes into operation only when it is found impossible to obtain the property ordered to be delivered.)

ORDER 21 RULE 32

Synopsis.

1. A. Scope.
2. Decree for specific performance.
3. Restitution of conjugal rights.
4. Form of decree for restitution of conjugal rights.
5. Decree for injunction.
6. "Opportunity of obeying the decree".
7. Sale of property. Sub rule (3).
8. Disobedience of order for injunction or specific performance.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made, has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

O. 21 R. 32 (*contd.*).

9. Disobedience of decree for restitution of conjugal rights.

1. A. Scope.—[1] Execution application—R. 32 (1) not specifically mentioned - Some of reliefs falling within R. 32 (1)—Application cannot be dismissed as a whole. (Vol 32) 1945 Oudh 81 (82).

[2] Decree for injunction - O. 21, R. 32 only prescribes mode of execution - If Court has to be moved, application should be made within limitation - On breach of injunction no contempt of Court proceeding arises. (Vol 22) 1935 Lah 702 (704.)

2. Decree for specific performance.—[1] Decree for specific performance of contract for sale - Court can as well grant possession of property even though no relief for possession is asked for in plaint or awarded by decree. (Vol 18) 1931 Pat 179 (180, 181)

[2] Decree for specific performance operates in favour of both parties - Defendant is as much entitled to enforce decree as plaintiff. (Vol 19) 1932 Cal 579 (582): 59 Cal 501.

3. Restitution of conjugal rights —[1] A decree for the restitution of conjugal rights passed between Hindus or Mohomedans can be enforced under this rule (1875-77) 1 Bom 164 (167) (DB.)

[2] In a decree for the restitution of conjugal rights passed between Mohomedans, the Court will refuse to send the wife back to her husband's house if cruelty by the husband is proved; so also if there is gross failure by the husband of the performance of his obligations towards his wife (1866-67) 11 Moo Ind. App. 551 (610) (PC)

[3] The general application of O. 21 R. 32 to decrees for the restitution of conjugal rights is, in the case of Parsees, superseded by the special provision of S. 36 of the Parsee Marriage and Divorce Act. (1872) 9 Bom H. C. R. 290 (290, 297, 304.)

4. Form of Decree for restitution of conjugal rights.—[1] In a suit for restitution of conjugal rights against the wife and other defendants who prevent her from going to her husband, the decree should declare the husband's right and direct that the other defendants do refrain from preventing the wife from returning to him. (Vol 7) 1920 Pat 798 (799.)

[2] Though R. 33 (1) of O. 21 has qualified R. 32 in enforcing decrees for restitution of conjugal rights, still a Court can pass an effective decree, so that where the wife is a minor, her parents can be directed to hand her over, and in default execution can proceed against their person and property. (Vol 1) 1914 Mad. 219 (221).

[3] Where, in a decree for the restitution of conjugal rights, the plaintiff's mother-in-law who was impleaded as a defendant in the suit, was directed to refrain from preventing the plaintiff's wife from returning home, it was held that her action in merely permitting her daughter, who was of age to reside in her home after decree, did not justify the attachment of her property under this rule. (1875-77) 1 All 501 (505) (DB.)

5. Decree for injunction.—[1] R. 32 (1) applies to prohibitory injunctions as well as to mandatory injunctions (Vol 32) 1945 Oudh 81 (82). * (Vol 6) 1919 Cal 674 (678)—46 Cal 108 * (1911) 21 Mad L. Jour 465 (466).

[2] Suit by plaintiff to be appointed guardian of his minor sons - Suit decreed - Defendant ordered to hand over the custody of minors - Defendant can be proceeded against under O. 21 R. 32 for non-compliance with order. (Vol 2) 1915 Mad 157 (170).

[3] An order to furnish an account which was contained in a preliminary decree is not an injunction within O. 21 R. 32. The word "injunction" as used in O. 21 R. 32 has a more extended meaning than it has in the Specific Relief Act. It is not every order of a Court directing a person to do a certain act that is an injunction. In its essence an injunction is a relief consequential upon an infringement of a legal right. (Vol 5) 1918 Pat 451 (452) : 3 Pat L. Jour 106 : 19 Cr. L. Jour 385.

6. "Opportunity of obeying the decree".—[1] An order for enforcing a decree by imprisonment under O. 21 R. 32 should not be made till the defendant has had an opportunity of obeying the decree or has continuously refused to obey it. (1870) 7 Bom H. C. R. (O. C. J.) 122 (136.)

[2] Decree in 1899 against the defendant for possession of the house and an injunction restraining him from occupying the house—Application for execution of the decree in 1904 alleging that the judgment-debtor

Illustration

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion, B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings.

[1882-S. 260; 1877—Ss. 259, 260; 1859—S. 200, *Cf. R. S. C., O. 42 Rr. 7 and 30*]

a. *Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 2.*

Objects and Reasons.

"The Committee have omitted in this rule all reference to a decree for the recovery of a wife, for there can be no such decree under the law, as a wife cannot be treated as a chattel to be delivered over to the husband. When any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both"—S. O. R.

PROVINCIAL AMENDMENTS**Allahabad**

For the words "one year," in sub-rule (3), read the words "three months," and after the words "on his application," at the end of the sub-rule, add the words "the Court may for good cause extend the time."

Calcutta

In sub-rule (3), substitute the words "three months" for the words "one year."

Lahore

(1) In sub-rule (3), for the words "one year," substitute the words "three months."

(2) Add the following proviso to sub-rule (3):

"Provided that the Court may, for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months; but it shall in no case exceed one year in all."

(3) In sub-rule (4), for the words "one year," substitute the words "three months or such other period as may have been prescribed by the Court." [7-4-1932]

O. 21, R. 32 (contd.)

has in violation of the perpetual injunction taken possession of the house and placed tenants in it—Held that the judgment-debtor had ample opportunity for obeying the decree and had failed to obey it. (1906) 2 All. 300 (302.)

[3] Application for execution dismissed on the ground that judgment-debtor was not given an opportunity to obey the decree—Subsequent application for execution, after opportunity had been given, is not barred. (1894) 21 Cal. 784 (788) P.C.]

[4] Decree in injunction suit passed in presence of defendants—No disobedience of injunction on part of defendants—Plaintiff is not entitled to ask Court to issue notice or order embodying injunction and have it served on defendants. O. 21 R. 32 does not provide for such notice or order. (Vol. 23) 1936 Mad. 706 (706, 707).

7. Sale of property—Sub-Rule (3).—[1] This rule is a highly penal one and must be construed strictly. Under it when a sale is ordered, the following conditions must exist: (a) a valid original attachment; (b) application within one year of that attachment by decree-holder for sale; (c) lapse of one year from date of attachment. Therefore, where an order of attachment was made on 27th June, 1908 and was carried out on 20th July 1908 and no application for sale was made by 20th July, 1909. Held, that the attachment ceased to exist, and the order for sale therefore was set aside. (1911) 1911 Pun. L. R. No. 170 p. 628 (630); 1911 Pun. Re. No. 69.

[2] Decree for restitution of conjugal rights—Court cannot change it into decree for payment of money—Property attached and sold within three months from date of attachment—Sale is void and without jurisdiction. (Vol. 24) 1937 Rang. 126 (127); 1937 Rang. L. R. 164.

[3] Decree obtained by wife for property against husband—Husband getting decree for restitution of conjugal rights—Execution of decrees—Wife's decree attached—

Wife can execute decree even during one year of husband's attachment provided proceeds go in satisfaction of decree against her. (Vol. 22) 1935 Mad. 413 (414).

[4] Decree for injunction—Judgment-debtor by his own act making it impossible to obey decree—He is liable to pay compensation. If, however, it be impossible to award the decree-holder any compensation, then the only remedy which must be adopted would be to detain him in civil prison. (Vol. 22) 1935 All. 480 (481); 57 All. 858 (DB.)

[5] Sale of property under O. 21 R. 32 (3) is for a person's wilful failure to obey the decree of Court and cannot be set aside under O. 21 R. 89 which is not applicable. (Vol. 20) 1933 Cal. 96 (97, 98).

8. Disobedience of order for injunction or specific performance.—[1] This rule specifically provides for the execution of a decree for injunction. It is wrong to say that the only remedy of the decree-holder is to bring a separate suit for damages. (Vol. 22) 1935 All. 480 (480); 57 All. 858, (DB.)

[2]. The 5th clause of Order 21 Rule 32 applies only where a decree for an injunction has not been obeyed. (Vol. 8) 1921 Lab. 376 (377) & (Vol. 4) 1917 Mad. 656 (657). (Breach of injunction—Subsequent withdrawal of obstruction does not repair breach.)

[3] Order 21, r. 32 cl. 5 does not apply to prohibitory injunctions. It is the act required to be done by the mandatory injunction that is "the act required to be done" within the meaning of the clause. (Vol. 21) 1934 Cal. 402 (403); 61 Cal. 148 (D. B.) & (Vol. 25) 1938 All. 416 (417, 418). I.L.R. (1938) All. 673. D.B. & (Vol. 25) 1939 Pat. 522 (523).

[But see per Richardson J.] (Vol. 6) 1919 Cal. 674 (675); 46 Cal. 103.

"Act required to be done" means what has to be done to enforce injunction, it applies to both kinds of injunctions.]

[4] The Court can under O. 21 R. 32 secure enforcement of decree granting permanent injunction by punishment.

Madras**(1) In sub-rule (3) :**

(i) for the words "one year," *substitute* the words "three months" ;

(ii) after the word "application," *insert* the words "the Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit."

(2) In sub-rule (4), for the words "one year," *substitute* the words "three months" ; and after the words "the date of the attachment," *add* "or of such extended period which the Court may order under sub-rule (3)."

Nagpur**(1) In sub-rule (3) :**

(i) for the words "one year," *substitute* the words "three months" ;

(ii) after the word "application," *insert* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year" ; and

(2) In sub-rule (4), for the words "one year," *substitute* the words "three months, or such further time as) may have been fixed by the Court under sub-rule (3)."

N.-W.F.P.

In sub-rule (3), for the words "for one year," *substitute* the words "for three months, or such further period not exceeding one year in the whole as may be fixed by the Court."

Oudh

(1) In sub-rule (3), for the words "one year," *substitute* the words "three months," and at the end of the sub-rule, *add* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year."

(2) In sub-rule (4), for the words "one year," *substitute* the words "three months, or such further time as may have been fixed by the Court under the previous sub-rule."

Patna

In sub-rule (3) for the words "for one year" *substitute* the words "for three months or for such further period, not exceeding one year in the whole, as may, on sufficient cause shown, be fixed by the Court."

Discretion of Court in **33.** (1) Notwithstanding anything in rule 32, the Court, either at the time
executing decrees for of passing a decree ^a[against a husband] for the restitution of conjugal rights
restitution of conjugal or at any time afterwards, may order that the decree ^b[shall be executed in
rights. the manner provided in this rule.]

O. 21 R. 32 (contd.)

shing the person disobeying, either by imprisonment or forfeiture of property. (Vol. 4) 1917 Mad. 656 (657) (The Court cannot order a security bond. * (1872). 18 Suth W. R. 282 (283) A decree for removal of certain obstructions in path-way, can be enforced under this rule. * (Vol. 32) 1945 Nag. 134 (137)—ILR (1945) Nag. 336. (Disobedience of an injunction issued under O. 39 R. 1 should be dealt with under this rule)

[5] O. 21 R. 32 prescribes the mode of executing a decree for an injunction and the Court is not justified in ordering the Police to interfere in the matter nor is it justified in appointing a Commissioner to see that the decree-holder performs without obstruction the duties appertaining to his office. Cl. (5) of R. 32 O. 21 does not authorize the passing of such orders and provides for a different state of things. (Vol 5) 1918 All 152 (153, 154)—40 All 648.

[6] Decree for injunction against several persons jointly—All jointly and severally responsible for disobedience—Death of one will not justify reduction of amount which decree-holder is entitled to get as compensation. (Vol 22) 1935 All 480 : 57 All 858 (DB.)

[7] Decree directing judgment-debtor to keep door permanently closed—Door closed but re-opened—Decree-holder's remedy is in execution under this rule and he need not bring a fresh suit. (Vol 1) 1914 All. 105 (106.)

[8] Under the present sub-rule (5) the Court has power to direct the act to be done, so far as practicable, by the decree-holder or by some other person appointed by the court, at the expense of the judgment-debtor. (Vol 6) 1919 Cal 674 (676)—46 Cal 103. * (Vol 17)

1930 PC 287 (290)—26 Nag L. R. 333—57 Ind App 333—58 Cal 692. (Action for specific performance of a contract to sell property with cultivating rights—Sanction of Board of Revenue required—Defendant can be compelled to prosecute the application for sanction—Affirming (Vol 13) 1926 Nag (465) (466).

[But see (1882) 8 Cal 174 (177, 178) (Under the old code the Court had no power to have the thing done by an officer of the court.)]

9. Disobedience of decree for restitution of conjugal rights.—[1] Under O. 21 R. 32, if the judgment-debtor in a decree for restitution of conjugal rights wilfully refuses to obey the decree, the only remedy open to the decree-holder is to proceed to attach the property of the judgment-debtor. The Court cannot compel the wife against whom a decree for restitution of conjugal rights has been passed to go and live with her husband. (1934) 35 Pun LR 655 (656). * (Vol 23) 1936 All 657 (658): ILR (1937) All 82 (Decree for restitution of conjugal rights against minor wife—Order for custody under s. 25, Guardian and Wards Act, should not be passed.)

ORDER 21, RULE 33 Note 1

[1] Before amendment of this Rule by Act 29 of 1923, it was held that a Court ought, in exercise of its discretion, to refuse execution of a decree for restitution of conjugal rights against wife by her detention in civil prison (Vol 11) 1924 All 836 (836, 837). Note:—As the Rule now stands after amendment, such decree cannot be executed by imprisonment whether the decree be against the wife or the husband. * (Vol 7) 1920 Bom 203 (204)—44 Bom 972. * (Vol 11) 1924 Lah 244 (245). * (Vol 10) 1923 Lah 595 (596) * (Vol 1) 1914 Mad 219 (221). * (1911) 10 Ind Cas 177 (177) (Sind),

(2) Where the Court has made an order under sub-rule (1) °['], it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

[See Section 56.]

- a. *Inserted* by the Code of Civil Procedure (Amendment) Act, (29 [XXIX] of 1923), Section 3.
- b. *Substituted* by Section 3. *ibid.*, for "shall not be executed by detention in prison."
- c. The words "and the decree-holder is the wife" were *repealed* by Section 3, *ibid.*

Decree for execution of document, or endorse-
ment of negotiable instru-
ment.

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the documents so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :—

"C.D., Judge of the Court of
(or as the case may be), for A.B., in a suit by E.F. against A.B.," and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

[1882-Ss. 261, 262 ; 1877-Ss. 261, 262 ; 1859-S. 202.]

ORDER 21, RULE 34 Note 1

[1] Decree directing defendant to execute document in favour of plaintiff is executable in the manner provided by this rule, on failure of defendant to obey directions of decree. (Vol 5) 1918 Cal 817 (818).

[2] Decree for execution of document need not be passed in suit for specific performance, (Vol 25) 1938 Cal 767 (767, 768.)

[3] Decree directing defendant to endorse certain promissory notes to plaintiff - Promissory notes barred by limitation before endorsement - Suit for compensation not maintainable - Proper remedy is by way of execution under this rule. (Vol 6) 1919 Mad 1071 (1071).

[4] Compromise decree directing execution of a con-

veyance by one of the parties. Proper course is to proceed under this rule. (1906) 10 Cal W N 345 (346). * (Vol 13) 1926 Cal 975 (976) (DB.) * (Vol 8) 1921 Cal 227 (229). (Subject matter held, not extraneous to suit.)

[5] Absolute divorce decree ordering payment of amount by husband to wife and also directing him to execute proper instrument to secure that payment—O. 21 R. 34 applies to such case. (Vol 25) 1938 Oudh 48 (49)—13 Luck 466 (DB.)

[6] Transfer after decree but before action is taken under—Doctrine of *lis pendens* applies. (Vol 5) 1918 Nag 221 (223, 224)—14 Nag LR 176.

[7] Application under this Rule is governed by Art. 182, Limitation Act. (1886) 10 Bom 91 (93).

35. (1) Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any women not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

[1882-S. 263 ; 1877-S. 263 ; 1859-Ss. 199, 223. Cf. R. S. C., O. 42 R. 5. See Rr. 36 and 95 to 103 ; See also S. 51, cl. (a).]

ORDER 21, RULE 35.

Synopsis.

1. Scope of the rule.
2. Delivery of possession - Symbolical and actual.
3. Effect of symbolical possession.
4. Joint possession - Undivided share.
5. Delivery of possession to agent.
6. Affixture of copy of warrant.
7. Removal of person bound by decree.
8. Use of force in giving possession.
9. Resistance to delivery of possession.
10. Consent of judgment-debtor.
11. Identification of land.
12. Break-open—Sub-rule (3).

1. Scope of the rule.—[1] Property delivered to the decree-holder in execution of his decree for possession—decree is satisfied—second application for possession on the ground that he was dispossessed by the judgment-debtor is not maintainable. ('82) 4 All 184 (185) (DB) * (Vol 8) 1916 All 261 (262, 264). * (Vol 10) 1923 Mad 25 (26, 27) (DB). * (Vol 4) 1917 Mad 202 (203) (DB). * (Vol 15) 1923 Nag 100 (101, 102) (DB).

[2] But a subsequent application will lie when the first application has been ineffectual. (Vol 11) 1924 Mad 200 (200) (DB). * (Vol 21) 1934 Cal 793 (794) (DB). * (Vol 20) 1933 Bom 457 (458) (FB). ('12) 16 Ind Cas 708 (709) (DB) (Cal).

[3] Decree-holder asked for delivery of land with standing crops—Delivery of the land only. He can apply for effective possession of land and crops (Vol 14) 1927 Mad 71 (71.)

[4] Similarly where decree-holder obtained possession which was ineffectual against a transferee *pendente lite* from the Judgment-debtor fresh application for delivery of possession, held maintainable against transferee. (Vol 20) 1933 All 201 (202, 203); 55 All 235 (DB).

[5] Decree-holder allows his decree to get time-barred without executing it, and the defendant continues in possession—Second suit for possession is not maintainable * (03) 25 All 35 (37) (DB). * (Vol 8) 1921 Lah 236 (237).

[6] Delivery of possession has not the effect of dispossessing a third person in possession and not present when the delivery took place. ('96) 20 Bom 351 (353) (FB). * ('04) 27 Mad 262, (270) (DB). Delivery will,

however, operate as dispossession of the third person if it takes place in his presence and adversely to his claim.

[7] Delivery of possession under this rule implies delivery of all things attached to it. * ('05) 3 Low Bur Rul. 129 (130) (DB).

[8] An order for delivery of possession should not, ordinarily, be made *ex parte*. (Vol 10) 1923 Pat 597 (599) (DB).

2. Delivery of possession - Symbolical and actual.—[1] This rule provides for delivery by actual possession of property in the possession of judgment-debtor and by proclamation to the occupant of the property of the fact of such delivery in respect of property not in the actual possession of the judgment-debtor. (Vol 19) 1932 Pat 145 (147, 148) : 11 Pat 165 (DB). * (96) 18 All 440 (449, 450) (FB) * ('80) 5 Cal 584 (588) (FB). * (Vol 24) 1937 Oudh 275 (276) : 13 Luck 96.

[2] Property capable of immediate actual possession must be delivered under sub-rule (1) and not by symbolical possession as between the parties to the decree. (Vol 10) 1923 Nag 237 (238) * (Vol 20) 1933 Lah 22 (22.)

[3] The term "symbolical possession" is applied where delivery is made under sub-rule (2) of this rule and Rr. 36 and 96. (Vol 10) 1923 Nag 237 (238.)

[4] Property to be delivered Zamindari—tank or mineral rights in direct possession of judgment-debtor—Delivery in such cases can be only by a proclamation of the fact of delivery of possession having been made—Such delivery is not symbolical but is effective as a delivery by actual possession. (Vol 26) 1939 Pat 151 (153) : 40 Cr. L Jour 339.

[5] A decree-holder getting symbolical possession can apply again under this rule for actual possession, if he is entitled to it. (Vol 5) 1918 Cal 350 (350) (DB).

[6] Where the decree-holder deliberately accepts such symbolical possession and does not repudiate it, he cannot apply under this rule for actual possession. (Vol 18) 1931 Cal 427 (430) (DB). * (Vol 22) 1935 Cal 245 (246) (DB).

[7] Delivery of possession of land includes the standing crops, and so the judgment-debtor cannot re-enter in order to reap and dispose of the crops. (Vol 26) 1939 Rang 388 (389) : 1940 Rang L R 157 (3 Low Bur Rul 129 (followed).)

3. Effect of, symbolical possession.—[1] Delivery by symbolical possession as between the parties to the

O. 21 R. 35 (*contd.*)

suit, where delivery by actual possession is impossible, has the same effect as an actual transfer of possession. (Vol 26) 1939 Pat 151 (153) * (Vol 22) 1935 Lah 612 (613) (DB).

[2] Decree-holder dispossessed by judgment-debtor subsequent to symbolical delivery—His possession becomes adverse to decree-holder only from the date of dispossession. ('80) 5 Cal 584 (588) (FB) Overruling 24 Suth W R (418) * (Vol 4) 1917 PC 197 (201) (PC): 5 Cal 584 (FB) approved * ('89) 16 Cal 530 (534) (FB) (overruling 10 Cal 402) * (Vol 15) 1928 Oudh 251 (254, 256) : 3 Luck 506 (FB) * ('73) 19 Suth W R 101 (102) (PC).

[But see (Vol 3) 1916 Mad 640 (640) : 39 Mad 543 (Symbolical possession (without prejudice) not actual possession for purpose of S. 145, Cr. P. Code.)]

[3] Decree-holder, who was given symbolical possession under mortgage—decree, prevented by transferee subsequent to the decree for possession—Decree-holder's suit for possession against the transferee within 12 years of the date of formal delivery was held to be within time. (Vol 28) 1941 Lah 357 (360) : ILR (1941) Lah (428) * ('80) 5 Cal 584 (588) (FB).

[4] Fresh period of limitation must be computed from the date of delivery of symbolical possession for a suit by an auction-purchaser against a person who is in actual possession of the property so delivered. ('97) 19 All 499 (502)

[5] Symbolical possession not delivered according to law, will not furnish a fresh starting point of limitation. (Vol 20) 1933 Lah 427 (428) (DB) * (Vol 23) 1936 Lah 749 (750)

[6] The delivery of symbolical possession has not such operation as against *third* persons who are not parties to the decree. ('12) 10 All L Jour 13 (17) * (99) 21 All 269 (271) (DB) * (95) 19 Bom 620 (625) (DB). * (Vol 5) 1918 Cal 983 (984) (DB) * ('13) 21 Ind Cas 765 (767) (DB) (Mad). * (Vol 10) 1923 Cal 82 (84) (DB) * (Vol 15) 1928 Oudh 391 (392) : 3 Luck 668 (DB) * (Vol 4) 1917 Pat 423 (424) (DB). (Vol 5) 1918 Oudh 184 (185) : 21 Oudh Cas 70 * (Vol 23) 1936 Mad 571 (572) (Note—This case is reversed on another point in (Vol 26) 1939 Mad 369 : ILR (1939) Mad (456))

4. Joint possession—Undivided share.—[1] Sub-rule (2) merely defines the manner in which decrees for joint possession are to be executed. (Vol 15) 1928 All 472 (474) : 51 All 303 (FB). * ('11) 11 Ind Cas 87 (88) (All)

[2] A person who is entitled to possession of immovable property jointly with others is not merely entitled to a decree declaring his rights in the land but also to a decree for *joint possession*; and it is immaterial whether he was originally in possession and was subsequently dispossessed or whether he had never been in possession at all. ('12) 34 All 150 (154) (DB). * ('04) 26 All 588 (590, 591) (FB) * ('94) 18 Bom 505 (506) (DB). * ('83) 10 Cal 244 (246) (DB).

[3] The court has a discretion in granting a decree for joint possession which must be exercised in accordance with the principles of justice, equity and good conscience. (Vol 15) 1928 All 472 (474) : 51 All 303 (FB).

[4] In the following cases a decree for joint possession was refused :—

(1891) 18 Cal 10 (21, 22) : 17 Ind App 110 (PC) * (Vol

2) 1915 Mad 50 (51) (DB) (Decree injuring another who is legally in possession will not be passed) * (Vol 1) 1914 All 210 (210) (Suit by one co-sharer to eject trespasser.)

[5] Sub-rule (2) has removed the difficulty experienced under the old Code of giving actual possession of a portion of the property by prescribing the mode of delivery of symbolical possession. (Vol 13) 1926 Lah 668 (669) (DB). * (Vol 23) 1936 Lah 749 (750) * (38) 67 Cal L Jour 39 (40) (DB) * ('39) 1939 All L Jour 375 (376).

[6] The delivery of joint possession under this rule is merely a symbolical transaction. (Vol 15) 1928 Lah 719 (719) (DB) * ('12) 36 Bom 373 (377) (FB) * ('39) 1939 All L Jour 375 (376).

5. Delivery of possession to agent.—[1] Delivery of possession can be made to a person who is authorised by the decree-holder. (Vol 4) 1917 Nag 231 (232) : 13 Nag LR 87.

6. Affixture of copy of warrant.—[1] Failure to affix the warrant for delivery of possession in some conspicuous place on the property is fatal to the delivery and such delivery cannot be the basis for a fresh suit for possession. (Vol 28) 1941 Pesh 25 (25) (DB) * (Vol 4) 1917 Lah 364 (365) : 1917 Pun Re No. 20 (DB) (Vo 16) 1929 Lah 545 (545, 546).

[2] Where the parties concerned had actually come to know of the proceedings taken to give symbolical possession, substantial compliance with the requirements of the rule will be presumed. (Vol 16) 1929 Lah 545 (545) * (Vol 7) 1920 Lah 453 (453) (DB) * (Vol 24) 1937 Oudh 275 (276) : 13 Luck 96 * (Vol 32) 1945 Oudh 96 (99).

[3] Process recorded as served will be presumed to have been so done with all formalities required by law—Person denying that it was so done should prove the contrary. ('80) 31 Pun LR 1001 (1002) * (Vol 15) 1928 Lah 910 (910, 911).

7. Removal of person bound by decree.—[1] The words 'any person bound by the decree' in this rule include the judgment-debtor as well as any person who may be held under law as bound by the decree. (Vol 19) 1932 Cal 241 (241, 242) : 59 Cal 789 (DB).

[2] In the case of property in occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub-r (1) must be given to the decree-holder. (Vol 12) 1925 Cal 1243 (1244) * ('87) 15 Cal 94 (99) (DB) * ('74) 11 Bom H. C. R. 24 (31) (DB).

[3] A transferee *pendente lite* is bound by delivery of symbolical possession. (Vol 28) 1941 Lah 357 (360) : ILR (1941) Lah 428 * (98) 20 All 349 (351) * (Vol 17) 1930 Cal 15 (16) : 56 Cal 1180 (DB).

8. Use of force in giving possession.—[1] Person bound by a decree refusing to vacate or deliver possession of the property—Reasonable degree of force may be used to remove him. (Vol 2) 1915 Cal 558 (560) : 42 Cal 318 (DB).

[2] Removal by force of a person not bound by the decree is punishable under Section 323 of the Penal Code. (Vol 17) 1930 Cal 720 (720).

9. Resistance to delivery of possession.—[1] Resistance to a warrant for delivery of actual possession by a person not bound by the decree is not an offence under S. 186 of the Penal Code. (Vol 12) 1925 Mad 813 (614).

Decree for delivery of immoveable property when in occupancy of tenant.

36. Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

[1882-S. 264; 1877-S. 264; 1859-S. 224. Cf. O. 21 R. 96.]

ARREST AND DETENTION IN THE CIVIL PRISON.

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court ^a[shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison :

^b[Provided that such notice shall not be necessary if the Court is satisfied by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]

O. 21, R. 35 (contd.)

10. Consent of judgment-debtor.—[1] Consent of judgment-debtor is not essential for executing warrant for delivery of possession. Nor is it necessary to apprise him of the fact of such delivery of possession. (Vol 20) 1933 Lah 22 (23) * (Vol 22) 1935 All 938 (939) : 7 Cr. L. Jour 56.

11. Identification of land.—[1] The court can make an enquiry to ascertain the land decreed where it appears in the execution of the decree that boundaries described in the plaint are no longer in existence. ('72) 17 Suth W R 379 (380) (DB.) * ('71) 16 Suth W R 171 (172) (DB.).

[But see ('69) 12 Suth W R 99 (99, 100) (DB.).

12. Break open—Sub-rule (3)—[1] Even under the old Code, it was held that an officer of Court can break open locks or doors to place decree-holder in possession though there was no corresponding provision under that Code. Though in the old Code there was no provision corresponding to this sub-rule, it was held that where the building or enclosure to be given possession of was locked by the judgment-debtor or some person claiming under him and bound by the decree, the officer of the Court had the power to break open the lock, and place the decree-holder in possession. (1874) 22 Suth W R 283 (284) (DB.).

ORDER 21, RULE 36.

Synopsis.

1. Scope and applicability.
2. Formal or Symbolical possession—See under O. 21, R. 35.
3. Possession without the intervention of the Court.

1. Scope and applicability:—[1] Rule 36 applies only to a case where the property is in exclusive possession of a person not bound by the decree and entitled to remain in possession. It does not apply to a case of a joint-holding which is covered by R. 35. (Vol 13) 1926 Lah 668 (669) (DB.).

[2] Where the property, which is the subject-matter of a suit for possession, is in the possession of a tenant or a mortgagee, or of a person having a right of residence, delivery of the property in execution can be made under this rule, provided that such person is not bound

by the decrees. (1913) 20 Ind Cas 571 (572) (Cal) (DB.) (Claim for residence.) * (Vol 4) 1917 Lah 336 (337) (Tenant) * (Vol 4) 1917 Mad 760 (761)—39 Mad 1042 (Tenant) * (1910) 33 Mad 452 (455) (DB.) (Tenant.) * (Vol 6) 1919 Oudh 39 (41)—22 Oudh Cas 278 (Mortgagee.) * (Vol 12) 1925 Rang 98 (98, 99) (DB.) (Case of a tenant - Rule applies to order under S. 17 of Rangoon Small Cause Courts Act (1920).)

[See also (Vol 1) 1914 All 440 (441) (Mortgagee need not even obtain symbolical possession.) * (Vol. 32) 1945 Oudh 200 (206) - 20 Luck. 356 (DB).]

[3] Where the third person claims to enter on the land under certain contractual rights and has not derived title from the defendant in the suit, he cannot be regarded as a tenant against whom an order under this rule can be passed (Vol 10) 1923 Mad 25 (27) (Decree-holder's remedy is either a criminal prosecution or a suit for damages.)

[4] To give legal possession under this rule, all the requirements of the rule must be carried out. (1871) 15 Suth W R 99 (99) (DB.) (Copy of warrant not fixed in any conspicuous place on the land—No legal possession.) * (Vol 12) 1925 Lah 264 (265) (Proclamation effected by beat of drum—No copy of warrant affixed—Possession is not properly delivered.) * (Vol 7) 1920 Lah 473 (473, 474)—omission to affix copy of warrant in conspicuous place—No legal delivery of possession.

[See (Vol 7) 1920 Lah 453 (453) (DB.) (Where publicity, which is the object of the provisions of law, has been clearly made there is substantial compliance with the requirements of the order, although certain formalities are dispensed with.)

2. Formal or Symbolical possession : See under O. 21, R. 35.

3. Possession without the intervention of the Court.—[1] Although O. 21, R. 36 provides for the assistance of the party who is purchaser at the execution sale, there is nothing whatever to prevent his obtaining possession, if he can, without the intervention of the Court. (1874) 22 Suth W R 406 (406) (DB.).

ORDER 21, RULE 37 Note 1

[1] Before amendment of this rule by Act XXI of 1936, Court had discretion to issue notice in first instance. (1911) 14 Oudh Cas 36 (37) (Grounds for belief that the judgment-debtor is not in a fit state of health

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

[1882-S. 245 B. See Sections 55 to 59 and 134 to 136.]

a. *Substituted* by the Code of Civil Procedure Amendment Act, 1936 (21 [XXI] of 1936), S. 3 for "may."

b. *Inserted* by S. 3, *ibid*.

Warrant for arrest to direct judgment-debtor to be brought up.

38. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

[1882-S. 337; 1877-Ss. 251, 343; 1859-S. 222.]

PROVINCIAL AMENDMENT

Madras

Substitute a comma for the full-stop after the word "paid" and *add* the following :

"or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in R. 25 (2) above."

Note :—The reference to R. 25 (2) is to that sub-rule as *substituted* by the Madras High Court.

39. (1) No judgment-debtor shall be arrested in execution of a decree Subsistence-allowance. unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

[1882-Ss. 339, 340; 1877-Ss. 339, 340; 1859-Ss. 276, 279. See S. 57.]

O. 21, R. 37 (*contd.*)

to undergo confinement are sufficient for the Court to exercise its discretion to issue notice in the first instance.) * (Vol 2) 1915 Lah 174 (174).

[2] Court issuing notice and warrant of arrest at same time acts injudicially (Vol 19) 1932 Pat 315 (316): 11 Pat 743 * (Vol 19) 1932 All, 692 (693): 34 Cr. L. Jour 455: 55 All 109 (DB.)

[3] Court cannot arrest though it can serve notice on the defendant, unless he is within the jurisdiction of the Court (Vol 13) 1926 Sind 51 (53).

[See also (Vol 5) 1918 Pat 427 (428): 3 Pat L. Jour (95). Warrant can be executed only within the Court's territorial jurisdiction.)

[4] Court has no discretion to order arrest where judgment-debtor does not appear. (Vol 31) 1944 Mad 191 (192.)

[5] Undischarged insolvent can be arrested under civil warrant in absence of protection order. (Vol 16) 1929 Bom 135 (135.)

[6] No previous attachment - Application for arrest is not illegal. (Vol 12) 1925 Lah 379 (379)

[7] An application for the issue of the warrant may be presumed when the warrant of arrest is issued in presence of decree-holder's pleader. (1913) 15 Bom L R 205 (208.)

[8] Order issuing warrant for arrest of judgment-debtor is appealable. (Vol 11) 1924 Lah 360 (360.)

ORDER 21 RULE 38 Note 1.

[1] Warrant of arrest must be executed within limits of jurisdiction of Court issuing same. (Vol 5) 1918 Pat 427 (428): 3 Pat L. Jour 95.

[2] Nazir can authorise his deputy to execute warrant of arrest—mere indorsement, though irregularly made by Naib Nazir subsequent so arrest and professedly under O. 21 R. 38 does not invalidate such arrest. (1884) 6 All 385 (388.)

[3] Where judgment debtor against whom warrant of arrest is issued absconds due to negligence of Nazir, latter is liable to decree-holder for such negligence. (1879) 4 Bom 65 (69.)

PROVINCIAL AMENDMENTS

Allahabad

Delete the words "in the civil prison" in sub-rule (5).

Bombay

For the existing sub-rules (4) and (5) of Rule 39, the following shall be substituted :

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence, together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed."

Calcutta

Omit the words "in the civil prison" in sub-rule (5).

[3-2-1933.]

Lahore

Delete the words "in the civil prison" in sub-rule (5).

[7-4-1932.]

Madras

Delete the present sub-rules (4) and (5) and substitute the following :

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

Nagpur

(a) To sub-rule (1) the following words shall be added, namely :

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house."

(b) For sub-rules (4) and (5), the following sub-rules shall be substituted, namely :

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit,"

[29-6-1943]

N.-W.F.P.

(1). For sub-rule (4), substitute the following :

"(4) All payments shall be made to the officer-in-charge of the civil prison."

(2). In sub-rule (5), omit the words "in the civil prison."

Oudh

In sub-rule (5), delete the words "in the civil prison."

Patna

In sub-rule (5) delete the words "in the civil prison" in the first place where they occur. [7-1-1936.]

^a40. (1) When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

ORDER 21, RULE 40.

Synopsis.

1. Scope of the Rule (Before the amendment of 1936.)
2. Poverty or other sufficient cause (old rule.)
3. Sub-rule (2) (old sub-rule (3))
4. Appeal.
5. Madras Amendment.

1. Scope of the rule (Before the amendment of 1936).—[1] Application by decree-holder under O. 21,

R. 11—Judgment-debtor not filing application under O. 21, R. 11 for instalment but merely relying on affidavit—Court ordering payment of decree by instalments—High Court on revision directing judgment-debtor to pay certain sum monthly as condition for exemption from arrest—subsequent application by decree-holder under O. 21, R. 11—Discretion of lower court is not fettered by order of High Court—It can pass order it deems fit. (Vol 23) 1936 Rang 280 (281) (DB)

[2] Judgment-debtor evading arrest—Court refusing to make further effort to apprehend and dismissing

(2) Pending the conclusion of the enquiry under sub-rule (1) the Court may, in its discretion order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the enquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest :

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3) it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

a. *Substituted by Section 4 of the Code of Civil Procedure (Amendment) Act, 1936 (21 [XXI] of 1936.)*

PROVINCIAL AMENDMENTS

Madras

The following sub-rules shall be *added* to Rule 40 :

"(6) During the temporary absence of the Judge who issued the warrant under Rule 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality or where the arrest is made on warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif empowered in writing by the District Judge in this behalf.

(7) No judgment-debtor shall be committed to the civil prison or brought before the Court from the custody to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (1) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort.

Sub-rule (5) of Rule 39 shall apply to such payments."

O 21, R. 40 (*contd.*)

execution case—order is not proper (Vol 20) 1933 Pat 248(248).

[3] Judgment-debtor applying to Court after issue of warrant without notice and before his arrest to enquire into his pauperism—S 151 does not apply as he can still surrender himself in Court and move it to pass order under R 40 (3) (Vol 16) 1929 Sind 110 (111).

2. Poverty or other sufficient cause. (Old Rule).

[1] Court is not bound to enforce execution by the arrest of judgment-debtor in every case under R 37. Court has discretion to disallow the application for arrest on any of the grounds specified in r 40 of O 21 Civil P C. (Vol 22) 1935 Oudh 57 (58) : 10 Luck 508 * ('11) 1911 Pun LR No. 246 Page 914 (915) ('11) Judgment-debtor not to be arrested in execution unless he shows bad faith and negligence in not satisfying the decree ; he should in the first instance be given an opportunity for paying up the monies due. Evading payment for a number of years is a ground for arrest.

[2] All the property of the judgment-debtor having been sold in execution of decrees obtained by other persons, if he is not able to pay off the decretal amount or any portion of it, it would be improper to order his imprisonment. (Vol 9) 1922 Lah 259 (259, 260).

[3] Execution ought to be stayed where to do so is not detrimental to decree-holder's interest. (Vol 12) 1925 Mad 42 (43) : 48 Mad 494

[4] Under Civil Procedure Code, court is not bound to issue order for the arrest of a lunatic in execution of decree. The power to order an arrest is discretionary. (1898) 22 Bom 961 (962) (DB).

[5] Order for release of judgment-debtor cannot be passed when evidence adduced by him as to poverty is not sufficient. (Vol 16) 1929 Pat 728 (729).

[6] Arrest of judgment-debtor, exemption of—Limit of Rs. 40 minimum necessary for livelihood—No evidence showing judgment-debtor earning more than Rs. 40 and failure to pay excess—Arrest should not be ordered (Vol 25) 1938 Rang 477 (478).

[7] Judgment-debtor arrested in execution of money decree having been adjudicated insolvent under Presidency Towns Insolvency Act (1909). He produces a protection order from Calcutta High Court—He is immune from arrest and detention for the said debt. (Vol 17) 1930 Lah 1070 (1072).

[8] While all property of insolvent judgment-debtor is in possession of ad interim receiver executing Court should give him benefit of R. 40 and not arrest him. (Vol 18) 1931 Lah 121 (122).

[9] Insolvency — Protection to insolvent is not granted *ipso facto*—Insolvent must seek it from the Court—Court should refuse protection only on exceptional grounds. (Vol 22) 1935 Rang 415 (417) : 13 Rang 623 (DB).

[10] The burden of proving poverty and inability to pay under O. 21, R. 40 lies on the judgment-debtor and if the judgment-creditor shows that the debtor is in a position to pay a substantial part of the decretal amount or instalment, the Court should refuse to direct his release. (Vol 1) 1914 Low Bur 51 (52) : 7 Low Bur Rule 339.

[11] Application under O. 21, R. 40 dismissed on ground that that rule was not applicable inasmuch as the applicant had not appeared before the Court in

Nagpur

Insert the following as sub-rule (6), (7) and (8) :

"(6) When a judgment-debtor is ordered to be detained in the custody of an officer of the Court under sub-rule (2) or the proviso to sub-rule (3) above, the Court may direct the decree-holder to deposit such amounts as, having regard to the specified or probable length of detention, will provide :

(a) for the subsistence of the judgment-debtor at the rate to which he is entitled under the scales fixed under Section 57.

(b) for the payment to the officer of the Court in whose custody the judgment-debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix :

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time, and

(ii) that the Court may from time to time require the decree-holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-rule (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by the decree-holder under sub-rule (6) shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed." [29-6-1943.]

Allahabad and Oudh

Under Section 4 of Act XXI of 1936 the amendments to Rule 40 made by the above High Courts prior to that Act have been repealed.

ATTACHMENT OF PROPERTY

Examination of judgment-debtor as to his property. 41. Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree ; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

[1882-S. 267 ; 1877-S. 267 ; 1859-S. 219. See Sections 60 to 64 and 136.]

O. 21, R. 40 (contd.)

obedience to a notice—It is open to the applicant to appear again before the Court in obedience to the notice and plead for exemption from arrest on the ground of poverty or any other cause which he may have put forward. (Vol 20) 1933 Lah 261 (261).

3. Sub-Rule (2) Old Sub-Rule (3).—[1] The security to be furnished by judgment-debtor must be proper and not illusory. (Vol 15) 1928 Cal 62 (63) : 54 Cal 782.

[2] Surety bond under R 40—Judgment-debtor applying for insolvency—Execution proceedings assigned to record room—Failure of insolvency application—Second application for execution—Surety is still liable, second application being application for revival of old judicially unterminted proceedings. (Vol 16) 1929 Lah 776 (777).

[3] Where the judgment-debtor has never been arrested, there cannot be an order directing his release. Consequently, the Court has no jurisdiction to demand a bond for the payment of decretal amount under O. 21 R. 40 (3), when judgment-debtor pleads poverty to notice under R. 37 of O. 21. (Vol 21) 1934 Lah 217 (218).

4. Appeal.—[1] Application for judgment-debtor's arrest dismissed—Order is appealable—Order directing arrest or detention of judgment-debtor is order under S. 47. (Vol 6) 1919 Lah. 15 (16) : 1 Lah 77.

[2] Where in execution of decree in a suit between the parties the Court ordered the release of judgment-debtor, held such order is a decree under the Code, and is therefore open to appeal. (1898) 21 Mad 29 (30) (DB).

[3] An appeal is competent from an order that the judgment-debtor is not entitled to the benefit of O. 21. R. 40. (Vol 16) 1929 Lah 141 (141).

5. Madras Amendment:—[1] Order of detention to be valid need not be in writing. (Vol 20) 1933 Mad 278 (279) : 34 Cr L Jour 284. (Judgment-debtor escaping from custody, commits offence under Penal Code (1860), S. 225—B.)

ORDER 21, RULE 41—Note 1.

[1] An application for the examination of the judgment-debtor can be made at any stage of the execution proceedings. (Vol 3) 1916 Cal 228 (229) : 43 Cal 285.

[2] It is not necessary to take out a Chamber Summons in order to apply to the Judge in Chambers under O. 21, R. 41. But except in very exceptional circumstances, the Court should never make an order without in the first instance giving a notice to the party against whom an order is sought. (Vol 29, 1942 Bom 100 (101) : ILR (1942) Bom 128.

[3] Examination of judgment-debtor under O. 21, R. 41—Application should be encouraged when it is necessary to prevent dilatory and expensive execution proceedings. (Vol 3) 1916 Cal 228 (229, 230) : 43 Cal 285.

[4] Examination of judgment-debtor under O. 21, R. 41—Order may be made ex-parte on verified tabular statement (Vol 3) 1916 Cal 228 (229) : 43 Cal 285.

[5] It is not compulsory on the decree-holder to exhaust all the usual methods of execution before applying under this Rule. (Vol 3) 1916 Cal 228 (229) : 43 Cal 285.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined

[1882-S. 255; 1877-S. 255. See O. 21 Rr. 12, 15 and 16.]

42. Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.

43. Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[1882-S. 269; 1877-S. 269; 1859-S. 283. See Ss. 2, 13, 62 and 145.]

O. 21, R. 41 (*contd.*)

[6] Order 21, Rule 41, which definitely restricts the rights of the party to call for accounts till after a decree is obtained within the principle that a more particular provision overrides a more general provision, limits the application of O. 39, R. 1 (b) even if the latter is in terms applicable. Nor can the inherent powers of the Court be invoked to justify the issue of an order for production of account books not related to the suit, at an earlier stage and thereby completely nullify the restriction laid down in O. 21, R. 41. (Vol 21) 1934 Mad 199 (199, 200, 201) : 57 Mad 685.

[7] Application for notice under Order 21, Rule 46A—Court should require decree-holder to specify debtor to apply under Order, 21 Rule 41. (Vol 29) 1942 Sind 87 (88) : ILR (1942) Kar 173 (DB).

[8] Decree directing inquiry as to damages is one for money and holder of such decree is entitled to invoke aid of O. 21, R. 41—But Court has discretion to give relief. (Vol 26) 1939 Mad 699 (702).

[9] Court has power to order even a mortgagee in possession to be examined respecting the property of the judgment-debtor. (1898) 17 Bom 514 (518) (DB).

[10] Affidavit filed by garnishee denying liability—Practice of Sind Judicial Commissioner's Court is to refuse permission to judgment-creditor to cross examine or to examine garnishee. (Vol 20) 1938 Sind 350 (351).

[11] Garnishee totally denying the debt—Court should order his examination or direct him to produce his account books, only if it is satisfied that it would better enable decree-holder to proceed with execution and would prevent possible fraud or collusion. (Vol 25) 1938 Mad 771 (772, 774).

[12] Property which is admittedly property of the judgment debtor is *prima facie* liable to be seized in execution of a decree against him and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree, subject to the mortgage debt. (Vol 1893) 17 Bom 514 (518) (DB).

[13] Power vested in Court by O. 21, R. 41 is discretionary and should be exercised with caution. (Vol 25) 1938 Mad 771 (772, 774).

ORDER 21, RULE 42—Note 1.-

[1] Attachment under O. 21, R. 42 is proceeding in execution and attracts all provisions relating to execution proper - Order disallowing attachment under O. 21 R. 42 comes within purview of S. 47 and is appealable. (Vol 28) 1941 Cal 357 (359) : ILR (1941) : 1 Cal 363 (DB.)

[2] Decree-holder applying for attachment under R. 42 is entitled to rateable distribution under S. 73 (Vol 21) 1934 Mad 604 (605) : 58 Mad 233 (DB.)

[3] Application under O. 21, R. 42—Court has no jurisdiction to investigate claims and objections to proposed attachment at stage of entertaining application—Only question then before Court is between decree-holder and judgment-debtor. Considerations governing attachment before judgment cannot be applied to this rule. (Vol 28) 1941 Cal 357 (359, 360) ILR (1941) 1 Cal 363 (DB.)

[4] Application under Rr. 5 and 6, O. 38, to call upon trustee to furnish security or in alternative attachment of his property—Court directing trustee to furnish security and mean-time issuing order for conditional attachment—Error of substance is not committed—Mistake is technical—High Court as Court of appeal can rectify it to treat order as one passed under O. 21, R. 42 (Vol 4) 1917 All 153 (154) (DB.)

[5] (Per Thiruvengkatachiar, J.) - Preliminary decree directing taking of accounts does not come within R. 42 (Phillips, J. Contra.) (Vol 16) 1929 Mad 641 (648)—52 Mad 563 (FB.)

[6] Preliminary decree in partnership accounts suit is not covered by R. 42 because it cannot be said who is judgment-debtor till after taking of accounts. (Vol 13) (1926) Sind 178 (179) (DB.) * (Vol 24) 1937 Cal 4 (7) (Words 'any other matter' in R. 42 do not include preliminary decree directing the taking of accounts in a partnership suit.)

[7] Inquiry into state of accounts under S. 92 for ascertaining trustee's liability is covered by R. 42, O. 21 (Vol 4) 1917 All 153 (154).

ORDER 21, RULE 43—Note 1.

[1] Order allowing attachment of moveable property wherever found is illegal—The order amounts to an order to attach the property whether it is found in the possession of judgment-debtor or of third party and wherever it is found. (Vol 28) 1941 Rang 347 (348) 1941 Rang LR 592 : 43 Cr. L. Jour 292.

[2] Decree is not moveable property. (Vol 27) 1940 Nag 270 (272) (DB.)

[3] Order 21, Rule 43 requires that property shall be attached by actual seizure and the word "seize" means taking possession forcibly or in pursuance of a warrant or legal process. ('80) 1930 Mad W.N. 487 (488.)

[4] Actual seizure of moveables to be attached does not always require physical contact but this depends

PROVINCIAL AMENDMENTS

Calcutta

Read Rule 43 as follows :

"Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure at the identification of the decree-holder or his agent, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value, or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once."

[8-11-1933 and 29-5-1941.]

Lahore

Re-number the rule as sub-rule (1) and add the following further proviso and sub-rules (2) and (3) :

"and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by—

(a) the custodian and his sureties,

(b) the officer of the Court who made the attachment,

(c) the person whose property is attached and made over,

(d) two respectable witnesses.

O. 21, R. 43 (contd.)

upon the particular fact. Where the goods to be seized were cattle securely tied by ropes so that they could not run away of their own accord. Held that it was sufficient for the officer of the Court to go sufficiently near the cattle and declare to others his intention to attach the cattle. (Vol 17) 1930 Mad 670 (671) : 31 Cr. L. Jour 1086.

[5] Where the warrant of attachment was executed as sanctioned by the order of the Court by affixing the Court seal to the outer door of the warehouse without breaking open the door and taking physical possession of goods inside the warehouse, it was held that this in effect was actual seizure within the meaning of S. 269 (now O. 21 R. 43) (1904) 27 Mad 346 (347) (DB.)

[6] Warrant addressed to "warrant officer, 3rd Division" and not by his personal name—Property distrained by peon and not by officer—Warrant and distraint are not illegal. (Vol 16) 1929 Mad 188 (189) : 29 Cr. L. Jour 1062.

[7] Attachment of moveables—Claim—Attachment released—Suit under O. 21 R. 63—Decree in favour of attaching creditor—Attachment not revived—Fresh seizure and custody are necessary. (Vol 17) 1930 Rang 247 (248) : 8 Rang 491.

[8] Supardar becomes officer of Court after approval by Court. (Vol 18) 1931 All 567 (573) : 54 All 263 (FB)

[9] Order 21, Rule 43, only makes distinct the liability of the Amin so far as the Court is concerned. It does not affect in any way the liability of a person who expressly takes charge of property taken in execution,

to either the Court or to the decree-holder. (Vol 8) 1921 All 220 (220, 221.)

[10] Property attached and entrusted to supardars disappearing from supardar's possession—Decree can be executed against judgment-debtor to the full (under Lahore amendment of the Rule.) (Vol 30) 1943 Lah 92 (95, 96) : LLR (1944) Lah 36 (DB.)

[11] When the Commissioner who was appointed as attaching officer appointed certain persons not as custodians of properties attached, but as new watchmen, it was held that the person who remained liable for the safe custody of the articles was the attaching officer himself. (Vol 20) 1933 All 385 (386.)

[12] The object of the surety bond taken under O. 21, R. 43, is to keep the goods attached under the control and direction of the Court. It does not mean that when the goods have to be sold the Court should direct their production into Court. ('27) 1927 Mad. WN 919 (920.)

[13] Where the Amin with warrant of attachment removed certain moveables pointed out by decree-holder but, where subsequently the articles were taken back to the house because the judgment-debtor, as a result of negotiations, paid a certain sum to the Amin, it was held that the articles must be deemed to have been attached by the seizure and removal of the articles from the house under O. 21, R. 43. ('30) 1930 Mad WN 487 (488.)

[14] Where under the rules framed by the Calcutta High Court option was not given to the judgment-debtor to keep the attached property on his premises or in some other place in the village, the removal by attaching officer of property attached was held illegal (Vol 15) 1928 Cal 815 (816) : 56 Cal 460 : 30 Cr. L. Jour 199.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian."

Madras

Substitute the following rule for Rule 43 :

"43 (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once ; and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment." [Dis. No. 166 of 1913.]

Nagpur

Substitute the following for Rule 43 :

"43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once ; and

Provided also that when the property attached consists of live-stock, agricultural implements or other articles which cannot be conveniently removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or any person claiming to be interested in such property, leave it in the village or at the place where it has been attached—

(a) in the charge of the judgment-debtor or of the station pound-keeper, if any, or

(b) in the charge of the decree-holder, or of the person claiming to be interested in such property or of such respectable person as will undertake to keep such property, on his entering into a bond with one or more sureties in an amount not less than the value of the property, that he will take proper care of such property and produce it when called for.

(2) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left, and if possible, of the parties to the suit, and of at least one respectable person in attestation of the correctness of the list. If the property attached includes both live-stock and other articles, a separate list of the live-stock shall similarly be prepared and attested."

[29-6-1913.]

N.W.F.P.

Add the following further proviso :

"Provided further that when the attached property consists of live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule, he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property, subject to the orders of the Court, if such person enters into a written bond for its production.

Any person who has so undertaken to keep attached property may be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

Patna

Substitute the following for Rule 43 :

"43. Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer, shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once."

[18-10-1933]

Lahore

Insert the following as Rules 43A, 43B, 43C and 43D :

"43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to Rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court it shall be removed to the court house.

Nothing in this rule shall prevent the judgment debtor, or any person claiming to be interested in such stock, from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43C. When an application is made for the attachment of live-stock or other moveable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days, before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43D. (1) Any person who has undertaken to keep attached property under R. (43) (1) (c) shall be liable to be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

Madras

Insert the following as Rules 43A and 43B :

"43A. (1) Whenever attached property is kept in the village or place where it is attached the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to R. 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the court house and delivered to the proper officer of the Court.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings."

[Dis. No. 166 of 1913.]

Nagpur

Insert the following as Rule 43A :

"43A. (1) When an application is made for the attachment of live-stock the Court may demand, in advance in cash at rates to be fixed half-yearly, or oftener, if necessary by the Courts with the sanction of the District Judge, the amount requisite for the maintenance of the live stock from the probable time of attachment to the probable time of sale, or may, at its discretion, make successive demands for portions of such period. The rates shall include cost of feeding, tending and conveyance and all other charges requisite for the maintenance and custody of the live-stock.

(2) If the live-stock be entrusted to any person other than the judgment-debtor the amount paid by the decree-holder for the maintenance of the cattle, or a part thereof, may at the discretion of the Court, be paid to the custodian of the live stock for their maintenance. The produce, such as milk, eggs, etc., if any, may either be sold, as promptly as possible for the benefit of the judgment-debtor, or may at the discretion of the Court, be set-off against the cost of maintenance of the live-stock."

[29-5-1943]

Patna

Insert the following as Rule 43A :

"43A. (1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either:—

- (a) in his own custody in any suitable place provided by the judgment-debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere ;
- (b) in the case of live-stock and provided the decree-holder furnishes the necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound-keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon ;
- (c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other costs, if any.

(2) If, in the opinion of the attaching officer, the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree-holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree-holder's expense. In the event of the decree-holder failing to provide the necessary funds, the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by Rule 66.

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the same and forward it without delay to the Court for its orders

(5) When property is removed to the Court it shall be kept by the nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the court-premises, or in the personal custody of the nazir, he may, subject to approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers of the Court in whose custody the property is kept.

(6) When property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree-holder shall withdraw an attachment or it shall be withdrawn under sub-rule (2) or sub-rule (9) the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment-debtor, the officer shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever live-stock is kept in the village or locality where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer : but the latter shall, if required by the decree-holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment-debtor failing to feed the attached live-stock in accordance with sub-rule (8), the officer shall call upon the decree-holder to pay forthwith, for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub-rule (2) and shall report the matter to the Court without delay.

(10) When attached live-stock is brought to court, the nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held, the nazir shall be at liberty to place in it such attached live-stock as can be properly kept there, in which case the pound keeper will be responsible for the property to the nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court, it be inconvenient to lodge the attached live-stock in the pound, the nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall from time to time fix the rates to be allowed for the custody and maintenance of the various descriptions of live stock with reference to seasons and local circumstances. The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court."

[18-10-1933.]

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—
Attachment of agricultural produce.

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited, and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[See Ss. 2 (13), 61.]

PROVINCIAL AMENDMENTS

Calcutta

Insert the words "at the identification of the decree-holder or his agent," after the words "attachment shall be made" in R. 44. [29-5-1941.]

Bombay

The following shall be inserted, namely :

"44A. Where the property to be attached is agricultural produce, a copy of the warrant or the order of attachment shall be sent by post to the office of the Collector of the district in which the land is situate." [19-1-1917.]

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

ORDER 21, RULE 44—Note 1.

[1] Unlike cases of other kinds of moveable property in which attachment is made by actual seizure, *Custodia Legis* in the case of growing crops is symbolical and is affected only by affixation of warrants of attachment provided for by Rule 44 without which the crops do not pass into the possession of the Court (Vol 18) 1931 All. 142 (142) : 32 Cr L Jour 437 * (Vol 20) 1933 Rang 267 (268) (Warrant of attachment not affixed - Attachment is not valid.)

[2] A property cannot be attached unless first the order for attachment has been issued, and secondly in execution of the order the other things prescribed by the rules in the Code have been done. (Vol 20) 1933 Rang 267 (268).

[3] Process signed by Amin but not bearing seal of

Court—Attachment is illegal. (Vol 22) 1935 All 214 (215) : 57 All 660 : 36 Cr. L. Jour 340.

[4] Where, when attachment was made, no copy of warrant of attachment was posted at the threshing floor where the paddy lay, it was held that the attachment was not made in accordance with O. 21, R. 44 (Vol 22) 1935 Rang 186 (187.)

[5] Attachment not in accordance with R. 44 does not transfer possession to Court. But attachment effected by officer of Court is presumed to be proper unless contrary is proved. (Vol 23) 1936 All 364 (365) : 37 Cr. L. Jour 675 * (Vol 22) 1935 All 436 (437) : 36 Cr. L. Jour 1094 (Presumption is that all formalities have been complied with).

ORDER 21, RULE 45—Note 1.

[1] Rule is not applicable where judgment-debtor is not in possession. (Vol 16) 1929 Lah 200 (202).

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

[See S. 61]

PROVINCIAL AMENDMENTS

Bombay

The following words shall be *added* to sub-r. (1), after *substituting* a semicolon for the full stop :

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time." [9-3-1926].

Calcutta

Add the following to sub-rule (1) :

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time." [2-8-1933]

Lahore

Add the following to sub-rule (1) of Rule 45 :

"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court." [7-4-1932]

Madras

Substitute a semi-colon for the full-stop at the end of sub-r. (1), and add the following words :

"and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time." [13-10-1936.]

Patna

Add to sub-r. (1) after deleting the full stop at the end of the sub-rule :

"and the applicant shall pay into Court such sums as he may from time to time be required by the Court to pay in order to defray the cost of such arrangements."

Attachment of debt, share and other property not in possession of judgment-debtor.

46. (1) In the case of—

- (a) a debt not secured by a negotiable instrument,
- (b) a share in the capital of a corporation,

ORDER 21, RULE 46

Synopsis.

1. Attachment of debt, share or other movable property-General.
2. Debt, meaning of.
3. Salary.
4. Attachment of mortgage-debt.
5. Attachment of debt already paid by cheque.
6. Procedure where garnishee denies debt.
7. Set off by garnishee of cross-debt.
8. Procedure where garnishee resides outside jurisdiction.
9. Garnishee admitting liability but not paying-procedure.
10. Attachment of shares.
11. Attachment of other movable property.
12. Service of prohibitory order.
13. Effect of non compliance with sub-rule (2).
14. Effect of attachment.
15. Payment into Court-Sub-rule (3).
16. Inherent power of Court to pass prohibitory orders in proper cases.

1. Attachment of debt, share or other movable property-General. —[1] A debt, in order to be attachable under O. 21, R. 46, must be due individually to the judgment debtor. Hence royalty payable to two persons jointly cannot be attached in execution of decree against either of them. ILR (1937) 2 Cal 440 (444).

[2] The share of an undivided brother in the ancestral family money lending business cannot be attached in execution of a decree against him personally. (Vol 1) 1914 Nag 13 (13) : 10 Nag LR 17.

[3] Debts only owned in part or as co-heir are not subject of garnishee proceedings :—Improper proceedings can be set aside at instance of others interested—On setting aside, Court should decide to whom refund is payable and not direct separate proceedings. (Vol 7) 1920 Mad 403 (404, 406).

[4] An application for execution against property not in the possession of the judgment-debtor such as debts due to him or money to which he is entitled in the custody of the Court should definitely specify the particular debt or decrees and such execution cannot issue merely on the strength of an application for attachment and sale of moveable property (1911) 9 Ind. Cas 240 (241) (Oudh) : (Vol 5) 1918 Mad 541 (542). Suit by purchaser in execution to recover debt due to judgment-debtor—Debt bond wrongly described in execution—Extraneous evidence to prove identity of debt is admissible.

[See however (Vol 29) 1942 Sind 87 (88) : ILR (1942) Kar 173 (DB). (For attachment under O. 21, R. 46 exact amount of debt need not be ascertained or stated—But before it is made subject of execution it must be ascertained—Debt attached before judgment—Approximate value of debt must be ascertained, and specified]

[5] If at the instance of a person who holds a decree against the vendor, a prohibitory order under O. 21, R. 46, is served on the vendee, before he has paid out the amount to the nominee of the vendor, in

(c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,
the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

[1882-S. 268; 1877-Ss. 268, 301 ; 1859-Ss. 236, 239.]

PROVINCIAL AMENDMENTS

Rules 46A to 46 I Calcutta

Add the following rules :

"46A. The Court may in case of a debt, other than a debt secured by a mortgage or a charge or by a negotiable instrument, which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so :

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District judge will deal with it in the same manner as if the case had been originally instituted in that Court.

O. 21, R. 46 (contd.)

accordance with the directions set out in the sale deed, the attachment is good and neither the vendee nor the vendor can object—(Per Full Bench). (Vol 29) 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).

[6] Order 21, R. 46, provides means for dealing by the attaching officer with goods which are in the physical possession of a third party whether or not the ownership of the goods be in the judgment-debtor or in the third party and whether or not the legal right to possession be in the judgment-debtor or in the third party. The rule is only intended to deal with the case of physical possession by a party other than the judgment-debtor. (Vol 19) 1932 Pat 279 (280, 281) : 11 Pat 493 : 33 Cri L Jour 883 (DB).

[7] Debt attached from garnishee before judgment—Amount of debt not specified—Fact that garnishee did not object to attachment is no reason why advantage obtained should thereafter be unduly pressed against him. (Vol 29) 1942 Sind 87 (88) : ILR (1942) Kar 173 (DB).

[8] An order of the Court to pay is a necessary ingredient of every garnishee order. (Vol 28) 1941 Cal 579 (580) : ILR (1941) 2 Cal 221.

[9] Decree against partners in their individual capacities—In execution of such decree garnishee proceedings cannot be taken in respect of debt due to firm. (Vol 28) 1941 Cal 364 (366, 367) : ILR (1941) 1 Cal 889.

[10] Subscription to provident fund cannot be attached by garnishee order. (Vol 26) 1939 Rang 432 (438) : 1939 Rang LR 504.

[11] Right to sue for damages for breach of contract is not attachable. (Vol 12) 1925 Sind 98 (99).

[12] Parties to garnishee proceeding knowing appointment of receiver to receive payment, not informing court and getting order passed by settlement—Payment by garnishee does not discharge him. (Vol 28) 1941 Cal 579 (580) : ILR (1941) 2 Cal 221.

2. Debt, Meaning of.—[1] Per Full Bench—The word 'debt' in S. 60 and O. 21, R. 46, means a sum of money which is now payable or will become payable in the future by reason of a present obligation. It is an actually existing debt, i.e., a perfected and absolute debt; not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not arise. (Vol 29) 1942 Lah 275 (278) : ILR (1943) Lah 17 (FB).

[2] Unpaid mortgage money is not "debt." Hence it cannot be attached in execution of decree against mortgagor or his heirs. (Vol 29) 1942 Lah 234 (236) : ILR (1943) Lah 746. * (Vol 21) 1934 All 449 (453).

[3] "Debts" include shares of debts also. (Vol 24) 1937 Cal 199 (200) : ILR (1937) 2 Cal 48.

[4] The term 'debt' means a debt either due or accruing due. An annuity cannot be attached when it does not fall due, as also money expected to reach a public officer, but not actually come to his hands. (1911) 14 Cal L Jour 127 (131, 133).

[5] Life-policy requiring proof of death before payment—Money payable by company becomes debt only on proof of death. (Vol 16) 1929 Mad 347 (347, 348).

Such application shall be made on affidavit verifying the facts alleged and stating that, in the belief of the deponent, the garnishee is indebted to the judgment-debtor.

46B. Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

46C. Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

46D. Where it is suggested or appears to be probable that the debt belongs to some third person or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

46E. After hearing such third person and any other person or persons who may subsequently be ordered to appear, or wheresuch third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest (if any) of such third or other person as may seem fit and proper.

46F. Payment made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid, for the amount paid or levied although such judgment may be set aside or reversed.

46G. The cost of any application made under rule 46A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court.

46H. An order made under Rules 46B, 46C or 46E shall be appealable as a decree." [26-1-1935.]

Patna

For rules dealing with the same topic, see Rules 63A to 63H added by the Patna High Court.

O. 21, R. 46 (contd.)

[6] Per Full Bench—Unpaid purchase price left with vendee is 'debt' due by him to vendor within S. 60 and O. 21, R. 46. (Vol 29) 1942 Lah 275 (278) : ILR (1943) Lah 17 (F.B.) : (Vol 29) 1942 Mad 650 (651). * (Even though vendee claims to defer payment of same till vendor pays off other incumbrances.)

[7] Dividend payable in insolvency to creditor of insolvent is not debt liable to be attached. (Vol 26) 1939 Mad. 811 (813).

[8] According to the Articles of Association of a certain Association, every member had to make a certain deposit, which was liable to be forfeited in certain events and also was subject to certain liens. It was repayable when the depositor ceased to be a member. A creditor of a member of the association sought to attach the deposit. Held that the deposit was not a "debt" under rule 46. (Vol 26) 1939 Bom 90 (91) : ILR (1939) Bom 109.

[9] Garnishee rules, R. 131 of O. 21 Money left with mortgagee for payment to creditors is not debt. (Vol 21) 1934 All 954 (956).

3. Salary.—[1] Salary of month cannot be attached before it has become payable at the end of that month. (Vol 26) 1939 Cal 428 (429) ILR : (1939) 1 Cal 523.

[2] Order absolute for injunction to the disburser to pay the judgment-debtor's salary into Court, is not an order effecting attachment, under S. 268, C.P.C. (1882). (1910) 7 Mad L. Tim 110 (111) * (1910) 5 Ind Cas 145 (146) (Mad) (DB.). (Allowance).

4 Attachment of mortgage debt.—[1] A mortgage-debt due under a simple mortgage being moveable property need not be proceeded against under R. 54 of O. 21. The proper course is to act under O. 21, R. 46 for attachment (Per Jenkins, C. J.) (1902) 26 Bom 305 (310) (DB.) * (Vol 11) 1924 All 796 (798) : 46 All 917 * ('09) 1909 Pun Re No. 18 Page 40 (40) * (Vol 2) 1915 Mad 551 (552). The fact of the mortgagee remaining in possession either actual or constructive makes no difference. * (1912) 16 Ind Cas 816 (816) (Mad) * (Vol 17) 1930 Oudh 473 (474) * (Vol 6) 1919 Oudh 132 (132, 133) : 21 Oudh Cas 400 (DB.).

[2] An attachment under O. 21, R. 54 is not necessary to make the sale of a mortgage bond carry the lien as well as the debt. (1893) 20 Cal 805 (809-810) (DB.) * (1912) 12 Mad L. Tim 300 (301). Execution sale of mortgage debt attached under S. 268 Old Code (now O. 21 R. 46)—Purchaser can bring mortgaged property to sale though attachment not made under S. 274 (now O. 21 R. 54.)

[3] Attachment of anomalous mortgagee's interest—Attachment of debt operates also on security and no fresh attachment of right to possession is necessary. (Vol 21) 1934 Mad 498 (499).

[4] A usufructuary mortgage in which there is a covenant to pay is a debt which can be attached under this rule. (Vol 29) 1942 Pesh 66 (68) * (Vol 19) 1932 Mad 233 (234) (Usufructuary mortgage debt is moveable property and as such attachable under O. 21, R. 46) * (Vol 18) 1931 Mad 38 (39). * (Vol 3) 1916 Mad 434 (435) : 9 Mad 389 * (Vol 18) 1931 Pat 63 (64).

[5] Personal covenant in OTHI deed to pay money debts Such money debts can be attached by Small Cause Court; they being moveable property. (Vol 18) 1931 Mad 38 (39)

[6] O. 21 R. 46 does not apply to the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor. The procedure should be by attachment under O. 21 R. 54 of the interest in the immovable property and its sale in accordance with the Code. (1911) 35 Bom 288 (291, 292) * (Vol 15) 1928 Mad 648 (649, 650, 651).

[7] Mortgage debt can be attached by the Court with in whose jurisdiction the mortgage bond is found. (Vol 20) 1933 Cal 379 (380) : 60 Cal 782 (D.B.).

[8] Mortgage debt due to judgment-debtor is moveable property within this rule. (Vol 20) 1933 Cal 379 (381) : 60 Cal 782 (DB.) * (Vol 20) 1933 Rang 61 (62) * (Vol 2) 1915 Mad 209 (210) : 37 Mad 51.

5. Attachment of debt already paid by cheque.—[1] There is no debt that can be attached in the hands of the garnishee where the latter has delivered a

Sind

Add the following as Rules 46A to 46 I :

46A. The Court may in the case of a debt (other than a debt secured by a mortgage or a charge or by a negotiable instrument) and any moveable property not in the possession of the judgment-debtor which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to any person liable to pay such debt or deliver or account for such moveable property (such person to be hereinafter called "the garnishee"), calling upon him either to pay on deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so :

Provided that if the debt or property in respect of which the application aforesaid is made is of value beyond the pecuniary jurisdiction of the Court, the execution case shall be sent, if the attaching Court is the Karachi Small Cause Court, to the High Court, if it is any other Court, to the District Court to which the said Court is subordinate; and thereupon the High Court or, as the case may be, the District Court or any other competent Court to which such case may be transferred shall deal with it in the same manner as if the case had been originally instituted in that Court.

Such application shall be supported by an affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

46B. Where the garnishee does not forthwith pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the cost of execution, or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order being made execution may issue as though such order were a decree against him.

46C. Where the garnishee disputes his liability, the Court may order that any issue or question necessary for the determination of the liability shall be tried as if it were an issue in a suit and upon the determination of such issue shall make such order as may seem just.

O. 21, R. 46 (contd.)

cheque for the debt to the judgment-debtor, even though the latter had not cashed the cheque. (1878-79) 5 Bom 49 (52) (DB)

[2] Where an order of attachment is served upon the officer holding the judgment-debtor's money, after he has endorsed a cheque in favour of judgment-debtor's assignee, the attachment is of no avail. (1911) 12 Ind Cas 869 (870) (Low Bur).

6. Procedure where garnishee denies debt.—[1] Executing Court cannot order garnishee to deposit debt or attach and sell his property. (Vol 11) 1924 Nag 98 (101) : 20 Nag L R 11.

[2] When the garnishee or third party admits the debt, payment can be ordered to be made to the judgment-debtor. (Vol 4) 1917 Low Bur 134 (135) * (Vol 14) 1927 All 41 (43).

[3] Courts in execution of a decree should not refuse to attach debts denied by the garnishee. (1906) 23 All 262 (263) (DB.)

[4] Where an application for attachment of a debt is made, the court is not bound to satisfy itself as to the existence of the debt. (Vol 3) 1916 Mad 504 (505) * (1906) 23 All 262 (263) (DB.) * (Vol 23) 1936 Mad 152 (153) : 59 Mad 966 (DB.) * (Vol 19) 1932 Mad 233 (234) * (Vol 18) 1931 Rang 175 (571) * (Vol 13) 1926 Rang 175 (176) : 4 Rang 100.

[5] Where the garnishee denies a debt, the proper course for the court is either to appoint a receiver for the collection of the debt or to sell the debt notifying the fact of the denial. (1906) 23 All 262 (263) (DB.) * (Vol 14) 1927 All 41 (43) * (Vol 18) 1931 Bom 238 (290) (DB.) * (Vol 13) 1926 Rang 175 (176) : 4 Rang 100 * (Vol 4) 1917 Low Bur 134 (135).

[6] Attachment before judgment—Question whether attached debt is due to judgment-debtor can be decided

when garnishee order is going to be enforced. (Vol 20) 1933 All 481 (482).

[7] Garnishee denying debt and objecting to jurisdiction of Court to order deposit of it in Court—No investigation or decision—Sale—Subsequent suit by purchaser against garnishee—Garnishee can raise those objections in suit. (Vol 23) 1936 Nag 218 (219.)

[8] Garnishee denying all liability—Court disallowing objection against attachment—Garnishee cannot institute suit under O. 21, R. 63, Civil P.C.—Order of executing Court does not come within Rr. 58 to 63, O. 21, Civil P.C. (Vol 23) 1936 Mad 152 (153) : 59 Mad 966 (DB.)

[9] An order appointing a receiver or for sale of debt does not debar the garnishee, in a suit on the debt, from setting up the defence that no debt is due. (Vol 13) 1926 Mad 1011 (1011.)

[10] If there are two competing claimants to the same debts the debtor is entitled to say that one of them is the person really entitled to payment from him and not the other. The debtor is entitled to refuse to pay the amount to the person who is not really entitled to payment. (1912) 11 Mad L. Tim 262 (264).

7. Set-off by garnishee of cross-debt Existence of debt owed by garnishee to judgment debtor cannot be challenged in execution proceedings—But garnishee is entitled to prove debt owed to him by judgment-debtor for purpose of set-off—Executing Court can investigate such matters. (Vol 24) 1937 Mad 848 (849).

8. Procedure where garnishee resides outside jurisdiction.—[1] No debt can be attached unless it is within the ordinary civil jurisdiction of the court of execution. (Vol 27) 1940 Rang 34 (36) : 1939 Rang LR 894.

[See (Vol 20) 1933 PC 150 (153) : 60 Ind App 211 : 57 Bom 474 (PC). (Situation of debt explained.)]

46D. Where it is suggested or appears to be probable that the debt or the property attached belongs to some third person or that any third person has a lien or a charge on or an interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt or property and prove the same.

Procedure when debt or property belongs to a third person.

46E. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided, or make such other order upon such terms, if any, with respect to the lien, charge or interest (if any) of such third or other person as may seem fit and proper.

Order to be made on hearing such person.

46F. Payment or delivery made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid, for the amount paid or levied or, as the case may be, property delivered, although such order may be set aside or reversed.

Payment or delivery under order to be a valid discharge.

46G. Debts owing from a firm carrying on business within the jurisdiction may be proceeded against under Rules 46A to 46E of this Order, although one or more members of such firm may be resident outside the jurisdiction: Provided that any person having control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee notice. An appearance by any member pursuant to such notice shall be a sufficient appearance by the firm.

Procedure re: debts owing from a firm.

Costs to be in discretion of Court.

46H. The costs of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto shall be in the discretion of the Court.

Orders appealable.

46I. An order made under Rules 46B, 46C or 46E, shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

O. 21, R. 46 (contd.)

[2] Executing Court—Jurisdiction to pass prohibitory order—Either debt or garnishee must be within jurisdiction. (Vol 21) 1934 Nag 167 (168) : 30 Nag LR 92 (DB). * (Vol 21) 1934 Sind 135 (135). (Debt payable outside British India—It was also assigned outside British India—Court in British India cannot attach such debt).

[3] An executing Court cannot order an attachment of a debt due to a judgment-debtor by a person outside its jurisdiction. (1912) 39 Cal 104 (112) (DB). Proper course is by transfer or under S 46 C.P.C.) * (Vol 2) 1915 Lah 273 (274) * (Vol 26) 1939 Mad 811 (812, 813). Prohibitory order under O. 21, R. 46, by Court issued directly to Official Assignee outside its jurisdiction not to pay dividend due to creditor of insolvent is invalid).

[4] A debt payable to the judgment-debtor outside the jurisdiction of the court in execution cannot be attached. (Vol 19) 1932 Cal 213 (214) : 59 Cal 199 (DB). * (Vol 26) 1939 Cal 428 (429, 430) : ILR (1939) 1 Cal 523.

[5] Only the Court having jurisdiction to execute can issue prohibitory order. (Vol 15) 1928 Nag 210 (210).

[6] Court cannot attach property outside its jurisdiction. (Vol 16) 1929 Lah 645 (646).

[7] Bengal Encumbered Estates Act (6 of 1876), Ss. 3 and 8—Mortgaged property taken over by Court of Wards—Debt secured by such mortgage is not mortgage debt—Jurisdiction to attach and sell this debt vests in Court within whose jurisdiction Manager of Court of Wards resides. (Vol 19) 1932 Pat 148 (149) : 11 Pat 478 (DB).

9. Garnishee admitting liability but not paying—Procedure.—[1] A debtor who admits that he owes money to the pfl., but refuses to pay, should be proceeded against under O. 21, R. 46, (a) of Burma Chief Court Rules. (Vol 3) 1916 Low Bur 33 (33) (DB).

10. Attachment of shares.—An attachment of shares in a corporation is made in the form required by Cl. (ii) of sub-rule (1) and by sub-rule (2) of R. 46, O. 21. (Vol 10) 1923 Mad 211 (212) : 45 Mad 537 (DB).

11. Attachment of other moveable property.—[1] "Moveable property" in Rule 46 includes agricultural produce. Attachment of agricultural produce in the hands of a person not a judgment-debtor should be made under Rule 46 and not Rules 44 and 45. (Vol 8) 1921 Sind 95 (96) : 15 Sind LR 128.

[2] Unpaid purchase money due to the judgment-debtor is moveable property attachable under this rule. (Vol 13) 1926 Mad 903 (904).

[3] Where money is deposited by a judgment-debtor with a railway company as security for the due performance of his duties as a servant of the Company, an attachment of such deposit is subject to all the rights of the company on the deposit, though the interest, if any, payable to the judgment-debtor on the deposit amount may be made available to the decree-holder by virtue of the attachment. (1846) 9 Mad 203 (206) (DB).

[See * (Vol 26) 1939 Bom 90 (91) : ILR (1939) Bom 109. Deposit made by member of Association which is subject to forfeiture and liens and is within absolute control of Association is not liable to attachment under O. 21, R. 46).]

[4] Controller of patents is not person in possession of rights of patentee—Service of prohibitory order under S. 51 upon controller is not attachment. (Vol 26) 1939 Cal 283 (284, 285) : ILR (1939) 2 Cal 618.

[5] Judgment-debtor owning share in property in possession of stranger—R. 46 as well as R. 47 comes into operation—Prohibitory orders should be issued not only to judgment-debtor but also to stranger in possession. (Vol 28) 1941 Nag 157 (158).

[6] Money in the hands of the decree-holder belonging to the judgment-debtor is moveable property not

O. 21, R. 46 (Contd.)

in possession of the judgment-debtor and not a debt not secured by negotiable instrument; so it may be attached without notice to the judgment-debtor. (1912) 15 Oudh Cas 289 (290).

12. Service of prohibitory order.—[1] Prohibitory order served on the Managing Director of private Company—Service is proper. (Vol 15) 1928 Rang 36 (38) : 5 Rang 685 (DB).

13. Effect of non-compliance with Sub-rule (2).—[1] Attachment to be effective must comply with all directions in O. 21, R. 46, appropriate to particular case—Attachment of debt—Failure to affix copy of order on conspicuous part of court-house renders attachment invalid. (Vol 29) 1942 Sind 96 (97) : ILR (1942) Kar 203 (DB). * (1905) 9 Cal WN 693 (695) (DB).

[See * (Vol 15) 1928 Rang 285 (285) : 30 Cri L Jour 748. (Proper procedure of attachment not followed—Conviction for removal of property is illegal.)

[2] Mere order does not amount to actual attachment—Copy of order must be duly served on debtor—Else no attachment of debt and S. 64 does not apply. (Vol 21) 1934 Pat 619 (622) (DB).

14. Effect of attachment.—[1] The object of attachment is only to prevent alienation : it does not create any security, charge or lien in favour of creditor attaching over the property attached but prevents and avoids private alienation by owner of the property. (Vol 32) 1945 Nag 97 (101) : ILR (1945) Nag 121 * (Vol 2) 1915 All 201 (203).

[2] An attachment under O. 21, R. 46, prohibits the creditor from collecting the debt, but does not prevent him from suing on the debt. (1891) 13 All 76 (78) (DB) * (1911) 10 Ind Cas 563 (569) (Cal) * (Vol. 6) 1919 Oudh 373 (374).

[3] A debtor is not absolved from liability by the fact that he paid the debt to a decree-holder of his creditor who attached the debt in execution of his decree, when he was not entitled to recover the debt. In such cases the debtor must contest his liability to pay to the decree-holder. (Vol 2) 1915 Lah 137 (138).

[4] Attaching creditor can get only what judgment-debtor could have got. (Vol 11) 1924 Cal 1068 (1068).

[5] If the judgment-debtor has already parted with his interest in the debt by assignment or created an equitable charge in respect of the same in favour of another person, the attaching creditor acquires no larger rights than his debtor. (Vol 25) 1938 Cal 606 (608).

[6] After attachment, garnishee, a bank, going into liquidation—Decree-holder not entitled to any preferential right but must take pro rata. (Vol 29) 1942 Pat 508 (511) : 21 Pat 287 (DB).

[7] Under R. 46, a decree-holder can attach the deposit made by the judgment-debtor with an Association for his membership; but where the amount is not payable to the debtor at the date of garnishee notice, he cannot issue a garnishee notice, asking the Association to pay up the deposit amount into Court. (Vol 14) 1927 Bom 365 (366).

[8] Attachment of debt—Objection by debtor allowed—Attachment ceases. (Vol 9) 1922 All 384 (385).

[9] Debt—Attachment of decree obtained on debt by judgment-debtor—Effect—Payment of debt to

judgment-debtor or order of Court recording satisfaction thereof—Attaching creditor's right to execute the decree not affected—(On the question whether after attachment of debt, attachment of the decree obtained thereon is also necessary, the two judges in the case take opposite views). (Vol 13) 1926 Mad 371 (371, 372, 376).

[10] When there are attachments of more Courts than one of varying grades, the garnishee acting under Sub. r. (3) of O. 21, R. 46, is bound to deposit the money in the court of the superior grade on the analogy of section 63. (1907) 17 Mad L Jour 488 (489, 490).

[11] Vesting order by competent foreign Court operates on insolvent's property in British India—Such a transfer is a transfer by operation of law and not a private transfer—Such vesting, therefore, does not give way to prior attachment of the property. (Vol 18) 1931 Mad 474 (477, 478) : 54 Mad 727 (DB).

[12] Debtors' property attached by one creditor—Another creditor cannot do an act so as to put debtor's property beyond the reach of attaching creditor'. (Vol 14) 1927 Mad 1147 (1148) (DB).

15. Payment into Court—Sub-rule (3)—[1] A debtor prohibited under Clause (i) of Sub-rule 1 may under Sub-rule 3 pay the amount of his debt into Court and such payment is as effectual as payment to the party. (Vol 11) 1924 Nag 98 (100) : 20 Nag LR 11.

[2] The payment contemplated by O. 21, r. 46 c¹ (3) is a payment into the attaching Court so as to be available for the attaching creditor and not a payment to the particular Court house when the payment is ear-marked for some other purpose. (Vol 23) 1936 Mad 251 (252).

[3] Order 21, R. 46 (3) operates quite independent of any question as to the circumstances under which the payment was made, or the motive which may have influenced the making of it. (Vol 8) 1921 All 81 (85) : 43 All 272.

[4] Deposit made subject to an enquiry is conditional deposit. (Vol 3) 1916 Cal 241 (243) : 43 Cal 269.

16. Inherent power of Court to pass prohibitory orders in proper cases.—[1] Even in cases not strictly governed by O. 21, R. 46, a prohibitory order can be passed under the inherent powers of the Court, where the ends of justice require it to be done. (Vol 19) 1932 Lah 295 (296) * (Vol 24) 1937 Cal 199 (201) : ILR (1937) 2 Cal 48. (Prohibitory order can be passed in respect of a share of debt.)

ORDER 21, RULE 46A (Sind)—Note 1.

[1] Application for notice under R. 46 A—Court should require decree-holder to specify debt or to apply under O. 21, R. 41—R. 46B is complementary to R. 46 A and must follow so far as debt is concerned R. 46 A—Unspecified or unascertained debt cannot be made subject of valid execution under R. 46 B—Notice under R. 46 A should, so far as debt is concerned, be in such terms that order pursuant thereto made under R. 46 B must be capable of execution. (Vol 29) 1942 Sind 87 (88, 89) : ILR (1942) Kar 173 (DB).

[2] Notice under O. 21, R. 46 A—Garnishee's failure to show cause debars him from subsequently raising objections under R. 58 O. 21 (Vol 30) 1943 Sind 23 (23) : ILR (1942) Kar 153.

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

48. (1) Where the property to be attached is the salary or allowances of a ^a[servant of the Crown] or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as ^b[the Appropriate Government may by notification in the Official Gazette] appoint ^c[in this behalf,—

(a) where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends, the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be;

(b) where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court.]

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by ^d[the Appropriate Government,] in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

ORDER 21, RULE 47—Note 1.

[1] A share or interest in moveable property is incapable of actual seizure and attachment by prohibitory order is the only proper course where such share or interest is to be proceeded against. (Vol 19) 1932 Cal 408 (408); 59 Cal 808 & (Vol 24) 1937 Lab 313 (313, 314) (Attachment of share of judgment-debtor in shop can only be by prohibitory order—Attachment of specific goods in shop not permissible.) (Vol 19) 1932 Mad 538 (539, 540); 55 Mad 1041; 33 Cri L. Jour 222.

[2] A co-parcener offender—Default in payment of fine—Attachment of standing crops of joint family by actual seizure is not legal as share of offender in crops is unascertained. (Vol 23) 1936 Mad 560 (560); 37 Cri L. Jour 836.

[3] Judgment-debtor owning share in property in possession of a stranger—Rule 46 as well as R. 47 come into operation—Prohibitory orders should be issued not only to judgment-debtor but also to stranger in possession. (Vol 28) 1941 Nag 157 (158).

[4] Trustee holds property on account of his cestui-que trust but latter is not co-owner with former. Hence this rule does not apply to attachment of moveable property held by a trustee on behalf of the cestui-que trust. (Vol 27) 1940 Nag 270 (272) (DB.)

ORDER 21, RULE 48.

Synopsis.

1. Attachment of salary of public officer etc.
2. "Subject to provisions of S. 60."
3. Sub-rule (2).
4. Sub-rule (3).
5. Appeal.

1. Attachment of salary of public officer etc.—[1] This rule does not apply to salaries of judgment debtors in private service. Such salaries are attachable only as debts after they fall due. (Vol 16) 1929 Nag 333 (334).

[2] Pay or pension in private service for the month is due on the last day of the month, even though it is not paid till the first of the next month and can be attached on the last day of the month. (Vol 17) 1930 Rang 161 (161).

[3] Wages of domestic servants are not salary or allowances under this rule. (Vol 16) 1929 Nag 333 (334).

[4] Money due to railway contractor for work done is not salary or allowance within this rule. (Vol 15) 1928 Nag 210 (210).

[5] Salary of a member of the provincial Legislative Assembly, cannot be attached under R. 48 as he is not a public officer. (Vol 26) 1939 Cal 428 (429, 430); ILR (1939) 1 Cal 523 (DB.)

[6] Attachment of salaries or allowances at the disposal of the disbursing officer is not invalid by reason merely of the fact that that sanction of the superior authority is necessary before the money is actually disbursed. (Vol 1) 1914 Low Bur 215 (215, 216); 8 Low Bur Rule 62.

[7] Court to which decree is sent for execution has power to attach under this rule. (Vol 14) 1927 Oudh 112 (112); 1 Luck 46 (DB.).

[8] The attachment under O. 21, R. 48, becomes complete and effective as soon as the notice of the order issued by the Court is served upon the disbursing

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind^{ed} [the Appropriate Government] or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and^e [the Appropriate Government] or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

Explanation.—In this rule 'Appropriate Government' means—

- (i) as respects any g[person] in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government;
- (ii) as respects any g[person] employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative; and
- (iii) as respects any other^a [servant of the Crown] or a servant of any other railway or local authority, the Provincial Government

[1882-S. 268.]

- a. *Substituted* by the Code of Civil Procedure (Amendment) Act, 1943 (V of 1943), S. 3, for "public officer"
- b. *Substituted* by the Repealing and Amending Act, 1942 (XXV of 1942), S. 3 and Sch. II for "the Central Government or the Provincial Government may by notification in their Official Gazette"
- c. *Substituted* by the Code of Civil Procedure (Amendment) Act, 1939 (XXVI of 1939), S. 2, for "in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be."
- d. *Substituted* by the Repealing and Amending Act 1942 (XXV of 1942). S. 3, and Sch. II for "the Central Government or the Provincial Government, as the case may be."
- e. *Substituted, ibid.*, for "the Central Government or the Provincial Government."
- f. *Explanation added, ibid.*
- g. *Substituted* by the Code of Civil Procedure (Amendment) Act, 1943 (Vol 1943), S. 3, for "public officer."

PROVINCIAL AMENDMENT.

Madras

Substitute a comma for the period at the end of the last sentence of sub-rule (1) and *add* the following clause "such amount or instalment being calculated to the nearest anna, by fractions of an anna of six pies and over being considered as one anna and omitting amounts less than six pies" [R. O. C. No. 1810 of 1926.]

O. 21, R. 48 (contd.)

officer, who accepts it. (Vol 28) 1941 Oudh 277 (278).

[9] Notice under R. 48 on officer to withhold salary of his subordinate—Such officer can apply to Court that attachment is illegal and should be vacated. (Vol 28) 1941 Bom 389 (391) : ILR (1941) Bom 415 (DB.) * (Vol 31) 1944 Cal 135 (136, 137) : ILR (1944) 2 Cal 187 (DB.)

2. "Subject to provisions of S. 60."—[1] Salary of postal employee does not by his consent become attachable when it is not otherwise so. (Vol 31) 1944 Lah 168 (168)

3. Sub-section (2).—[1] O. 21, R. 48 cannot override S. 73 - Salary attached under O. 21, R. 48 is assets within the meaning of S. 73 and successive attaching decree-holders are entitled to rateable distribution thereof. (Vol 26) 1939 Cal (485) (486) : ILR (1939) 1 Cal 40.

[2] Decree-holder obtaining prohibitory order under O. 21, R. 48 attaching portion of judgment-debtor's salary—Other judgment-creditors not applying for rateable distribution—First decree-holder held entitled to receive whole of amount attached and Court had no jurisdiction to cancel prohibitory order. (Vol 27) 1940 Rang 201 (202) : 1940 Rang LR 421 (SB)

[3] In cases of attachment of salaries of postal employees, Court should obtain on the application of the decree-holder the relevant materials from the Post-master-General to work out the figures itself and then issue an attachment for a definite amount. (Vol 28) 1941 Pat 157 (160).

4. Sub-section (3).—[1] If the disbursing officer does not comply with the Civil Court's order of attachment of the salary of some of his subordinates, the Court should realise the money from Government. (1910) 1910 Pun LR No. 65 p. 172 (174) : 1910 Pun Re No 10 (DB.)

[2] No order under R. 48 (3) of the Code can be made against Government without bringing the Government on the record as a party. (1912) 1912 Pun LR No. 255 p. 804 (805) : 1912 Pun Re No. 93.

5. Appeal.—[1] Where a decree-holder seeks to execute his decree by attachment of judgment-debtor's pay under this rule the question whether it is possible to execute the decree in the manner which has been adopted by the executing Court is a question under S. 47 and the decision of the question therefore is appealable as a decree. No revision therefore lies. (Vol 20) 1933 Bom 185 (186).

[2] Order under this rule is not revisable but an appeal lies from it. (Vol 23) 1936 Lah 761 (762).

49. (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

[Of. R. S. C., O. 46, Rr. 1A, 1B.]

ORDER 21, RULE 49.

Synopsis.

1. Attachment of partnership property.
2. Sub-rule (2)
3. Decree against individual partner.
4. Sub-rule (4)—Notice.

1. Attachment of partnership property.—[1] Decree against individual partner—Partnership property cannot be attached, but an order creating a charge on the interest of the judgment-debtor in the partnership can be passed with or without the appointment of the receiver. (Vol 28) 1941 Cal 364 (366) : ILR (1941) 1 Cal 389. * (Vol 19) 1932 All 468 (469) (DB.) (Interest of partner in partnership property only vests in receiver - He cannot be appointed to manage entire partnership) * (Vol 6) 1919 Cal 296 (304) (DB.)

[2] A debt due to a firm cannot be attached under R. 46 in execution of a decree against a partner in his individual capacity. (Vol 28) 1941 Cal 364 (366, 367) : ILR (1941) 1 Cal 389 (DB.)

[3] Order 21, R. 49 is imperative and sale of partnership property in execution of money decree against one of partners is inoperative and invalid. (Vol 22) 1935 Cal 275 (278) (DB.)

[4] Interest of partner in partnership assets is moveable—O. 21, R. 78 applies to sale of partner's interest—O. 21, R. 90 does not apply. (Vol 25) 1938 Lah 65 (67, 68) (DB.)

[5] Rule does not apply to dissolved partnership—Dissolution of partnership on partner's death—Subsequent decree against his assets—Order under R. 49 cannot be made in respect of his assets in partnership. (Vol 38) 1946 Mad 176 (178). (Expression "a partner" and "such partner" in R. 49 (2) mean a partner in the firm as such.)

[6] Rule 49 cannot be read with S. 52 (1), so as to make it applicable to a case where a partnership is dissolved on the death of a partner and a decree obtained against the legal representatives of the

deceased is sought to be executed by attachment of the assets belonging to him in the (dissolved) partnership. (Vol 38) 1946 Mad 176 (179.)

2 Sub-rule (2).—[1] Rule 49 provides process in substitution of ordinary process of attachment—R. 49 (2) does not contemplate levying of attachment within R. 58. R. 63 not applicable where process is issued under R. 49. (Vol 38) 1946 Mad 176 (177, 178).

[2] Order 21, R. 49 (2) charges the interest of the partner in the partnership property and profits. The partner's interest is his right to participate in the net assets of the firm, that is, in the value or proceeds of the assets less the liabilities to third parties and not less any liability to himself. (Vol 27) 1940 Rang 153 (154) (DB.) The court charges and orders the sale of whatever the partner is entitled to from the partnership business as between that partner and the other partners, as if on dissolution of the firm.

See also (Vol 28) 1941 Nag 63 (65, 66) : ILR (1942) Nag 248 (Judgment-debtor partner entitled only to share of profits over-drawing his account—Other partners are entitled to priority over the judgment-creditor of over-drawing partner—Receiver can insist that nothing should be paid to the judgment-debtor for any private or personal purpose.

[3] Applications under O. 21, R. 49—Objection by garnishee that judgment-debtor is not his partner and no money is due to him—Objection not decided—Appointment of receiver is irregular. (Vol 27) 1940 All 250 (250.)

3. Decree against individual partner.—[1] Assignee of one partner cannot sue other partners for accounts—Assignee obtaining decree against one of other partners and receiver appointed for share of judgment-debtor partner—Even such receiver cannot sue other partners for accounts but has only to receive profits of judgment-debtor partner. (Vol 19) 1932 Pat 15 (18, 19) : 10 Pat 792 (DB.)

4. Sub-rule (4)—Notice.—[1] An order passed under sub-rule (2) without any notice as required by this rule is irregular and can be set aside in revision. (Vol 27) 1940 All 250 (250, 251.)

Execution of decree
against firm.

50. (1) Where a decree has been passed against a firm, execution may be granted—

- (a) against any property of the partnership ;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may

ORDER 21, RULE 50.

Synopsis.

1. Scope of the rule.
2. Where a decree has been passed against a firm.
3. Award.
- 3a. Against partnership property.
4. Against any person who has appeared.
5. Sub-rule (2).
6. Determination of liability under Sub-rule (2) operates as a decree.
7. Sub-rule (4).
8. Insolvency of firm.

1. Scope of the Rule.—[1] Order 21, R. 50 should be read subject to provisions of O. 30, (Vol 19) 1932 Bom 334 (336). (Vol 14) 1927 Bom 581 (592) : 51 Bom 986 (DB). * (Proviso to R. 3, O. 30 overrides R. 50.)

[See however (Vol 14) 1927 Bom 447 (448) : 51 Bom 794 (DB). (Order 21, R. 50 is not controlled by O. 30, R. 2 (3)]

[2] Decree against members of firm requires execution against them and not merely against firm. (Vol 20) 1933 Pesh 63 (65).

[3] The rule applies only to cases in which members of a partnership who have not been impleaded as such are sought to be arrested in execution of a decree obtained against the firm. (Vol 2) 1915 Mad 1073 (1073) (DB).

[See also (Vol 17) 1930 Lah 243 (244). (Decree against firm—Partner sought to be made personally liable—R. 50 (2) is intended to apply to such cases.)]

[4] Decree against firm—Decree-holder can pursue any of the three courses regardless of their order. (Vol 20) 1933 Lah 472 (472).

[5] Decree against firm is decree against its partners individually and can be executed against them—Inclusion of other persons along with some partner in execution application does not render it invalid. (Vol 25) 1938 Cal 316 (317, 318). (DB).

[6] No order under O. 21, R. 50, can be passed making the share-holders liable when the decree is against a limited liability company and where such an order is passed, the order must be deemed to be a nullity and must be ignored by the Court. (Vol 24) 1937 Lah 59 (80).

2. Where a decree has been passed against a firm.—[1] The word 'firm' is used in R. 50 of O. 21, in the same sense as that in which it is used in O. 30, because the rule applies only to decrees passed in suits instituted under O. 30. That being so, O. 21, R. 50, applies only to a decree passed against a contractual firm and not to a decree passed against a joint family business and a decree against a joint family business which is not a contractual firm cannot be executed with the aid of O. 21, R. 50. (Vol 29) 1942 Cal 613 (615) : ILR (1942) 1 Cal 161. (Award against such business is equally incapable of execution under O. 21, R. 50.) * (Vol 28) 1941 Pat 596 (598) : 20 Pat 755 (DB).

[See however (Vol 27) 1940 Pat 149 (151) (DB). (Order 21, R. 50 applies even to a Joint Hindu Family firm consisting of father and son. * (Vol 17) 1930 Pat 205 (207) : (Decree in name of joint family partnership firm of father and son—Son neither appearing, nor admitting partnership nor served individually.—No order under O. 21, R. 50 (2)—Decree cannot be executed against property in hands of son)].

[See also Notes on O. 30, R. 4.]

3. Award.—[1] If a firm as such is a party to a reference and the submission is signed by the firm in the firm name, an award may be made against the firm in the firm name. (Vol 20) 1933 Bom 433 (434) : 58 Bom 162 (DB). * (Vol 18) 1931 Lah 736 (737) (DB).

[But see * (Vol 14) 1927 Bom 428 (430). *Obiter*—It is doubtful whether a firm can be lawfully made a party to a reference to arbitration. The term 'parties' used in the Arbitration Act cannot apply to a firm apart from its partners.]

[2] Order is applicable to the execution of an award filed in Court. (1935) 62 Cal 833 (835). * (Vol 14) 1927 Bom 428 (430). * (Vol 11) 1924 Cal 117 (118) * (Vol 23) 1936 Sind 211 (211) : 30 Sind LR 6 (DB). * (Vol 18) 1931 Sind 82 (84) : 25 Sind LR 460. * (Vol 16) 1929 Sind 28 (29) : 23 Sind LR 422 (DB). * (Vol 12) 1925 Sind 293 (294) : 19 Sind LR 1.

[See also * (Vol 29) 1942 Cal 613 (615) : ILR (1942) 1 Cal 161. (Award against joint family business cannot be executed under O. 21, R. 50, because this rule applies to contractual firms only.)]

[3] Where an award against a firm is filed, execution cannot proceed against an individual partner under the provisions of O. 21, R. 50 (1) (c) which only applies in the case of a decree passed against a firm in a suit. It is necessary under O. 21, R. 50 (2) either for the Court filing the award or for the Court to

order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

[Cf. R. S. C., O. 48A, R. 8.]

PROVINCIAL AMENDMENT.

Patna

In sub-r. (2) *add* the words " or to the Court to which it is sent for execution " after the words " passed the decree " and before the words "for leave."

O. 21, R. 50 (*contd.*)

which the decree is transferred for execution to decide, whether the person is liable to be proceeded against in execution as an individual partner. (Vol 18) 1931 Lah 736 (738) : 13 Lah 327 (DB) * (Vol 16) 1929 Lah 228 (229, 230).

[4] The question whether any or all persons served with notices of award or of its filing in court are partners in the firm can only be litigated when an application under O. 21, R. 50 is made against persons alleged to be partners and cannot be gone into in proceedings for filing the award. (Vol 23) 1936 Sind 121 (123) : 29 Sind LR 292. * (Vol 19) 1932 Bom 375 (377). It should be decided in execution proceedings or by separate suit.

[5] An award obtained against a firm cannot be executed against a party who is alleged to have been a partner in the firm but who was not served either with the notice of arbitration or of filing of the award. (Vol 14) 1927 Bom 428 (430.)

[6] Sub-rule (2) of R. 50 of O. 21, deals with a case where a person denies that he is a partner of the firm against which the decree has been passed. It does not contemplate a dispute relating to the question whether the award is against a firm at all. (Vol 29) 1942 Cal 613 (616) : ILR (1942) 1 Cal 161.

3. (a) *Against partnership property.*—[1] Firm dissolved before decree—Firm's property can be proceeded against. (Vol 11) 1924 Bom 366 (367, 368) (DB).

[2] Under Eng. Law, in a judgment against a firm, execution may issue against any property of the firm only so far as partners not served and who have not appeared are concerned. (1913) 36 Mad 414 (417) (DB).

[3] Sons of a deceased partner are liable for debts to the extent of father's assets. (Vol 14) 1927 Sind 247 (248).

[4] *Suit against firm*—Person known to be dead subsequently discovered to be partner—Execution cannot be issued against legal representative in respect of personal assets. (Vol 16) 1929 Mad 733 (737) : 52 Mad 885 (FB).

4. *Against any person who has appeared.*—[1] Where one of the partners refused to accept a summons which was therefore affixed to the outer door of the place of business and the partner did not appear in execution proceedings: *Held*, that he was served individually as a partner and as such execution could proceed against him under O. 21, R. 50 (1) (c). (Vol 2) 1915 Cal 238 (242) (DB).

[2] Summons served on authorized agent of partners is individual service on partners and the decree so obtained can be executed against the partners personally. (Vol 15) 1928 Lah 528 (529).

[3] Served partners cannot subsequently contest their liability as partners.—They do not come under O. 21, R. 50 (2). (Vol 29) 1942 Sind 97 (98) : ILR (1942) Kar 218. (DB). * (Vol 13) 1926 Sind 51 (52).

[4] Words " or who has been adjudged to be partner " provide for a case where the only person served on behalf of the firm denies that he is a partner and the plaintiff asks for an issue being raised for purpose of holding whether the service on him is good service on the firm or not. In such proceedings, if a person is adjudicated as a partner and no decree is then passed against the firm, no further leave under O. 21, R. 50 to execute the decree against him is necessary. (Vol 19) 1932 Sind 199 (201) : 26 Sind LR 228.

[5] The term ' partner ' within the meaning of the second part of O. 21, R. 50, includes ' legal representative,' and it is open to the plaintiff to raise and have decided in execution proceedings against the firm the liability of the legal representative of a deceased partner. (Vol 23) 1936 Sind 211 (212) : 30 Sind LR 6 (DB).

[6] *Suit against firm*—One of parties pleading his non-liability and decision on issue raised on such plea—He cannot plead subsequently that such adjudication can be made only after judgment is passed. (Vol 22) 1935 Lah 520 (521) (DB).

[7] Decree against firm and some partners mentioned specifically—Liability of other partners is not excluded but action must be taken under R. 50. (Vol 12) 1925 Sind 317 (318) : 18 Sind LR 146 (DB).

[See also (Vol 25) 1938 Cal 316 (317, 318). (Execution cannot proceed against those who are stated to be the remaining partners of the firm in the petition for execution and who do not come under O. 21, R. 50, without the leave of the court which passed the decree, though their mere inclusion will not invalidate execution petition)]

[8] It is not contemplated by O. 30, while O. 21, R. 50 provides a definite procedure, whereby the issue can be determined before any execution can go against the person who has entered appearance under protest. (Vol 14) 1927 Cal 758 (760) : 54 Cal 1057.

5. Sub-rule (2).—[1] Sub. R. 2, R. 50, is only applicable in absence of conditions in sub-r. 1. (Vol 2) 1915 Cal 238 (242) (DB).

[2] A point of difference between an order under O. 21, R. 50 (2) and an order under S. 47 is that an

O. 21, R. 50 (*contd.*)

order under S. 47 may be passed by the Court executing the decree, whereas an order under O. 21, R. 50 (2) may be passed only by the Court which passed the decree. (Vol 26) 1939 Sind 161 (164) : ILR (1939) Kar 589 (FB).

[3] The words "Where the liability is not disputed" in O. 21, R. 50 (2), mean and can only mean liability as a partner in the firm, and that is the only question which can be determined in proceedings taken under the sub-rule. (Vol 21) 1934 Sind 135 (136).

[4] Notice not issued individually to partners. Their liability as partners must be proved. (Vol 20) 1933 Lah 591 (591). (Presumption arising under Contract Act, S. 264, does not avail creditor if he is customer after dissolution).

[5] Executing Court can try question under R. 50 (2). (Vol 16) 1929 Lah 228 (230) * (Vol 19) 1932 Bom 516 (518) (DB). (Opportunity must be given to a partner who has not been served to dispute his liability.)

[6] Per B. J. Wadia, J.—The language of R. 50, sub-r. (2), is sufficiently wide to permit a person desiring to dispute his liability as a partner to do so, not only on the ground that he was not a partner, but on other grounds as well. All appropriate issues can be tried by the Court, that is, all proper defences, or defences "appropriate" to the issue of the liability as partner and appropriate also to the procedure under O. 21, R. 50 sub-r. (2). (Vol 27) 1940 Bom 330 (332) : ILR (1940) Bom 562 (Per Wadia J.) * (Vol 28) 1941 Sind 8 (9) : ILR (1941) Kar 69 (DB). (O. 21, R. 50 does not exclude enquiry as to whether a party to suit is liable as partner because he held himself out as such—O. 21, R. 50 is not limited to finding of fact whether particular person is or is not partner).

[7] In inquiry under R. 50 (2) person can admit that he is partner—But he cannot dispute decree. (Vol 21) 1934 Sind 135 (135, 136).

[8] Ex-parte decree against firm mentioning also individuals constituting it—Execution—Objection by partners A and B that they were not personally liable—A and B proceeding under O. 9, R. 13 to set aside ex-parte decree—Proceeding dismissed on decree holder contending that decree was against firm—Decree-holders held could not subsequently contend that decree was against individuals. (Vol 23) 1936 Pat 496 (497) (DB).

[9] Suit against firm decreed—Property attached in execution—Objection by person not party to decree that property is his own allowed—No suit under R. 63 filed by decree-holder—Application of decree-holder for leave to execute against such objector on the ground that he is in charge of firm allowed—Decree-holder can execute decree against same property and prior order under R. 53 is no bar. (Vol 22) 1935 Pat 409 (411) : 14 Pat 557.

[10] Application for leave to execute decree is not barred so long as decree is alive. (Vol 22) 1935 Sind 12 (13) : 29 Sind LR 236.

[11] Application under O. 21, R. 50 (2) is application in execution of decree. (Vol 26) 1939 Sind 161 (162) : ILR (1939) Kar 589 (FB.) * (Vol 23) 1936 Sind 138 (139) : 30 Sind LR 88 (DB). (Time-limit for it is same as for execution.) (Vol 17) 1930 Sind 138 : 24 Sind LR 451 dissented from).

[But see * (Vol 27) 1940 Pat 596 (598) : 19 Pat 909. (The proceeding for obtaining leave under O. 21, R. 50 is not an application for execution, nor does the leave

granted amount to any order for execution. But an order for the arrest of the judgment-debtor amounts to a determination that the decree was capable of execution and would *prima facie* operate as revivor. * (Vol 17) 1930 Sind 180 (181) : 24 Sind LR 132. (Though application for leave is not an execution application falling under art. 182, Limitation Act, it falls under art. 181 and must be filed within three years of the decree).

[12] An application under O. 21, R. 50 (2), for leave is merely an ancillary application in an application for execution and is governed by Art. 182 of the Limitation Act, and not by Art. 181. The fact that the application is not framed as one for execution but as one for determining the liability of the partners who were not served in the suit does not make any difference. (Vol 22) 1935 Mad 926.

[13] Sub-rule (2) of r. 50, O. 21 does not contemplate a separate application for leave prior to the presentation of the execution petition itself. It is permissible to make one application combining both the prayers. (Vol 32) 1945 Cal 303 (304) (DB). * (Vol 18) 1931 Lah 736 (738) : 13 Lah 327 (DB). (Application for execution implies application for leave to execute decree against partner).

[14] The following different views are held on the question whether the court to which a decree is transferred for execution can grant leave under sub rule (2) of R. 50 :—

[a] Court to which decree is transmitted for execution has no jurisdiction to entertain a petition under r. 50 (2). The proper Court is the Court which passed the decree. (Vol 32) 1945 Cal 303 (304) (DB) * (Vol 29) 1942 Mad 501 (502) : ILR (1942) Mad 688 * (Vol 19) 1932 Pat 323 (324) : 11 Pat 580 (DB). (The words 'the court which passed the decree' refer to the original Court which actually passed the decree and not the court executing it). * (Vol 24) 1937 Pesh 96 (97). * (Vol 26) 1939 Sind 161 (164) : ILR (1939) Kar 589 (FB). * (Vol 23) 1936 Sind 138 (138) : 30 Sind LR 88 (DB). * (Vol 23) 1936 Sind 11 (12) : 30 Sind LR 290 * (Vol 18) 1931 Sind 82 (83) : 25 Sind LR 460.

[b] Notwithstanding the wording of O. 21, R. 50 (2) the Court to which a decree is sent for execution, has power to decide, whether a particular person, against whom it is desired to proceed, is a partner or not. (Vol 18) 1931 Lah 736 (738) : 13 Lah 327 (DB). * (Vol 18) 1931 Lah 507 (508) * (Vol 8) 1921 All 199 (200) : 43 All 394.

[c] The court passing the decree does not cease to have jurisdiction to grant leave to the decree-holder under O. 21, R. 50 (2), merely because it has transferred the execution of the decree to another court. (Vol 24) 1937 All 758 (759) : ILR (1937) All 946 (DB).

6. Determination of liability under sub-rule (2) operates as a decree.—[1] An order granting leave to execute a decree against any person on the ground that he is a partner, made under O. 21, R. 50, sub-rs. (2) and (3) is not a decree. (Vol 16) 1929 Bom 386 (387, 388) : 53 Bom 339.

[2] Ex parte order granting leave to apply for execution does not have the force of decree. (Vol 16) 1929 All 390 (391, 392) (DB).

[But see * (Vol 22) 1935 Pat 409 (411) : 14 Pat 857. (Obiter—If a party is given an opportunity to dispute his liability and does not come forward to dispute it, an order passed against him in such circumstances

51. Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

[1882-S. 270 ; 1877-S. 270 ; 1859-S. 238.]

52. Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

[1882-S. 272 , 1877-S. 273 ; 1859-S. 237. Cf. R. S. C., O. 46, R. 12. See S. 73].

PROVINCIAL AMENDMENT.

Madras

Add the following as proviso (ii) and re-number the existing proviso as (i) :

"(ii) Provided further that, where the Court whose attachment is determined to be prior, receives or realizes such property, the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets.

Explanation.—Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court." [P. Dis. No. 445 of 1935.]

O. 21, R. 50 (contd.)

should on principle have the same force as an order passed against him after the question of his liability has been tried and determined against him.

[3] The words "conditions as to appeal or otherwise as if it were a decree" in O. 21, R. 50 (3), mean "the conditions whether as to appeal or in other respects as if it were a decree". They include conditions imposed by orders or rules outside the Code. (Vol 20) 1933 Cal 546 (547) : 60 Cal 530.

[4] Appeal from order under O. 21, R. 50 (2) and (3) is chargeable with ad valorem court-fee under Art. 1, Sch 1, and not under Art. 11 Sch 2, Court-fees Act. (Vol 26) 1939 Sind 161 (161, 163) : ILR (1939) Kar 589 (FB) ; (Vol 21) (1934) Lah 958 (959, 960) : 15 Lah 893 (DB). (Art 11 or Art. 17, Sch 2 does not apply) ; (Vol 17) 1930 Lah 825 (827) ; (Vol 17) 1930 Sind 255 (256) : 25 Sind LR 25 (DB).

[5] Deputy Registrar of High Court empowered to grant leave under R. 50 cannot determine liability of a contesting party. (Vol 12) 1925 Rang 317 (318) (DB).

7. Sub-rule (4). [1] Execution against individual partner—Notice must be served before proceeding. (Vol 13) 1926 Cal 271 (274) : 53 Cal 214 (DB).

[2] Construction of—Decree against firm—Legal representatives of a deceased partner not summoned—Leave can be given to execute decree against legal representatives. (Vol 10) 1923 Bom 66 (67) (DB).

8. Insolvency of firm.—[1] Where a decree has been passed against a firm but all the members have been served individually, the decree can be executed against them personally though the firm has been declared insolvent and though there has been no application under O. 21, R. 50. (Vol 12) 1925 Lah 379 (379).

ORDER 21, RULE 51—Note 1.

[1] An attachment of a negotiable instrument, whether in the possession of the judgment-debtor or not, should be by actual seizure, as third party becoming

possessed of it is likely to be prejudiced by a mere prohibitory order of which he may know nothing. (Vol 10) 1923 Mad 317 (318, 319) : 46 Mad 415.

[2] A prohibitory order is sufficient attachment against the debtor. (Vol 15) 1928 Mad 940 (942) (DB).

[3] Cheque in judgment-debtor's favour on bank—Proper procedure is actual seizure of cheque and not prohibitory order under O. 21, r. 52 directing bank's manager to withhold payment. (Vol 29) 1942 Rang 59 (60) : 1941 Rang LR 759.

ORDER 21, RULE 52.

Synopsis.

1. Scope of the Rule.
2. Property in the custody of the court or public officer.
3. Property in the hands of Receiver and Official Assignee.
4. Determination of questions of title and priority.
5. Appeal and Revision.

1. Scope of the Rule.—[1] Order 21, r. 52, deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways. (Vol 22) 1935 Sind 214 (215) : 29 Sind LR 251.

[2] Sale proceeds deposited in Court during confirmation of sale—Judgment-debtor not objecting to confirmation—Surplus amount payable to judgment-debtor is attachable under O. 21, R. 52. (Vol 24) 1937 Nag 391 (393) : ILR (1938) Nag 402.

[3] The circumstance that one decree-holder has attached certain properties of the judgment-debtor is by itself not a ground for preventing another decree-holder of the same judgment-debtor from attaching the same property under O. 21, R. 52. (Vol 17) 1930 Mad 4 (11).

[4] Money deposited in court to satisfy A's decree-B, attaching the money before judgment and getting

O. 21, R. 52 (*contd.*)

decree and must apply for execution of his decree and transfer of money in his own suit. He cannot apply to court holding the money for payment. (Vol 13) 1926 Mad 1104 (1105).

[5] Attachment under R. 52 is to be effected by issuing a notice to the custody court to hold the property subject to the orders of the Court issuing notice. (Vol 3) 1916 Cal 570 (572, 573, 574) (DB). (R. 52 is applicable even when property is in custody of same court executing the decree. (1911) 11 Ind Cas 859 (859) (Burma). An attachment of property in the custody of another Court not having been made by notice to that Court is irregular.)

[6] Attachment before judgment in force—Another decree-holder putting to sale property in execution of his decree and purchasing it, failing to give notice according to O. 21, R. 52 to Court previously attaching property before judgment—Property again sold in execution of decree, in which it was attached before judgment—Decree-holder previously purchasing property is not entitled to damages from decree-holder in subsequent decree. (Vol 23) 1936 Cal 112 (113, 114).

[7] The expression 'further orders of the Court' in O. 21, r. 52 Civil P. C., is wide enough to cover any order that the Court may make. (Vol 22) 1935 Pat 201 (204).

[8] Money in the hands of a Court in another District cannot be attached—Decree must be transferred to that court. (Vol 1) 1914 Upp Bur 15 (16).

[9] C mortgaging his properties to A and then to B—A suing on his mortgage without joining B and properties sold—Surplus proceeds deposited in Court—B attaching the deposit before the judgment in his suit, but no note made in deposit register—A obtaining another decree for unsecured debts and deposit paid to him towards the decree—Deposit was held to have been properly attached by B and his rights, as puisne mortgagee not affected. (Vol 15) 1928 Lah 593 (594, 595).

[10] Applies even when the property is immovable property. The words "interest or dividend becoming payable thereon" are not placed to limit the general meaning of the word "property", (Vol 29) 1942 Bom 58 (55).

2. Property in the custody of the Court or public officer. [1] The rule permits of attachment of property in the hands of an Official Trustee. (1889) 12 Mad 250 (252)

[2] Letters addressed to the judgment-debtor containing currency notes, in the custody of the post-master attached under O. 21 R. 52—A day before the attachment took place senders of letters requested the post-master to have the letters returned—Held that the letters were held in trust on behalf of the addressee and further they were liable to be attached. (1890) 13 Mad 242 (247).

[3] Railway Provident Fund money paid into Post Office for being sent to the railway servant by money order—Money attached in course of transmission—Held Post office was acting as agent of railway servant judgment-debtor and not of the railway company. (Vol 3) 1916 All 386 (386, 387).

[4] Garnishee order—Attachment of revenue payable in future is on same footing as interest or dividend and is attachable. (Vol 2) 1915 Bom 313 (314) : 39 Bom 80.

[5] Attachment of property—Property handed over to Amin—Amin handing over property to supradar :

Held that the supradar does not become a public officer within the meaning of O. 21, r. 52. (Vol 21) 1934 All 357 (358) (DB).

[6] Money of person liable to pay land revenue attached by Court—Collector should obtain such order as can legally be made in Government's favour—He cannot distrain amount. (Vol 30) 1943 Sind 30 (31, 32) : ILR (1942) Kar 478.

[7] The words "in the custody of the court" imply actual custody. (Vol 20) 1933 Mad 342 (343, 344). * (Vol 4) 1917 Cal 13 (15) : 44 Cal 1072.

[8] The rule does not allow an anticipatory attachment of money expected to reach the hands of a court or a public officer and is restricted to moneys actually in its or his hands. (1911) 14 Cal L Jour 127 (133). * (1898) 22 Bom 39 (41) (DB). * (Vol 2) 1915 Mad 236 (236). Attachment before money paid in Court is invalid.)

3. Property in the hands of Receiver and Official Assignee. [1] Money with the receiver is supposed to be in Court's custody. The Court having such custody only can decide questions relating to such money. No other Court has jurisdiction to do it. (Vol 3) 1916 Pat 321 (322) : 1 Pat L Jour 449. * (1930) 32 Bom LR 1315 (1317) (DB). Receiver appointed in administration suit.

[2] Leave of the Court is necessary before attachment can issue against property in the hands of a Receiver appointed by the Court. (Vol 18) 1931 Pat 204 (204) (DB). * (Vol 29) 1942 Bom 53 (53). (R. 52 does not deal with the leave necessary to be obtained for proceeding under O. 21, r. 52) * (1894) 21 Cal 85 (92). (Attorneys holding a lien for costs cannot attach money in the hands of the Receiver, without the previous permission of the Court.)

[But see * (Vol 21) 1934 Rang 174 (176) (DB). Property in hands of receiver can be attached without permission of Court.]

[3] Merely asking permission to attach money in receiver's hands will not effect attachment. (Vol 23) 1936 Rang 83 (84) (DB).

[4] Appointment of receiver by Court of rents and profits—R. 52 has no application. (Vol 20) 1933 Cal 417 (418) : 60 Cal 345 (DB).

[5] After passing preliminary decree in partnership suit and appointment of receiver therein, it is competent to High Court on original side to make charging order at the instance of creditors of partnership firm—Effect of such order is to constitute judgment-creditor secured creditor, having priority over unsecured creditors. (Vol 17) 1930 Bom 451 (454) : 54 Bom 667. * (Vol 14) 1927 Bom 394 and 405 overruled.)

[6] Receiver appointed in suit for administration of the estate of a deceased but no decree passed—Receiver ought not to be directed to pay judgment-creditor who has obtained attachment under O. 21, R. 52. (1930) 32 Bom LR 1315 (1318). * (Vol 14) 1927 Bom 657 (659).

[7] Appointment of receiver by consent of parties in suit by A against B—It was held that the other creditors of B could attach in hands of receiver only the amount which was in excess of the amount due to A. (Vol 23) 1936 Rang 83 (84) (DB).

[8] Moneys in the hands of the Official Assignee which are payable to the judgment-debtors as creditors of the insolvent by way of dividend declared by the Official Assignee, are attachable under O. 21, R. 52. (Vol 12) 1925 Bom 344 (344) : 49 Bom 638.

53. (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

- (a) if the decrees were passed by the same Court, then by order of such Court, and
- (b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—
 - (i) the Court which passed the decree sought to be executed cancels the notice, or
 - (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

O. 21, R. 52 (*contd.*)

[See also * (Vol 24) 1937 Rang 538 (539) (DB.) (Attachment of property in custody of Court—Dividend in Official Assignee's hands to which judgment-debtor is entitled not declared before particular date—Creditors of such judgment-debtor are not entitled to anything prior to that date).]

4. Determination of questions of title and priority. [1] The property already under attachment of Small Cause decree attached by High Court under Rule 52—Question of priority arising—Held that Small Cause Court was the only Court to decide the question of priority between claimants to property and the plaintiffs. (1895) 19 Bom 710 (713).

[2] Disputes relating to money in hands of receiver can be decided by Court in whose custody money is. (Vol 3) 1916 Pat 321 (322) : 1 Pat L Jour 449 (DB).

[3] The Court of Deputy Collector is a Court of justice and has a right to determine the question of priority of claim to surplus moneys in its custody. (1868) 10 Suth W.R. 43 (43) (DB).

[4] Proviso—Scope—Disputes about title or priority—Determination need not be in same suit in which property was placed in custody of Court. (Vol 26) 1939 Mad 210 (213) : ILR (1939) Mad 1004 (DB).

[5] It has been held in the under-mentioned case that where a fund in another Court to the credit of the judgment-debtor is attached by a decree-holder, he is entitled to be paid out in priority to subsequent creditors attaching the fund later on. Immediately on the attachment, the money becomes payable. (Vol 6) 1919 Mad 66 (68) : 42 Mad 692 (DB).

[6] Money in custody court is not assets in attaching court unless such money is ordered to be credited to the attaching court. (Vol 20) 1933 Mad 342 (344).

[7] The under-mentioned case holds that O. 21, R. 52 does not give title to attaching creditor. (Vol 4) 1917 Cal 13 (16) : 44 Cal 1072 (DB).

[See however * (1881) 7 Cal 553 (555, 556) (DB).]

[8] Custody Court has no power to make rateable distribution unless it happens to be the attaching Court as well. (Vol 20) 1933 Cal 814 (814, 815) (DB). (Vol 4) 1917 Cal. 13 : 44 Cal 1072 distinguished as a case where the attaching and the custody courts were the same).

[9] Property in custody of Court—Attachment takes effect from the date when the precept is received by Court holding property. (Vol 22) 1935 Lah 914 (915).

[10] Where a fund in the Court is attached by another Court in execution of a decree, it is the duty of the former Court to hold the fund subject to the directions of the executing Court and to transfer it to that Court. The fund as soon as it is transferred to the

execution Court becomes "assets held" by that Court within S. 73 of the C. P. Code. (Vol 8) 1921 Mad 218 (221, 222, 223) : 44 Mad 100 (FB).

[11] An order passed under O. 21, R. 52 is not an administrative order but a judicial one and is binding upon the parties concerned. (Vol 12) 1925 Cal 354 (355).

[12] The enquiry under the proviso is of the same nature as an investigation of claim proceedings. (1892) 19 Cal 286 (288).

[13] Proviso does not bar regular suit. (Vol 26) 1939 Cal 413 (414) (DB).

[14] R. 52 does not override S. 47. (Vol 14) 1927 All 574 (575) (DB).

[15] Proviso to O. 21, R. 52, does not contemplate determination of a dispute between a decree holder and judgment-debtor regarding the eligibility of the attachment. The question falls under S. 47. (1936) 19 Nag L Jour 287 (290).

[16] Where a decree-holder attaches moneys deposited in Court in pursuance of an attachment before judgment taken out by another suitor, the former is entitled to be paid the entire amount of his decree out of the fund. (Vol 2) 1915 All 275 (276) : 37 All 575 (DB).

5. Appeal and Revision. [1] Where the holder of a decree passed by a Munsif's Court attached in execution thereof a sum of money realised in execution of a decree passed by the Sub-Court in favour of the judgment-debtor and obtained an order from the Sub-Court for payment of the money, an appeal against the order lay to the Dt. Court and not to the High Court. (Vol 5) 1918 Mad 921 (921).

[2] Custody Court deciding that certain person is not entitled to any priority—No revision lies on the mere ground that the decision is erroneous on a question of law, when the custody Court had jurisdiction to decide the question either rightly or wrongly. (Vol 23) 1936 Lah 521 (523).

ORDER 21, RULE 53.

Synopsis.

1. Scope of the Rule.
2. Decree for money.
3. "Decree for sale in enforcement of a mortgage or charge."
4. Other decrees.
5. Preliminary Decree for accounts, Attachability of.
6. Decrees passed by different Courts.
7. Effect of attachment.
8. Stay of execution.
9. Representative—Sub-rule (3)
10. Adjustment of attached decree—Sub-r. (6).

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

[1882-S. 273; 1877-S 273. See S. 51 (b).]

O. 21, R. 53 (*contd.*)

1. Scope of the Rule.—[1] Rule 53 lays down the procedure to be followed in execution when a money decree has been attached. (Vol 11) 1924 Rang 21 (21) : 1 Rang 360 (DB.) * (1883) 6 Mad 418 (419) (DB) (Rule 53 is inoperative as to the procedure to be adopted * (Vol 31) 1944 Sind 68 (70) : ILR (1943) Kar 393 (DB.)

[2] O. 21, R. 53 cannot be safely interpreted by the analogy of other sections of the Code. (1905) 32 Cal 1104 (1106) (DB.)

[3] R. 53 (1) (b) applies to attachment of decree either before or after judgment. (1912) 22 Mad L. Jour 394 (395) (DB.)

[4] Money decree cannot be sold—R. 53 must be followed. (Vol 19) (1932) Pat 349 (350) : 12 Pat 36 (DB.) * (1878—80) 2 All 290 (291) (DB.) * (1893) 20 Cal 111 (113, 114, 115) (DB.) * (1883) 6 Mad 418 (419) (DB.) * (Vol 11) 1924 Rang 21 (21) : 1 Rang 360 (DB.) (Money decree is not moveable property.)

[5] For attachment of decree to be effective notices to judgment-debtor and decree-holder are imperative : Mere order communicating fact of attachment to Court passing decree is not sufficient. (Vol 26) 1939 Nag 17 (18.)

[6] Attachment of decree - Rule 53 is exhaustive—Rule 46 does not apply. (Vol 31) 1944 Nag 298 (301) : ILR (1944) Nag 885. * (Vol 31) 1944 Sind 68 (70) : ILR (1943) Kar 393 (DB.)

[7] Attachment of *ex parte* decree in favour of judgment-debtor—*Ex parte* decree set aside but decree again passed in favour of judgment-debtor after trial on merits—Attachment of decree-holder revives as soon as fresh decree is passed. (Vol 20) 1933 Rang 346 (347).

[8] R. 178, Madras Civil Rules of Practice, is applicable to decrees other than those falling under O. 21, R. 53 (1). (Vol 21) 1934 Mad 692 (694) : 55 Mad 285.

2. Decree for money.—[1] A decree for unascertained mesne profits is a decree for money.—(1892) 2 Mad L. Jour 288 (289, 290) (DB.) * (Vol 5) 1918 Pat 65 (67) : 4 Pat L. Jour 336 (DB.) (Such decree cannot be sold under S. 60)

[2] Deficiency in purchase price to be recovered from defaulting purchaser—Certificate certifying the same is attachable under R. 53 as money-decree. (Vol 13) 1926 All 379 (382.)

[3] Decree includes Revenue Court decree—Proper way to attach such decree is that provided by R. 53. (Vol 12) 1925 All 264 (265).

[But see * (1899) 21 All 405 (406, 407) (DB.) (Case decided under old Code—No longer good law.)]

[4] Decree for maintenance is not a money-decree and cannot be attached under this rule. (1910) 20 Mad L. Jour 97 (98) (DB.)

[5] Rule applies only where right attached is expressly settled by decree—A right to recover mesne profits by way of restitution by reason of reversal of decree in appeal is not a decree and cannot be attached under this rule. (1901) 24 Mad 341 (344, 345) (DB.)

[6] Court in proceeding to attach and execute decree which is covered by R. 53, as if it was not so covered commits mere irregularity—Sale of such decree is not nullity. (Vol 12) 1925 All 264 (265.)

3. "Decree for sale in enforcement of a mortgage or charge."—[1] Decree attached one for sale—It cannot be sold but must be executed. (Vol 31) 1944 Nag 298 (301) : ILR (1944) Nag 885. * (Vol 8) 1921 Bom 127 (127) : 45 Bom 343.

[See * (1911) 34 Mad 442 (444, 449) FB. (O. 21 R. 53 does not apply where decree-holder does not object to his creditor bringing decree for sale.)]

[But see * (1910) 11 Cal L. Jour 78 (81) (DB.) (Case under old Code—No longer good law.)]

PROVINCIAL AMENDMENTS

Allahabad

(1) In sub-rule (1) (b) and in sub-rule (4), *after* the words "to such other Court," *add* the words "and to any other Court to which the decree has been transferred for execution."

(2) In sub-rule (6), *for* the words "after receipt of notice thereof," *read* the words "after receipt of notice, or with the knowledge thereof."

Calcutta

(1) In sub-rule (1) (b), *after* the words "to such other Court," *insert* the words "and to any Court to which it has been transferred for execution"; also *insert* therein the words "or Courts" *after* the words "requiring such other Court."

(2) In sub-rule (1) (b) (ii), *cancel* the words "to execute its own decree" and *substitute* therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court."

(3) In sub-rule (4), *insert* *after* the words "by sending to such other Court," the words "and to any Court to which it has been transferred for execution."

(4) In sub-rule (6), *substitute* the words "in contravention of the said order with knowledge thereof" *for* the words "in contravention of such order after the receipt of notice thereof."

Lahore

(1) *Add* the following words to sub-rule (1) (b), *after* the words "to such other Court":
"and to the Court to which it has been transferred for execution"

(2) In sub-rule (1) (b) (ii), *substitute* the words "the attached" *for* the words "its own"; and *insert* the following words between the words "executed or" and "his judgment-debtor";

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(3) In sub-rule (6), *substitute* the words "with the knowledge," *for* the words "after receipt of notice."

[7-4-1932.]

Madras

(1) In sub-rule (1) (b) (ii):

(i) *after* the word "judgment-debtor" and *before* the word "applies" *add* the words "if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court," and

(ii) *for* the words "its own," *substitute* the words "the attached."

[13-10-1936.]

(2) *Add* the following as sub-rule (1) (c):

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it."

[11-1-1918.]

O. 21, R. 53 (*contd.*)

[2] Decree for maintenance charging immoveable property attached in execution of other decree—Decree cannot be sold—Proper course is to apply for execution of maintenance decree. (Vol 6) 1919 Mad 894 (896 898)

[But see (Vol 21) 1934 Nag 83 (84)].

[3] Preliminary decree in a mortgage suit is not a "decree" as is contemplated in O. 21, R. 53 (1) and the correct procedure is for the court to sell it. (Vol 24) 1937 All 652 (653); ILR (1937) All 823 (DB) (Such a decree is attachable property within S. 60) * (Vol 23) 1936 All 857 (858) (DB.) * (Vol 24) 1937 Oudh 365 (366); 13 Luck 217 (DB.) * (The attaching creditor has no *locus standi* as regards the execution of final decree that is subsequently passed.)

[But see (Vol 31) 1944 Nag 298 (301); ILR (1944) Nag 885. Both preliminary and final decree for sale fall within the wording of R. 53 (1)—Creditor attaching preliminary decree can apply to make decree final.

[4] Mortgage decree attached in execution of decree for costs and executed only for realising the costs, and portion of property sold for the purpose—Sale is irregular but not void—Irrregularity can be waived. (Vol 8) 1921 Cal 382 (383) (DB)

4. Other decrees.—[1] Decree relating to immoveable property is not "immoveable property" and should be attached only under Rule 53 and not under R. 54.

(Vol 6) 1919 Nag 19 (20); 16 Nag LR 72 * (1911) 8 All L. Jour 1327 (1328) * (1886) 10 Bom 444 (447) (DB.) (Decree for redemption).

[2] Preliminary decree in partition suit attached—Procedure under R. 53 (4) is to be followed. (Vol 19) 1932 Cal 80 (82); 58 Cal 934 (DB.)

[See also (Vol 24) 1937 Pesh 13 (15, 16) (FB.) (Decree for possession by partition—Attachment should be under O. 21, R. 53—Attachment under O. 21, R. 54 is invalid.)]

5. Preliminary decree for accounts, Attachability of.—[1] Preliminary decree directing taking of partnership accounts is one for payment of money. (Vol 16) 1929 Mad 641 (643); 52 Mad 563 (FB.) *Thiruvengkatchariar J., contra.* * (Vol 28) 1941 Pat 43 (44); 19 Pat 935 (DB.) * (Decree is attachable but not saleable) (Vol 2) 1940 Pat 107 (108, 109); 18 Pat 688 (DB.) (1903) 27 Bom. 556 (560) (DB.) (Decree is attachable).

[But see (Vol 24) 1937 Cal 4 (6, 7) (DB.) (Such decree cannot be attached and sold under R. 53.)]

6. Decree passed by different courts.—[1] R. 53 is applicable where two decrees for money, though not passed by same court, are being executed by same court. (1878-80) 2 All 290 (291) (DB.)

[2] Transferee Court executing decree has same powers regarding steps contemplated by R. 53 (4) as if decree was passed by itself. (Vol 27) 1940 Pat 557 (559); 19 Pat 892. * (1913) 13 Mad L. Tim 227 (231),

Nagpur

Substitute —

- (1) "to such other Court and to any other Court to which the decree has been transferred for execution" for the words, "to such other Court" occurring in clause (b) of sub-rule (1) and in sub-rule (4), and
- (2) the following as sub-clause (ii) of clause (b) of sub-rule (1) in place of the existing sub-clause:—
- "(ii) the holder of the decree sought to be executed or his judgment-debtor with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court applies to the Court receiving such notice to execute the attached decree."

N.W. F. P.

- (1) In sub-rule (1) (b) and in sub-rule (4), after the words "to such other Court," add the words "or to any other Court to which the decree has been transferred for execution."
- (2) In sub-rule (1) (b) (ii), for the words "its own decree," substitute the words "the attached decree."
- (3) In sub-rule (6) for the words "after receipt of notice thereof," read "after receipt of notice or with the knowledge thereof."
- Oudh**
- (1) In sub-rule (1) (b) and in sub-rule (4), after the words "to such other Court," add the words "and to any other Court to which the decree has been transferred for execution."
- (2) In sub-rule (6), for the words "after receipt of notice thereof," read the words "after receipt of notice, or with the knowledge thereof."

O. 21, R. 53 (*contd.*)

294.) (Even if there is defect, it does not make the order of attachment void but can be waived—Per Sundara Iyer J.)

[3] Attachment of money decree is complete when notice of attachment is served on the Court which passed the decree—Subsequent transfer of the said decree is void as against all claims enforceable under attachment. (Vol 24) 1937 All 63 (64.)

[4] A obtaining mortgage decree against B on original side of Munsif's Court—C obtaining decree against A in small cause suit in same Court—Attachment of A's decree in execution of C's decree—Absence of notice under O. 21, R. 53 (1) (b). Attachment is still valid—C held entitled to execute attached decree. (Vol 31) (1944) Mad 353 (354, 355) : ILR (1944) Mad 690 (FB.)

7. Effect of attachment.—[1] Attachment of the decree has the effect of staying further execution and of debarring the Court from proceeding further until that bar has been removed in either of the ways specified in the Rule. (1905) 32 Cal 1104 (1106) (DB.) * (12) 1912 Mad WN 176 (177) (DB)

[2] Attachment does not render the decree incapable of execution nor does it destroy decree-holder's interest in it. (1903) 13 Mad L. Jour 265 (266) * (Vol 20) 1933 Oudh 349 (349, 350.)

[But see (1912) 85 Mad 622 (624) (FB.)—Not good law under present Code.]

[3] Decree-holder of attached decree can apply for execution after attachment. (Vol 21) 1934 Cal 140 (142) (DB.) * (Vol 22) 1935 Bom 416 (417) * (Vol 21) 1934 Lah 142 (143) * (Vol 22) 1935 Mad 413 (414) (Decree by wife for property against husband—Husband getting decree for restitution of conjugal rights—Wife's decree attached—Wife can execute decree even during one year of husband's attachment provided proceeds go in satisfaction of decree against her.)

[4] Money decree attached—Transfer by holder of decree is not prohibited—Transferee gets valid title—He is entitled to apply for execution under R. 16, O. 21. (Vol 16) 1929 Pat 1 (2, 3) : 7 Pat 726 (DB.) * (Vol 14) 1927 Nag 132 (133) : 23 Nag LR 20.

[But see (1912) 11 Mad L. Tim 144 (145) (DB.) (Dissented from in (1913) 18 Mad L. Tim 227.)]

[5] Attachment of decree is not step-in-aid of execution of such decree. (Vol 21) 1934 Cal 234 (234, 235) : 60 Cal 1357 (DB.)

[6] Attachment of decree—Proceeds paid to one of decree-holders before satisfaction of decree of attaching decree-holder—Court can order refund under S. 151. (Vol 21) 1934 Lah 142 (143).

[7] Judge ordering attachment and falling ill—Notice issued in form ordered by Judge and sealed but signed by Court reader for Judge—This does not prevent attachment from being effective. (Vol 18) 1931 Rang 185 (188) : 9 Rang 140 (DB.)

[8] Attachment before judgment—Decree obtained—Judgment-debtor becoming insolvent—Attaching creditor cannot proceed under O. 21, R. 53. (Vol 20) 1933 Nag 229 (230) : 29 Nag LR 303.

[9] D obtaining decree against H—J obtaining decree against D for larger amount and in execution attaching decree obtained by D against H—Subsequent sale by D of his decree to S—S starting execution proceedings—Objection by J under S. 47 allowed—In appeal S pleading that absence of notice on D prior to his sale rendered attachment ineffective—Held sub-cls. (6) and (4) could not help S. (Vol 25) 1938 Cal 401 (401, 402.)

[10] S in execution of his decree against T attaching decree obtained by T against B—S also attaching decree obtained by B against L—Executing Court on B's objection removing attachment—Pending appeal by S, B executing his decree against L and obtaining satisfaction thereof—Subsequently S's appeal allowed—Attachment by S of B's decree against L could not be revived—Remedy of S was against B and not L. (Vol 32) 1945 Cal 264 (266, 267) (DB.)

8. Stay of execution.—[1] The provision in cl. (b) (ii) of sub-rule (1) does not mean that when the holder of the decree sought to be executed makes an application for execution, the attached decree ceases to be attached decree; it only means that a period is provided by the Rule up to which a stay of execution is to be arranged by the Court to which notice is sent to enable the holder of the decree sought to be executed to make application for execution of the attached decree. (Vol 22) 1935 Lah 194 (196) : 15 Lah 910.

[2] Decree attached under O. 21, R. 53 (1) (b) is capable of execution by Court that passed it before

Patna

Substitute the following for sub-rule (1) (b) :

"(b) If the decree sought to be attached was passed by another Court then by the issue to such other Court (or to the Court to which the decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until —

(i) the Court which has issued the notice shall cancel the same, or

(ii) the holder of the decree sought to be executed, or his judgment-debtor, with the consent of the said decree-holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree."

O. 21, R. 53 (contd.)

conditions (i) or conditions (ii) mentioned in request addressed to that Court have been fulfilled—Object of request is not to prevent other attaching creditors from asking for execution of decree. (Vol 27) 1940 PC 173 (175, 176) : ILR (1940) Kar (PC) 312 : ILR (1941) Mad 1 : 67 Ind App 350 (PC.)

9. Representative sub-r. (3).—[1] Once a decree has been attached by another decree-holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the original holder thereof. (Vol 17) 1930 All 659 (661) * (Vol 22) 1935 All 125 (125) (He can make objection in execution proceedings of the attached decree * (Vol 8) 1921 Cal 580 (582) * (Vol 24) 1937 Lah 368 (369) * (Vol 6) 1919 Lah 275 (276) : 1919 Pun Re No. 44. * (Vol 16) 1929 Oudh 413 (414) (DB.) (He becomes representative from the date on which attachment is ordered and not when he applies for attachment. * (Vol 15) 1928 Rang 25 (26) : 5 Rang 595 (DB.)

[2] The attaching creditor is entitled to take the money out of court and certify payment in the same manner as the decree-holder himself. (Vol 27) 1940 PC 167 (171) : ILR (1940) 2 Cal 493 : ILR (1940) Kar (PC) 321 : 67 Ind App 36 (PC) * (Vol 17) 1930 All 659 (661) (DB.)

[3] Decree executed by attaching another decree—Payments made by judgment-debtor under latter decree to satisfy the latter decree satisfy *Pro Tanto* both decrees and interest ceases to run under both decrees. (Vol 8) 1921 Cal 580 (581) (DB.)

[4] Attaching decree-holder cannot make adjustment of attached decree and record satisfaction by reason of that adjustment. He is representative only for the purpose of execution. (Vol 27) 1940 Mad 534 (537) * (Vol 24) 1937 Cal 468 (472, 473) (DB.)

[5] Certificate holder under Bengal Public Demands Recovery Act attaching decree obtained by his judgment-debtor—Though representative, he cannot adjust attached decree for smaller sum—Such adjustment is not binding on holder of attached decree. (Vol 27) 1940 PC 167 (170) : ILR (1940) 2 Cal 493 : ILR (1940) Kar (PC) 321 : 67 Ind App 36 (PC.)

[6] One attaching decree-holder can apply for execution of decree without obtaining consent of other attaching creditors. (Vol 27) 1940 PC 173 (175, 176) : ILR (1940) Kar (PC) 312 : ILR (1941) Mad 1 : 67 Ind App 350 (PC.)

[7] R. 53 refers to stage of execution of attached decree and not where attachment is refused. (Vol 1) 1914 Oudh 359 (359) : 17 Oudh Cas 374.

[8] Decree-holder attaching decree in favour of judgment-debtor along with other property—Decree-holder proceeding only against other property—Decree-holder filing fresh execution proceedings with regard to

attached decree and getting his name substituted as decree-holder in place of judgment-debtor—Court dismissing previous execution case in default—After attachment of decree subsequent dismissal of case for default cannot be an obstacle to prevent decree-holder from executing that decree in subsequent execution proceeding under O. 21, R. 53. (Vol 26) 1939 Cal 465 (465, 466.)

[9] Judgment-debtor depositing money in Court to set aside mortgage sale—Attaching creditors of decree-holder purchaser by order of Court withdrawing part of deposited amount—Decree-holder not consenting—Decree-holder can challenge validity of deposit—Deposit is not decree and R. 53 does not apply—Sale should not be confirmed unless mortgagee decree-holder refunded amount withdrawn. (Vol 20) 1933 Cal 39 (41) : 59 Cal 1464 (DB.)

10. Adjustment of attached decree—Sub-rule (6) —[1] Notice under sub-rule (6) is not necessary to complete attachment—Payment or adjustment made by judgment debtor under attached decree before notice under sub-r. (6) is valid if made bona fide. (Vol 14) 1927 Mad 728 (730) : 50 Mad 677 (FB.) * (Vol 8) 1921 Mad 135 (136) * (Vol 6) 1919 Mad 840 (841) (DB.) Adjustment after attachment does not bind attaching creditor whether or not notice of attachment is given to judgment-debtor.

[2] "Either through Court or otherwise" refer not to receipt of notice but to payment (Vol 21) 1934 Pat 619 (622) (DB.) * (Vol 6) 1919 Mad 840 (843) (DB.)

[3] Attaching decree-holder is not bound by compromise between parties to attached decree, if judgment-debtor had notice of attachment. (Vol 20) 1933 All 82 (84) (DB.) * (Vol 1) 1914 All 284 (285) (DB.)

[4] Decree attached—Adjustment of such decree not certified cannot be recognised. (Vol 20) 1933 Rang 239 (240) : 11 Rang 420 (DB.)

[5] Attaching creditor, if also judgment-debtor in attached decree, is prohibited from making payment under decree. He can show why decree cannot be executed against him. (Vol 24) 1937 All 63 (64.)

[6] Adjustment out of Court—Adjustment between the judgment-debtor in decree sought to be attached and person attaching such decree is not prohibited but only that between judgment-debtor and decree-holder in the decree sought to be attached. (Vol 11) 1924 Pat 696 (698) (DB.)

[7] Order and attachment valid—Adjustment whether prior or subsequent to attachment is immaterial (Vol 18) 1931 Rang 185 (188) : 9 Rang 140 (DB.)

[8] Appeal from decree compromised resulting in dismissal of suit—Compromise is adjustment of decree. (Vol 28) 1941 Lah 402 (406) : ILR (1942) Lah 603 (DB.)

[9] O. 21 R. 53 (b) applies to attachment before judgment as well. (Vol 26) 1939 Pat 81 (82, 83) (DB.)

54. (1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

[1892-S. 274 ; 1877-S. 274 ; 1859-Ss. 235, 239. See S. 64 and O. 21, R. 67.]

PROVINCIAL AMENDMENTS

Allahabad

(1) At the end of clause (2) *substitute* a comma for the full stop and thereafter *add* the following :
 “and, where the property, whether paying revenue to Government or otherwise, is situate within Cantonment limits, in the office of the Local Cantonment Board and of the Military Estates Officer concerned.”
 [27-9-1941.]

(2) *Add* the following as sub-rule (3).

“(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.”

Bombay

(1) *Add* the following to sub-rule (1) :

“Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.” [9-3-1926.]

(2) *Substitute* a comma for the full stop at the end of sub rule (2) and *add* the following thereafter :

“and also, where the property is situate within Cantonment limits, in the office of the Local Cantonment Board and the Military Estates Officer concerned.”
 [3-3-1941.]

ORDER 21, RULE 54 (Allahabad) Note I.

[1] Person, taking transfer long before order of attachment had been proclaimed would not be bound by prohibition contained in the order which may have been passed on the same date—Transferee is entitled to priority on equitable grounds as well. (Vol 26) 1939 All 154 (155, 156) (DB).

ORDER 21, RULE 54 (Bombay), Note I.

[1] Attachment ordered—Subsequent transfer for consideration—Attachment operates from date of knowledge or of its proclamation whichever is earlier. (Vol 31) 1944 Bom 265 (266, 267) (DB.)

ORDER 21 RULE 54 (Nagpur) Note I.

[1] The word “purchaser” in O. 21, R. 54 (3) is issued in its technical legal meaning and includes a mortgage. (1929) 12 Nag L. Jour 94 (95.)

ORDER 21, RULE 54.

Synopsis.

1. Attachment of immoveable property—General.
2. Immoveable Property.
3. Attachment of Property belonging to Hindu co parcener.
4. Attachment when complete.
5. Service of prohibitory order.
6. Proclamation of order of attachment.
7. Beat of drum.
8. Affixing copy on conspicuous part of property.
9. Affixing copy in Court-house.
10. Affixing copy in Collector's office.
11. Effect of attachment and re-attachment.
12. Absence of attachment, and irregular and invalid attachment.

1. Attachment of immoveable property—General
 —[1] Attachment under S. 64 with reference to immoveable property means one made under this rule. (Vol 4) 1917 Cal 832 (832) (DB)

[2] An attachment is a necessary preliminary to execution proceedings. (Vol 29) 1942 Lah 153 (155): ILR (1942) Lah 559 (FB). * (1891) 15 Bom 222 (228) : 18 Ind App 22 (PC.) Where certain property already attached by creditors to enforce portion of debt which had accrued at an earlier period under same instrument of mortgage, was sold in satisfaction of his decree for instalments. Subsequently due by same debtor, it was held that second order for attachment would be an empty formality and there is no rule which requires it (No attachment unnecessary in the case of mortgage decree for sale) * (Vol 17) 1930 Pat 108 (109) : 8 Pat 801 * (1880) 4 Bom 515 (520) (FB.) (Do.)

[3] Object of rule in prescribing a particular way of notifying the attachment is to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him. (Vol 29) 1942 Lah 153 (155) : ILR (1942) Lah 559 (FB.)

[4] Object of attachment is to place property in *custodia legis*—Effect of it is to restrain judgment-debtor from alienating it. (Vol 14) 1927 Mad 190 (191.)

2. Immoveable property—[1] Equity of redemption in a mortgage is “immoveable property.” (Vol 8) 1921 Cal 801 (803) (DB.) * (1897) 21 Bom 226 (228) (DB.)

[2] Mortgagee's right in a usufructuary mortgage is immoveable property. (Vol 27) 1940 All 481 (482) : ILR (1940) All 596.

Calcutta

- (1) *Add* the following to sub-rule (2) :

"and also, where the property is situated within Cantonment limits, in the office of the Local Cantonment Board and the Military Estates Officer concerned."

[26-7-1941.]

- (2) *Add* the following as sub-rule (3) :

"(3) Such order shall take effect, where there is no consideration for such transfer, or charge from the date of the order, and where there is consideration for such transfer, or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged, or from the date when the order is proclaimed under sub-rule (2), whichever is earlier."

Lahore

- (1) At the end of sub-rule (2), *substitute* a semicolon for full stop and *add* :

"Where the property is land situated in a Cantonment, copies of the order shall also be forwarded to the Cantonment Board and to the Military Estates Officer in whose area that Cantonment is situated."

[As amended on 3-10-1941.]

- (2) *Add* the following as sub-rule (3) :

"(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation, whichever is earlier."

[7-4-1932.]

Madras

Add the following as sub-rule (3) :

"(3) the order of attachment shall be deemed to have been made as against transferees without consideration from the judgment debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is earlier."

[13-10-1936.]

Nagpur

- (1) In sub-rule (2) *delete* the full stop at the end and *add* the following words :

"and also where the property is situate within Cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned."

[29-6-1943.]

O. 21, R. 54 (*cond.*)

3. Attachment of property belonging to a Hindu coparcener.—[1] An attachment of the share of an undivided Hindu coparcener in a joint family property must be made in respect of his undivided share in the whole family property and not of his share in each item of it. (Vol 7) 1920 Mad 1035 (1036) (DB.)

[2] The attachment of an undivided interest of a co-parcener has the effect of preventing the accrual of title by survivorship to the other members if member whose share is attached dies after attachment and before sale. (Vol 13) 1926 All 157 (158) : 48 All 4 (DB) * (1893) 20 Cal 895 (898) (DB.)

4. Attachment when complete.—[1] An attachment under this rule is not complete unless an order of attachment has been issued, and in execution of that order the other formalities prescribed by the Code have been complied with. (Vol 15) 1928 PC 139 (141, 142) : 51 Mad 349 : 55 Ind App 256 (PC); (Vol 9) 1922 Mad 447 : 15 Mad 90 (Reversed) * (Vol 16) 1929 Bom 395 (396) : 53 Bom 851 * (Vol 32) 1915 Cal 308 (310), (DB.) * (Vol 24) 1937 Cal 7 (8). (Failure to affix order on Court house—No valid attachment—But that fact will not affect the right of person obtaining order of attachment to apply under O. 21, R. 90 to set aside sale of property in execution of another decree held after his order of attachment and decree) * (Vol 18) 1931 Cal 763 (766) : 58 Cal 598 (DB.) * (Vol 25) 1938 Lah 16 (17) (All formalities except that of affixing order on conspicuous part of court house proved—No evidence to the contrary—Attachment is presumed to be valid) * (Vol 24) 1937 Lah 671 (672) (Omission to affix notice, etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment) * (Vol 26) 1939 Mad 793 (793, 794.) * (Vol 14) 1927 Mad 450

(452) * (Vol 7) 1920 Mad 804 : 42 Mad 844 (FB) followed * (Vol 15) 1928 Pat 600 (602) : 8 Pat 1 (DB.) * (Vol 21) 1934 Rang 207 (208).

[See however (Vol 25) 1938 Cal 236 (237) (Conditional order of attachment under O. 38 R. 5—No process issued under O. 21 R. 54 but bailiff observing all formalities required by R. 54—Attachment held effectual.

5. Service of prohibitory order.—[1] The mere writing of a prohibitory order is not enough. It must be published as required by cl. (2) so as to give the judgment-debtor opportunity of knowing that he is prohibited. (Vol 6) 1919 Mad 594 (595) : 42 Mad 565 (DB.) * (1905) 27 All 258 (259) (Warrant of attachment should show the amount for which property is attached) * (Vol 26) 1939 Mad 793 (793, 794) (Prohibitory order must be passed by the Court; it is not enough for the Court to say "attach" and for Amin to say "I have attached" to constitute valid attachment.)

[2] Attachment is complete and valid when prohibitory order is proclaimed and affixed—Copy of prohibitory order need not be served on judgment-debtor. (Vol 28) 1941 All 41 (41, 42) : ILR (1941) All 39 (DB.)

[3] Due service of notice under O. 21, R. 54 should be presumed when record of Court on the point is not available. (Vol 11) 1924 All 747 (748) : 46 All 741 (DB.)

[4] Property within jurisdiction of court but judgment-debtor living outside jurisdiction—Court can issue prohibitory order to judgment-debtor. (Vol 26) 1939 Rang 433 (434) : 1939 Rang LR 587.

6. Proclamation of order of attachment.—[1] Mere prohibitory order is not enough to constitute valid attachment. Proclamation described in second part of the rule must be carried out. (Vol 10) 1928 Lah

(2) *Add* the following as sub-rule (3) :

" (3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made." [29-6-1943.]

N.-W. F. P.

(1) *Add* the following at the end of sub-rule (2) :

" and also where the property is situate within Cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned." [5 10-1940.]

(2) *Add* the following as sub-rule (3) :

" (3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made."

Oudh

(1) *Delete* full stop at the end of sub-rule (2) and *add* the following :

" and also where the property is situate within Cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned." [9-9-1941.]

(2) *Add* the following as sub-rule (3) :

" (3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made."

Patna

Insert a comma in place of the full stop at the end of sub-rule (2) and *add* the following :

" and also where the property is situate within Cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned."

Sind

Add the following at the end of sub-rule (2) :

" and also where the property is situate within Cantonment limits, in the office of the local Cantonment Board and the Military Estates Officer concerned."

O. 21, R. 54 (*contd.*)

423 (424) : 4 Lah 211 (DB.) * (Vol 16) 1929 All 846 (847) * (Vol 24) 1937 Cal 375 (376) (Attachment before judgment—Order of attachment in form No. 5 of Appendix F published—No publication of attachment in Form No. 24, Appendix E as laid down under O. 21, R. 54—Attachment is invalid—No reference in order sheet to O. 21, R. 54 or to prohibition of attachment order as required by it. No presumption under S. 114, Evidence Act, can be drawn that attachment was properly made.) * (Vol 14) 1927 Cal 885 (886) : 55 Cal 545 (DB.) * (Vol 12) 1925 Rang 89 (91). (Warrant of attachment is not legal evidence against person disputing it.)

[2] Order of attachment duly proclaimed constitutes sufficient notice to the judgment-debtor. (Vol 30) 1943 Mad 322 (324) * (Vol 28) 1941 All 41 (41, 42) : ILR (1941) All 39 (Separate service of order on judgment-debtor is not necessary) * (Vol 13) 1926 Oudh 45 (46). * (Vol 26) 1939 Rang 434 (435, 436) : 1939 Rang LR 594 (SB.) (Personal service of prohibitory order on judgment-debtor is not necessary. * (Vol 23) 1936 Rang 403 (404, 405) (DB.) (Do.)

[3] Delay in effecting proclamation, as, for instance, where attachment ordered before judgment is not completed till after judgment, does not vitiate the proceedings (Vol 6) 1919 Mad 752 (753, 754) : 42 Mad 1. (DB.)

7. Beat of Drum.—[1] In case of resistance to proclamation by beat of drum, proclamation in loud voice adjacent to property for attachment is sufficient (Vol 19) 1932 Oudh 76 (76) (DB.)

8. Affixing copy on conspicuous part of property.—[1] A copy of the proclamation order must be affixed on a conspicuous part of the property. (1881) 7 Cal 84 (89) (DB.) * (Vol 22) 1935 Lah 57 (59) (Mere affixure in the village is not sufficient compliance.

* (Vol 23) 1936 Rang 403 (405) (DB.) (Single parcel of land with buildings thereon—Copy of order of attachment may be fixed on any building or conspicuous part of land.)

[2] Property to be sold consisting of right of fishing over length of stream—It is not possible to say that any particular spot is conspicuous part—Copy of order must be conspicuously displayed at various portions of estate—In addition sale should be advertised in local newspapers or in Gazette. (Vol 5) 1918 Pat 266 (266) (DB.)

[3] Omission to affix copy of proclamation order on conspicuous part of the property is material irregularity which will afford a ground for setting aside the execution sale. (Vol 10) 1923 Lah 671 (671). * (1921) 60 Ind Cas 527 (527, 528) (Lah) * (Vol 5) 1918 Pat 266 (266) (DB.)

[4] Several properties ordered to be attached—Copy of order must be affixed on each of the properties. (Vol 30) 1943 Mad 712 (713) : ILR (1944) Mad 262 (DB.)

9. Affixing copy in Court-house.—[1] A copy of proclamation of sale must under R. 67 read with this rule be affixed on a conspicuous part of the Court house. (Vol 5) 1918 Nag 213 (213.)

[2] Omission to affix copy of attachment order on conspicuous part of the Court house is a material irregularity within the meaning of O. 21 R. 90 (Vol 7) 1920 Lah 24 (25).

[3] Posting of copy of attachment order on the court-house—No mention in process-server's report—Initial presumption is that formality is not complied with and attachment is invalid. (Vol 26) 1939 Lah 284 (285.)

10. Affixing copy in Collector's Office.—[1] Where property attached is land paying revenue to Government, the rule requires in addition that the

Removal of attachment after satisfaction of decree.

55. Where—

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
 - (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
 - (c) the decree is set aside or reversed,
- the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

[1882-S. 275 ; 1877-S. 275 ; 1859-S. 245. See Rule 57 and Order 38 Rule 9]

PROVINCIAL AMENDMENTS.

Allahabad

Substitute the following for Rule 55 :

"55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under Section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where —

- (a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

O. 21, R. 54 (contd.)

order of attachment should be affixed in the Collector's office. (Vol 18) 1931 Pat 58 (59) : 9 Pat 860. * (Vol 15) 1928 Pat 600 (602) : 8 Pat 1 (DB.)

[2] Publication of sale at Collector's Office is necessary even in the case of enfranchised *shrotriem* village. (Vol 11) 1924 Mad 217 (218, 223) : 46 Mad 736 (DB.)

[3] Attachment proved—Fixing of copy of order in Collector's Office may be presumed under S. 114 Evidence Act. (Vol 21) 1934 P. C. 217 (218) : 15 Lah 886 : 61 Ind App 371 (PC.)

[4] The word 'Land' in Sub-cl. (2) has a special and restricted meaning and does not comprise sites assessed to land revenue on which buildings with structures of a permanent character have been constructed. (Vol 31) 1944 Lah 455 457 * (Vol 12) 1925 Lah 583 (DB.) held *obiter* and not followed.)

11. Effect of attachment and re-attachment.—[1] An attachment under this rule does not constitute dispossession of the party in actual possession. It simply prohibits alienation. (1880) 4 Bom 529 (535) (FB) * (Vol 13) 1926 Mad 42 (43) (DB.) (Adverse possession, continuity, of is not disturbed by attachment * (1907) 30 Mad 207 (209) (Attaching creditor cannot maintain action for wrongful removal of attached property. * (Vol 13) 1926 Sind 199 (200) : 19 Sind LR 35.

[See however (Vol 28) 1936 Nag 120 (120) : 81 Nag LR 212. (Immoveable property attached in execution is in possession of Court.)]

[2] Attachment does not create any interest or title in the property in favour of the attaching party. (Vol 29) 1942 Oudh 465 (471, 472) : 18 Luck 866 (FB) * (Vol 16) 1929 Bom 200 (201) * (Vol 32) 1945 Nag 97 (101) : ILR (1945) Nag 121 (Attachment does not create any security, charge or lien in favour of attaching creditor over property attached.

[8] Attachment prohibits judgment-debtor alone from making a transfer. (Vol 29) 1942 Oudh 465 (471) : 18 Luck 866 (FB.)

[4] The issue of a fresh attachment does not render

void an already subsisting attachment ; it is a mere redundancy. (Vol 3) 1916 Pat 353 (355) (DB.)

12. Absence of attachment and irregular and invalid attachment.—[1] Attachment is made only to keep judgment-debtor's property intact and to enable decree-holder to bring it to sale. It is a step in execution designed for the protection of the judgment-creditor and not for the benefit of the judgment-debtor. (Vol 21) 1934 Bom 241 (242, 243.)

[2] A sale without the property sold having been attached is not a nullity and will not be set aside unless substantial loss or injury is proved to have resulted therefrom (1912) 12 Mad L. Tim 300 (301) * (Vol 8) 1916 Cal 465 (467) (DB.) * (1907) 34 Cal 787 (802) * (1891) 18 Cal 188 (192) (DB.) * (Vol 17) 1930 Lah 685 (686).

[3] Any defect or error in the mode of attachment is only an irregularity which does not render the sale *ipso facto* void. (1885) 7 All 731 (733) (DB.) * (Vol 17) 1930 Cal 353 (355) (DB) * (1895) 5 Mad L. Jour 70 (74) (Delay in affixing sale proclamation) * (Vol 10) 1923 Nag 78 (79).

[See * (Vol 16) 1929 Lah 441 (442)]

[4] Failure to notify the attachment in the way prescribed by the rule may or may not be a mere irregularity as between the decree-holder and the auction purchaser, but as between the decree-holder and auction purchaser on the one hand and an alienee from the judgment-debtor during the improper attachment on the other different equities come into operation. (Vol 3) 1916 Oudh 169 (173.)

[5] The execution of the warrant of attachment can be delegated to a subordinate officer (Vol 27) 1940 Lah 30 (31) (DB) (But a non-official cannot effect a valid attachment.

ORDER 21 RULE 55—Note 1.

[1] An attachment of property cannot be deemed to be withdrawn when satisfaction of the decree in part only is certified to the Court. (1912) 10 All L. Jour 165 (167) * (Vol 14) 1927 Mad 648 (649).

[2] In the case of an instalment decree the instalment which has become due and in respect of which

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)], is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] is set aside or reversed,

the attachment shall be deemed to be withdrawn, and in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

Oudh

Substitute the following for Rule 55 :

"55. (1) Where an application has been made to the Court under Section 73, sub-section (1), for rateable distribution of assets in respect of the property of judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court; or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is otherwise made through the Court or certified to the Court; or

(c) the decree [including any decree, passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is set aside, or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

56. Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

[1882-S. 277 ; 1877-S. 277 ; 1859-S. 242. See S. 51 (e) and Rr. 64, 79 and 81. Cf. O. 39, R. 10]

57. Where any property has been attached in execution of a decree, but by reason of the decree holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

[See Rr. 55, 60 and 63 Cf. O. 38, Rr. 8, 9 and 11.]

O. 21, R. 55 (*contd.*)

attachment has been made is the 'amount decreed', in R. 55. (Vol 15) 1928 Nag 65 (65).

[3] Rule is not exhaustive of circumstances under which attachment is withdrawn. (Vol 24) 1937 Cal 390 (392) (DB.) * (Vol 21) 1934 All 1057 (1064) (DB.) (Even in such cases result is same, as when attachment ceases under R 55) * (Vol 24) 1937 Pesh 90 (91) (DB) (Attachment ceases as soon as the sale takes place and does not subsist till confirmation.)

[4] Rule applies to attachment before judgment. (Vol 28) 1941 Sind 13 (14) : ILR (1940) Kar 454.

[5] Mere deposit does not satisfy decree—Sum paid into Court by judgment debtor to satisfy decree of attaching creditor rateably distributed among other creditors—Entire decree of attaching creditor is not satisfied and attachment therefore continues. (Vol 26) (1939) Pat 392 (396) : 18 Pat 404 (DB.)

[6] Where the decree of the Court of first instance is reversed in first appeal, but restored in second appeal the result of the decision in second appeal is to revive the attachment which, under the provision of O 21, R. 55, is deemed to have been withdrawn in consequence of the decision in first appeal. (Vol 5) 1918 Oudh 275 (278).

[See however (Vol 24) 1937 Lah 169 (170, 171) (Attachment in execution of decree—Reversal of decree and consequent order removing attachment—Subsequent decree, after remand, in favour of decree-holder—Original attachment cannot revive and alienation between removal of original attachment and subsequent attachment of is not void.)

[7] See also the following cases decided under this Rule as amended by the High Court of Allahabad and Chief Court of Oudh. (Vol 21) 1934 All 1057 (1063) (DB.) (Notice must be "issued" to sale officer executing decree before he becomes *functus officio*). * (Vol 21) 1934 All 896 (897) : 57 All 237 (DB.) (By the amendment, even if the attaching decree-holder is satisfied or withdraws his claim, that would not affect the rights of those who had already applied for rateable distribution.) * ('38) 1936 Oudh W N 861 (863, 864) (DB) (R. 55 (2) (b) means that an attachment shall not be deemed to be withdrawn unless the decree of the applicant for rateable distribution is also satisfied along with the other decree).

ORDER 21, RULE 57.

Synopsis.

1. Scope and object.
2. "By reason of the decree-holder's default,"
3. Effect of dismissal...

Objects and Reasons.

"The purpose of this rule is to put an end to doubts which from time to time have arisen as to the continuance of an attachment by reason of the practice of 'striking off proceedings' or 'removing proceedings from the file' for which there is no justification in the Code."—S. O. R.

PROVINCIAL AMENDMENTS

Calcutta

Add the following words at the end of the rule :

"Unless the Court shall make an order to the contrary."

Madras

Substitute the following for Rule 57 :

"57. (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date, it shall state whether the attachment continues or ceases : Provided that when the Court dismisses such an application by reason of the decree-holder's default, the order shall state that the attachment do cease.

(2) Where the property attached is a decree of the nature mentioned in sub-rule (1) of Rule 53 and the Court executing the attached decree dismisses the application for execution of the attached decree, it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report, the Court attaching the decree shall proceed under the provisions of sub-rule (1) and communicate its decision to the Court whose decree is attached."

[13-10-1936.]

O. 21, R. 57 (contd.)

4. Dismissal of application by Collector.
5. Execution removed from file for statistical purposes.
6. Responsibility of sapurdar of attached property after dismissal for default.
7. Revival of attachment, when possible.
8. Attachment before judgment.

1. Scope and object —[1] The object of this rule is to put an end to the practice of disposing of execution applications by such orders as "application struck off" or "lodged". (Vol 6) 1919 Lah 337 (339) : 1919 Pun. Re. No. 154. * (Vol 2) 1915 Mad 885 (886) (DB.)

[2] This section is intended to remove the doubt that existed under the old Code as to the effect of an order of dismissal upon attachment, by providing in explicit terms that the attachment should cease upon the dismissal, irrespective of any question of intention. ('11) 88 Cal 482 (485) (DB.) * (Vol 9) 1922 Lah 108 (109) : 3 Lah 7 (DB.)

[3] The rule prescribes the procedure to be followed, where, after attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default. (Vol 29) 1942 Bom 227 (231) (DB.) * (Vol 16) 1929 Cal 465 (466) : 56 Cal 416 (DB) * ('37) 1937 Mad W.N. 480 (486) (DB.)

[4] The Court should not "strike off" execution applications for default of the decree-holder. Such an order is deemed to be one of dismissal. (Vol 17) 1930 Bom 16 (20) (DB.) * (Vol 6) 1919 All 194 (196) : 41 All 157 (DB.) * ('13) 17 Cal. W.N. 204 (205) (DB.) * (Vol 11) 1924 Lah 645 (645, 646) (DB.) * (Vol 16) 1929 Nag 82 (82). * (Vol 17) 1930 Rang 325 (326) (DB.)

[5] The provisions of this rule do not apply to orders passed before the coming into force of the present Code. (Vol 2) 1915 Mad 1121 (1122) (DB.) * (Vol 3) 1919 Mad 1104 (1105) (DB.)

2. "By reason of the decree-holder's default." —[1] Default means failure to go on with the application and have the property sold. (Vol 28) 1941 Bom 395 (396) : ILR (1941) Bom 652. * (Vol 27) 1940 Pesh 29 (30). * (Vol 6) 1919 All 194 (195, 196) : 41 All 157 (DB.) * (Vol 21) 1934 Lah 395 (396) (Overruled on another point in (Vol 26) 1939 Lah 36 : ILR (1938) Lah 582 (FB) * (Vol 22) 1935 Mad 17 (20) * ('11) 38 Cal 482 (485) (DB.) * (Vol 11) 1924 Lah 645 (645, 646)

(DB.) * (Vol 9) 1922 Lah 108 (109, 110) : 3 Lah 7 (DB) * (Vol 7) 1920 Oudh 175 (176, 177) : 23 Oudh Cas 166. * (Vol 25) 1938 Bom 18 (20) : ILR (1937) Bom 890.

[2] Omission to serve notice on the judgment-debtor as required by R. 66 of this Order amounts to a default. (Vol 23) 1941 Bom 395 (396) : ILR (1941) Bom 652. * ('11) 38 Cal 482 (485) (DB.) * ('13) 17 Cal W. N. 204 (205) (DB.) (Proclamation not made.)

[3] Failure to furnish any information called for by the Court is a default. (Vol 13) 1926 Mad 980 (983) : 50 Mad 67 (DB.)

[4] Decree-holder withdrawing application—Court can dismiss the same for default. (Vol 12) 1925 Mad 1113 (1114) (DB.) (Overruled on a different point in (Vol 29) 1942 Mad 41 : ILR (1942) Mad 336 (FB.)

[5] Request by the decree-holder to the Court to strike off an execution application—Court can dismiss application for execution under this rule. (Vol 27) 1940 Pesh 29 (30) * (Vol 11) 1924 Lah 645 (646) (DB.) * (Vol 16) 1929 Nag 82 (82) * (Vol 25) 1938 Lah 590 (592). (Execution application consigned to record room at decree-holder's request—Held application dismissed for default.)

[6] Decree-holder consenting to an application for adjournment of sale made by the judgment-debtor—Court can dismiss application for execution under this rule. (Vol 10) 1923 Pat 446 (447) (DB.)

[7] Decree-holder according to judgment-debtor's request for time—Application struck off—Held there was no default of decree-holder. (Vol 31) 1944 Nag 324 (324) : ILR (1944) Nag 739.

[8] An omission to do anything which the decree-holder is not under an obligation to do, does not constitute a default. (Vol 25) 1938 Lah 728 (728, 729) (DB.) * (Vol 25) 1938 Lah 123 reversed.)

[9] A dismissal of the execution application for want of bidders at the sale will not put an end to the attachment under this rule. (Vol 10) 1923 Mad 703 (703) (DB.)

[But see (Vol 20) 1933 Rang 169 (171).]

[10] Where, though there was an attachment the parties as well as the Court were proceeding in ignorance of the attachment, the dismissal of the application at a stage when the Court thought that the attachment

Nagpur

Substitute the following rule for Rule 57 :

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist."

[29-6-1943.]

N.-W.F.P.

Cancel the concluding sentence of Rule 57, "upon the dismissal . . . shall cease," and substitute the following :

"In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such direction the attachment shall be deemed to cease."

Oudh

Substitute the following for Rule 57 :

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist."

Patna

Delete the last sentence and add the following sub-paragraph :

"Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs."

[7-1-1936.]

O. 21, R. 57 (*contd.*)

was yet to be effected, does not come within the scope of this rule. (Vol 10) 1923 Mad 703 (705) (DB.) * (Vol 25) 1938 Lah 728 (728, 729) (DB.) * (Vol 25) 1938 Lah 123 reversed.)

[11] Where an attachment has taken place before judgment, or on a prior execution application and the Court rejects a subsequent execution application in *limine* under O. 21, R. 17, the attachment will not come to an end. (Vol 27) 1940 Mad. 615 (617) (DB.)

[12] The mere fact that the decree-holder has been restrained by an injunction from executing a decree does not mean that the Court is bound to dismiss an application for execution under this rule. (Vol 30) 1943 Bom 273 (277).

[13] Application for attachment before judgment dismissed, not for default of the decree-holder, but on the claim of third party being allowed—O. 21 R. 57 does not apply: (Vol 31) 1944 Mad 126 (127.)

3. Effect of dismissal.—[1] Where an execution application is dismissed for default, the attachment previously effected ceases forthwith. (Vol 30) 1943 Bom 255 (256) * (Vol 10) 1923 Bom 30 (31) : 46 Bom 942 (DB.) * ('14) 19 Cal L. Jour 248 (250) (DB.) * (Vol 9) 1922 Lah 108 (110) : 3 Lah 7 (DB.) * (Vol 10) 1923 Pat 446 (447) (DB.)

[2] Even where the dismissal for default is due to a misapprehension by the Court, the attachment will cease. (Vol 28) 1941 Bom 395 (397) : ILR (1941) Bom 652.

[3] The dismissal of an interlocutory application in a pending execution application does not terminate attachment. (Vol 27) 1940 Mad 172 (173.)

[4] The obtaining of a fresh attachment during the continuance of a prior attachment does not terminate the prior attachment. (Vol 27) 1940 Mad 172 (173) (The fresh attachment is a mere superfluity.)

[5] An order "petition dismissed"; attachment to continue 'puts an end to the attachment' (Vol 28) 1941 Bom 395 (396) : ILR (1941) Bom 652, * ('11) 38 Cal 482 (485) (DB.) * (Vol 25) 1938 Lah 590 (592). * (Vol 16) 1929 Nag 82 (83) * (Vol 6) 1919 All 194 (195, 196) : 41 All 157 * (Vol 17) 1930 Mad 414 (415.)

[See however Vol 22) 1935 Mad 17 (20)].

[But see (Vol 12) 1925 All 456 (456) * (Vol 9) 1922 All 62 (63) : 44 All 274 (DB.)]

[6] Under the rule as amended in Nagpur in 1930 and in Peshawar the Court has power while dismissing an application for execution to continue the attachment. (Vol 23) 1936 Nag 277 (278) : ILR (1938) 1 ag 346 * (Vol 27) 1940 Pesh 29 (30).

[See (Vol 32) 1945 Nag 257 (261) : ILR (1945) Nag 571. (Order continuing attachment is irregular but not illegal.)]

[See also amendments made by other High Courts.]

[7] The rule applies only to cases of dismissal by reason of the decree-holder's default. (Vol 27) 1940 Mad 733 (737) * (Vol 32) 1945 Nag 257 (261) : ILR (1945) Nag 571 * (Vol 4) 1917 Mad 705 (705) (DB.) * (Vol 20) 1935 Pat 609 (610) (DB.) * (Vol 5) 1918 Pat 599 (600) : 3 Pat L. Jour 310 (DB.) * (Vol 29) 1942 Bom 227 (231.)

[8] Dismissal of application due to mistake of Court—Attachment does not terminate. (Vol 27) 1940 Mad 129 (130) * ('12) 34 All 490 (490) (DB.) * (Vol 22) 1935 Mad 275 (276).

[See however (Vol 28) 1941 Bom 395 (397) : ILR (1941) Bom 652 (Execution application dismissed for default due to misapprehension—Rule applies.)]

[9] Dismissal of an application due to order of stay or injunction of a competent Court—Attachment is not terminated. (Vol 17) 1930 Lrh 647 (649) * (Vol 4) 1917 Mad 705 (705) (DB.) * ('09) 2 Ind Cas 265 (266) (Cal (DB.) * (Vol 6) 1919 Cal 515 (545) : 46 Cal 64 (DB.) * (Vol 23) 1936 Oudh 14 (16) (DB.) * (Vol 13) 1926 Mad 453 (454) (DB.)

[10] Court has power to direct by an explicit order that the attachment should cease even though there is no default on the part of the decree holder. (Vol 8) 1921 Oudh 175 (194) (DB)

[11] Even in cases where the dismissal of an application for execution is not for default, the attachment will normally come to an end on the dismissal unless the Court otherwise directs. (Vol 30) 1943 Bom. 255 (256) * (Vol 27) 1940 Mad 763 (765).

4. Dismissal of application by Collector.—[1] Where execution proceedings are transferred to the Collector, he can dismiss the execution application for

INVESTIGATION OF CLAIMS AND OBJECTIONS.

58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

[1882 S. 278 ; 1877-S. 278 ; 1859-S. 246. See Ss. 47 and 64.]

O. 21, R. 57 (contd.)

default under this rule, and the attachment ceases thereupon. (Vol 10) 1923 Nag 18 (19) * (Vol 9) 1922 Nag 267 (270) : 18 Nag LR 152.

5. Execution removed from file for statistical purposes.—[1] There is no provision of law authorising the Court to lodge an application or record it or strike it off from the file for what is commonly called statistical purposes. (Vol 27) 1940 Lah 78 (79) : ILR (1940) Lah 516. * (Vol 13) 1926 Mad 453 (454) (DB.) * (Vol 17) 1930 Mad 303 (305) (DB.).

[2] An order such as "struck off" or "recorded" or "closed" or "consigned to the record room" only amounts to an adjournment *sine die*. (Vol 27) 1940 Lah 78 (79) : ILR (1940) Lah 516. * (Vol 27) 1940 Mad 763 (764) * (Vol 13) 1926 Mad 453 (455) (DB.). (Petition recorded.) * (Vol 15) 1928 Mad 398 (399) (DB.). (Petition closed). * (Vol 17) 1930 Lah 647 (651) (Sale stayed.—Petition consigned to record room). * (Vol 13) 1926 All 734 (736) : 48 All 698 (DB.). (Petition recorded to reduce pending file) * ('34) 1937 Mad WN 480 (485) (DB.). (Order "Adjourn, rejected" does not amount to dismissal) * (Vol 23) 1936 Lah 873 (874).

[See however (Vol 25) 1938 Lah 590 (592) (Application for execution consigned to record room at request of decree-holder.—Held that this was a dismissal of the application.)

[3] The removal of an application for statistical purposes is not a judicial determination and no fresh application is necessary to continue the same. (Vol 7) 1920 Mad 358 (358) (DB.) * (Vol 3) 1916 Mad 937 (938) (DB.).

[See also (Vol 2) 1915 All 410 (411) ; 37 All 518 (DB.). (Subsequent application treated as application to revive suspended proceedings.)

6. Responsibility of sapurdar of attached property after dismissal for default.—[1] A sapurdar is responsible to the Court for the production of the property entrusted with him. He cannot escape liability by pleading that owing to the decree-holder's default the execution application was dismissed, with the result that the attachment terminated under this rule and that therefore he handed over the property to the judgment-debtor. (Vol 27) 1940 Pesh. 29 (30) * (Vol 6) 1919 Lah 108 (108) : 1919 Pun. Re. No. 60.

7. Revival of attachment, when possible.—[1] A revival of the execution proceedings, for instance, does not operate to revive the attachment so as to prejudice the rights of a third party in the property acquired in the mean time. ('11) 14 Cal L. Jour. 476 (480) (DB.) * (Vol 12) 1925 Mad 1113 (1114) (DB.). (Overruled on a different point in (Vol 29) 1942 Mad 41 :

ILR (1942) Mad 386 (FB). * (1913) 19 Cal. L. Jour. 248 (250, 251) (DB.).

[2] Where there is no question of prejudice to third parties the attachment can also be revived. (Vol 9) 1922 Nag 267 (270) : 18 Nag LR 152. * (Vol 23) 1936 Pat 126 (127).

8. Attachment before judgment.—The following conflicting views have been expressed as to the effect of an order of dismissal under this rule upon attachment effected before judgment.

[1] The dismissal of an execution application for default does not put an end to the attachment before judgment. (Vol 11) 1924 All 860 (861) : 46 All 894 (DB.) * (Vol 16) 1929 Cal 465 (466) : 56 Cal 416 (DB.) * ('12) 16 Cal L. Jour. 86 (89) (DB.) * (Vol 24) 1937 Pat 626 (627) : 16 Pat 589 (DB.).

[2] The attachment before judgment therefore ceases upon the dismissal of the application for execution. * (Vol 30) 1943 Mad 322 (324). (Vol 11) 1924 Mad 494 (500) : 47 Mad 483 (FB.). (Overruling (Vol 6) 1919 Mad 752 : 42 Mad 1 * (Vol 8) 1921 Nag 57 (59) : 17 Nag LR 121 * (Vol 9) 1922 Nag 81 (81). * (Vol 28) 1941 Sind 13 (15) : ILR (1940) Kar 454 (DB.).

[3] Dismissal of an execution application puts an end to attachment before judgment, but the dismissal of an execution application in relation to movable properties has not the effect of putting an end to an attachment of immovable properties. (Vol 27) 1940 Bom. 250 (251) * (Vol 18) 1931 Bom 550 (554) : 55 Bom 693 (DB.). (Affirming (Vol 16) 1929 Bom 321 : 53 Bom 543.).

[4] Where two properties have been attached before judgment, the dismissal of an application for execution (after decree) with reference to one of them will not cause the termination of the attachment of the other. (Vol 30) 1943 Mad 322 (325).

[5] An attachment before judgment is not terminated by the rejection in limine of an execution application, for non-compliance with the formal requirements of the law. (Vol 27) 1940 Mad 615 (617) (DB.).

ORDER 21, RULE 58.

Synopsis.

1. Investigation of claims and objections.
2. "Where any claim is preferred to or any objection is made."
3. On the ground that such property is not liable to such attachment.
4. Objection raised after sale.
5. Any property attached.
6. Claims to debts attached in execution.

Objects and Reasons.

"Though the execution of a mortgage decree is expressly incorporated in the Code, the Committee still think that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under this and the following rules but should be determined in the ordinary course. This does not imply that the procedure under the latter rules as to resistance to possession or dispossession does not apply."—S. O. R.

PROVINCIAL AMENDMENTS

Allahabad

Add the following words to sub-rule (2) :

"(or objection), or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

Calcutta

Add the following words at the end of sub-rule (2) :

"upon such terms as to security, or otherwise, as to the Court shall seem fit."

[3-2-1933]

Lahore

Add the following to proviso under sub-rule (1) :

"and that if an objection is not made within a reasonable time of the first attachment, the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment." [7-4-1932.]

O. 21, R. 58 (*contd.*)

- 7 Claim to decree attached in execution.
8. Claim to property seized by receiver.
9. Claims to properties ordered to be sold under a mortgage decree.
10. Claim to property attached in execution of rent decree.
11. Property attached on execution of decree in favour of company in liquidation—Claim to such property.
12. Who can prefer claim.
13. Parties and representatives.
14. Trustees and shebait.
15. Claim by Official Receiver or official Assignee.
16. Claims by third persons.
17. Claims by transferee of property from the judgment-debtor.
18. Assignee of decree from the judgment-debtor.
19. "Shall proceed to investigate the claim."
20. Proviso.
21. Transfer of proceedings under this rule.
22. Effect of order—Res judicata.
23. Proclamation of sale pending claim petition.
24. Appeal.
25. Revision.

1. Investigation of claims and objections.—[1] Where a party or his representative has any objection to attachment being made, the question must be decided by the Court executing the decree and not by a separate suit. (Vol 28) 1941 Pat 240 (241) * (Vol 22) 1935 All 183 (184) (DB.) * (Vol 21) 1934 Cal 258 (259) * (Vol 26) 1939 Lah 207 (208). * (Vol 23) 1930 Bom 227 (231) : 60 Bom 516 (DB.) * (Vol 9) 1922 Pat 572 (573) (DB) * (Vol 26) 1939 Nag 183 (185) : ILR (1939) Nag 548 (DB.) * (Vol 22) 1935 Mad 923 (924) *

[But see (Vol 26) 1939 Pat 354 (356) (DB.) (Representative of judgment-debtor objecting that the property is his personal property—Objection can be treated as coming under O. 21, R. 58.)

[2] Where a third party has a claim or an objection to the attachment of property attached in execution of a decree, he may either file a suit claiming the

appropriate relief, or he may file an application under this rule. (Vol 29) 1942 Oudh, 465 (471) : 18 Luck 366 (FB).

[See also (Vol 30) 1943 Nag 273 (275) : ILR (1943) Nag 462 (468, 469) (Defendant discharged by decree at instance of plaintiff as being not proper—Party ceases to be party within S. 47 and his objection falls under R. 58). * (Vol 24) 1937 Lah 313 (313) (Appeal against order of attachment is not tenable.)

[3] A third party is not bound to prefer a claim or an objection under this rule. (Vol 29) 1942 Oudh 465 (471) : 18 Luck 366. * ('13) 40 Ind. App 56 (64) : 40 Cal 598 (PC.)

[4] The remedy provided by this rule is a summary and concurrent remedy securing a speedy settlement of title. (Vol 7) 1920 Mad 187 (190) (DB.) * ('85) 11 Cal 673 (679) (DB.) * (Vol 32) 1945 Pat 485 (489) : 24 Pat 408 (DB) (If a person chooses to take advantage of a summary remedy he must also suffer its disadvantages.)

[See (Vol 29) 1942 Cal 180 (202) (DB.)]

[See however (Vol 22) 1935 All 183 (185) (DB.) (Procedure to be followed is not a summary procedure.)

[5] Where a third party prefers a claim under this rule, the enquiry is only a summary investigation and not a full trial of the issues between the parties. (Vol 7) 1920 Mad 187 (189) (DB.) * (Vol 13) 1926 Nag 197 (198).

[6] Where a decree-holder applies for the attachment of a certain property as belonging to the judgment-debtor, it is not for the Court to anticipate proceedings under this rule and refuse to order attachment on the ground that the property does not belong to the judgment-debtor. (Vol 22) 1935 Lah, 114 (114, 115).

[7] A Collector, to whom the execution of a decree has been transferred has no power to inquire into objections to attachment under this rule. (Vol 23) 1936 Bom 227 (231) : 60 Bom 516 (DB.)

[8] This rule and rule 63 do not apply to the Vizagapatam Agency Tracts. (Vol 9) 1922 Mad 271 (272) : 46 Mad 35 (DB.)

2. "Where any claim is preferred to or any objection is made."—[1] The rule is wide and comprises claims of third parties whether put forward by themselves or on their behalf by the parties, or their representatives. ('99) 23 Mad 195 (202) (FB).

Nagpur

Delete the full stop at the end of sub-rule (2) and *add* the following :

"or, where the property to be sold is immoveable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided." [29-6-1943,]

Oudh

Add the following words to sub-rule (2) :

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

Patna

Substitute the following for Rule 58 :

"58. (1) When any claim is preferred to any property, the subject-matter of the execution proceedings, or any objection is made to the attachment thereof, on the ground that the applicant has an interest therein which is not bound under the decree, or that such property is not liable to attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection. And in no case shall the sale become absolute until the claim or objection has been decided."

O. 21, R. 58 (contd.)

[See (Vol 28) 1941 Pat 240 (241).]

[2] Decree-holder not objecting to oral objections to attachment cannot subsequently urge that no written application was submitted. (Vol 20) 1933 Sind 126 (127).

3. "On the ground that such property is not liable to such attachment."—[1] Where there is no attachment at all, an objection under this rule is incompetent. (Vol 10) 1923 Bom, 381 (382) (DB) * (Vol 11) 1924 Mad 889 (889) (DB.) * (Vol 22) 1935 All 343 (344, 345) (DB.) * (Vol 33) 1946 Mad 176 (178).

[2] A third party whose property is sought to be attached in execution paid into the Court the decretal amount and then sought for a refund of the money on the ground that his property was not liable to attachment. Held that the Court had inherent power to order refund, although the case did not fall under this rule. (Vol 27) 1940 Sind 191 (192).

[3] An objector cannot prefer an application under this rule merely on the ground that he has not been made a party to the execution proceedings. (Vol 13) 1926 Mad 355 (356) (DB.)

[4] The words 'on the ground that such property is not liable to attachment' have reference merely to a case where an objection is made to an attachment and not to a claim preferred to the property. (Vol 14) 1927 All 593 (596); 49 All 903 (DB.)

[5] A claimant can put forward his claim under this rule on the ground that there is no decree or valid attachment. (Vol 16) 1929 Mad. 383 (384) * (Vol 14) 1927 Mad 450 (455).

[6] A claimant cannot attack the validity of the decree. (Vol 29) 1942 Cal 180 (202) (DB) * (Vol 22) 1935 Lah 549 (550). * (Vol 26) 1939 Pat 430 (432).

[7] A claimant cannot plead that the execution application is barred by limitation. (Vol 29) 1942 Cal 180 (202) (DB) * (Vol 8) 1921 Pat 311 (311). * (Vol 16) 1929 Rang 152 (152, 153) : 7 Rang 132.

4. Objections raised after sale.—[1] (a) The Court cannot entertain a claim under this rule, after execution sale takes place. (Vol 29) 1942 Bom 263 (265); ILR 1942 Bom 636 * (Vol 18) 1926 Cal 468 (468). * (Vol 24) 1937 Cal 390 (392) (DB.) * (Vol 25) 1938 Lah

568 (568) ; ILR 1938 Lah 593 (DB.) * (Vol 11) 1924 Pat 76 (76) (DB.) * (Vol 15) 1928 Rang 80 (80) ; 5 Rang. 751. * (Vol 24) 1937 Pesh. 90 (91) (DB.) * (Vol 24) 1937 Pesh 97 (99) (DB.)

(b) A claim can be preferred after the sale but before its confirmation. (Vol 18) 1931 Mad 782 (783) : 55 Mad 251 (But see observations in (Vol 29) 1942 Mad 41 : ILR (1942) Mad 336 (FB.) * ('05) 1 Nag LR. 167 (168) * (Vol 25) 1938 Nag 475 (476) : ILR (1940) Nag 306. * (Vol 27) 1940 Nag. 7 (7) * (Vol 20) 1933 Sind 198 (200) : 27 Sind LR 226 (DB.)

(c) Under the rule as amended in Patna and Allahabad an objection under this rule can be dealt with upto the time of confirmation of the sale. (Vol 26) 1939 Pat 430 (431) * (Vol 26) 1939 All 598 (599).

[2] An objection by a party to the suit can be raised even after the sale. (Vol 24) 1937 Pesh 82 (83).

[3] A third party whose property is being wrongfully sold for another's debt must prefer his objection or claim under this rule. He cannot apply under O. 21, R. 90. (Vol 28) 1941 P.C. 45 (46) : 20 Pat 791 : 68 Ind App 97 : ILR (1941) Kar PC 88 (PC).

5. Any property attached.—[1] The rule applies to any property attached. ('10) 15 Cal W. N. 817 (819) (DB.) (Moveables) * ('07) 4 Low Bur Rul 16 (16) (Do) * ('01) 14 C. P. L. R. 124 (125) (Do) * ('70) 13 Suth W R 63 (67, 68) (FB) (Fractional share of immovable property attached.)

[2] An objection by a third party to the attachment of any property can be entertained only after an attachment has been made. (Vol 22) 1935 All 343 (344) (DB.)

6. Claims to debts attached in execution.—[1] Garnishee failing in his claim—No suit filed within one year of the order against him—He cannot assert as a plaintiff or a defendant the right denied by the order. (Vol 1) 1914 Bom 299 (300) : 38 Bom 631 (DB.) * (Vol 18) 1931 Bom 288 (290) (DB) (Assumed). * (Vol 11) 1924 Lah 367 (367) * ('04) 27 Mad 67 (70, 71) (FB) (Overruling 24 Mad 20.)

[2] Garnishee denying the existence of a debt, lays no claim to attached property. This Rule therefore does not apply. (Vol 23) 1936 Mad 152 (153) : 59 Mad 966 (DB.) * (Vol 33) 1946 Mad 176 (178.)

O. 21, R. 58 (*Contd.*)

[3] Garnishee claiming right to defer payment—Rule applies. (Vol 29) 1942 Mad 650 (651).

[4] Garnishee failing to show cause why he should not pay into the Court the debt in response to a notice under O. 21, R. 46 A (Sind Amendment) Objection at a later stage by means of an application under this rule is barred. (Vol 30) 1943 Sind 23 (23) : ILR (1942) Kar 153 * (Vol 28) 1941 Rang 197 : 1941 Rang LR 177 relied on.)

7. Claim to decree attached in execution.—[1] Where A obtains a decree against B for money and in execution thereof attaches a decree in favour of B and C who had obtained before the attachment a transfer of the decree attached prefers a claim to the decree, his claim falls under this rule. (Vol 13) 1926 All 244 (245.)

8. Claim to property seized by receiver.—[1] A receiver in insolvency after adjudication of the judgment-debtor seizing properties as belonging to the insolvent third persons can prefer their claims or objections to such property—Such claims fall under S. 4 of the Provincial Insolvency Act. Procedure to be followed is that prescribed by this rule. (Vol 1) 1914 All 212 (212) : 36 All 8 (DB) * ('11) 13 Bom LR 13 (17).

[2] The decision of the Insolvency Court on such claims can be challenged by way of appeal or otherwise as provided by the Insolvency Act, and not by a suit under Rule 63. (Vol 15) 1928 All. 158 (159) (DB.)

[3] The mere fact that subsequent to the attachment, the judgment-debtor becomes an insolvent and his properties become vested in the Official Assignee will not disentitle a claimant from preferring an objection under this rule. ('87) 9 All 232 (233, 234) (DB.) * (Vol 15) 1928 All 158 (159) (DB.)

9. Claims to properties ordered to be sold under a mortgage decree.—[1] This rule does not apply to claims or objections relating to properties ordered to be sold under a mortgage-decree. ('05) 27 All 700 (701) (DB.) * (Vol 20) 1923 Lah 75 (76.) * ('80) 4 Bom 515 (520) (FB.) * (Vol 8) 1921 Cal 479 (480) (DB.) * ('87) 14 Cal 631 (633) (DB.) (The remedy is by way of suit.) * (Vol 16) 1929 Lah 760 (761.) * (Vol 17) 1930 Mad 712 (712) (DB.) * (Vol 19) 1932 Mad 716 (719) * (Vol 12) 1925 Nag 185 (185, 186) * (Vol 6) 1919 Pat 131 (131) (DB.)

[2] Where a mortgage decree-holder 'erroneously applies for and gets an attachment effected on the properties and a claim is thereupon preferred, this rule will apply and the order on the claim will be conclusive within the meaning of Rule 63 (Vol 23) 1936 Pesh 53 (54) * (Vol 24) 1937 Lah 360 (361) (DB.) * (Vol 15) 1928 Mad 525 527 (DB.) * (Vol 2) 1915 Low Bur 136 (137) : 8 Low Bur Rul 215 (FB.)

[3] As the effect of the amendment of O. 21, R. 53 to 60, by the Patna High Court, a claim to mortgage property directed to be sold in execution of the mortgage decree falls within O. 21, R. 58. (Vol 31) 1944 Pat 24 (25) : 22 Pat 709.

10. Claim to property attached in execution of rent decree.—[1] By virtue of S. 170 of the Bengal Tenancy Act (VIII of 1885), Rules 58 to 63 do not apply to a tenure of holding attached in execution of a decree for arrears of rent thereof. Hence, no claims or objections can be filed under this rule. (Vol 27) 1940 Pat 21 (22.) * (Vol 26) 1939 Cal 272 (272)

* ('01) 28 Cal 382 (385, 386) (FB) * ('06) 33 Cal 566 (569) (FB.)

[2] The rule applies to proceedings in execution of rent decrees under the Madras Estates Land Act, 1908 (Vol 15) 1928 Mad 360 (360) : 51 Mad 774 (DB.) * (Vol 19) 1932 Mad 716 (718).

11. Property attached in execution of decree in favour of company in liquidation—Claim to such property.—[1] S. 171 of the Companies Act does not preclude an objection being taken under this rule when property is attached in execution of a decree in favour of a company in liquidation. (Vol 23) 1936 Pesh 185 (186.)

12. Who can prefer claim.—[1] Where the interest of a claimant accrued after the attachment which was effected, he cannot come under Rule 58. (Vol 21) 1934 Pat 511 (511, 512) : 13 Pat 765 (DB.)

[2] Occupancy rights of judgment-debtor attached—Landlord has sufficient interest in the property to entitle him to prefer objection. (Vol 23) 1938 Lah 877 (678) (DB.)

[3] An objection by a person who subsequent to the attachment purchases the property in execution of another decree, is not one within this rule. (Vol 21) 1934 Pat 511 (512) : 13 Pat 765 (DB.) * (Vol 22) 1935 Nag 171 (172) : 31 Nag LR 301 (Court has inherent jurisdiction to deal with such cases.) * (Vol 26) 1939 Lah 380 (381) (Do.)

[4] Post office cash certificates in the name of a person attached in execution Held that objection by the Postmaster-General having custody of the certificates falls within this rule. (Vol 23) 1938 Cal 445 (445.)

[5] Objection taken by the Secretary of State for India to whom notice is issued under O. 21, R. 48 for the attachment of the salary of a Government servant comes under this rule. (Vol 23) 1936 Lah 761 (762.)

[See also (Vol 28) 1941 Bom 389 (391, 394) : ILR (1941) Bom 415 (DB.)]

[6] Where the shares of a member of a co-operative Society are attached in execution of a decree against the member, the society can object to the attachment under this rule. (Vol 26) 1939 Lah 305 (306.)

[7] It is doubtful whether a reversioner having only a spes successionis is in regard to the attached property can prefer an objection to the attachment under this rule. (Vol 29) 1942 Cal 180 (203) (DB.)

13. Parties and representatives.—[1] Objections to attachment raised by parties or their representatives as representing third parties or as trustees, are really objections by third parties and have to be decided under the provisions of Rr. 58 to 63. ('85) 7 All 547 (549, 550) (DB.) * ('01) 23 All 263 (265) (DB.) * (Vol 23) 1936 Pat 256 (257) * (Vol 22) 1935 All 897 (899) (DB.)

[But see (Vol 29) 1942 Sind 14 (15) : ILR (1941) Kar 474 (DB.) (Judgment-debtor objecting because property held by him as mutwalli—Case comes within S. 47 and not O. 21, R. 58.)

[2] Claim by the karnavan of a Malabar tarwad that the whole of the tarwad property is not liable to attachment in execution of a personal decree against him, falls under this rule. (1900) 10 Mad. L. Jour. 85 (86) (DB.) * (Vol 3) 1916 Mad 789 (789) (DB.)

[See however ('04) Mad L. Jour 137 (138) (DB.)

O. 21, R. 58 (*contd.*)

[3] Suit against testator—Executor who was made legal representative claiming to be legatee of part of property to be held in trust for charity—Objection in execution as legatee holding property in trust falls under S. 47 and not under O. 21, R. 58. Suit by him on dismissal of his objection is not maintainable. (Vol. 33) 1946 Mad. 209 (214) (DB.)

[4] A, a Hindu debtor, died leaving B, a daughter and C a daughter's son. A's creditor sued C alone and obtained a decree against A's assets in his hands. In execution of the decree, property in the hands of B (the daughter) was attached as being the assets of the deceased. B objected on the ground that the property was her personal property and did not form part of the assets of the deceased. It was held that B's objection was one by a stranger and as such came within this rule and not under S. 47. (Vol 19) 1932 All 263 (264) (DB.)

[See also (Vol 25) 1938 Nag 321 (322) : ILR (1940) Nag 509. (Decree against sons as legal representatives of the deceased—Widow not impleaded—Objection by Widow.)]

[5] Objection headed under O. 21, R. 58—Held that, in view of the nature of objections and character which the objector occupied in relation to the proceedings, the objections must be deemed to have been made as the representative of the original judgment-debtor and fell under S. 47. (Vol 31) 1944 Oudh 314 (318) : 20 Luck 226.

[6] Objection under S. 47—Held that the objector as a stranger could object under O. 21, R. 58 and the objection should not be thrown out merely because it was put under S. 47. (Vol 31) 1944 Pat 242 (244, 247) : 23 Pat 265. ✱ (Vol 30) 1943 Cal 56 (57). Res judicata.)

[7] See also notes on S. 47.

14. Trustees and shebaitis.—[1] A personal decree against a trustee or shebait does not estop him from asserting the claim of the beneficiary under this rule. (13) 21 Ind Cas 748 (749) (DB.) (Mad.) ✱ ('88) 15 Cal 329 (340) : 15 Ind App 1 (PC.) ✱ (Vol 2) 1915 Cal 327 (329, 330) : 42 Cal 440 (DB.) ✱ (Vol 23) 1936 Rang 403 (404) (DB.) (But it is not open to him in his capacity as trustee to question authority of pleader for himself in his personal capacity to consent to attachment. ✱ ('11) 39 Cal 298 (303) (FB.)

15. Claim by Official Receiver or Official Assignee.—[1] If the vesting order takes place before attachment, the Official Receiver can prefer a claim under this rule. (Vol 28) 1941 Mad 262 (264) (DB) ✱ (Vol 23) 1936 Cal 573 (574) : ILR (1937) 1 Cal 261. ✱ (Vol 22) 1935 Mad 151 (152) : 53 Mad 403 (DB) ✱ (Vol 23) 1936 Sind 2 (3) : 30 Sind LR 288 (DB)

[See also (Vol 25) 1938 Rang 319 (320) (DB.) (Objection by receiver in administration suit falls under this rule.)

[2] If the vesting order is subsequent to the attachment, then the claim of the Official Receiver does not fall under this rule; Articles 11 and 13, Limitation Act, do not apply to such cases. See also Note 23 on S. 47 and the AIR Commentaries on the Limitation Act 2nd (1942) Edn., Art 11 Note 11 and Art 13 Note 2. (Vol 9) 1922 Mad 189 (190, 191) : 45 Mad 70 (DB)

16. Claims by third persons.—[1] The procedure under this rule applies to claims of third persons only. ('85) 7 All 365 (366) (DB). ✱ ('92) 18 Bom 700 (702) (DB.)

17. Claims by transferee of property from the judgment-debtor.—[1] A transferee of property

attached in execution can object under this rule to the attachment made subsequent to his transfer. (Vol 28) 1941 Pat 394 (394) (DB.) ✱ (Vol 13) 1926 All 244 (245). ✱ (Vol 4) 1917 Mad 4 (5) (DB.) ✱ ('12) 1912 Pun LR No 123 page 374 (375) ✱ (Vol 17) 1930 Pat 390 (391) (DB) ✱ ('11) 15 Cal W N 542 (544) (DB.) ✱ (Vol 26) 1939 All 264 (267) : ILR (1939) All 354 (DB)

[See (Vol 26) 1939 Nag 183 (186) : ILR (1939) Nag 548 (DB.) (Transferee subsequent to attachment cannot claim under this rule, he being bound by decree and being thus a 'representative' of a party to the suit.)]

[2] A simple mortgagee of the attached property can prefer a claim under this rule. (Vol 5) 1919 Mad 1054 (1054) (DB.) ✱ (Vol 14) 1927 All 593 (594) : 49 All 903 (DB.)

18. Assignee of decree from the judgment debtor.—[1] The transferee of a decree from the judgment-debtor can apply under this rule to remove an attachment of the decree made subsequent to the transfer. (Vol 15) 1928 Rang 25 (26) : 5 Rang 595 (DB.) ✱ (1900) 10 Mad L Jour 116 (117) (DB.)

19. "Shall proceed to investigate the claim" [1] The Court is bound to investigate a claim unless it has reason to reject it for delay. ('67) 8 Suth W R 26 (27) (DB.) ✱ (Vol 20) 1933 Lah 421 (421) ✱ (Vol 22) 1935 All 183 (185) (DB.) ✱ (Vol 22) 1935 Rang 207 (208) (DB.)

[2] It is improper merely to notify a claim in the sale proclamation, without any investigation. (Vol 6) 1919 Mad 738 (743) : 41 Mad 935 (FB.) (Per Seshagiri Ayyar, J.)

[3] No investigation but merely notification of claim in sale proclamation—Such order though wrong is conclusive till set aside by a suit under O. 21, R. 63. (Vol 6) 1919 Mad 737 (742) : 41 Mad 935 (FB.)

[4] The Court should not reject a claim without investigation merely on the ground that the question of possession of title is doubtful or complicated. (Vol 1) 1914 Lah 508 (509.)

[5] An order for merely notifying a claim does not preclude the executing Court from subsequently investigating the claim on the merits. (Vol 22) 1935 Mad 1015 (1017).

[6] It is not possible to define the amount of enquiry which constitutes an investigation. ('88) 15 Cal 521 (526) : 15 Ind App 123 (PC.)

[7] If the order purports to deal with the merits it must be taken that there has been an investigation. ('06) 29 Mad 225 (227) (DB) ✱ (Vol 4) 1917 Oudh 99 (101) : 19 Oudh Cas 357.

[9] The question to be decided is, whether on the date of the attachment, the judgment debtor or the objector was in possession and where the Court is satisfied that the property was in possession of the objector, it must be found whether he held it on his own account or in trust for the judgment-debtor. (Vol 18) 1929 Pat 273 (274) ✱ (Vol 7) 1920 Mad 748 (753) : 43 Mad 760 (FB.) ✱ (Vol 26) 1939 All 117 (119). ✱ (Vol 22) 1935 Pat 267 (268.)

[9] The sole question to be investigated is, one of possession. (Vol 30) 1943 Bom 129 (130) : ILR (1943) Bom 171. ✱ (Vol 29) 1942 Cal 180 (202) (DB.) ✱ (Vol 27) 1940 Mad 881 (882) ✱ (Vol 18) 1931 Lah 656 (666). ✱ ('02) 29 Cal 548 (546). ✱ (Vol 15) 1928 Mad 163 (163). ✱ (Vol 16) 1929 Nag 66 (67). ✱ (Vol 9) 1922 Low Bur 16 (16). ✱ (Vol 14) 1927 Sind 114 (115). ✱ (Vol 24) 1937 Cal 639 (641). ✱ (Vol 26) 1939 All 117 (119).

O. 21, R. 58 (*contd.*)

[10] Questions of legal right and title are not relevant except so far as they affect the question of possession. (Vol 27) 1940 Mad 881 (882) * (1900-02) 1 Low Bur Rul 180 (181, 182), * (Vol 23) 1936 Rang 306 (307) : 14 Rang 516 * (Vol 31) 1944 Pat 242 (246) : 23 Pat 365 (DB). * ('37) 1937 Mad W N 320 (320). * (Vol 21) 1934 Rang 212 (213) (DB) * (Vol 22) 1935 Pat 267 (268).

[11] Ultimate question of trust is outside the scope of investigation under this rule. (Vol 11) 1924 Cal 744 (748) : 51 Cal 548 (DB)

[12] Complicated questions like the benami nature of transactions should not be gone into during the investigation. (Vol 27) 1940 Pat 653 (654) : 19 Pat 494 * (Vol 16) 1929 Pat 273 (274) * (Vol 23) 1936 Bom 160 (162) : 60 Bom 226.

[13] It has been held in the following cases that the Court does not act without jurisdiction, if it does not go into the question of possession but decides the claim on some other basis like the title (12) 34 All 365 (370) (DB). * (Vol 4) 1917 Mad 311 (311) (DB). * (Vol 4) 1917 Low Bur 79 (80).

[14] Person, objecting to attachment, claiming under transfer from the judgment-debtor—Evidence that transfer was fraudulent is not admissible—Creditor's remedy is by suit under O. 21, R. 63. (Vol 33) 1946 Mad 174 (175).

20. Proviso—[1] The court cannot dismiss a claim petition under this rule on the ground of delay, without giving the claimant an opportunity to explain the delay and without considering the explanation. (Vol 20) 1933 All 751 (751) (DB). * (Vol 24) 1937 Oudh 268 (269) : 13 Luck 111 (DB).

[2] Dismissal of claim on the ground of delay after investigation is illegal. (Vol 5) 1918 Upp Bur 32 (32) : 2 Upp Bur Rul 136 * (Vol 4) 1917 Cal 9 (10) (DB)

[3] An order rejecting a claim on the ground of delay which is not set aside by a regular suit within one year from the date of the order is conclusive within the meaning of R. 63. (Vol 15) 1928 Mad 525 (526) (DB). * (Vol 20) 1933 Bom 190 (191) : 57 Bom 213 (DB). * (Vol 22) 1935 Pat 122 (123) * (Vol 22) 1935 Cal 500 (501).

21. Transfer of proceedings under this rule.—

[1] A transfer to another Court of only the objection under this rule without transferring the execution proceedings also is not according to law. (Vol 25) 1933 Lah 95 (96).

22. Effect of order—Res judicata.—[1] An order on a claim petition disallowing the claim bars, on general principles of res judicata, a fresh application on the same ground. (Vol 29) 1942 Mad 5 (8) (DB). * ('70) 14 Suth WR 144 (145) (DB).

[See (Vol 27) 1940 Lah 67 (67) (Application dismissed as incompetent without enquiry on merits—No res judicata)]

[2] Where a claim under this rule is rejected, the claimant cannot raise the same question by way of defence to a suit for possession by the auction-purchaser. (Vol 22) 1935 Cal 500 (502) (DB). * (Vol 22) 1935 Rang 161 (162).

[See however (Vol 26) 1939 Mad 456 (461) : ILR (1939) Mad 803 (SB).]

[3] The order passed in a claim proceeding is only good the particular claimant or the particular property attached and not a general decision enuring to the bene-

fit of others who are not parties thereto. ('67) 8 Suth WR 27 (28) (DB). * ('02) 25 Mad 721 (723) (DB). * ('92) 15 Mad 477 (479) (DB).

[See (Vol 30) 1943 Oudh 431 (432).]

[See also (Vol 26) 1939 All 657 (659).]

[4] An order in favour of one of several decree-holders disallowing a claim cannot be availed of in favour of the other decree-holders who are not parties to the claim. (Vol 29) 1942 Mad 128 (129). * ('96) 18 All 413 (413) (DB).

[See also (Vol 26) 1939 Mad 456 (460) : ILR (1939) Mad 803 (SB).]

[5] Claim under the rule disallowed. Order disallowing the claim not set aside by a suit under R. 63. Held that a person holding a decree against the defeated claimant and seeking to attach the property in execution of his decree will be bound by the previous order dismissing the claim of his judgment-debtor. (Vol 23) 1936 All 722 (723) * (Vol 22) 1935 All 888 (relied on).

[6] Claim preferred by the manager of the Court of Wards on behalf of a minor without the sanction of the Court of Wards—Order disallowing the claim does not bind the minor. ('99) 27 Cal 242 (252, 253) (DB).

[7] Claim by a third party that he is the owner of attached property.—Attachment set aside—Decision that the third party is the owner is not binding on the judgment-debtor, unless he has appeared and opposed the claim. (Vol 26) 1939 All 728 (729).

[8] A certain property is attached in execution of a decree against A. B prefers claim under this rule on the ground that C is the owner of the property and that he B is a usufructuary mortgagee from him. The claim is dismissed. C then redeems the property and objects to the attachment. C (the mortgagor) cannot be called the representative of B (the mortgagee) and is not bound by the decision against B (Vol 29) 1942 Oudh 465 (472) (FB).

[9] Application under O. 21, R. 58 rejected—Subsequent suit, based on title independent of anything decided by rejection of application, is not barred even if brought more than one year of rejection of the application. (Vol 32) 1945 Pat 434 (435) : 24 Pat 345 (DB).

[10] Subject to the operation of the doctrine of res judicata, an order on a petition under this rule does not extend beyond the execution of the order which gave rise to those proceedings. (Vol 32) 1945 Mad 333 : (336) : ILR (1946) Mad 79 (FB). * (Vol 8) 1921 Mad 105 : 44 Mad 268 (Overruled).

23. Proclamation of sale pending claim-petition.—[1] A court cannot order the issue of a proclamation of sale while a claim petition is pending. (Vol 27) 1940 Mad 6 (7).

24. Appeal.—[1] No appeal lies against an order allowing or rejecting a claim under this rule. The order is conclusive subject to the result of the suit contemplated by Rule 63. (Vol 28) 1941 Mad 262 (264) (DB). * (Vol 28) 1941 Pat 394 (394) (Revision lies). * (Vol 10) 1923 All 292 (292) * ('80) 2 All 752 (753) (DB). * ('04) 28 Bom 458 (460) (DB). * ('02) 6 Cal W N 63 (65) (DB). * (Vol 10) 1923 Rang 195 (195) : 1 Rang 276. * (Vol 22) 1935 Mad 151 (152) : 58 Mad 403 (DB). (No appeal lies even though the application is headed as one under S. 47). * (Vol 23) 1936 Lah 830 (831). * (Vol 23) 1936 Sind 2 (2) : 30 Sind LR 288 (DB). * (Vol 24) 1937 Pat 341 (343).

59. The claimant or objector must adduce evidence to show that at the date of the Evidence to be attachment he had some interest in, or was possessed of, the property adduced by claimant. attached.

[1882-S. 279.]

PROVINCIAL AMENDMENT

Patna

Substitute the following for Rule 59 :

"59. The claimant or objector must adduce evidence to show that at the date of the decree or of the attachment, as the case may be, he had some interest in, or was possessed of, the property in question."

60. Where upon the said investigation the Court is satisfied that for the reason stated in the Release of property claim or objection such property was not, when attached, in the possession of from attachment. the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

[1882-S. 280 ; 1877—S. 280 ; 1859—S. 220 See S. 63.]

O. 21, R 58 (*contd.*)

[2] Defendant discharged by decree at instance of plaintiff as being not proper party to suit ceases to be party within S. 47 and he is not entitled to object to attachment under R. 58 and to file a suit under R. 63 if objection is dismissed—S. 47 does not bar suit (Vol 30) 1943 Nag 273 (276) : ILR (1943) Nag 462 (469.)

[3] Decree-holder in execution proceedings merely asking that his previous mortgage should be notified—Sale proclamation merely announcing existence of that mortgage—No determination under O. 21, R. 62—Order would not be final and appeal would not lie to High Court or to Federal Court. (Vol 27) (1940) FC 1 (2,3): 1940 FCR 1 (FC.)

[4] Under the special provisions of the Agra Tenancy Act 1926, an order passed by an Assistant Collector, Second Class, is appealable to the Collector, but the party aggrieved by the appellate order can file a suit under O. 21, R. 63 (Vol 19) 1932 All 502 (503) : 54 All 767 (DB.)

[5] There is a conflict of opinion as to whether an order dismissing a claim petition is a "judgment" within the meaning of the Letters Patent and appealable as such.

[a] It is a "judgment" and appealable as such. ('02) 25 Mad 555 (559) (DB.) * (Vol 3) 1916 Mad 883 (884) : 39 Mad 1196 (DB.)

[b] It is not a "judgment" and hence no appeal lies. (Vol 14) 1927 Rang 287 (287) : 5 Rang 381 (DB.)

[c] Concluding words of O. 21, R 63, preclude an appeal from the order. (Vol 20) 1933 Cal 715 (716) : 60 Cal 914 (DB.) (Whether order is 'judgment' not decided.)

[6] Where the claim is one coming under S. 47, the order passed thereon is appealable even though the objection was misdescribed as one under O. 21, R. 58 and the Court dealt with it as such. (Vol 19) 1932 Lah 376 (377) * (Vol 22) 1935 All 183 (185) * (Vol 21) 1934 Mad 435 (435) : 57 Mad 822 (DB) * (Vol 26) 1939 Lah 207 (208) * (Vol 22) 1935 Mad 923 (924) * (Vol 16) 1929 Pat 141 (144) : 8 Pat 717 * (Vol 16) 1929 Pat 472 (472) (DB.)

25. Revision.—[1] See S. 115 and the following cases.—(Vol 29) 1942 Pat 369 (370). (Objection dismissed—Remedy is either to apply in revision or to file suit under O. 21, R. 63.) * ('42) ILR (1942) Kar 160

(161. 162) (DB.) (No revision lies when remedy by way of suit under O. 21, R 63 is open.) * ('40) 6 BR 696 (698). (Where, although purporting to deal with the question of possession, the Court has really been considering the question of benami, the High Court will interfere with its order in revision.)

ORDER 21, RULE 59—Note 1.

[1] The rule places the burden on the claimant to prove that at the date of attachment he had some interest in the property attached or was in possession thereof. (1891) 18 Cal 290 (295) * (Vol 24) 1937 Cal 639 (640).

[2] O. 21, R 59, does not mean that, if the claimant establishes that he has some interest in the attached property he can succeed irrespective of the question of possession ; nor should his claim be disallowed if he fails to establish the interest set up, irrespective of the question of possession of judgment-debtor. (Vol 2) 1915 Cal 116 (117).

[3] The interest referred to in O. 21, r. 59, is not necessarily an interest in land in the sense that expression is used in S. 54, T P. Act (Vol 22) 1935 Mad 193 (194).

[4] The words 'some interest' mean such an interest as would render the possession of the judgment-debtor possession not on his own account but on account of or in trust for some other person. (Vol 2) 1915 Cal. 116 (117). * (1897) 1 Cal WN 617 (622). * (Vol 20) 1933 Nag 297 (298).

[5] Mere attachment does not give a person any interest in the property within the meaning of the rule. (Vol 22) 1935 Nag 171 (172) : 31 Nag LR 301.

[6] Rule applies to investigation of claims in attachment before judgment. (Vol 20) 1933 Nag 297 (298).

ORDER 21, RULE 60—Note 1.

[1] Under this rule the Court has to investigate whether the property attached was "at the time of the attachment in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him. (Vol 15) 1928 All. 668 (669) * (Vol 5) 1918 Low Bur 32 (32).

[2] An order of release should be unconditional. (Vol 6) 1919 Cal 473 (473).

[3] In execution of decree attachment made—Objection by charge-holder allowed—Property sold subject

PROVINCIAL AMENDMENT

Patna

Substitute the following for Rule 60 :

"60. Where upon the said investigation the Court is satisfied that for the reasons stated in the claim or objection, such property was not, at the date of the decree, or when attached, as the case may be, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from the execution proceedings, or from attachment,

Where the property has been sold, such order shall have the effect of setting aside the sale; and if it has been purchased by a third party in good faith, the Court may make such order for his compensation by the decree-holder or objector, to an extent not exceeding 12-1/2 per cent. of the purchase price, as it thinks fit."

61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

[1882-S. 281 ; 1877-S. 281 ; 1859-S. 246.]

PROVINCIAL AMENDMENT

Patna

Substitute the following for Rule 61 :

"61. Where the Court is satisfied that the property was, at the time of the decree, or of the attachment, as the case may be, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim." [8-10-1937.]

O. 21, R. 60 (*contd.*)

to charge—On suit by purchaser defendants contended that sale was illegal being without attachment—Court ordering illegal sale subject to charge treated attachment as subsisting—Sale therefore held valid. (Vol 7) 1920 Bom 182 (184) : 44 Bom 860.

(4) Claimant found to be in possession in his own right—Claim cannot be rejected on the ground of want of title. (Vol 26) 1939 All 117 (119) * (Vol 22) 1935 Rang 11 (12) (Court cannot declare that the claimant is liable under the decree though it was not passed against him).

[5] Person in possession claimed by decree-holder to be in possession on behalf of judgment-debtor—Claim of title should be gone into. (Vol 21) 1934 Rang 212 (213).

[6] Objection by judgment-debtor that attached property is held by him in representative capacity falls under O. 21, R. 60. (Vol 2) 1915 Cal 275 (276) (*Obiter*). * (Vol 2) 1915 Cal 327 (329) : 42 Cal 440 (Judgment-debtor alleging to be in possession as shabait of deity.)

[7] A mortgagee in possession is in possession on account of or in trust for the mortgagor to the extent of the mortgagor's interest. And if the property is attached under a decree against the mortgagee, it must be realised from that attachment to the extent of the mortgagor's interest. (1911) 10 Ind Cas 994 (995) (Rang).

[8] Claimant having half share in attached property—Proper course is to release entire property and to proceed by way of attachment under R. 47. (Vol 19) 1932 Cal 408 (408) : 59 Cal 808.

[9] The words "some other person," in R. 60, can only mean some person other than the attaching decree holder and the judgment-debtor. Therefore, when the only persons interested in the attached property are the

attaching creditor and the judgment-debtor, the prohibition contained in this section does not apply. (Vol 27) 1940 Nag 270 (271).

[10] Release from attachment under R. 60—Suit under R. 63 by decree-holder and decree passed in his favour—Original attachment continues. (Vol 8) 1921 Cal 101 (103) * (Vol 5) 1918 Oudh 275 (278). * (Vol 10) 1923 Rang 237 (239).

[11] Order of Court directing return of attached property—*Supratilak* becomes depository for objector. (Vol 11) 1924 Nag 12 (13).

[12] The rule is inapplicable to questions arising between parties themselves. (Vol 23) 1936 Bom 227 (231) : 60 Bom 516.

ORDER 21, RULE 61—Note 1.

[1] Decree-holder attaching property which judgment-debtor alleged was wakf property—Court holding wakf illusory—Court is bound to disallow claim under this rule. (Vol 22) 1935 Rang 395 (396).

[2] Failure to decide question of possession under this Rule and deciding question of title is material irregularity—Order can be revised by High Court. (Vol 2) 1915 Cal 116 (117). (DB.)

[3] If the Court auction takes place, the effect of an order disallowing a claim under this rule is to give the auction purchaser a title as against claimant subject to the result of the suit under R. 63. (1890) 17 Cal 260 (262) (DB.) * (Vol 20) 1933 Mad 879 (881, 882) : 57 Mad 195.

[4] Order under R. 61 does not bar suit under S. 42, Specific Relief Act (Vol 6) 1919 Lah 364 (365, 366).

[5] An order passed under this rule is not appealable. (1904) 28 Bom 458 (460) (DB.)

[6] An order dismissing a claim passed by a Judge of High Court in exercise of the original civil jurisdiction is subject to appeal. (1902) 25 Mad 555 (559) (DB.)

62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Continuance of attachment subject to claim of incumbrancer.

[1882-S. 282 ; 1877-S. 282.]

ORDER 21, RULE 62.

Synopsis.

1. Scope of the Rule.
2. "Subject to mortgage."
3. Mortgage in favour of a person not in possession.
4. Effect of order under this rule.
5. Appeal.

1. Scope of the Rule.—[1] The Code clearly makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided by R. 62 and the latter by r. 66 (1906) 28 All 418 (420) * (Vol 17) 1930 Oudh 362 (365) (DB.)

[2] Under R. 62, the Court after being satisfied of the existence of the mortgage, sells only the judgment-debtor's right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage (1906) 28 All 418 (420) * (Vol 26) 1939 Cal 620 (621, 622) (DB.) : ILR (1939) 2 Cal 291 : (Vol 7) 1920 Cal 354 (357) (DB.) : 47 Cal 446. * (Vol 20) 1933 Mad 879 (881) (DB.) : 57 Mad 195. * (Vol 26) 1939 Nag 305 (308) : ILR (1939) Nag 665 * (Vol 22) 1935 Oudh 23 (25, 26) : 10 Luck 343 (DB.) Court holding under O. 21, R. 62 property subject to mortgage—Auction purchaser cannot subsequently challenge existence or validity of mortgage. * (Vol 17) 1930 Oudh 362 (365) (DB.) * (Vol 2) 1915 Oudh 157 (158.)

[3] Claim by mortgagee—Claim allowed and property sold subject to mortgage—Decree-holder purchaser cannot afterwards challenge mortgage. (Vol 10) 1923 Nag 282 (283) : 19 Nag LR 15. * (Vol 26) 1939 Nag 305 (308) : ILR (1939) Nag 665.

[4] Purchaser at auction sale subject to mortgage can challenge same on ground that nothing is due thereunder—But in this case he was held precluded from doing so, by the judgment-debtor's admission of the mortgage. (Vol 11) 1924 Nag 208 (209).

[5] Property sold subject to mortgage—Claim of mortgagee recognized under R. 62—Suit to avoid mortgage—Purchaser's plea that mortgage was fraudulent—Suit to set aside mortgage under R. 63 held not necessary and purchaser can set up fraudulent nature of mortgage under S. 44, Evidence Act, (Vol 1) 1914 Bom 302 (303) (DB.)

[6] Application by intervenor to raise attachment without stating that he has lien on property attached—Order that property may be sold subject to intervenor's lien is not under R. 62 but under R. 66. (1911) 35 Bom 275 (277, 278) (DB.)

[7] Whether property is sold subject to mortgage or simply notice is given in sale proclamation of such encumbrance, result is same so far as auction-purchaser is concerned. (Vol 12) 1925 Oudh 154 (157) :—27 Oudh Cas 308.

[8] Puisne mortgagee purchasing property in his decree—Application to notify his encumbrance in execution of subsequent mortgage—R. 62 does not apply, but application is maintainable under R. 66 * (Vol 4) 1917 Oudh 92 (96) (DB.)

2. "Subject to a mortgage."—[1] Dismissal of objection by mortgagee for recognition of his encumbrance is conclusive, unless set aside in a suit under R. 63 (Vol 7) 1920 Mad 191 (192) (DB.) * (Vol 26) 1939 All 657 (659) * (Vol 26) 1939 Cal 620 (622) : (DB.) ILR (1939) Cal 291. * (Vol 17) 1930 Nag 116 (119) : 26 Nag LR 136 (FB.) (Vol 13) 1926 Nag 423 22 Nag ILR 94 overruled. (Vol 29) 1942 Pat 406 (408) : 21 Pat 300. * (Vol 26) 1939 Pat 21 (22). * (Vol 18) 1931 Rang 310 (312) : 9 Rang 367.

[But see (Vol 25) 1938 Lah 760 (761). * (Vol 3) 1916 Bom 179 (180) : 41 Bom 64 (DB.) Distinguishing 22 Bom 640.]

[2] Mortgaged property attached by third party in execution of his money decree—Mortgagee by application informing Court of his mortgage and praying for same being notified in proclamation—Court's order dismissing application on ground that mortgage had been discharged held not one passed under O. 21, R. 62 (Vol 26) 1939 All 657 (659).

[3] Mere fact that incumbrances are notified in sale proclamation does not dispense with proof regarding validity of incumbrances. (Vol 28) 1941 Oudh 205 (207) (DB.) * (1938) 67 Cal L. Jour 79 (80).

3. Mortgage in favour of a person not in possession.—[1] R. 62 refers only to claim of mortgagee not in possession. (Vol 11) 1924 Oudh 384 (385) * (1909) 33 Bom 311 (316) (DB.)

[2] Mortgagee in possession—Objection to attachment decided in his favour—Attached property ought to be released—Sale subject to mortgage is irregular. (1909) 33 Bom 311 (316) (DB.) * (1873) 10 Bom H.C.R. 100 (102.)

[3] Property in possession of mortgagee attached—If it can be inferred that the decree-holder's intention was not to attach the property itself but the equity of redemption,—attachment may be allowed upon the equity of redemption in spite of mortgagee's application for removal of attachment. (Vol 12) 1925 Cal 296 (297). * (Vol 11) 1924 Oudh 404 (404). * (Vol 14) 1927 Pat 51 (52) * (Vol 10) 1923 Rang 119 (119) : 4 Upp Bur Rul 127 : 25 Cr. L. Jour 311.

[4] Usufructuary mortgagee's objection to attachment dismissed and property sold and delivered to auction-purchaser—Usufructuary mortgagee is not entitled to sue under S. 68 T. P. Act—He must file a suit for enforcement of his mortgage. (Vol 23) 1936 Oudh 263 (264) : 12 Luck 144.

4. Effect of order under the rule.—[1] The effect of an order under O. 21, R. 62, continuing an attachment subject to a mortgage is that the purchaser at the auction sale takes only the mortgagor's right of redemption. (Vol 6) 1919 Low Bur 124 (124) * (1910) 7 All L Jour 199 (200, 202.) * (Vol 3) 1916 Cal 349 (351) (DB.) Property purchased subject to lien—Purchaser is bound to satisfy lien. * (Vol 6) 1919 Lah 163 (164.) A purchaser in execution purchasing the property subject to an incumbrance with possession must pay it off before he claims possession.

[2] Purchaser in execution of his own decree subject to mortgage lien, declared by court, without acquiescing in order can question validity of mortgage within one

63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

[1882-S. 283 ; 1877-S. 283 ; 1859-S. 220.]

PROVINCIAL AMENDMENTS.

Calcutta

Add the following as Rule 63A :

"R. 63A. When an attachment of moveable property ceases, the Court may order the restoration of the attached property to the person in whose possession it was before the attachment." [8-11-1933.]

Patna

Add the following heading and Rules 63A to 63H :

GARNISHEE ORDERS.

"R. 63A. Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under R. 46 and the debtor prohibited under cl. (—) of sub-r. (1) of R. 46 (hereinafter called the garnishee) does not pay the amount of the debt into Court in accordance with R. 46, sub-r. (3), the Court on the application of the decree-holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

R. 63B. (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, and if he does not appear in answer to the notice issued under R. 63A, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

O. 21, R. 62 (contd.)

year of the order. (Vol 8) 1931 All 139 (140) (DB.) 52 All 1032 (DB.)

5. Appeal.—[1] Decree-holder in execution proceedings merely asking that his previous mortgage should be notified—Sale proclamation merely announcing existence of that mortgage—No determination under O. 21, R. 62—Order would not be final and appeal would not lie to High Court or to Federal Court. (Vol 27) 1940 FC 1 (2) (FC)—1940 F. C. R. 1 (*Obiter*).

ORDER 21, RULE 63

Synopsis.

1. Scope of the rule.
2. "The party against whom an order is made."
3. Order dismissing a claim for default.
- 3a. Ex-parte order against decree-holder.
4. Order refusing to investigate.
- 4a. Withdrawal of claim.
- 5 Attachment before judgment.
6. "May institute a suit to establish the right which he claims."
7. Parties to the suit.
8. Consequential relief, if and when should be asked.
9. Damages for wrongful attachment.
10. Suit not necessary if property is released from attachment.
11. Claimant can pay money under protest.
12. Other remedies open to a claimant or objector.
13. Objector can plead invalidity of attachment.
14. Subject to the result of the suit the order is conclusive.
15. Property in respect of which the order is conclusive.

16. Effect of decision in claim cases as to possession.

17. Burden of proof in a suit under this rule.

18. Defence of fraudulent transfer by the judgment-debtor.

19. Jurisdiction.

20. Valuation of suit for court-fees.

21. Insolvency of judgment-debtor.

22. Effect of attachment on adverse possession.

23. Costs.

23a. Decree holder's suit under this rule whether step-in-aid of execution.

24. Local amendments.

1. Scope of the rule.—[1] The rule gives a statutory right of suit to the party against whom an order is passed in the claim proceedings. (Vol 29) 1942 Pat 406 (408) : 21 Pat 300 (DB.) * (Vol 27) 1940 Pat 653 (658) : 19 Pat 494 (DB.) * (Vol 5) 1918 Mad 76 (77) (DB.) * (Vol 21) 1934 Mad 435 (435) : 57 Mad 822. * (Vol 13) 1926 Rang 73 (73) : 3 Rang 515. * (Vol 24) 1937 Lah 360 (361) (DB.) * (Vol 25) 1938 Oudh 85 (37) (DB.)

[But see * (Vol 27) 1940 All 407 (410) : ILR (1940) All 542 (DB.)]

[2] A suit under this rule has to be filed within one year from the date of the order. (Vol 6) 1919 Cal 835 (836) : 45 Cal 785 (DB.) * (Vol 16) 1929 Pat 116 (117) (DB.)

[3] No cause of action arises for a suit under this rule before the claim order and attachment. (Vol 10) 1923 Rang 82 (83, 84.)

[4] If no suit is filed, the order becomes conclusive. (Vol 30) 1943 Mad 36 (38) ILR (1942) Mad 40 (DB.) * (Vol 10) 1923 Rang 156 (156.) * (Vol 7) 1920 Mad 206 (208) (DB.)

[5] Under this rule, what is conclusive is the order

(2) If the garnishee appears in answer to the notice issued under R. 63A and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

R. 63C. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt, and prove the same if necessary.

R. 63D. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

R. 63E. Payment made by, or levied by execution upon, the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied although such order or the judgment may be set aside or reversed.

R. 63F. The costs of any application for the attachment of a debt or under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

R. 63G. Out of the amount recovered under the garnishee order the Court shall deduct a sum equal to the court-fee payable under the Indian Court-fees Act on a plaint in a suit for recovery of the money and credit the same to the Government.

R. 63H. (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeals or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution."

O. 21, R. 63 (contd.)

which decides the liability or otherwise of the property to attachment. (Vol 31) 1944 Bom 50 (53.)

[6] The finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is in the nature of an appeal. (Vol 18) 1926 Nag 197 (198.)

[7] The rights of parties in property attached is decided by the Court in the form of an independent declaration and not as though sitting in appeal over the executing Court. (Vol 32) 1945 All 22 (23) : ILR (1944) All 496 (DB.)

[8] Question of title also can be fully gone into in a suit under this rule. (Vol 7) 1920 Mad 748 (753, 756) : 43 Mad 760 (FB) * (Vol 8) 1921 Bom 368 (369) : 45 Bom 1020 (DB) (1911) 9 Ind Cas 260 (268) Mad.

[See however (1912) 15 Cal L. Jour 649 (651.)]

[9] Suit under this rule is one in substance to set aside the claim order. ('86) 8 All 6 (9) : 12 Ind App 150 (PC) * (Vol 25) 1938 Nag 376 (377) : ILR (1940) Nag 519.

[10] Excepting that the suit should be one to set aside the order, no other restriction as regards the nature of the suit is prescribed, though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit. (Vol 18) 1931 Lah 430 (431.)

[11] The decision places the parties in *status quo ante* as on the date of attachment either by vacating or confirming the order. (Vol 5) 1913 Mad 572 (573) * ('94) 18 Bom 260 (263) (DB) * (Vol 25) 1938 Mad 857 (858) (DB.)

[12] Order on objection not falling under O. 21 R. 58 is not governed by this rule. (Vol 30) 1943 Bom 12 (13) : ILR (1943) Bom 104 (DB) * (Vol 23) 1936 Bom 227 : 60 Bom 516 followed. * (Vol 29) 1942 Oudh 465 (471, 472) : 18 Luck 866 (FB) * (Vol 22) 1935 All 183 (185) (DB.) * (Vol 25) 1938 Lah 760 (761) (Vol 22) 1935 Rang 186 (186) * (Vol 24) 1937 Pat 63 (64) :

16 Pat 54 (FB). * (Vol 22) 1935 Nag 171 (172) 31 Nag LR 301. * (Vol 24) 1937 Pesh 97 (99) (DB) * (Vol 29) 1942 Pat 406 (407) : 21 Pat 300 (DB) * (Vol 24) 1937 Pat 63 : 16 Pat 54 (FB) (distinguished.)

[13] This rule is not governed by S. 92 (3). (Vol 32) 1945 Pat 189 (192) : 23 Pat 961 (DB.)

[14] An executor litigating both as executor and legatee under will cannot file a suit under this rule (Vol 35) 1946 Mad 209 (214) (DB.)

2. The party against whom an order is made.—

[1] The rule refers only to the party against whom the order is made. (Vol 6) 1919 Mad. 738 (742) : 41 Mad 935 (FB.)

[2] A judgment-debtor, who is not, in fact, a party to the claim proceedings, does not, in the eye of law, become such by reason solely of his being the judgment-debtor. (Vol 11) 1924 All 302 (303) : 46 All 45 * (Vol 9) 1922 All 411 (412) (DB.) : * ('07) 30 Mad 335 (339) (FB.) * ('98) 22 Bom 875 (879, 884) (DB.)

[3] Whether a person was in fact a party is a question of fact. (Vol 29) 1942 Mad 330 (331, 332) (DB.) * ('11) 35 Mad 168 (173) (DB.) * (Vol 1) 1914 Lah 447 (448) : 1914 Pun Re No 84 (DB.) * (Vol 22) 1935 Lah 534 (535) : 16 Lah 1100 (DB.)

* [But see (Vol 16) 1925 Lah 657 (658.)]

[4] An order either allowing or dismissing an application under this rule is conclusive only as between the decree-holder and the claimant. (Vol 29) 1942 Oudh 465 (472) : 18 Luck 366 (FB.) * (Vol 18) 1931 Lah 74 (76.)

[5] A suit by judgment debtor, who was not a party to the enquiry, against successful claimant is not governed by this rule. ('88) 15 Cal 874 (679) (DB.) * (Vol 16) 1929 Pat 604 (605) (DB.)

[6] A suit by the defeated claimant against the judgment-debtor who was not a party to the claim enquiry, is not affected by the provisions of this rule ('10) 34 Mad 533 (534) (DB.)

* [See also (Vol 29) 1942 Mad 330 (331, 332) (DB.) (Suit by judgment-debtor against defeated claimant—

O. 21, R. 63 (*contd.*)

Defence by latter is not barred by his failure to sue under this rule within the period of one year.]

[7] Judgment-debtor who was in fact a party to the claim is bound by the order passed therein and can file a suit under this rule. (Vol 2) 1915 Mad 463 (463) (DB.) * (Vol 22) 1935 Lah 534 (535) : 16 Lah 1100 (DB.)

[8] Hindu reversioner unsuccessfully maintaining a claim in an execution of the decree against the widow—After her death he can file a suit, though her death may be more than year after the order. (Vol 12) 1825 Lah 84 (85) (DB.) * (Vol 19) 1932 Lah 179 (180) : 13 Lah 524 (DB.)

[9] In a suit under this rule a third party can obtain only a declaration which he claims in the property attached in execution. (Vol 32) 1945 All 22 (23)—ILR (1944) All 496.

[10] Claimant not a party to decree—Objection dismissed and no suit filed under this rule—He cannot re-agitate the question under S. 47. (Vol 32) 1945 Pat 116 (117)—23 Pat 760.

3. Order dismissing a claim for default.—[1]

The rule applies to any order passed in the claim proceedings, whether with or without investigation. (Vol 29) 1942 Mad 41 (42) : ILR (1942) Mad 336 (FB.) * (Vol 12) 1925 Mad 1113 : * (Vol 12) 1925 Mad 265 : 110 Ind Cas 511 (Mad) and (Vol 28) 1941 Mad 77 overruled : (Vol 22) 1935 Mad 328 impliedly overruled.) * (Vol 26) 1939 Cal 620 (623) : ILR (1939) 2 Cal 291 (DB.) * (31) 180 Ind Cas 200 (201) (All.)

[2] Order dismissing a claim for default is an order which comes within the purview of this rule. (Vol 29) 1942 Mad 41 (42) : ILR (1942) Mad 336 (FB.) * (Vol 14) 1927 All 593 (595) : 49 All 903 (DB.) * (Vol 6) 1919 All 247 (248) : 42 All 628 (DB.) * (Vol 9) 1922 Cal 166 (167) (DB.) * (Vol 8) 1921 Oudh 54 (58) : 24 Oudh Cas 218. * (11) 12 Ind Cas 345 (347) (Oudh) * (1907-01) 2 Upp Bur Rul 267. * (Vol 40) 1923 Nag 69 (69) * (Vol 13) 1926 Nag 428 (425) : 22 Nag LR 94. * (Vol 26) 1939 Cal 620 (623) : ILR (1939) 2 Cal 291 (DB.) * (Vol 24) 1937 Cal 390 (392) (DB.) (Dismissal of claim for default after sale is without jurisdiction—This rule does not apply in such cases.)

[3] Dismissal of an objection by a party to suit does not fall under this rule and no separate suit will therefore lie. (Vol 23) 1936 Pat 268 (270) (DB.)

3a. Ex parte order against decree-holder.—[1]

An order accepting a claim *ex parte* on the decree-holder's default is conclusive and the decree-holder must file a separate suit. (Vol 23) 1936 Pesh 115 (116) (DB.)

[2] Where a claim has been accepted *ex parte* without notice to the decree-holder, the court can restore the proceedings acting under its inherent powers. (Vol 23) 1936 Pat 176 (177).

4. Order refusing to investigate.—[1] Orders passed against the claimant or decree-holder, whether with or without investigation, are placed on the same footing. (Vol 29) 1942 Mad 41 (42) : ILR (1942) Mad 336 (FB.) * (Vol 12) 1925 Mad 1113 : (Vol 12) 1925 Mad 265 : 110 Ind Cas 511 (Mad) : (Vol 28) 1941 Mad 77 overruled.)

[2] If the party against whom the order of rejection is made under the proviso to R. 58 does not file a suit within one year, the order becomes conclusive against him. (Vol 15) 1928 All 827 (328) * (Vol 20) 1933 Bom

190 (191) : 57 Bom 213 * (Vol 22) 1935 Pat 122 (123). * (Vol 22) 1935 Pat 31 (32). * (Vol 10) 1923 All 435 (436) : 45 All 438 (DB.) * (Vol 13) 1926 Mad 593 (593, 594) (DB.) * (Vol 11) 1924 Mad 111 (112) : 47 Mad 160 (DB.) * (Vol 10) 1923 Nag 187 (188) : 19 Nag LR 34. * (Vol 11) 1924 Rang 42 (44) : 1 Rang 481 (DB.) * (Vol 22) 1935 Rang 207 (208) (DB.) * (Vol 22) 1935 Cal 500 (501, 502) (DB.) * (Vol 25) 1938 Lah 677 (677, 678) (DB.) * (Vol 26) 1939 Cal 620 (623) : ILR (1939) 2 Cal 291 (DB.)

[3] The test is whether the order is "against" the claimant or decree-holder. It does not mean that the order must be one on the merits. (Vol 29) 1942 Mad 41 (42) : ILR (1942) Mad 336 (FB.) * (Vol 6) 1919 Mad 738 (742) : 41 Mad 985 (F;B.)

[But see (Vol 24) 1937 Oudh 493 (497) : 13 Luck 484 (DB.) * (Vol 25) 1938 All 542 (544) (DB.) * (Vol 24) 1937 Nag 149 (149) : ILR (1939) Nag 450 * (Vol 23) 1936 Pesh 185 (186) * (Vol 24) 1937 Pesh 97 (99) (DB.)

[4] Objector to attachment not asking for investigation Order recording the petition—is not one against him. (Vol 29) 1942 Mad 41 (42, 43) : ILR (1942) Mad 336 (FB.)

[5] Refusal to entertain claim on the ground of want of jurisdiction—Order does not fall under this rule. (Vol 29) 1942 Bom 263 (266) : ILR (1942) Bom 636 : (Vol 29) 1942 Mad 41 (43) : ILR (1942) Mad 336 (FB.) * (Vol 21) 1934 Pat 511 (513) : 13 Pat 765 (DB.) : (Vol 24) 1937 Nag 170 (171) : ILR (1938) Nag 276.]

[6] Order dispensing with investigation and directing claim to be noted on sale proclamation is not against claimant. (Vol 10) 1923 Mad 295 (295, 296) (DB.) * (82) 11 Cal L Rep 352 (354) (DB.)

[But see (Vol 31) 1944 Mad 417 (417, 418).]

[7] Order dismissing the petition after directions for stopping sale and refusing to investigate claim is not one against the claimant. (Vol 29) 1942 Mad 41 (43) : ILR (1942) Mad 336 (FB.)

[8] Order dismissing the petition without prejudice to claimant is not one against him. (Vol 29) 1942 Mad 41 (43) : ILR (1942) Mad 336 (FB.)

[9] An order merely recording the objections by reason of the claimant withdrawing or not pressing his claim is not an order negating claim and, therefore, is not an order against the claimant. (Vol 18) 1931 Bom 288 (290) (DB.) * (Vol 16) 1929 Rang 123 (125) * (1907) 4 Low Bur Rul 75 (75) * (Vol 12) 1925 Nag 2 (6) : 20 Nag LR 106 (DB.)

[But see (Vol 29) 1942 Mad 41 (43) : ILR (1942) Mad 336 (FB.) * (Vol 12) 1925 Mad 1113 : * (Vol 12) 1925 Mad 265 : 110 Ind Cas 511 (Mad) and (Vol 28) 1941 Mad 77 overruled.) * (Vol 18) 1931 Oudh 1 (4) : 6 Luck 461 (FB.)]

[10] Execution petition struck off subsequent to claim—Claim petition closed—There is no order against the claimant. (Vol 16) 1929 Rang 123 (125).

[11] Consent orders do not come within the scope of this rule. (Vol 6) 1919 Cal 126 (127) (DB.)

[But see (Vol 29) 1942 Bom 263 (266) : ILR (1942) Bom 636. (Vol 2) 1915 Mad 1128 (1129).]

[See however (Vol 27) 1940 Pat 653 (654, 655) : 19 Pat 494 (DB.)

4a. Withdrawal of claim.—[1] Claim dismissed on the voluntary withdrawal of the claimant is not an order against the claimant. (Vol 15) 1923 Mad 878 879 (DB.) * (Vol 22) 1935 Mad 328 (330.)

O. 21, R. 63 (*contd.*)

[2] The dismissal order should make it quite clear that it is not intended to be an adverse order. (Vol 29) 1942 Mad 41 (43) : ILR (1942) Mad 336 (FB) : (1928) 110 Ind. Cas 511 (Mad) (overruled)

5. Attachment before judgment.—[1] The rule applies also to orders on claims to property attached before judgment. (Vol 5) 1918 Mad 26 (28, 29) : 41 Mad 849 (FB) (Overruling) (Vol 5) 1918 Mad 640 : 41 Mad 23 * (Vol 16) 1929 Cal 225 (226). * (Vol 16) 1929 Cal 162 (162.) * (Vol 18) 1931 Rang 279 (280) : 9 Rang 561.

[2] Party whose claim in respect of property attached before judgment has been dismissed must file a suit under this rule and it will not abate even if the suit in which attachment was made is dismissed. (Vol 3) 1916 Mad 295 (296) (DB.)

[3] Where the objection of the legal representative against an attachment before judgment is dismissed he cannot ask the court to go into the question of title under S. 47. (Vol 32) 1945 Cal 449 (449, 450, 451) (DB)

[4] For period of limitation for claim suits brought in respect of property attached before judgment, see A. I. R. Commentaries on the Limitation Act 2nd (1942) Edition, Art 11 and Art 120.

[5] A provincial small cause court has no jurisdiction either to attach immovable property before judgment or to decide any claim in respect of such an attachment. (Vol 11) 1924 Cal 193 (196) (DB.)

6. "May institute a suit to establish the right which he claims."—[1] An order in a claim proceeding may be contested in a suit brought for the purpose. ('68) 15 Cal 521 (526) : 15 Ind App 123 (PC.)

[2] Sale of property under claim in court auction cannot frustrate the right of suit. (Vol 10) 1923 Pat 152 (152.)

[3] The suit contemplated by the rule is a suit to establish the right claimed in the enquiry. (Vol 29) 1942 Cal 338 (340) (DB.) * (Vol 29) 1942 Cal 386 (388) (DB.) * (Vol 15) 1928 Mad 840 (841) (DB.) * ('84) 7 Mad 295 (297) (FB.) * (Vol 23) 1936 Pesh 206 (207) (DB.) * ('37) 20 Nag L. Jour 199 (200.)

[4] The liability or non-liability of the property attached to satisfy the decree under execution is the point to be decided in the suit. (Vol 29) 1942 Cal 180 (201) (DB.) * (Vol 23) 1936 Lah 524 (527) : 17 Lah 668 (DB)

[5] The liability of third persons to satisfy the decree by the sale of their right, title and interest in the property is not the question for decision. ('96) 23 Cal 302 (308) (DB.) * (Vol 2) 1915 Cal 411 (411) (DB.)

[6] The suit is in essence a continuation of the execution proceedings. (Vol 30) 1943 Mad 341 (342). * (Vol 29) 1942 Cal 180 (202) (DB.) * (Vol 27) 1940 Lah 497 (498). * (Vol 15) 1928 Mad 1201 (1207) : 52 Mad 465 (DB.) * (Vol 12) 1925 Nag 82 (85) : 22 Nag LR 67. (Vol 24) 1937 Rang 473 (474.) * (Vol 26) 1939 Pat 138 (139) : 17 Pat 588 (DB.) * (Vol 25) 1938 Pat 468 (471.) * (Vol 24) 1937 Pesh 13 (16) (DB.)

[But see * (Vol 28) 1941 Lah 392 (395) : ILR (1941) Lah 760 (FB.) * (Vol 6) 1919 Lah 200 (201) : 1919 Pun Re No. 70 (DB) (Held that by virtue of S. 136 of the Companies Act, 1882, such a suit is not one in continuation of an execution proceeding.)]

[7] The question of title and not merely the question of possession is decided in the suit. (Vol 7) 1920 Mad

748 (753, 756) : 43 Mad 760. * (Vol 20) 1933 Mad 328 (329) (DB.) * (Vol 24) 1937 Pesh 13 (16) (DB) Also see Note 2.

(8) Suits brought under this rule are substantive suits and must be tried like any other suit, subject to the ordinary rules of procedure and evidence. ('86) 12 Cal 696 (701) (DB.) * ('13) 1 Upp Bur Rul 181 (181, 182)

[9] The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense and is not restricted by special standards of evidence or law. (Vol 11) 1924 Cal 744 (748) : 51 Cal 548 (DB.) * (Vol 20) 1933 Mad 328 (329) (DB.)

[10] Decree-holder bringing a suit must establish the judgment-debtor's subsisting title as on the date of attachment and the suit should be tried as judgment-debtor's suit for possession. (10) 35 Bom 79 (88).

[11] A defeated claimant bringing suit must establish that the judgment-debtor had no right to the property but need not establish his own title, where it is shown that he was in possession of the property at the time of attachment. (Vol 23) 1936 Lah 524 (527) : 17 Lah 668 (15 Cal 674 and 3 Cal L. Jour 381 followed.) * (Vol 26) 1939 Sind 177 (177) : ILR (1939) Kar 589 (DB.) (Suit by decree-holder under R. 63—Rules of evidence which require a plaintiff to prove his claim are not abrogated because he is suing a successful claimant.)

[12] Same property attached by two different persons under different decrees—Objection preferred under R. 58 dismissed—The two separate attachments give rise to two separate causes of action. (Vol 24) 1937 Lah 220 (221) (DB)

[13] In a suit under this rule, the justifiability or otherwise of the decree under execution is not a relevant question. (Vol 26) 1939 Pat 430 (432.)

[14] Question under S. 52 C.P.C. cannot be raised in a suit under this rule by an attaching creditor. (Vol 24) 1937 Rang 561 (533.)

7. Parties to the suit.—[1] Where a decree-holder sues under this rule to avoid a transfer on the ground that it was made to defraud or delay the creditors of the transferor he must bring it in the form of a representative suit and O. 1, R. 8 would be applicable. (Vol 30) 1943 Lah 96 (97) (DB.) * (Vol 27) 1940 Mad 789 (790, 791) : ILR (1940) Mad 808 (DB.) * (Vol 21) 1934 Rang 332 (332) : 12 Rang 670. * (Vol 23) 1936 Cal 733 (784) * (Vol 23) 1936 Rang 117 (118, 119) : 14 Rang 81 (DB.) * (Vol 27) 1940 Oudh 200 (201) : 15 Luck 503. (Creditor proceeding under O. 21 R. 63 not knowing existence of other creditors is not bound to bring representative suit—It is for defendant to object that there are other creditors and that a representative suit should be brought)

[See however (Vol 23) 1936 Pesh 158 (160) (DB.)]

[But see (Vol 33) 1946 Sind 78 (80.)]

[2] See A. I. R. Commentaries on the Transfer of Property Act 2nd (1944) Edn S. 53.

[3] Where the decree-holder's suit seeking to avoid a transfer is not based on such transfer having been made with intent to defeat or delay the creditors, the suit need not be a representative suit. (Vol 25) 1938 Bom 289 (290, 291) : ILR (1938) Bom 445 * (Vol 24) 1937 Bom 476 (477). * (Vol 26) 1939 Pat 138 (139) : 17 Pat 588 (DB.) * (Vol 27) 1940 All 72 (74) : ILR (1940) All 81 * (Vol 27) 1940 All 407 (409, 411) : ILR (1940) All 542 (DB.)

[4] Transferee and the judgment-debtor will be necessary defendants in the decree-holder's suit attacking the alienation. (Vol 21) 1934 Rang 332 (333) : 12

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Rang 670. (Vol 21) 1934 Rang 302 (303) : 12 Rang 666-

[But see ('06) 28 All 41 (43) (DB) * (Vol 26) 1939 Sind 177 (177) : ILR (1939) Kar 539 (DB)]

[5] Transferee from the successful claimant after the order in the claim proceedings, but before the institution of the suit, need not be impleaded in the suit. (Vol 2) 1915 Mad 495 (498), 38 Mad 535 (DB) * (Vol 26) 1939 Pat 138 (139) : 17 Pat 588 (DB.)

[6] Property sold and purchased by stranger—Decree-holder a necessary party in the suit by defeated claimant. (Vol 32) 1945 Pat 189 (190) : 23 Pat 961.

[7] An auction purchaser can file a suit to declare that the mortgage, subject to which the attachment and sale took place, is not true and valid. (Vol 18) 1931 All 139 (140) : 52 All 1032 (DB.)

Also see O. 21, R. 62, Note 5)

[8] In a suit by the defeated claimant, the judgment-debtor is a necessary party, especially if the objector seeks to establish his title both against judgment-debtor and the decree-holder. ('06) 28 All 41 (43) (DB.) * (Vol 26) 1939 Sind 177 (177) : ILR (1939) Kar 539 (DB.) * (Vol 24) 1937 Rang 249 (250.)

[But see (Vol 21) 1934 Mad 537 (539)],

[9] If the properties are sold away in court-action, the auction-purchaser alone need be impleaded. (Vol 10) 1923 Mad 58 (59) (DB.) * (Vol 22) 1935 Pesh 29 (30). * ('04) 27 Mad 94 (98) (DB.) (Vol 15) 1923 Nag 65 (66). * (Vol 14) 1927 Lah 631 (634) : 9 Lah 167 (DB.) * (Vol 26) 1939 Pat 321 (322). (Suit instituted impleading decree-holder and judgment-debtor—Execution sale pending the suit—Execution purchaser need not be joined as a party.)

[But see ('40) 1940 Nag L Jour 604 (605). * ('08) 1 Oudh Cas 83 (84). * (Vol 23) 1936 Pesh 139 (190) (DB.)]

[10] A transferee from the defeated claimant can also sue under this rule. ('04) 26 All 89 (91).

[11] Whether judgment-debtor is a proper party depends upon the pleadings. (Vol 29) 1942 Cal 92 (95) : ILR (1942) 1 Cal 169 (DB)

[See however (Vol 23) 1936 Rang 56 (57) (DB.) (Suit by decree-holder—Judgment-debtor is proper though not necessary party.)]

9. Consequential relief, if and when should be asked.—[1] There is no limitation as regards the nature of the suit to be filed or any particular prayer that may be included in the suit under the rule. (Vol 29) 1942 Nag 61 (62) : ILR (1942) Nag 166. * (Vol 5) 1918 Nag 233 (233). * (Vol 6) 1919 Mad 257 (258) : 42 Mad 143 (DB). * (Vol 15) 1928 Rang 34 (35) : 5 Rang 699.

[2] The suit is not one in the nature of a mere declaratory suit, but also one for consequential reliefs. (Vol 4) 1917 Mad 393 (364, 395) : 40 Mad 733 (SB). * (Vol 18) 1931 Lah 483 (484) : 13 Lah 143 (DB) * ('94) 17 Mad 389 (390) (DB). * (Vol 29) 1942 Nag 61 (62, 63) : ILR (1942) Nag 166.

[3] The plaintiff is not bound to ask for consequential relief but may ask for a mere declaration. (Vol 29) 1942 Pat 406 (40-) : 21 Pat 800 (DB), * ('06) 29 Mad 151 (152) (FB.) (overruling 16 Mad 140.) * (Vol 21) 1934 Rang 332 (333) : 12 Rang 670 * ('91) 14 Mad 23 (25) (DB.) * (Vol 17) 1930 All 395 (306). ('80) 4 Bom 529 (535) (FB.) * (Vol 14) 1927 Lah 631 (633) : 9 Lah

167 (DB.) * (Vol 10) 1923 Pat 564 (572) (DB.) * (Vol 5) 1918 Pat 217 (218) : 3 Pat L Jour 132 (DB) * (Vol 18) 1931 Rang 810 (811, 812) : 9 Rang 367, * (Vol 25) 1938 Mad 741 (742) (DB.)

[But see ('98) 1 Oudh Cas 272 (279).]

[4] Defeated claimant succeeding in getting declaration can file a separate for possession (Vol 15) 1928 Mad 840 (844) (DB.) * (Vol 24) 1937 Rang 249 (250) * (Vol 24) 1937 Rang 133 (134).

9. Damages for wrongful attachment.—[1] Claim for damages for wrongful attachment can be asked by a defeated claimant in a suit under the rule. ('86) 2 Cal 696 (705) (DB.)

[2] Value of the property already sold can be claimed in a suit under the rule (Vol 4) 1917 Mad 393 (394, 395) 40 Mad 733 (SB).

[3] The plaintiff need not prove in the suit for damages that the decree-holder resisted the claim out of malice or without reasonable and probable cause. (Vol 27) 1940 Rang 43 (44) : 1939 Rang LR 690. * ('90) 17 Cal 436 (442) : 17 Ind App 17 (PC.)

Also see S. 62, Note 4.

[4] Costs incurred by the plaintiff as objector in the execution proceeding cannot be recovered as damages. (Vol 25) 1938 Lah 334 (335, 336).

[5] Decree-holder not getting a reversal of the order in claim proceedings cannot question it when the claimant sues to recover damages for wrongful attachment. (Vol 27) 1940 Rang 43 (44) : 1939 Rang LR 690.

[6] Damages are to be measured by loss to the plaintiff. (Vol 27) 1940 Rang 43 (44, 45) : 1939 Rang LR 690.

10. Suit not necessary if property is released from attachment.—Defeated claimant need not bring a suit when the attachment is withdrawn by the decree-holder himself. (Vol 11) 1924 Cal 744 (749) : 51 Cal 548 (DB.) * (Vol 17) 1930 All 177 (178, 179) (DB.) * (Vol 5) 1918 Mad 450 (451) (DB.) * (Vol 3) 1916 Low Bur 25 (25). * (Vol 168) 1929 Rang 228 (228). * ('94) 18 Bom 241 (243) (DB.)

[2] Where the attachment comes to an end, the defeated claimant need not file a suit. (Vol 27) 1940 Mad 763 (764, 765) * (Vol 24) 1937 Lah 169 (170). * (Vol 31) 1944 Bom 50 (54) * (Vol 24) 1937 Mad 44 (46) (Confirmed on Letters Patent Appeal in (Vol 26) 1939 Mad 456 : ILR (1939) Mad 803 (SB).)

[3] Decree holder bringing suit must do so within one year whether attachment is withdrawn within that period or not. (Vol 32) 1945 Pat 435 (438) : 24 Pat 408.

[4] In the following cases, the attachment comes to an end.

[a] Where the decree is satisfied, set aside or reversed or the decretal amount is paid into court or the attachment is voluntarily withdrawn. (Vol 28) 1941 Oudh 95 (97). * (Vol 11) 1924 Cal 744 (750) : 51 Cal 548. * ('01) 31 Cal 228 (231) (DB.) * (Vol 8) 1921 Bom 35 (36) : 45 Bom 561 (DB.) * ('89) 13 Bom 72 (74) (DB.) * ('10) 34 Mad 533 (535) (DB.)

[But see ('78) 1 All 541 (543) (DB.)]

(b) Where attachment is raised for default of decree-holder under R. 57 of O. 21. (Vol 21) 1934 All 267 (270) 271 : 56 All 537 (FB) ('11) 14 Cal L Jour 476 (479) (DB.) * ('26) 94 Ind Cas 120 (120) (DB.) (Cal.) * (Vol 9) 1922 Lah 108 (111) : 3 Lah 7 (DB.)

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[See (Vol 12) 1925 Mad 1113 (1114) (DB) (Note — Overruled in (Vol 29) 1942 Mad 41 : ILR (1942) Mad 386 (FB) on a different point.]

[5] Where execution proceedings are dismissed, a subsequent suit beyond one year for declaration of title is not barred. (Vol 32) 1945 Pat 369 (372) : 24 Pat 462 (DB.)

[6] When the attachment is raised the cause of action for any suit founded upon an order in claim falls to the ground. (Vol 14) 1927 Mad 893 (893) * (Vol 21) 1934 All 267 (270) : 56 All 537 (FB).

[7] The claimant will not be affected by any of the consequences of a failure to institute a suit after the attachment is raised. (Vol 28) 1941 Oudh 95 (97).

[8] The withdrawal or raising of the attachment or the satisfaction of the decree should have taken place within the period of one year prescribed by Art 11, Limitation Act. (Vol 11) 1924 Cal 744 (751) : 51 Cal 548 (DB.) * (06) 29 Mad 225 (229, 230) * (Vol 24) 1937 Mad 44 (46) * (Vol 13) 1926 Nag 423 (425) : 22 Nag LR 94.

[But see (Vol 18) 1931 Lah 74 (76).]

[9] Suit under S. 42, Specific Relief Act by the decree-holder for declaration that property, the attachment on which was withdrawn on a claim being preferred, is liable to attachment and sale is competent. (Vol 23) 1936 Bom 160 (161, 162) : 60 Bom 226.

[10] Order under O. 21, R. 62 directing sale of attached property subject to mortgage—Subsequently execution dismissed for default and attachment raised—Order directing the sale conclusive unless set aside. (Vol 26) 1939 Nag 305 (308) : ILR (1939) Nag 665.

11. Claimant can pay money under protest.—[1] Objector failing in claim may prevent sale by paying decretal amount under protest and sue to recover the money so paid. ('13) 40 Cal 598 (610) : 40 Ind App 56 (PC). * ('81) 7 Cal 648 (653) : 8 Ind App 93 (PC.)

12. Other remedies open to a claimant or objector.—[1] No appeal or review lies from an order passed in claim proceedings. ('79) 1879 Pun Re No. 143 Page 417 (417) (FB) * ('70) 13 Suth WR 121 (122) (DB.) (No appeal lies.)

[But see ('67) 7 Suth WR 79 (80) (DB.)]

[2] The only remedy of the defeated party is to file a suit under this rule. (Vol 29) 1942 Pat 369 (370) * ('08) 35 Cal 202 (206, 207) : 35 Ind App 22 (PC) * (Vol 23) 1936 Sind 2 (3) : 30 Sind LR 288 (SB.) * (Vol 32) 1945 Nag 257 (258, 260) : ILR (1945) Nag 571 (Mortgagee's objection dismissed—He must file a suit)

[3] Defeated party cannot either as plaintiff or as defendant, challenge the validity of the order in any other matter or proceeding (Vol 15) 1923 All 327 (329) (DB). ('76) 1 All 381 (386) (FB) * ('98) 22 Bom 640 (644, 645) (DB.) * (Vol 1) 1914 Bom 299 (300) : 38 Bom 631 (DB.) * (Vol 9) 1922 Cal 164 (164) (SB) * (Vol 16) 1929 Lah 865 (866) : 11 Lah 369 (DB) * (Vol 3) 1916 Lah 377 (378) : 1915 Pun Re No. 101 (DH.) * ('94) 17 Mad 17 (19) (DB) : ('87) 10 Mad 357 (361) (DB.) * (Vol 12) 1925 Nag 390 (391). ('05) 8 Oudh Cas 306 (312) * (Vol 10) 1923 Rang 156 (156) * (Vol 22) 1935 Rang 161 (162) * (Vol 25) 1939 Cal 620 (622) : ILR (1939) 2 Cal 291.

[4] Mere filing of suit against the party within one year or the fact that defence was filed within

one year of claim does not affect the conclusiveness of the order. (Vol 30) 1943 Mad 36 (38) (DB) * (Vol 5) 1914 Mad 693 (693) (DB.)

[5] A defeated claimant cannot obstruct the auction-purchaser in delivery proceedings under rule 99 of this Order. ('12) 16 Cal WN 882 (884) (DB) * ('85) 9 Bom 35 (38.)

[6] The dismissal of a claim does not bar the claimant applying to set aside sale after making the necessary deposit under Rule 89 of this Order. (Vol 10) 1923 Mad 487 (488, 489) (DB). * (Vol 13) 1926 Nag 10 (13) : 21 Nag LR 102.

13. Objector can plead invalidity of attachment.—[1] Invalidity of attachment can be pleaded by the objector or claimant. (Vol 14) 1927 Mad 450 (455) * ('89) 10 All 479 (484) (DB.)

[See however (Vol 29) 1942 Cal 338 (340).]

[2] An objector cannot question the legality or validity of the decree against the judgment-debtor on the ground that it is colourable or collusive. (Vol 29) 1942 Cal 180 (202) DB : 17 Mad 389 (dissent from.) * ('86) 10 Bom 659 (661) (DB).

14. Subject to the result of the suit the order is conclusive.—[1] An order is conclusive as to what is expressly or by implication stated in the order. (Vol 31) 1944 Pat 331 (334) : 23 Pat 284 (DB.)

[2] Conclusiveness of order passed in claim proceedings is not restricted as between parties only. (Vol 29) 1942 Oudh 465 (472) : 18 Luck 366 (FB) * (Vol 1) 1914 Cal 281 (282) (DB) * (Vol 4) 1917 Cal 669 (670) : 44 Cal 698 (DB) * ('13) 1913 Mad WN 54 (55) (DB.) (Third person cannot take advantage of the order.)

[3] An order in claim proceedings binds the representative-in-interest and binds also their representatives-in-interest (Vol 11) 1924 Sind 97 (99) : 17 Sind LR 63 (DB). * (Vol 23) 1936 Cal 590 (592).

[4] An auction-purchaser is bound by an order against the decree-holder made under R. 62. (Vol 26) 1939 Mad 393 (395) : ILR (1939) Mad 600 * (Vol 6) 1919 Lah 125 (126) * ('10) 8 Ind cas 117 (118) : 35 Mad 35 (DB) * (Vol 23) 1936 Cal 590 (592) * (Vol 26) 1939 Cal 620 (622) : ILR (1939) 2 Cal 291 (DB).

[But see ('11) 35 Bom 275 (277) (DB.)]

[5] An auction-purchaser is entitled to plead in bar to a suit by the defeated claimant that the order rejecting his claim has become conclusive against him. (Vol 7) 1920 Mad 191 (192) (DB.)

[6] A person who is neither a party nor the representative of such a party cannot claim the benefit of an adjudication under R. 53. (Vol 29) 1942 Mad 330 (331, 332) (DB) * (Vol 13) 1943 Oudh 431 (432.)

[7] An order dismissing a claim has not the effect of vesting the property in the judgment-debtor. (Vol 29) 1942 Oudh 465 (472) : 18 Luck 366 (FB).

[8] Where the defeated claimant is already in possession of the property, his failure to sue within the period of one year under this rule will not extinguish his right to the property. (Vol 29) 1942 Oudh 465 (472) : 18 Luck 366 (FB).

[9] The conclusiveness of the order is only provisional and the order itself is liable to be set aside by the decision given in the suit filed under this rule. (Vol 31) 1944 Mad 126 (127) * (Vol 8) 1921 Mad 105 (106) : 44 Mad 268 (DB). * (Vol 30) 1943 Bom 129 (131) : ILR (1943) Bom 171. (Success of claim suit

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does not mean the setting aside or reversal of the claim order as in an appeal, though it may have the effect of nullifying such order.)

[10] Even in the case of an attachment before judgment, the order is only provisional. (Vol 31) 1944 Mad 126 (127).

[11] Whether the claim suit is decreed in the first instance or an appeal, the order remains final only until such decree. (Vol 31) 1944 Mad 126 (127).

[12] A claim suit keeps the execution proceedings pending till the decision of the suit. (Vol 17) 1930 Oudh 468 (DB) * (Vol 17) 1930 Oudh 265 (266) : 5 Luck 680 (DB).

[13] If the suit by the decree-holder succeeds the proceedings continue. (Vol 8) 1921 Cal 101 (103, 104) (DB) * (Vol 19) 1922 Mad 176 (178) : 45 Mad 84 (DB) : ('75) 23 Suth WR 183 (184) (DB) * ('76) 1 All 355 (357) (FB).

[14] If the suit by claimant fails the proceedings continue. (Vol 17) 1930 Oudh 265 (266) : 5 Luck 680 (DB).

[15] If the suit by the decree-holder fails, or the suit by the claimant succeeds, the proceeding fails simultaneously. ('84) 7 Mad 167 (170) (DB) * (Vol 17) 1930 Oudh 468 (471) (DB).

[16] Transferee from successful claimant takes the property subject to the result of the suit by decree-holder. ('96) 23 Cal 829 (834) (DB) * (Vol 8) 1921 Cal 101 (103, 104) (DB).

[17] Where the decree-holder succeeds in the suit, the attachment is revived and the transferee cannot assert his right against him. (Vol 27) 1940 Lah 497 (498) * (Vol 5) 1918 Oudh 275 (277). * (Vol 16) 1929 Cal 524 (525) : 57 Cal 122 * ('76) 1 All 355 (357, 359) * (Vol 9) 1922 Mad 176 (178) : 45 Mad 84 (DB) * (Vol 31) 1944 Mad 126 (127, 128) (Attachment before judgment) * (Vol 8) 1921 Cal 101 (103, 104) * (Vol 26) 1939 Oudh 178 (179) : 14 Luck 543.

[See however (Vol 17) 1930 Rang 247 (248) : 8 Rang 491.]

[18] The auction-purchaser in court sale after claim is rejected takes the property subject to the result of the subsequent claim suit. Case is subject to be defeated by the claimant succeeding in the suit. (Vol 28) 1941 Pat 405 (407) : 20 Pat 261 (DB) * (Vol 14) 1927 Lah 681 (683) : 9 Lah 167 (DB) * (Vol 25) 1938 Pat 468 (471).

[19] An order in claim proceedings will not be binding on the parties in subsequent proceedings which are independent. (Vol 29) 1942 Lah 192 (193) (DB).

[20] An application under S. 4 of the Provincial Insolvency Act is not a 'suit' for purposes of this rule. ('37) 1937 Mad W N 1046 (1047).

15. Property in respect of which the order is conclusive.—[1] The claim order is conclusive only as regards the *particulars property* in dispute. (Vol 29) 1942 Cal 92 (95) : ILR (1942) 1 Cal 169 (DB). * (Vol 4) 1917 Cal 669 (670) : 44 Cal 698 (DB). * ('90) 14 Bom 206 (209, 213) (DB). * (Vol 26) 1939 All 657 (659).

[2] Application for proceeding with execution originally started by the decree-holder after his success in the claim suit is a continuation of the proceedings and is not barred. ('96) 23 Cal 437 (440) * (Vol 21) 1934 Pat 532 (533) (DB). * ('04) 28 Mad 50 (53) (FB.) : 10 Mad 22 overruled.

16. Effect of decision in claim cases as to possession.—[1] The claim order is conclusive as to the successful party's *right to possession*. ('79) 14 Bom 372 (377) (DB). * ('74) 21 Suth WR 133 (134). * (Vol 32) 1945 Pat 485 (488) : 24 Pat 408.

[2] The order is not conclusive as against the question of possession arising in other proceedings in respect of the same property. (Vol 11) 1924 Cal 744 (748) : 51 Cal 548 (DB). * (Vol 32) 1945 Pat 434 (435) : 24 Pat 345.

[3] A claimant who claimed adverse possession of the property against the judgment-debtor but whose plea was rejected, can plead, in a suit for possession by auction-purchaser, possession from a date anterior to the order, though no suit was brought under this rule. (Vol 26) 1939 Mad 456 (461) : ILR (1939) Mad 803 (SB). (Dissenting from 8 Mad 506.)

17. Burden of proof in a suit under this rule.—[1] The plaintiff must establish the right claimed. (Vol 28) 1941 Mad 727 (728, 729). * (Vol 27) 1940 All 407 (409, 411) : ILR (1940) All 542 (DB). * (Vol 27) 1940 Pat 270 (272) (DB). * (Vol 26) 1939 Pat 321 (322) (DB). * (Vol 26) 1939 Lah 438 (439) (DB) * (Vol 30) 1943 Cal 534 (538) (DB).

[2a] The defeated claimant who sues must show affirmatively that not only the ostensible title but also the real title is in him. (Vol 3) 1916 Cal 666 (677) (DB) * (Vol 29) 1942 Lah 192 (193) (DB) * (Vol 27) 1940 Mad 444 (444, 448) (DB) * (Vol 15) 1928 All 476 (480) (DB). * ('08) 30 All 321 (323) (DB) * (Vol 19) 1932 Lah 174 (175) (DB) * (Vol 21) 1934 Nag 253 (254) * (Vol 24) 1937 Nag 1 (2) : ILR (1937) Nag 291 * (Vol 20) 1933 Rang 211 (212) * (Vol 20) 1933 Rang 129 (130) * ('82) 6 Bom 215 (223, 224) (FB) * (Vol 2) 1915 Cal 819 (820) (DB). * (Vol 26) 1939 Cal 578 (579) (DB). * (Vol 5) 1918 Mad 274 (275) : 41 Mad 205 (DB) * (Vol 14) 1927 Oudh 440 (440) (DB) * (Vol 3) 1916 Oudh 27 (28) : 19 Oudh Cas 64 * (Vol 22) 1935 Pat (231, 235) (DB) * (Vol 6) 1919 Pat 345 (349, 349) (DB).

[2b] Observations of the Privy Council in (Vol 14) 1927 PC 237 (238) : 5 Rang 852 (PC) do not alter the above position. (Vol 15) 1928 Mad 1259 (1260) * (Vol 19) 1932 Mad 302 (303) : 55 Mad 748 (DB) * (Vol 16) 1929 Pat 579 (581) : 8 Pat 890 (DB). * (Vol 22) 1935 Pat 231 (235, 236) (DB) * (Vol 20) 1933 Rang 129 (131). * (Vol 21) 1934 Nag 253 (254) * (Vol 20) 1933 Nag 185 (185).

[3] In cases under this rule burden of proving the validity of the alienation is on the plaintiff. (Vol 19) 1932 Mad 302 (303) : 55 Mad 748 (DB) * (Vol 20) 1933 Rang 91 (92) * (Vol 20) 1933 Rang 129 (131) * (Vol 30) 1943 Cal 534 (538) (DB).

[4] Where the plaintiff has proved alienation by a duly registered sale deed reciting passing of consideration, the burden of proving that sale is bogus falls upon the other party. (Vol 24) 1937 Nag 9 (10) * (Vol 24) 1937 Nag 143 (146) : ILR (1939) Nag 266 * (Vol 32) 1945 All 42 (44, 45) : ILR (1944) All 737.

[5] Dismissal of claim *without investigation* on the ground of delay—Defendant must show the registered deed of transfer as fraudulent. (Vol 18) 1931 Mad 40 (41) * (Vol 15) 1928 Pat 434 (436) : * 7 Pat 777 (DB) * (Vol 6) 1919 Nag 122 (123).

[See however (38) 40 Pun LR 705 (707).]

[6] Property in possession of judgment-debtor—Claim by decree-holder unsuccessful—In the declaratory suit by him, he can rely on presumption arising from judgment-debtor's possession and the defendant should prove the contrary. (Vol 24) 1937 Rang 362 (363).

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[7] Where the facts are fully established and the inference from them is clear, the question of onus is not material. (Vol 25) 1938 PC 290 (290, 291) : ILR (1939) Kar (PC) 31 (PC).

18. Defence of fraudulent transfer by the judgment-debtor.—[1] Suit by defeated claimant—Defence of fraudulent transfer by the judgment-debtor can be raised. (Vol 8) 1921 All 298 (301) (DB.) * (Vol 7) 1920 Mad 748 (758) : 43 Mad 760 (FB.) (Overruling (Vol 4) 1917 Mad 519 and (Vol 5) 1918 Mad 421 : 41 Mad 612 (FB.)) * ('12) 15 Cal L. Jour 649 (651) (DB.) * (Vol 1) 1914 Cal 380 (382) (DB.) * (Vol 7) 1920 Bom 10 (11) (DB.) * (Vol 7) 1920 Nag 83 (85). * (Vol 7) 1920 Nag 80 (81, 83) : 16 Nag LR 3.

19. Jurisdiction.—[1] The value of the suit for purposes of jurisdiction is the *amount of the decree*, where the value of the property exceeds that amount and where it does not, it is the actual value of it. ('07) 30 Mad 335 (338) (FB.) * (Vol 20) 1933 All 249 (250) : 55 All 315 (FB.) * (Vol 21) 1934 Rang 302 (303) : 12 Rang 666 * (Vol 21) 1934 Rang 332 (333) : 12 Rang 670 * ('74) 11 Bom HCR 186 (189) (DB.) * ('88) 15 Cal 104 (106) (DB.) * ('08) 1908 Pun Re No. 94, page 436 (FB.) * ('06) 2 Nag LR 87 (89) * (Vol 31) 1944 Nag 308 (310) : ILR (1944) Nag 783 * (Vol 1) 1914 Lah 356 (357) (DB.) * (Vol 16) 1929 Oudh 413 (414) (DB.).

[2] Where the property has been sold in execution before the suit, the value of the property will determine the value of the suit. (1939) 45 Cal WN 609 (611) (DB.).

[But see (Vol 22) 1935 Oudh 271 (272) : 11 Luck 1 (DB.).]

[3] Value of the property attached will be the value of the suit where the judgment-debtor is made a party and declaration of title as against him is also prayed for. ('95) 17 All 69 (74) (DB.) * (Vol 19) 1932 Rang 20 (21) * (Vol 3) 1916 Mad 858 (859) : 39 Mad 602 (DB.).

[4] The nature of the suit or the Court in which the suit is to be brought, depends on the nature of the claim and the right sought to be enforced. Hence a suit under this rule cannot be brought in a Court of Small Causes. ('81) 7 Cal 608 (611) (DB.) * ('90) 1890 Pun Re No. 51, page 133 (135) (DB.) * ('05) 8 Oudh Nag 281 (282) * ('85) 7 All 152 (159) (FB.) * ('85) 8 Bom 259 (259) (DB.) * ('86) 9 Mad 206 (208) (DB.).

[But see (Vol 2) 1915 Mad 1164 (1171) : 39 Mad 219 (FB.) ('76) 1870 Pun Re No. 84 (DB.) (1865) 2 Suth WR 43 (44) (DB.) : ('78) 2 Bom 365 (370) (DB.).]

[5] An order passed in a claim petition in the Presidency Small Cause Court is final subject to the right of a new trial. (Vol 19) 1932 Cal 661 (663) : 59 Cal 827 (DB.) * ('91) 18 Cal 296 (301).

[6] Even where the provisions of Rules 58 to 63 of this order have been made applicable to suits in Revenue Courts, a suit under this rule cannot be brought in a Revenue Court. (Vol 21) 1934 PC 217 (219, 220) : 61 Ind App 371 : 15 Lah 836 (PC) * (Vol 20) 1933 Mad 865 (867).

20. Valuation of suit for court-fees.—[1] Suit to declare a property is not attachable is chargeable with a fixed court-fee under schedule II, Article 17, clause

(1) of the Court-fees Act. (Vol 28) 1941 Cal 28 (29) * (Vol 28) 1941 Pat 174 (175) (DB.) * ('05) 35 Cal 202 (206) : 35 Ind App 23 (PC) * ('97) 1897 Pun Re No 51 Page 225 (228, 229) (FB.) * ('80) 4 Bom 515 (528) (FB.).

21. Insolvency of judgment-debtor.—[1] Order allowing claim to an attachment before insolvency of judgment-debtor—Suit to set it aside does not require permission of Insolvency Court. (Vol 16) 1929 Mad 323 (326, 328) (DB.).

[But see (Vol 9) 1922 Nag 108 (109) : 19 Nag LR 126 * (Vol 20) 1933 Nag 217 (217).]

22. Effect of attachment on adverse possession.—[1] An attachment does not arrest the running of limitation in favour of a person holding adversely to the judgment-debtor. (Vol 30) 1943 Mad 425 (426) : ILR (1943) Mad 696 (DB.) * (Vol 13) 1926 Mad 42 (43) (DB.) * (Vol 26) 1939 Mad 456 (458) : ILR (1939) Mad 803 (SB.).

[2] The fact that a person holding adversely to the judgment-debtor prefers a claim under R. 58 before the expiry of the statutory period of twelve years does not prevent him from pleading successfully that on the *date of the suit* he has acquired a right by prescription. (Vol 13) 1926 Mad 42 (42), (DB.) * (Vol 26) 1939 Mad 456 (461, 462) : ILR (1939) Mad 803 (SB.).

[But see (Vol 25) 1933 Mad 857 (858) (DB.) * ('94) 18 Bom 260 (263) (DB.) * (Vol 5) 1918 Mad 572 (573) (DB.) * ('11) 35 Bom 79 (89) (DB.).]

[3] The maturing of title by prescription *after* the institution of the suit under this rule against the claimant will not be good a defence to the suit. (Vol 30) 1943 Mad 425 (426, 427) : ILR (1943) Mad 696 (DB.).

23. Costs.—[1] Court cannot, in a suit under this rule, order the payment of costs incurred in the claim proceedings, in favour of the successful party. ('09) 1 Ind Cas 428 (430) (DB.) (Cal) * (Vol 12) 1925 Mad 233 (233.) (The authority of this decision is very much shaken by the later decision of the Madras High Court in (Vol 30) 1943 Mad 248 : ILR (1943) Mad 411)* (1911) 11 Ind Cas 828 (830) (DB.) (Low Bur.).

[But see (Vol 15) 1928 Rang 248 (249) : 6 Rang 408. * (Vol 20) 1933 Rang 91 (91).]

[2] Claim preferred under R. 58 rejected with costs—Claim decreed—Order in proceedings under R. 58 is superseded including order for costs. (Vol 25) 1938 Nag 376 (377) : ILR (1940) Nag 519.

[But see (Vol 30) 1943 Bom 129 (131) : ILR (1943) Bom 171.]

[3] Person succeeding in claim suit can get restitution of costs paid in the claim proceedings (Vol 30) 1943 Mad 248 (250) : ILR (1943) Mad 411 (DB.).

23a. Decree-holder's suit under this rule, whether step-in-aid of execution.—[1] Suit is not a step-in-aid of execution (Vol 25) 1938 Nag 534 (535) : ILR (1940) Nag 334 (DB.).

[See however (Vol 26) 1939 Rang 296 (299) : 1940 Rang LR 82 (DB.). (Suit under O. 21 R. 63 is a step-in-aid of execution but a plaintiff cannot be treated as an application within Art. 182, cl. 51.)]

24. Local Amendments.—[1] See the following cases. (Vol 29) 1942 Pat 508 (511) : 21 Pat 287 : (Vol 28) 1941 Pat 458 (459) : (Vol 33) 1946 Mad 176 (177, 178).

SALE GENERALLY.

64. Any Court executing a decree may order that any property attached by it and liable

Power to order property attached to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

[1882-S. 284; Cf. R. S. C., O. 43, R. 2. See S. 51 (b)]

PROVINCIAL AMENDMENT.

Patna

For the words "attached by it" substitute the words "in respect of which it has made an order of attachment."

Insert the words "which is" between the words "and" and "liable."

[7-1-1986.]

65. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by

Sales by whom conducted— an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

[1882-S. 286; 1877-S. 286; 1859-S. 248. See Rule 76]

ORDER 21, RULE 64.

Synopsis.

1. "Any court executing a decree."

2. May order.

3. "Attached by it."

4. Sale without attachment.

5. "Liable to sale."

6. Sale of property not belonging to judgment-debtor.

7. Such portion thereof as may be found necessary.

8. Appeal.

1. "Any court executing a decree".—[1] Sale by commissioner or receiver appointed by consent of parties is not sale by Court.—*Foundage* on sale proceeds cannot be levied under Sind Chief Court Rules. (Vol 29) 1942 Sind 112 (113) : ILR 1942 Kar 196.

2. May order.—[1] It is obligatory on the Court to order sale, when a valid application for such order and a valid attachment have been made (Vol 2) 1915 Mad 885 (886) * (1886) 12 Cal 317 (322) (DB.)

[2] Order under O. 21, R. 64 may be modified, if judgment-debtors appear under O. 21, R. 66 and prove that they are agriculturists and that the proceedings should be transferred to the collector. (Vol 26) 1939 Bom 526 (528) * (Vol 21) 1934 Bom 383 (385) (DB). The date at which status of judgment-debtor is to be determined is the date of order for sale under Or. 21, R. 64.

3. "Attached by it".—[1] Sale by Court of property attached by different court is not forbidden. (Vol 16) 1919 Mad 852 (853).

4. Sale without attachment.—[1] Attachment is essential for sale. (Vol 17) 1930 Mad 414 (416).

[2] The absence of an attachment in execution of a decree, though an irregularity, does not render the sale in execution absolutely void. (Vol 3) 1916 Cal 465 (468) * (DB) (Vol 18) 1931 Cal 35 (36) : 57 Cal 1206 * (Vol 32) 1945 Nag 97 (100) : ILR (1945) Nag 121 * (Vol 9) 1922 Nag 267 (271) : 18 Nag LR 152 * (Vol 10) 1923 Pat 45 (47) : 2 Pat 207 * (Vol 21) 1934 Rang 158 (159).

[But see (Vol 5) 1919 Cal 1036 (1037).]

[3] See also under S. 51.

5. "Liable to sale".—[1] Court in execution can sell any right and interest of judgment-debtor which he is competent to sell. (Vol 18) 1931 Oudh 352 (353) : 7 Luck 111.

[2] Money decree cannot be sold. R. 53 must be followed. (Vol 19) 1932 Pat 349 (350) : 12 Pat 36.

[3] Attachment and sale of debt—Procedure—Debt can be sold under O. 21 R. 64 and delivery made in manner prescribed in R. 79. (Vol 4) 1917 Low Bur 134 (135)

[4] Property first attached in execution of decree by A—Then property sold in execution of decree by B another decree-holder against same judgment-debtor—Auction-purchaser cannot object to attachment by A, because at the time of attachment he had interest but can object to sale by A under the prior attachment and court has inherent power to recognize such objection. (Vol 26) 1939 Lah 380 (381, 382).

[5] Two applications for sale in execution of two decrees of different decree-holders—Sale should be ordered first in case of application which is prior—Existence of order for sale in execution of other decree should be notified. (Vol 20) 1933 All 10 (11).

6. Sale of property not belonging to the judgment-debtor.—[1] Court cannot sell property of persons not parties to proceedings before it—As to such persons decree or sale is nullity. (Vol 7) 1920 Cal 838 (838).

[2] Execution sale on—Decree-holder getting his own property sold as judgment-debtors's—Will be estopped from denying it as against action-purchaser—Evidence Act, S. 115. (Vol 9) 1922 Mad 63 (1) (63).

7. Such portion thereof as may be found necessary.—[1] It is permissible under this rule to order the sale of a portion of the attached property. (1909) 3 Ind Cas 81 (51) (Cal) : (Vol 29) 1942 Pat 152 (154). (Executing court not bound to value property and order sale only of part—judgment debtor not asking for exercise of discretion cannot raise objection in second appeal.)

8 Appeal.—[1] An appeal lies against an order passed under O. 21, R. 64. (1879) 4 Cal LR 27 (28).

ORDER 21, RULE 65.—Note 1

[1] The rule enables the court to appoint a person who is not an officer of the court, e.g., an auctioneer, to conduct an execution sale. (Vol 4) 1917 Cal 740 (742) : 44 Cal 789. Receipt of purchase money by agent appointed is receipt of assets by court.

PROVINCIAL AMENDMENT.

Nagpur

The following sentence shall be added :

"Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in or within the precincts of the court-house, no such declaration shall be made without the leave of the Court." [29-6-1948.]

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, Proclamation of sales the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold ;
- (b) the revenue assessed upon the estate, or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government ;
- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

O. 21, R. 65 (contd.)

[2] The words "the court may appoint" apply not only to "such other person" but also to "Officers of the court." (1869) 12 Suth WR 238 (238) (DB).

[3] Executing Court directing bailiff to hold sale—Sale conducted under supervision of, and bids recorded by, officer not in seisin of the case—Order that property was sold to purchaser subsequently recorded by officer in seisin of a case—There is no irregularity so as to affect sale. (Vol 15) 1928 Pat 615 (626) : 8 Pat 122.

[4] Court can direct that bidders shall be from a particular class of persons. (Vol 14) 1927 Bom 143 (145).

[5] Lahore High Court Rules framed under O. 21, R. 65. Rule contained in (Vol 1) Chap 12 L. r. 20 (v) refers only to conduct of sales and has no bearing on the question of attachment. (Rule provides that sale of property worth more than Rs. 100 should not be entrusted to process-server. (Vol 27) 1940 Lah 30 (31).

[6] Sale by commissioner or receiver appointed by consent of parties is not sale by court. (Vol 29) 1942 Sind 112 (113) : ILR (1942) Kar 196.

[7] Duty of Court—Court should be very careful to see that no taint or touch of fraud or misrepresentation is found in conduct of its ministers. (Vol 5) 1918 Bom 59 (65).

ORDER 21, RULE 66

Synopsis.

1. Nature of proceedings under this rule.
2. Delegation of this power to settle proclamation.
3. "Such proclamation shall be drawn up after notice."
4. "Such proclamation shall state the time and place of sale."
5. "As fairly and accurately as possible."
6. Specification of property.
7. Specification of revenue.

8. Encumbrances to which property is liable.

9. Amount to be recovered.

10. Everything which the Court considers material, etc.

11. Value of the property.

12. Effect of an order under this rule.

13. Non-compliance with the provisions of this rule.

14. Verified statement to accompany application for order for sale—Sub-rule (3)

15. "Court may summon any person," etc—Sub-rule (4).

16. Appeal.

17. Revision.

18. Applicability of the rule of *res judicata* to proceedings under this rule.

19. Judgment-debtor dying pending execution.

20. Local amendments.

1. Nature of proceedings under this rule—[1] There is a conflict of opinion on the question whether proceedings under this rule are administrative or judicial in character. The following are three different views :—

(a) The proceedings are of an administrative character. (04) 27 Mad 259 (261) (FB). * (Vol 15) 1928 Bom 245 (246) : 52 Bom 444 (DB). * (Vol 4) 1917 All 349 (349, 350) : 39 All 415 (DB). * (Vol 11) 1924 Mad 767 (768) (DB). † (Vol 14) 1927 All 208 (209) * (Vol 22) 1935 Mad 711 (714).

(b) The proceedings under this rule are of a judicial character. (Vol 29) 1942 Lah 153 (159) : ILR (1942) Lah 559 (FB) * (Vol 26) 1939 Lah 113 : ILR (1939) Lah 103 (overruled). * (Vol 4) 1917 Pat 381 (381) : 2 Pat L Jour 130 (FB).

(c) The proceedings under this rule are of a judicial character only where the order affects rights, liabilities or equities of the parties. (Vol 15) 1928 Mad 1169 (1170) (DB). * (Vol 16) 1929 Mad 506 (508) (DB). * (11) 14 Cal L. Jour 35 (36) (DB) * (11) 14 Cal L. Jour 607 (609) (DB).

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

[1882-S. 287; 1877-S. 287; 1859-S. 249.]

PROVINCIAL AMENDMENTS

Calcutta

After the word "property" in clause (e) in sub-rule (2) add the following proviso :

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property but the proclamation shall include the estimate, if any, given by either or both of the parties." [26-7-1938.]

Lahore

Add the following words to clause (e) of sub-rule (2) :

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property ; but the proclamation shall include the estimate, if any, given by either or both of the parties." [4-11-1929]

After sub-rule (2) add the following as sub-rule (3) and re-number the existing sub-rules (3) and (4) as (4) and (5), respectively :

O. 21, R. 66 (contd.)

2. Delegation of the power to settle proclamation.—[1] Sale proclamation must be settled by the Court and the power cannot be delegated to a Commissioner. (Vol 13) 1926 Mad 755 (755) : 49 Mad 333 (DB).

3. "Such proclamation shall be drawn up after notice."—[1] Notice to judgment-debtor is necessary before settling sale proclamation. (Vol 19) 1932 All 55 (57) (DB) * (Vol 22) 1935 Mad 459 (462) (DB).

[2] The object of notice is to allow the judgment-debtor opportunity to raise any objection he may have. (Vol 29) 1942 Lah 158 (159) : ILR (1942) Lah 559 (FB) * (Vol 26) 1939 Lah 113 : ILR (1939) Lah 103 overruled.)

[3] The decree-holder must take steps for the issue and service of notice. ('11) 88 Cal 482 (485) (DB).

[4] Notice is not necessary before drawing up fresh proclamation under R. 69 (2). (Vol 13) 1926 Oudh 76 (76, 77) (DB.) * (Vol 32) 1945 Mad 499 (500)..

[5] Necessary particulars ascertained in previous execution proceedings—Fresh notice is absolutely necessary before preparing proclamation again. (Vol 8) 1921 Oudh 222 (223) : 24 Oudh Cas 391.

[6] Valuation fixed before the date on which parties were to be heard on the point—Court has acted without jurisdiction. (Vol 10) 1923 Pat 102 (102) (DB).

[7] Notice under this rule given—Absence of notice under R. 22 does not vitiate the proceedings. (Vol 26) 1939 Lah 473 (473) : ILR (1940) Lah 231 * (Vol 25) 1938 Pat 298 (290) * (Vol 13) 1931 Cal 476 (478) (DB) * (Vol 8) 1921 Lah 384 (385).

[8] A notice under this rule is to be served in the same manner as a summons. (Vol 12) 1925 Cal 552 (554) (DB.) * (Vol 18) 1931 All 159 (160) (DB).

4. "Such proclamation shall state the time and place of sale."—[1] The omission to state in the proclamation the time of sale is a material irregularity within the meaning of R. 90. It is not enough merely to mention the day of sale. (Vol 6) 1919 Nag 128 (128, 129) : 15 Nag LR 125 * (Vol 2) 1915 Oudh 124 (126);

18 Oudh Cas 1 * (Vol 24) 1937 All 407 (409) (DB) * (Vol 22) 1935 Lah 992 (992).

[2] The hour of sale should also be stated in the proclamation. ('97) 24 Cal 291 (293) (DB).

[3] Sale taking place at an earlier hour than the one advertised, is a nullity. ('85) 7 All 676 (677) (DB.) * ('89) 16 Cal 794 (798) (DB.)

[See however (Vol 2) 1915 Lah 354 (355) (DB.) * ('07) 1907 Upp Bur CPC 9.]

[4] Sale advertised to take place between particular hours—Once the sale had begun it could be finished earlier than last hour up to which it is stated it will continue. (Vol 21) 1934 Bom 348 (351) : 58 Bom 564.

[5] Sale taking place a few hours later than the advertised time—There is no material irregularity. (Vol 14) 1927 Rang 84 (85) (DB).

[6] Judgment-debtor agreeing to adjournment of sale without fresh proclamation—Failure to mention time of sale not a material irregularity. (Vol 20) 1933 All 546 (549) : 55 All 519 (DB).

[7] The omission to state the place of sale in the proclamation is a material irregularity. ('87) 9 All 511 (511, 512) (DB); * (Vol 14) 1927 Rang 84 ('85) (DB).

[8] Holding sale at a different place from that stated in proclamation is a material irregularity. ('06) 1906 Pun Re No. 132 Page 493 (495) * (Vol 31) 1944 Nag 199 (200) : ILR (1944) Nag 584 (DB) (Compare ('67) 4 Bom H C R A C 164 (166) (DB.) (Uncertainty in the place.)

[9] Good and sufficient reasons should be shown for directing the holding of a sale beyond the jurisdiction of the Court ordering the sale. ('88) 13 Bom 22 (25) (DB.)

5. "As fairly and accurately as possible."—[1] Judge not availing himself of all the material facts before him while drawing up proclamation—Purchaser misled—He can ask for proportionate refund of money or for cancellation of the sale. (Vol 3) 1916 Low Bur 3 (5) : 8 Low Bur Rule 427.

6. Specification of property.—[1] Property to be sold should be definitely ascertained by court before

"(3) Where the property to be sold is moveable property which has been made over to a custodian under sub-clauses (a) or (c) of clause (1) of Rule 43 of this Order, the Court shall also issue a process by way of notice to the custodian, directing him to produce the property at the place of sale, at a time to be specified therein with a warning that if he fails to comply with the directions, he shall be liable to action under Section 145 of the Code of Civil Procedure."

Madras

Re-number the existing clause (e) to sub-rule (2) as (f) and add the following as clause (e) :

"(e) the value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor."

[13-10-1936.]

Nagpur

Substitute a comma for the full stop at the end of clause (e) of sub-rule (2) and *add* the following :

"including the decree-holder's estimate of the approximate market price."

[29-6-1943.]

N.-W.F.P.

Add the following words to clause (e) of sub-rule (2) :

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property ; but the proclamation shall include the estimate, if any, given by either or both of the parties."

Patna

Omit the words "shall be drawn up after notice to the decree-holder and the judgment-debtor and" from sub-rule (2), and *add* the following proviso after sub-clause (e) of sub-rule (2) :

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale proclamation."

O. 21, R. 66 (contd.)

including it in the proclamation. ('80) 4 Bom 323 (326) (DB). * (Vol 15) 1928 Oudh 491 (492) (DB). Property not mentioned in mortgage deed or decree thereon cannot be included in proclamation.)

[2] Property of stranger to decree directed to be sold—He can sue to set it aside. ('79) 4 Cal 142 (154) (FB).

[3] The property to be sold should be described as fairly and accurately as possible. (See (Vol 29) 1942 Mad 97 (99) DB). (Want of specification of extent of judgment-debtor's interest in joint family property does not invalidate sale proclamation or sale) * ('03) 8 Cal WN 257 (262) (DB).

[4] The description should be sufficient to identify the property. ('69) 12 Suth WR 488 (488) (DB).

[5] In the following cases description was held sufficient:—

(a) Where from the surrounding facts and circumstances, there could not be any ambiguity as to the property actually sold. (Vol 16) 1929 Cal 409 (412) : 55 Cal 902.

(b) Main holding or village sufficiently described—Names of villages which appertain to that need not be mentioned (Vol 15) 1928 Pat 615 (624) : 8 Pat 122.

(c) Property described as share of mortgagor in bhaiyachari village. (Vol 16) 1929 Oudh 263 (264, 265).

[6] In the following cases description was held insufficient:—

[a] Particulars of business omitted in a sale of judgment-debtor's interest in business. (Vol 30) 1943 Lah 129 (138.)

[b] Mere statement of khasra numbers without indicating what the properties were. ('05) 1905 Pun Re No 47 page 168 (168).

[c] Non-specification of the share of the properties to be sold. ('05) 32 Cal 542 (546, 547, 548).

[d] Eleven items consisting of villages and plots sold—Separate proclamations issued without giving particulars regarding land revenue or situation. (Vol 32) 1945 Lah 196 (198) : ILR (1944) Lah 280.

[7] The court can hold an enquiry for getting sufficient description of the property. (Vol 30) 1943 Lah 129 (138) (DB) * (Vol 27) 1940 Lah 394 (which is reversed on another point).

[8] Two properties amalgamated into one premises stated as two—Boundaries of lots given in the proclamation and no one misled—There is material irregularity (Vol 20) 1933 Cal 662 (663) (DB).

[9] The judgment-debtor's interest in the property should be specified.

[See ('10) 34 Mad 143 (145).]

[10] Fresh proclamation is necessary where a portion of property is released from attachment subsequent to the issue of a sale proclamation. ('78) 3 Cal 544 (545, 546) (DB).

[But compare (Vol 19) 1932 All 664 (664) (DB).]

[10a] Mortgaged properties advertised for sale—Judgment-debtor applying for fixing of instalments—Order for instalments made on judgment-debtor having fresh proclamation with condition that the decree could be executed on default of any instalments—*Held* decree-holder cannot execute it without a fresh proclamation. (Vol 32) 1945 Pat 76 (78) : 23 Pat 854.

[11] Question as to what was sold to the purchaser at a court sale—Order of attachment, the sale proclamation and the sale certificate should be looked at. (Vol 12) 1925 Cal 1247 (1247) * ('80) 6 Cal 213 (217, 218) (PC).

[See ('13) 41 Cal 590 (599) : 41 Ind App 38 (PC) * (Vol 13) 1926 All 730 (732) * ('81) 3 All 647 (652) (FB) * ('81) 6 Cal 243 (246) (PC)].

[12] Sale of property in the hands of legal representative for decree debts due by judgment-debtor—Latter's interest in property passes to the purchaser. ('78) 10 Beng LR 294 (300) (PC) * (Vol 4) 1917 PC 121 (123) : 41 Mad 403 : 45 Ind App 54 (PC).

[13] Discrepancy between sale proclamation and the certificate of sale—The former prevails. (Vol 28) 1941 Bom 885 (886) : ILR (1941) Bom 682 (DB).

7. Specification of revenue.—[1] Property to be sold, an interest in estate or part of estate paying revenue to Government—Revenue assessed must be specified in

O. 21, R. 66 (*contd.*)

the proclamation. ('69) 12 *Suth WR* 488 (488, 489) (DB.)

[2] Omission to state the revenue assessed on the estate to be sold is a material irregularity. ('73) 19 *Suth WR* 434 (436) (SB.)

8. Encumbrances to which property is liable.—

[1] The encumbrances to which the property to be sold is liable should be stated as fairly and accurately as possible. (Vol 32) 1945 *PC* 87 (70) : 72 *Ind App* 104 : *ILR* (1945) *Mad* 801 : *ILR* (1945) *Kar* (PC) 142 (PC) * ('03) 30 *Cal* 599 (606, 607) (FB).

[2] Amount due on the encumbrances notified should be mentioned. (Vol 4) 1917 *Cal* 461 (462) (DB). * ('81) 7 *Cal* 34 (41, 42) (DB).

[See however (Vol 21) 1934 *Mad* 260 (262) (DB).]

[3] Alleged mortgages admitted or disputed may also be stated. (Vol 6) 1919 *Upp Bur* 18 (19) : 3 *Upp Bur* 139 * ('05) 3 *Low Bur* 275 (277) (DB).

[4] The decree-holder is not required to inspect and peruse all the mortgage documents mentioned in the encumbrance certificate and notify any specially onerous conditions that may be included therein (Vol 8) 1921 *Mad* 209 (210) (DB).

[5] Encumbrancer himself can apply to the Court to have his encumbrance notified in the sale proclamation (Vol 28) 1941 *Sind* 101 (103) : *ILR* (1941) *Kar* 199 (DB) * (Vol 13) 1926 *All* 268 (269) : 48 *All* 260 (DB).

[6] An encumbrancer is not bound to notify his encumbrance and failure to do so will not debar him from enforcing it. (Vol 22) 1925 *Lah* 527 (528).

[7] Prior mortgagee impleaded in suit on puisne mortgagee—Issue regarding his priority abandoned—Still he can claim notification of his mortgage in the proclamation. (Vol 16) 1929 *Oudh* 88 (89) : 3 *Luck* 472 (DB).

[8] Court cannot order sale subject to encumbrance. (Vol 18) 1931 *Oudh* 157 (159) (DB).

[9] The court cannot adjudicate upon the rights of the parties as to such encumbrances. (Vol 20) 1933 *All* 287 (288) (DB).

[10] A notification of encumbrances does not amount to an adjudication as to the binding nature of the alleged encumbrance, and the auction purchaser is entitled to dispute the validity of the mortgage (Vol 26) 1939 *Nag* 305 (308) : *ILR* (1939) *Nag* 665 * (Vol 25) 1938 *All* 542 (544) (DB) * (Vol 22) 1935 *Rang* 19 (20) * (Vol 24) 1937 *Oudh* 493 (497) : 13 *Luck* 484 (DB) * (Vol 23) 1936 *Cal* 590 (592) * (Vol 20) 1933 *Mad* 879 (881, 882) : 57 *Mad* 195 * (Vol 22) 1935 *Oudh* 23 (25, 26) : 10 *Luck* 343.

[See however (Vol 18) 1931 *Rang* 310 (312) : 9 *Rang* 867.]

[11] Decree itself directing the sale of the property subject to a certain encumbrance—Purchaser cannot challenge the validity of the encumbrance afterwards. (Vol 5) 1918 *Pat* 421 (421) (DB).

[12] A person who has waived the irregularity arising out of failure to notify encumbrances, cannot subsequently object to it. (Vol 16) 1929 *Lah* 673 (674).

[13] Fact of sale being subject to encumbrance mentioned in proclamation—But conduct of officer conducting the sale misleading the purchaser to believe that it is free—Sale is vitiated. (09) 36 *Cal* 323 (334) : 36 *Ind App* 32 (PC).

[14] Though a mortgage is not notified it will still bind the property in purchaser's hands. (Vol 1) 1914 *Oudh* 137 (140) (DB) * (Vol 5) 1918 *Oudh* 167 (168) * ('06) 3 *Low Bur* 275 (278) (DB) * (Vol 22) 1935 *Lah* 527 (528).

[15] A charge to be binding on the purchaser must have been notified. See *AIR Commentaries on Transfer of Property Act* 1st (1943) *Edn.* S. 100.

[16] A decree-holder who has a mortgage in his own favour, will be stopped from setting it up against an auction-purchaser, if he fails to disclose it in his application under this rule, and if it is not mentioned in the proclamation. ('06) 2 *Nag* *LR* 106 (109, 110) * ('99) 21 *All* 309 (310) (DB) * ('98) 22 *Bom* 686 (692) (DB). * ('76) 1 *Bom* 314 (318) (DB) * (Vol 7) 1920 *Cal* 354 (357) : 47 *Cal* 446 (DB) * ('92) 15 *Mad* 803 (804) (DB) * ('08) 11 *Oudh* *Cas* 206 (208) * (Vol 9) 1922 *Upp Bur* 1 (3) : 4 *Upp Bur* 62 * ('69) 3 *Beng* *LR* 407 (408) (DB)

[But see (Vol 18) 1931 *All* 549 (549) : 53 *All* 631 (DB).]

[17] An auction-purchaser to be free of a mortgage of the property he has purchased in favour of the decree-holder himself must have had no notice of the mortgage (Vol 13) 1926 *Oudh* 330 (331) * ('96) 20 *Bom* 290 (292) (DB) (Registration was held to be notice)

[18] Failure of decree-holder to notify mortgage in his own favour—Mortgage can be enforced against subsequent encumbrancer, unconnected with the execution and not prejudiced by the omission. ('85) 18 *Nag* *L. Jour* 274 (278).

[19] Encumbrance in favour of decree-holder omitted from the proclamation by mistake of officers of court. No estoppel arises against the decree-holder. (Vol 8) 1921 *All* 113 (116) : 43 *All* 703 (DB) * (Vol 13) 1926 *Oudh* 330 (331).

[20] The rule of estoppel applies to judgment-debtor also. (Vol 2) 1915 *Oudh* 185 (187) (Mortgagee impleaded as defendant in rent suit—Failure to take steps to notify his mortgage.)

[21] Where any person misled the purchasers to believe that the mortgage he put forward did not exist, he is estopped from alleging it. ('70) 2 *N W P H C R* 315 (319) (DB). (Giving evasive answer to intending purchaser.) * ('07) 4 *All L. Jour* 709 (711).

[(Compare ('87) 9 *All* 690 (702) (DB).]

[22] The rule of estoppel by conduct can arise in respect of any claim to be put forward against purchaser. ('84) 7 *Mad* 107 (110) (DB). * ('13) 20 *Ind* *Cas* 753 (754) (DB) (Cal.)

[23] An attachment is not an encumbrance and hence need not be notified. (Vol 24) 1937 *Pat* 50 (51, 52) (DB.)

9. Amount to be recovered.—[1] Amount to be recovered according to decree should be entered in the proclamation and where the decree does not grant interest, it should not be included ('78) 3 *Cal* 602 (610) : 5 *Ind App* 78 (PC).

[2] Where the decree awards future interest, the interest should be calculated up to the date fixed for the sale. (Vol 19) 1932 *Cal* 555 (557) (DB).

[3] Decree granting future interest—In application interest calculated only up to date of application—Interest can be calculated in the proclamation up to date fixed for sale. (Vol 19) 1932 *Cal* 555 (557) (DB.)

O. 21, R. 66 (*contd.*)

[4] Decree-holder himself purchasing property and put in possession—Sale subsequently set aside and fresh sale proclamation ordered—Mesne profits for the period he was in possession may be deducted from the decretal amount (Vol 1) 1914 Low Bur 178 (179) (DB).

[5] Sale adjourned under R. 69 and fresh proclamation waived by judgment-debtor—Decree partly satisfied—Sale held for the full amount on the adjourned date is not irregular. (Vol 15) 1928 Pat 615 (621) : 8 Pat 122 (DB).

[6] Low valuation of property due to mis-statement by decree-holder as to amount due under prior encumbrance—Adjournment of sale obtained by judgment-debtor several times by waiving fresh proclamation—Held that the waiver to be effective, the knowledge of true facts relating to the mis-statement and an intention on the part of the judgment-debtor to waive his right to object should be proved by decree-holder. (Vol 32) 1945 PC 67 (70) : 72 Ind App 104 : ILR (1945) Mad 601 : ILR (1945) Kar (PC) 142 (PC).

[7] An incorrect statement of amount due in the sale proclamation—Jurisdiction of the Court to sell property is not affected—Sale held is not illegal. (Vol 9) 1922 Cal 321 (327) : 49 Cal 45 (DB).

[8] Objection taken to correctness of amount entered in the sale proclamation—Sale should not be held before objection is disposed of. (Vol 10) 1923 All 503 (504) (DB).

10. Everything which the Court considers material, etc.—[1] Clause (e) does not mean that the Court is to give a detailed account of all matters connected with the property. ('99) 1899 Pan Re No. 30 page 153 (157) (DB).

[2] Income from the property ordered to be sold need not be specified. (Vol 15) 1928 Lah 918 (918) * (Vol 17) 1930 Lah 692 (694) * (Vol 15) 1928 Mad 398 (398) (DB).

[But compare ('01) 4 Oudh Cas 329 (332).]

[3] The following have been held to be necessary particulars that should be stated :—

[a] Any pending suit against the property by a defeated claimant. (Vol 19) 1932 Mad 119 (119) : 55 Mad 205.

[b] Annual rent of house property in town. (Vol 30) 1943 Oudh 204 (203) : 18 Luck 547.

[c] Fact that property is held under occupancy tenure. ('05) 27 All 684 (687) (FB).

[d] Widow's right to possession for dower debt. (Vol 19) 1932 Nag 18 (20) : 27 Nag LR 389.

[e] Sale of joint family property for a debt binding on family—Fact that minor son's interest also is intended to be sold may be stated. (Vol 16) 1929 Bom 465 (466) : 53 Bom 777.

[f] Claim of any third party in possession of property to be sold. (Vol 24) 1937 Nag 140 (143).

[g] Undivided share in joint family property attached and ordered to be sold—Final decree in partition proceedings pending at the time passed—Court must proclaim the ascertained share only for sale. (Vol 19) 1932 Bom 210 (212).

[4] The following have been held to be unnecessary particulars :—

[a] Plan of property. (Vol 12) 1925 Oudh 150 (150)

[b] Upset price. ('01) 28 Cal 73 (77).

[c] Amount of rent where sale is of a tenure. ('81) 7 Cal 723 (725).

[5] It is incumbent on the Court to see that all the particulars required under O. 21, R. 66 are given properly, so that intending bidder may know exactly what he is going in for. (Vol 25) 1933 Mad 720 (720) (DB).

[6] Sale of holding of a tenant brought about by land-lord—Failure to notify usual incidents of the tenure—No estoppel against landlord to enforce it against purchaser—Unusual incidents must be notified if they are to be enforced. ('03) 30 Cal 213 (215, 217) (DB).

11. Value of the property.—[1] There is a conflict of decisions as to whether the Court should give its own valuation of property to be sold. The following are the different views :—

[a] The Court is not under an obligation to give its own valuation. (Vol 15) 1928 Mad 503 (504) : (51) Mad 655 (DB). * (Vol 14) 1927 Mad 1009 (1009) : (DB) * (Vol 19) 1932 All 664 (664) (DB) * (Vol 15) 1928 Nag 281 (282).

[But see (Vol 17) 1930 Nag 191 (192, 193).]

[b] The Court is as of duty bound to give its own valuation. (Vol 14) 1917 Pat 381 (382) : 2 Pat L. Jour 130 (FB).

[See (Vol 27) 1940 Pat 707 (711) : 19 Pat 688.] * (Vol 20) 1933 Cal 511 (513) : 60 Cal 581 (DB) * (Vol 21) 1934 Cal 205 (207) (DB) * (Vol 1) 1914 Low Bur 178 (179) (DB).

[But see ('04) 31 Cal 922 (926) * (Vol 24) 1937 Rang 157 (158).]

[c] It is not necessary to give the value of the property in every case. (Vol 26) 1939 Bom 182 (183) : ILR (1939) Bom 389 (DB).

[But see (Vol 22) 1935 Bom 331 (332) (DB).]

[d] In exceptional cases the Court need not give valuation. (Vol 20) 1933 Cal 511 (513) : 60 Cal 581 (DB) * (Vol 18) 1931 Cal 520 (520) : 58 Cal 577 (DB).

[2] The omission of the Court to give an estimate of the value is a mere irregularity and does not by itself vitiate the sale. (Vol 18) 1931 Cal 490 (491) : 58 Cal 813 (DB.) * (Vol 17) 1930 Lah 685 (686, 687) * (Vol 9) 1922 Cal 93 (94) (DB).

[3] By virtue of amendments to the rule made by the High Courts of Calcutta, Lahore, Madras, Nagpur, Patna and the Judicial Commissioner's Court of N.W.F.P. the Court is now under no obligation to give its own valuation but may accept the valuation by the parties.

[4] The judgment-debtor may by his conduct be estopped from raising the objection that the sale proclamation was misleading and prevented possible bidders from bidding or from offering prices. (Vol 20) 1933 All 546 (550) : 55 All 519 (DB).

[5] An elaborate enquiry before fixing the value of the property is not necessary. (Vol 19) 1932 Cal 141 (142) (DB) * (Vol 4) 1917 Pat 381 (382) : 2 Pat L. Jour 130 (FB).

[But see (Vol 9) 1922 Pat 550 (551) : 1 Pat 214 (DB).

[6] Highest bid offered far below value stated—It is not evidence of fraud or material irregularity in the publishing of the sale proclamation or the conduct of sale. (Vol 9) 1922 Pat 550 (551, 552) : 1 Pat 214 (DB).

[7] Highest bid below the stated value—The Court cannot dismiss the execution application. (Vol 31) 1944

O. 21, R. 66 (contd.)

Pat 54 (58) : 28 Pat 61 (FB.) (Decree-holder only bidder refusing to bid upto amount specified—He should be allowed to take out further proclamation or to take such further steps as he thought proper). (Vol 13) 1926 Pat 146 (146).

[8] Court cannot consider illegal cesses while fixing the valuation. ('02) 7 Cal WN 439 (439, 440) (DB).

[9] Right to have lease of a mill for 20 years—Value should not be fixed by capitalising annual rent for 20 years. (Vol 21) 1934 Lah 146 (146).

[10] Heavily encumbered property—It should not be valued on the basis of deducting value of encumbrances from its value in free state. (Vol 22) 1935 Cal 614 (618) (DB).

[11] House in city—Test of its value is by ascertainment of annual rent—Valuation should be made according to the prevalent value. (Vol 30) 1943 Oudh 204 (208) (DB).

[12] Sale of lands—Court should group them in small and convenient plots and offer them for sale. (Vol 27) 1940 Pat 422 (423) (DB) * (Vol 25) 1938 Mad 720 (724) (DB).

[13] Even where the decree is mortgage-decree the Court has discretion to fix the order of sale. (Vol 31) 1944 Mad 429 (430).

12. Effect of an order under this rule.—[1] An order made under this rule does not become conclusive even though a suit to set it aside is not instituted before the expiry of 12 months from the date of the order. (Vol 14) 1927 Bom 234 (235, 236) (DB) * (Vol 23) 1936 Cal 590 (592) * (Vol 25) 1938 All 542 (544) (DB) * (Vol 3) 1916 Oudh 169 (173) (DB).

[2] Property sold to bonafide purchaser—Subsequent reversal, variation or amendment of decree does not affect the sale. (Vol 17) 1930 All 578 (579) (DB).

[3] Failure by a stranger whose property is wrongly attached and sold to object—Still his rights are not affected. ('85) 9 Bom 86 (91, 93) (DB).

13. Non-compliance with the provisions of this rule.—[1] Non-compliance with the rule is a material irregularity and the sale can be set aside. (Vol 30) 1943 Lah 129 (138) (DB) * (Vol 30) 1943 Oudh 204 (208) : 18 Luck 547 (DB) * (Vol 27) 1940 Lah 394 (398) * (Reversed in (Vol 30) 1943 Lah 129 on another point) * (Vol 27) 1940 Mad 82 (85) : ILR (1940) Mad 420 (DB) * ('06) 3 Low Bur Rul 275 (277) (DB) * ('02) 29 Cal 73 (99) (FB) * (Vol 12) 1925 All 459 (462, 464) : 47 All 479 (DB) * (Vol 24) 1937 All 407 (409) (DB).

[2] Sale cannot be ordered pending objection by judgment-debtor to the sale proclamation. (Vol 10) 1923 All 503 (504) (DB) * (Vol 5) 1918 Cal 490 (490) (DB) * (Vol 25) 1938 Lah 65 (68) (DB).

[3] Irregularity arising on non-compliance with the rule can be waived and once waived cannot be raised in any subsequent proceedings. ('89) 12 Mad 19 (25) : 15 Ind App 171 (PC) * (Vol 20) 1933 All 546 (550) : 55 All 519 (DB) * (Vol 29) 1942 Sind 164 (165) : ILR (1942) Kar 351 (DB) * (Vol 32) 1945 Cal 434 (436) (DB).

[4] Judgment-debtor not aware of fact to which he ought to object and failure to object not due to his mistake—He is not estopped from objecting subsequently. (Vol 2) 1915 Mad 989 (992, 993) : 38 Mad 387 (DB).

[5] A person may be held to waive irregularities in

the sale proclamation by bidding at the sale. (Vol 16) 1929 Lah 673 (674).

[6] Where the objection is to the want of jurisdiction to sell, there can be no estoppel by waiver (Vol 18) 1931 Oudh 398 (400) (DB).

[See however ('06) 28 All 273 (276) (DB) * (Vol 20) 1933 Pesh 71 (72).

[7] An objection on the ground that the rule itself does not apply to the execution procedure in a particular case must be taken at an earlier stage and cannot be raised by judgment-debtor after he accepts a sale proclamation issued under this rule and gained some advantage thereby. (Vol 31) 1944 Pat 98 (100) : 22 Pat 631.

14. Verified statement to accompany application for order for sale—Sub-rule (3).—[1] Application for an order for sale—Verified statement as required by sub-rule is necessary (Vol 29) 1942 Lah 153 (159) : ILR (1942) Lah 559 (FB). * (Vol 19) 1932 All 62 (63) (DB).

[2] Omission to file verified statement does not vitiate a sale. (Vol 4) 1917 Lah 136 (138) * (Vol 15) 1928 Nag 14 (15) * (Vol 26) 1939 Pesh 9 (11). (It is a material irregularity within O. 21, R. 90.)

[But see (Vol 16) 1929 Nag 305 (306).

[3] Any person acquainted with the facts of the case may verify the statement. (Vol 7) 1920 Pat 636 (637) (DB).

15. "Court may summon any person" etc.—Sub-rule (4).—[1] Claim to immoveable property preferred in the course of investigation under R. 66—It cannot be treated as one under R. 53. (1890) 14 Bom 369 (370) (DB).

[2] The power conferred upon the court under this sub-rule shows that the court is not to act blindly on information supplied by the parties. (Vol 32) 1945 PC) 67 (70) : 72 Ind App 104 : ILR (1945) Mad 601 : ILR (1945) Kar (PC) 142 (PC).

16. Appeal.—[1] An order under this rule is not appealable under S. 104 or O. 41 R. 1. (Vol 7) 1920 Pat 636 (638) (DB).

[2] An order under this rule to be appealable as decrees under S. 47 read within S. 2, must be one affecting the rights, liabilities or equities of parties. (Vol 16) 1929 Mad 506 (508) (DB) * (Vol 12) 1925 Pat 500 (503) : 4 Pat 731 SB) * (Vol 26) 1939 FC 74 (80) : ILR (1939) Kar (FC) 165 : 1939 FCR 193 (FC).

[3] Appeal was held not to lie from the following orders:—

(a) An order about the value of the property to be entered in the sale proclamation. ('04) 27 Mad 259 (261) (FB) * (Vol 26) 1939 FC 74 (80) : ILR (1939) Kar (FC) 165 : 1939 FCR 193 (FC).

[b] An order as to the sale of the properties in particular lots. ('04) 27 Mad 259 (261) (FB) * (Vol 15) 1932 All 136 (137) (DB) * (Vol 31) 1944 Mad 429 (430) * (Vol 16) 1929 Lah 815 (816).

[c] An order as to service of notice prescribed by the rule. (Vol 13) 1926 Cal 1184 (1184) (DB).

[d] An order for the entry of certain encumbrances in the sale proclamation. (Vol 21) 1934 Cal 761 (762) * (Vol 28) 1941 Sind 101 (102) : ILR (1941) Kar 199 (DB) * (Vol 27) 1940 FC 1 (2) : 1940 FCR 10 (FC).

[e] An order fixing the place of sale. ('04) 27 Mad 259 (261) (FB).

O. 21, R. 66 (*contd.*)

[f] An order fixing the upset price. (Vol 15) 1928 Mad 1169 (1170) (DB) * (Vol 16) 1929 Mad 206 (508) (DB).

[g] Order fixing the amount for which sale is held ('04) 27 Mad 259 (261) (FB).

[h] Order to issue proclamation pending enquiry into objection. (Vol 8) 1921 Cal 629 (630, 631) (DB).

[i] Order refusing to make an entry that the judgment-debtor had acquired a prior mortgagee's interest mentioned in the proclamation. (Vol 5) 1918 Cal 601 (601) (DB).

[4] Where the order decides both on administrative matters and rights of parties an appeal will lie from that order. (Vol 29) 1942 Lah 153 (160) : ILR (1942) Lah 559 (FB) (Vol 26) 1939 Lah 113 : ILR (1939) Lah 103 over-ruled.) * (Vol 27) 1940 Mad 54 (55). (Order passed after a contest that the properties will be sold as one lot) * (Vol 15) 1928 Mad 1169 (1170) (DB) * (Vol 10) 1923 Pat 134 (134) (DB) * (Vol 13) 1926 Cal 610 (611) (DB).

[But compare ('08) 18 Mad L. Jour 568 (569) (DB)].

[5] Mortgage decrees against several judgment-debtors—Order directing that property of some be sold first—Order is appealable as a decree. (Vol 11) 1924 Mad 365 (366) (DB) * (Vol 13) 1926 Mad 834 (835) (DB).

[6] An order relating to the boundaries or the area of the property to be sold is appealable as a decree. (Vol 12) 1925 Cal 318 (319) (DB) * (Vol 20) 1933 Lah 333 (334) (Area).

[7] An order as to whether a sale is to be held by the Court itself or by the Collector on the ground of the judgment-debtor being an agriculturist is a judicial order which is open to appeal. (Vol 26) 1939 Bom 526 (528).

[8] An order determining an application for setting aside a sale on the ground of irregularities in drawing up the sale proclamation is one under S. 47 and appealable as a decree. ('08) 32 Bom 572 (574) (DB) * (Vol 12) 1925 Mad 1142 (1142). (Second appeal lies—Following (Vol 7) 1920 Mad 481.)

[9] Question of waiver decided against judgment-debtor not raised on appeal before High Court—The same cannot be raised before the Privy Council. ('07) 34 Cal 709 (710); 34 Ind App 164 (PC). (question being one of fact).

[10] Finding that judgment-debtor was aware of the attachment and had notice of the date for settlement is one of fact which is binding on him in second appeal. (Vol 32) 1945 Mad 77 (79).

17. Revision.—[1] Acts of court under this rule is subject to the revisional jurisdiction of the High Court. (Vol 4) 1917 Pat 381 (381, 382) : 2 Pat L. Jour 130 (FB).

(Compare (Vol 3) 1916 Mad 632 (632) (DB).

[2] Acts of administrative character—Held that the High Court can interfere under S. 107 of Government of India Act, 1915. (Vol 4) 1917 Pat 381 (382) : 2 Pat L. Jour 130 (FB).

[3] Discretionary matter—High Court will not interfere. (Vol 19) 1932 Cal 576 (578, 579) (DB) * (Vol 31) 1944 Mad 429 (430).

[4] Applicant not prejudiced by the order—High Court will not interfere. ('06) 3 Low Bur Rul 275 (278) (DB).

18. Applicability of the rule of *res judicata* to proceedings under this rule.—[1] The principle of *res judicata* applies to execution proceedings. (Vol 9) 1922 All 27 (28) : 44 All 350 (DB).

[2] An order which merely settles the details to be entered in a sale proclamation is only administrative or ministerial and cannot operate as *res judicata*. (Vol 11) 1924 All 480 (480) * (Vol 23) 1941 Sind 101 (103) : ILR (1941) Kar 199 (DB) * (Vol 12) 1925 Pat 500 : 4 Pat 731 relied on) * (Vol 12) 1925 Pat 500 (502) : 4 Pat 731 (FB).

[3] A final order affecting the rights of the parties passed in proceedings under this rule will operate as *res judicata*. (Vol 27) 1940 Mad 54 (55) * (Vol 11) 1924 Pat 628 (628, 629) (DB) * (Vol 20) 1933 All 192 (195) (DB) * ('10) 7 All L. Jour 401 (403).

[4] The principle of constructive *res judicata* (Section 11, Explanation 4) also applies to execution proceedings. (Vol 29) 1942 Lah 153 (160) : ILR (1942) Lah 559 (FB) (Vol 26) 1939 Lah 113 : ILR (1939) Lah 103 overruled) * (Vol 9) 1922 All 27 (28) : 44 All 350 (DB).

[Contra (Vol 12) 1925 Pat 588 (590) (DB).]

[5] Party sought to be barred by constructive *res judicata* must have had clear notice of the claim made against him. (Vol 11) 1924 Mad 1 (6) : 46 Mad 768 (FB).

[But see (Vol 12) 1925 Nag 320(320):21 Nag LR 23.]

[6] Where a service upon judgment-debtor is not personal, sufficiency of service has to be declared by Court—Omission to do so does not detract from the order becoming *res judicata* where the facts show that the judge passed the order after considering the question of sufficiency (Vol 31) 1944 Mad 193 (194).

[7] Constructive *res judicata* does not operate where the previous application was dismissed for default. (Vol 12) 1925 Pat 588 (590) (DB).

[8] The principle of *res judicata* will not apply if the Court had no jurisdiction to pass the order in question. (Vol 18) 1931 Oudh 398 (400) (DB).

[9] Notice under the rule sent to judgment-debtor—Failure of judgment-debtor to make appearance and plead want of jurisdiction—Court passing order on the materials before it—Objection as to jurisdiction barred by *res judicata*. ('06) 28 All 273 (276) (DB).

[10] A decision in the course of execution proceedings operates as *res judicata* even in a subsequent suit between the parties. (Vol 26) 1939 All 368 (369) : ILR (1939) All 385 (DB).

[11] Court executing mortgage decree can direct properties to be sold in a particular order though a specific prayer for such order was not specifically granted and embodied in the decree (Vol 13) 1926 Mad 834 (835) (DB.) (Following (Vol 11) 1924 Mad 509).

[12] A decree-holder ought not to be allowed to take up inconsistent positions to the prejudice of the judgment-debtor. ('09) 3 Ind Cas 22 (23) (DB) (All).

19. Judgment-debtor dying pending execution.—[1] Judgment-debtor dying before sale of his undivided interest in joint family properties under attachment—Decree-holder can proceed against such interest in property in the hands of surviving coparceners. ('85) 7 All 731 (732) (following 5 Cal 148; 6 Ind App 88 (PC).

Mode of making
proclamation.

67 (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the ^a[Official Gazette] or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

[1882-S. 289 ; 1877-S. 289 ; 1859-S. 249.]

a. Substituted by A. O. for "local official Gazettee."

PROVINCIAL AMENDMENTS.

Madras

Add the following as sub-rule (4) :

"(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment-debtor".

[13-10-1936.]

Patna

Add the following words at the end of sub-rule (1) after deleting the full-stop at the end of the sub-rule :

"and may, if the Court so directs, on the application of the decree-holder, be proclaimed and published simultaneously with the order of attachment."

68. Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the judge ordering the sale.

[1882-S. 290 ; 1877-S. 290.]

O. 21, R. 66 (contd.)

[2] Judgment-debtor dying before sale proclamation—Sale proclamation drawn up without notice to legal representatives—Sale held on the basis of it is void. (Vol 15) 1928 All 74 (76) : 49 All 830 (DB).

[3] Sale proclamation legally drawn up after notice to judgment-debtors—One dying subsequently—No fresh proclamation after notice to legal representatives is necessary. (Vol 20) 1933 All 654 (655).

20. Local Amendments.—[1] O. 21, R. 66 N. W. F. P. See (Vol 26) 1939 Pesh 9 (12).

[2] O. 21, R. 66 (Patna) See (Vol 29) 1942 Pat 152 (154) (DB) * (Vol 27) 1940 Pat 422 (423) (DB) * (Vol 26) 1939 Pat 90 (94) : 17 Pat 714 (DB).

ORDER 21, RULE 67.

Synopsis.

1. Object of the rule.
2. Publication in the Gazette or Newspaper.
3. Division of Property into lots—Sub-rule (3).
4. Non-compliance with the rule.

1. Object of the rule.—[1] Provisions are made to protect judgment-debtors—Proper opportunities to bidders are offered. (Vol 25) 1933 Cal 699 (700).

2. Publication in the Gazette or Newspaper.—[1] Under this rule, it is not obligatory on Court to direct advertisement of sale, though it has a discretion to do so. (Vol 6) 1919 Lah 260 (261).

[See also (Vol 19) 1932 Cal 627 (629) (DB).] (No interval between publication in Newspaper and sale as required under R. 68.)

[2] The want of correspondence between the advertisement in the Gazette and the schedule of the attached property in the sale proclamation constitutes an irregularity which might be cured if the sale was regular in other respects. (1914) 41 Cal. 590 (598, 599): 41 Ind App 38 (PC)

3. Division of Property into lots—Sub-rule (3).—[1] No separate proclamations need be made for each separate lot, where the property is divided into separate lots for being sold. (Vol 17) 1930 Lah 685 (687).

[2] Where estates, through embraced in the same process, are really at such a distance that there is no certainty of communication to persons interested in one of such lots of what is publicly done in the other, a separate proclamation for each can be issued. (1888) 12 Bom 368 (370) (DB)

4. Non-compliance with the rule.—[1] Failure to make proclamation of sale in the manner prescribed amounts to a material irregularity which can be a ground for setting aside the sale under R. 90, provided substantial injury is also proved. (Vol 29) 1942 Cal 275 (276) : ILR (1941) 2 Cal 570 (DB.) (Non-compliance with O. 21, Rr. 67 to 69 does not 'ipso facto' render sale a nullity.) * (Vol 20) 1933 All 747 (747, 748) : 55 All 162 (DB.) (Failure to publish sale proclamation by beat of drum where it is possible is material irregularity.) * (Vol 25) 1938 Cal 699 (701) * (1891) 18 Cal 422 (426) (FB.) (Revenue paying land—Copy not affixed in Collector's office—Sale not void without proof of substantial injury) * (Vol 10) 1923 Lah 671 (672). (Failure to affix copy of proclamation on conspicuous part of property—Material irregularity.)

ORDER 21, RULE 68—Note 1.

[1] It is open to the judgment-debtor to consent to have the sale before the prescribed time, but such consent should be express and in writing. (1880) 5 Cal 259 (263) (DB). (Application by judgment-debtor that a portion of the property may be sold is not consent.)

[2] Under the present Code, sale must be held after 30 days not only from the affixing of a copy of the proclamation of sale on the court-house but also from its being affixed on the property. See Order 21, Rule 54 as it stands at present.

PROVINCIAL AMENDMENTS.

Allahabad

For the words "fifteen days" read the words "seven days."

Lahore

For the word "thirty" read "fifteen" and for the word "fifteen" read "one week"

[7-4-1932]

N.W.F.P.

For the word "thirty" read "fifteen" and for the word "fifteen" read "seven."

Oudh

For the words "fifteen days" read the words "seven days."

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

[1882-S. 291. Cf. Rules 55 and 89.]

ORDER 21, RULE 69.

Synopsis.

1. Court—meaning of.
2. "May in its discretion adjourn any sale."
3. Who can apply for adjournment.
4. Imposition of terms on adjournment.
5. Adjournment after partial sale.
6. Omission to adjourn the sale to a specified day and hour.
- 6a. Omission to specify place of adjourned sale.
7. Fresh proclamation when necessary.
8. Waiver of proclamation.
9. Stoppage of sale on deposit of debt and costs.
10. Who can tender the amount.
11. Sale on a date other than the one to which it is adjourned.

1. Court—meaning of.—[1] Ex parte decree—Application to set aside—Dismissal—Appeal—Appellate Court not empowered to stay execution proceedings—Original Court has the discretion. (Vol 3) 1916 Pat 897 (898) (DB).

[2] An execution proceeding pending before a Sub-Judge is a judicial proceeding and if an impending sale is sought to be adjourned, there must be a proper application to the Sub-Judge and no action should be taken upon a letter from the District Judge. (1909) 4 I C 373 (373) (DB) (Cal).

2. "May in its discretion adjourn any sale."—[1] A court can adjourn the sale to a future date in order to have a better sale, in the event of want of bidders, or for any other similar reason. (1904) 31 Cal 373 (377, 378) (SB).

[2] A Sale in the precincts of the Court-house cannot be adjourned without leave of the Court—Omission to obtain leave is a material irregularity. (1902) 12 Mad L. Jour 97 (99) (DB).

[3] Sale adjourned—No reasons recorded—This amounts to material irregularity. (Vol 19) 1932 All 369 (369) (DB).

[4] Court sale not within the precincts of Court—Officer conducting sale adjourning it to a further date and on that date closing auction for reporting some matter to the executing Court—Auction cannot be said to have been closed. (Vol 15) 1928 Lah 249 (249).

[5] Order of Court postponing sale—But sale effected by sale officer before order is communicated to him—Sale is void and can be set aside. (Vol 22) 1935 Lah 694 (695) (DB.) * (Vol 30) 1943 Lah 349 (351): ILR (1944) Lah 222 (FB) (case of stay of sale—(Vol 17) 1930 Lah 17 overruled) * (Vol 8) 1921 All 102 (103).

[6] Application under S. 170 (2) of Bengal Tenancy Act may be oral and may be made to the Nazir but must be before the tenure is knocked down to purchaser—*Bona fides* need not be gone into—O. 21, R. 69 does not apply. (Vol 10) 1923 Pat 572 (574).

[7] Execution sale of part of judgment-debtor's share in property cannot be stayed only on the ground that injunction staying sale of other part has been issued. (Vol 21) 1934 Cal 781 (782): 61 Cal 568.

3. Who can apply for adjournment.—[1] No specific prohibition against third persons applying for adjournments. (Vol 22) 1935 Mad 295 (296.)

4. Imposition of terms on adjournment.—[1] Court can impose terms for adjournment of sale even though rule does not specifically say so. (Vol 22) 1935 Mad 295 (296).

5. Adjournment after partial sale.—[1] Sale if continuing from day to day is not a case of adjourned sale and may be continued for any length of time. (Vol 30) 1943 Mad 739 (741) * (Vol 14) 1927 Pat 312 (313): 6 Pat 432 (DB). (Property kept on hammer for 12 days in expectation of higher bid—There is no fresh sale and R. 69 (2) does not apply.)

PROVINCIAL AMENDMENTS.

Allahabad

For sub-rule (2) *substitute* the following :

"Where a sale has been once adjourned under sub-rule (1), a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it ;

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary :

Provided also that the Court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under Rule 66."

Bombay

In sub-rule (2) "thirty days" shall be substituted for "seven days." [9-3-1926.]

Calcutta

Substitute the words "one calendar month" for the words "seven days" in sub-rule (2).

Lahore

In sub-rule (2) "thirty days" shall be substituted for "seven days." [7-4-1932]

Madras

In sub-rule (2) for the words "seven days" *substitute* the words "thirty days." [13-10-1936.]

Nagpur

In sub-rule (2) for the words "seven days" *substitute* the words "fifteen days." [29-6-1943.]

N.-W.F.P.

In sub-rule (2) for the word "seven" *substitute* the word "thirty" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

Oudh

In sub-rule (2) for the word "seven" *read* the word "fourteen," and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

Patna

In sub-rule (2) for the word "seven" *read* "fourteen" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

O. 21, R. 69 (*Contd.*)

[2] The practice of Courts under High Court Rules, is to place all properties intended for sale on a list, and the sale commences on a day fixed which must go on from day to day until list is cleared. If particular property happens to be sold on any day according to its turn, there cannot be said to be an adjournment within the meaning of the Rule. (1890) 17 Cal 152 (154) (DB). * (Vol 24) 1937 Pat 386 (386, 387): 16 Pat 408 (DB). (Sales on same list held in accordance with Rules of Patna High Court—Such sales though continuing beyond first day cannot be deemed to have been held in contravention of O. 21, R. 69).

[3] Court sale—Acceptance of decree-holder's bid—Refusal by him to deposit the usual 25 per cent of the price—Attempt by auctioneer to continue sale but finally closing it to continue it on a further date if so ordered by Court—Sale is not postponed. (Vol 15) 1928 Lah 699 (700) (DB).

6. Omission to adjourn the sale to a specified day and hour.—[1] Adjournments of sales should be to a specified day and hour. The exact provisions of the Code should be followed in these matters. (1897) 20 Mad 159 (161) (DB).

[2] If there is no announcement of the specific day and hour to which the sale is adjourned the Court may come to the conclusion that there has been a material irregularity. (Vol 17) 1930 All 542 (543) (DB). * (Vol 19) 1932 All 869 (869) (DB) (Exact time not specified) * (Vol 14) 1927 All 241 (241): 49 All 402 (DB). (Hour fixed for sale must be clearly announced)*

(Vol 32) 1945 Cal 484 (486) (DB) (Omission to specify hour.) * (1911) 14 Cal L. Jour 541 (551) (DB) (Do) * (1904) 31 Cal 815 (818) (DB) * (1936) 19 Nag L. Jour 103 (104) * (Vol 30) 1943 Oudh 204 (208, 209): 18 Luck 547 (DB). (Omission to specify hour.)

[See also (Vol 20) 1933 Cal 662 (663) (DB). (Hour of sale not specified—Irregularity does not vitiate sale unless inadequacy of price is the result.) * (Vol 15) 1928 Mad 823 (825) (DB). (Sale adjourned—Adjournment is presumed to be postponed to the same hour on the new date—But Court should strictly confirm to R. 69.))

[3] In considering R. 69 (1) main question is whether non-specification of exact hour is material irregularity. If judgment-debtor agrees that there should be no fresh proclamation, omission ceases to be a material irregularity. (Vol 20) 1933 All 546 (549): 55 All 519 (DB).

[4] Hours in original proclamation from 11 to 5—Subsequent agreement to hold it on adjourned date without proclamation—No question of adjournment arises within R. 69 (2). (Vol 21) 1934 Nag 250 (251).

[5] Specification necessary only when court adjourns sale—Sale adjourned by officer conducting sale—Omission to mention hour is not material irregularity. (Vol 22) 1935 All 182 (182) (DB).

[6] Non-compliance with the provisions is a material irregularity but not a nullity rendering the sale liable, to be set aside under O. 21, R. 90—Sale proclamation

O. 21, R. 69 (*contd.*)

fixing 10th January for sale but owing to a notice under Bengal Agriculturist Debtor's Act the case was put off for orders on 15th and sale fixed for 17th, but sale held the next day for want of bidder on 17th. Held—the irregularity though material did not make the sale a nullity. (Vol 29) 1942 Cal 275 (276) : ILR (1941) 2 Cal 570 (DB).

[7] Sale held till 1 p.m. and adjourned to "an hour or so" without stating reasons for adjournment—Sale held again from 2-30 p. m. to 4 p.m. Non-specification of exact hour to which sale is adjourned and failure to give reasons for adjournment held not such material irregularities as to take sale out of purview of Code. (Vol 25) 1938 Nag 107 (108) : ILR (1938) Nag 436 (DB).

6a. Omission to specify place of adjourned sale.—Ordinarily when sale is postponed, date and not place is changed—Sale to take place at B postponed to date five days after at X—In absence of publication at B on date of sale the place and date of adjourned sale, sale is nullity—It is not merely irregularity. (Vol 31) 1944 Nag 199 (200) : ILR (1944) Nag 584 (DB).

7. Fresh proclamation when necessary.—[1] Fresh proclamation is necessary when sale is adjourned for a longer period than seven days. (1907) 29 All 196 (202) : 34 Ind App 37 (PC) * (Vol 30) 1943 Oudh 204 (209) : 18 Luck 547 (DB). (By amendment in Oudh, the period in Sub-r. (2) is extended to 14 days) * ('38) 1938 Nag L. Jour 10 (12). (In C Form proceedings, though sale is held by Tahsildar, it is the Collector who accepts the bid and if the bid is accepted within 15 days as per notifications Nos 7114 and 7115 which extend seven day's time fixed by O. 21, R. 69 to 15 days a fresh proclamation is not necessary to make the acceptance legal.)

[2] Where an execution sale is held more than 7 days after the date originally advertised and without a fresh proclamation, it is a mere irregularity and the sale will not be set aside in the absence of substantial injury. (1912) 39 Cal 26 (32) : 38 Ind App 200 (PC) * (Vol 16) 1929 Mad 624 (624) * (Vol 15) 1928 Oudh 98 (99) : 2 Luck 490 (DB) * (Vol 1) 1914 Oudh 164 (165) * (Vol 29) 1942 Pat 238 (240) : 21 Pat 281 (DB) (Breach of R. 69 does not involve any question of jurisdiction) * (Vol 15) 1928 Pat 615 (621) : 8 Pat 122 (DB) * (Vol 5) 1918 Pat 686 (687) (DB) (Sale adjourned *sine die*.)

[3] Sale adjourned each time to less than thirty days but aggregate adjournment for years—Sale without fresh proclamation is vitiated. (Vol 30) 1943 Mad 739 (741) (DB).

[4] Sale stayed till further orders.—Order for sale later on without proclamation is illegal. (Vol 10) 1923 Rang 154 (154).

8. Waiver of proclamation.—[1] A waiver on application for postponement of an execution sale, by the judgment-debtor, of a fresh proclamation does not amount to waiver of objections to the previous one. (1911) 4 Cal L. Jour 346 (351) (DB).

[2] The waiver of a fresh proclamation by the judgment-debtor implies a waiver of objection to any defect appearing on the face of the Sale proclamation but does not imply a waiver of a right to object to any irregularities in the attachment. (Vol 25) 1938 PC 230 (231, 232) : 32 Sind LR 879.

[3] A sale was twice adjourned with the consent of the judgment-debtor without a fresh proclamation. But if a judgment-debtor waives his right it is competent

for a judgment-creditor to object to the sale taking place without a fresh proclamation. He can impeach the regularity of the sale on this ground. (1901) 24 Mad 311 (315) (DB).

[4] Guardian for minor judgment-debtor waiving fresh proclamation for getting sale adjourned—O. 32, R. 7 has no application to the consent for waiver. (Vol 21) 1934 Mad 260 (262) (DB) * (1910) 37 Cal 897 (904) (DB).

9. Stoppage of sale on deposit of debt and costs. [1] A mortgagor judgment-debtor can exercise the right of stopping the sale on payment of the decretal amount with costs after the passing of the order absolute for sale but before the property is actually knocked down to the bidder. (1904) 31 Cal 863 (870) (FB). * (1898) 20 All 354 (356) * (1897) 19 All 205 (208) (DB).

[2] A sale in execution of a third lot of properties after the judgment debtor had paid up the amount due when two prior lots had been knocked down, is not vitiated by irregularity because the words "the debt and costs" in the section could not be interpreted to mean "the balance of debts and costs which would remain if the knocking down could be taken to be the completion of the sale." (Vol 2) 1915 Mad 750 (750) (DB).

[3] Under sub-rule (3) it is the officer conducting the sale who has to be satisfied that the requisite amount has been paid into Court. (Vol 22) 1935 Lah 694 (695) (DB). (Collector's sale—Sale conducted by Revenue Assistant—Notice to Collector's clerk as to payment into court is not sufficient.)

10. Who can tender the amount.—[1] A judgment-debtor or transferee of the property from him is entitled to tender the amount under this rule. (1888) 10 All 1 (4) (DB).

[2] A purchaser in execution of decree on a prior mortgage can tender the amount to avoid sale in execution of a decree on a subsequent mortgage. (1907) 5 Cal L. Jour 45 Note 45.

[3] A payment made to prevent a sale in execution of a decree is not a voluntary payment, whether made by the judgment-debtor or by a third person claiming the property. (1872) 18 Sath W R 503 (503, 504) (DB).

11. Sale on a date other than to which it is adjourned.—[1] Sale held on day to which it had not been adjourned is materially irregular and should be set aside if judgment-debtor suffers substantial injury. (Vol 8) 1921 Cal 597 (598) (DB).

[See (Vol 25) 1938 Cal 699 (700) (Sale not held on date fixed for it—Subsequent sale without adjournment order is not nullity but a mere irregularity.)]

[2] Sale held on day on which it has been proclaimed that it shall not take place is invalid. (Vol 27) 1940 Mad 206 (207) (DB).

[3] If the Nazir accepted bids for being forwarded to the Court, at a date or place or an hour different from that fixed by the court, then if the properties have been taken out of the monthly sales by him, the sale is a nullity. But when the Court orders monthly sales commencing from a certain date, it is for the Court and the Court only to direct otherwise. If the Court has not passed any subsequent orders for taking the sale out of monthly sales and if the Nazir exceeds his powers by postponing the sale to a future date the sale is deemed to be in course of monthly sales and hence valid. (Vol 26) 1939 Cal 369 (371, 372) : ILR (1939) 1 Cal 530 (DB).

70. Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution Saving of certain sales. of a decree has been transferred to the Collector.

[1882-S. 287, last para ; 1877-S. 287, last para. See Ss. 54, 68 to 72 and Third Schedule.]

71. Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

[1882-S. 293 ; 1877-S. 293 ; 1859-S. 254 last para. See Rr. 77, 84 and 86 and Ss. 68 to 71.]

ORDER 21, RULE 70—Note 1.

[1] Decree transferred to Collector—Sale in its execution postponed *sine die* No fresh proclamation—Sale is irregular although Rr. 66 to 69 do not strictly apply. (Vol 16) 1929 Oudh 235 (237) : 4 Luck 635 (DB.)

ORDER 21, RULE 71.

Synopsis.

1. Application of the rule.
2. Failure of execution sale due to auction-purchaser's default—Right of decree-holder and judgment-debtor.
3. Re-sale.
4. Power to order recovery of deficiency.
5. Procedure under the rule.
6. Who may apply under the rule.
7. By reason of purchaser's default.
8. Where defaulting purchaser is merely an agent.
9. Liability for interest on deficiency.
10. Certificate
11. Suit for deficiency in re-sale if maintainable.
12. Insolvency Proceedings.
13. Suit if lies to set aside order under this rule.
14. Appeal.

1. Application of the rule.—[1] The rule extends to all sales, whether of moveable or immovable property. ('81) 7 Cal 387 (339).

2. Failure of execution sale due to auction-purchaser's default—Right of decree-holder and judgment-debtor.—[1] Where the price bid at the second sale is less than that bid at the first sale decree-holder is not bound to proceed against the defaulting purchaser. He may recover from the judgment-debtor the balance of it that may be due and leave him to pursue his remedies against the defaulting auction-purchaser under this rule. (1878) 2 Bom 562 (564).

[See also ('82) 8 Cal 291 (294)]

3. Re-sale.—[1] Re-sale in consequence of default of auction-purchaser to deposit 25 per cent of the purchase money under R. 84—R. 71 applies. (1881) 5 Bom 575 (577) * (Vol 9) 1922 All 200 (201, 202) : 44 All 266 (FB). (Failure of purchaser to make deposit of 25 per cent—Property re-sold next morning—Sale must be deemed to have been held 'forthwith'. (1889) 12 Mad 454 (458) (DB) * (Vol 20) 1933 Nag 123 (125) : 29 Nag L.R. 52.

[2] The rule applies to resale in consequence of default of auction-purchaser in payment of poundage fee (1909) 9 Cal L. Jour 115 (115, 116) (DB).

[3] For the application of the rule resale on auction-purchaser's default must be of the same property. (Vol 27) 1940 Mad 566 (568) (DB). (First sale of property subject to mortgage—Resale of same property subject to decree on the mortgage—Held, property was same and what was sold was right, title and interest of judgment-debtor in it.)

[4] The rule that resale must be of same property as that put up for sale at the first sale does not apply where property has changed during interval owing to natural causes or the change in the wording of the sale proclamation has been due to purchaser's own default and conduct. (Vol 6) 1919 Mad 10'4 (1021, 1022, 1023) : 41 Mad 474.

[5] For the application of the rule the resale must be under the same decree. Where on default of purchaser a resale was ordered and in the meantime the property was sold at the instance of another judgment-creditor, for a lower price, then there is no real resale and the first purchaser is not liable for the difference. (1871) 16 Suth WR 14 (15).

[6] Rule must be enforced unless defaulting purchaser would be substantially prejudiced. (Vol 12) 1925 Mad 631 (633).

[7] Defect in sale proclamation is ground of objection to liability under O. 21, R. 71. (Vol 18) 1931 Bom 367 (369).

[8] Resale contemplated by the rule in resale held according to law. Hence unless a resale on failure of purchaser to pay deposit under R. 84 is held 'forthwith' within the meaning of that rule the auction-purchaser will not be liable for the deficiency on resale. (Vol 3) 1916 Lah 445 (446) * (Vol 24) 1937 Lah 924 (925) * (Vol 16) 1929 Lah 744 (745) * (Vol 12) 1925 Oudh 397 (398) : 28 Oudh Cas 327.

[But see (Vol 24) 1937 All 556 (558). (Resale after fresh proclamation—Purchaser is not relieved of his liability under R. 71). * (Vol 31) 1944 Pesh 27 (28) (Purchaser's default in depositing 25 percent—Bailiff instead of holding fresh sale forthwith-reporting matter to Court—Fresh sale ordered by Court—R. 71 applies.)]

[9] Deficiency in price on resale by purchaser's default cannot be claimed unless his bid was finally accepted by the Court. (Vol 16) 1929 Lah 673 (676).

[10] Where any item of property is to be resold on account of purchaser's default, the decree-holder is not debarred from proceeding against other property of judgment-debtor than the one originally sold. (1874) 21 Suth WR 149 (150).

[11] Even if at a resale held on the purchaser's default no bidders are forthcoming there is a resale within the meaning of the rule and the purchaser at the first sale can be proceeded against for the price bid by him at that sale. (Vol 18) 1926 Mad 739 (740).

O. 21, R. 71 (*contd.*)

4. Power to order recovery of deficiency.—[1] Court and not the officer holding sale has power to order recovery of deficiency. (Vol 18) 1931 Bom 367 (368).

[2] Even where property is sold by the Collector in execution of a decree transferred to him the Civil Court and not the Collector has jurisdiction to order recovery of deficiency under this rule. (Vol 18) 1931 Bom 367 (368).

5. Procedure under the rule.—[1] Though O. 21, R. 71, does not expressly provide for the issue of notice to the defaulting purchaser, it is the duty of the Court to give him notice and to hear and decide on his objection before it orders execution to issue against him. (Vol 6) 1919 Mad 1014 (1022, 1023): 41 Mad 474.

6. Who may apply under the rule.—[1] Decree-holder can apply to recover deficit even if judgment-debtor, and not he, is damned by default. (Vol 26) 1939 Nag 269 (273): ILR (1941) Nag 485 (DB).

[2] The term decree-holder in the rule means the decree-holder who brings the property to sale. Other decree-holders are not included in the term, although they may be entitled to rateable distribution under S. 78. (Vol 13) 1926 Mad 872 (874): 49 Mad 570 (DB) * (Vol 23) 1936 Oudh 277 (278, 279): 12 Luck 720 (DB).

[3] Assignee of decree-holder who brought the property to sale can apply to recover deficiency on resale. (Vol 32) 1945 Mad 349 (349, 350).

[4] The decree-holder is entitled to enforce the defaulting purchaser's liability for the whole amount of the deficiency and is not bound to confine his application to the decretal amount that may remain outstanding. (Vol 13) 1926 Mad 872 (873): 49 Mad 570 (DB).

[5] Under O. 21, R. 71, the order against an auction-purchaser can be made at the instance of either the decree-holder or judgment-debtor and when once such an order has been made, the latter can recover the difference in the price from the auction-purchaser. The rule does not require that the order should in so many terms state that it is passed against the auction-purchaser and in favour of the judgment-debtor. (Vol 18) 1931 All 667 (668) (DB).

7. By reason of purchaser's default.—[1] Fraudulent suppression of encumbrances by decree-holder at both sales—Defaulting purchaser misled—Defaulting purchaser cannot be made answerable for deficiency under R. 71. (Vol 16) 1929 Oudh 294 (295): 4 Luck 684 (DB).

[2] Fact that acceptance of final bid rests with Court does not entitle bidder to resale from his bid. (Vol 2) 1915 Cal 815 (816).

8. Where defaulting purchaser is merely an agent.—[1] A person who bids at a sale merely as an agent of another person is not liable under this rule. (1873) 20 Suth WR 80 (82) * (Vol 26) 1939 Nag 269 (273): ILR (1941) Nag 485. (Bid made on behalf of temple by its managing trustee—Default in payment of deposit—Trustee is not personally liable for deficit.)

[2] Court is one party to the auction sale—Hence in absence of acceptance by Court of auction-purchaser's agent as, the person making the bid as the

alleged agent, is personally liable for deficit on re-sale. (Vol 11) 1924 Mad 476 (477) (DB).

[3] Where a person professes to bid as agent of another without the latter's authority, the alleged agent is liable for damages. (173) 20 Suth WR 397 (398) (SB).

9. Liability for interest on deficiency.—[1] The defaulting purchaser is not liable to pay interest on the deficiency in price. (1868) 9 Suth WR 500 (501) * (Vol 11) 1924 Mad 476 (478) (DB). (Interest on deficiency is payable only from date of order under this rule, and not from the date of sale to the date of the order.) * (Vol 6) 1919 Pat 102 (107) (DB).

10. Certificate.—[1] Decree-holder or the judgment-debtor is not barred from recovering the difference in the amount of sale and resale from the defaulting purchaser on the ground that certificate under this rule was not issued. (1897) 19 All 22 (25) (SB). * (Vol 20) 1933 Nag 123 (125): 29 Nag LR 52. (Certificate issued not in proper form) * (Vol 31) 1944 Pesh 27 (28) (Absence of certificate or certificate issued not being in proper form would not prevent recovery of deficiency.)

[2] Deficiency in purchase price to be recovered from defaulting purchaser—Certificate certifying the same is attachable under R. 53 as money decree. (Vol 13) 1926 All 379 (382) (DB)

11. Suit for deficiency on re-sale if maintainable.—[1] The rule provides only a summary remedy for enforcing the right to claim deficiency and does not bar the general remedy by way suit. (Vol 6) 1919 Pat 102 (106) (DB).

12. Insolvency proceedings.—[1] Attachment and sale by Insolvency Court—O. 21, R. 71 applies—Defaulting purchaser can be ordered to pay deficiency on re-sale. (Vol 8) 1921 Nag 25 (26): 17 Nag LR 49.

[2] The rule does not apply to sales by Receiver under the Provincial Insolvency Act. (Vol 4) 1917 All 74 (75): 39 All 267.

13. Suit if lies to set aside order under this rule.—[1] Order for payment of deficiency under this rule—No separate suit lies to set aside the order—Remedy of aggrieved party is by way of appeal. (Vol 12) 1925 Oudh 360 (361): 29 Oudh Cas 18 (DB). * (Vol 9) 1922 All 200 (203): 44 All 266 (FB) (19 All 22 should be deemed overruled by this rule) * (Vol 14) 1927 Nag 112 (112): 23 Nag LR 14 (Dissenting from 7 Nag LR 134).

14. Appeal.—[1] Appeal lies against an order deciding an application by a decree-holder or judgment-debtor under this rule against a defaulting auction-purchaser to recover deficiency in price. (Vol 9) 1922 All 200 (202): 44 All 266 (FB) * (1898) 25 Cal 99 (101) * (1865) 3 Suth WR 3 (3) * (Vol 15) 1928 Lah 249 (249) * (1895) 18 Mad 439 (443) (DB) * (1889) 12 Mad 454 (457) * (Vol 31) 1944 Nag 199 (200): ILR (1944) Nag (584). (Where the matter is one between two rival decree-holders and the judgment-debtor does not enter into the picture at all, the decree-holders themselves being the purchasers concerning the subject matter, one in the earlier sale and the other in the latter, no appeal lies.) * (Vol 14) 1927 Nag 112 (112): 23 Nag LR 14.

[2] Application to recover deficiency of price from defaulting purchaser—Amount claimed less than Rs. 500 No second appeal lies. (Vol 8) 1921 Bom 229 (230).

Decree-holder not to bid for or buy property without permission.

72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of S. 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person, whose interests are affected by the sale, by order set aside the sale, and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

[1882-S. 294 ; 1877-S. 294. Cf. O. 21, R. 84.]

PROVINCIAL AMENDMENTS

Allahabad

In sub-rule (2) for the words "with such permission", read the words "the property sold," and re-number this sub-rule "72" and delete sub-rules (1) and (3).

N.-W.F.P.

(1) For sub-rule (1) substitute the following :

"72. (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment-debtor and for sufficient cause debar him from so bidding or purchasing."

(2) In sub-rule (2) for the words "with such permission", substitute the words "the property."

(3) Cancel sub-rule (3).

ORDER 21, RULE 72.

Synopsis.

1. Permission to bid.
2. Where a decree-holder purchases with such permission.
3. Setting off decretal amount against purchase money and rateable distribution.
4. Amount due on decree.
5. Purchase without permission.
6. The Court may, if it thinks fit, set aside the sale.
7. Appeal.

1. Permission to bid.—[1] Judge in winding up has no jurisdiction to allow liquidator to bid in execution—He should seek permission of the execution Court. (Vol 14) 1927 All 681 (681, 682) : 50 All 173.

[2] Rule does not debar holders of other decrees from bidding. (Vol 11) 1924 Rang 81 (92) (DB.)

[3] Where a decree-holder has associated with himself a stranger, he could not claim the sale to be valid when his interest and the interest of the decree-holder cannot be separated. (1913) 16 Oudh Cas 86 (89, 90) (DB.)

[4] Leave to bid should be cautiously given after the court was satisfied that no purchaser at an adequate price can be found and that the sale proclamation has been duly published. (1889) 16 Cal 132 (DB.)

[5] Executing Court has power to impose any condition to the permission to bid at a court sale. (1935) 39 Cal WN 1293 (1295) (DB).

[6] An order imposing on the decree-holder a condition that his lowest bid should be the amount of the decree is not ultra vires or illegal. (1913) 16 Oudh Cas 86 (89, 90).

[7] Where a permission to bid was granted on condition that the decree-holder should not bid below upset price and the decree-holder actually made bid below

upset price, it was held that the sale should be set aside as the decree-holder contravened O. 21, R. 72 (1). ('38) 1938 Nag L. Jour 180 (181).

[8] Where the decree-holder is joint in family with the manager of one of the judgment-debtors who is a minor, it was held that permission to bid should not be granted, as the purchase by decree-holder would amount to one by agent of property of his principal. (1881) 7 Cal 346 (347, 348) (DB).

[9] Decree-holder allowed to bid up to decretal amount need not offer decretal amount plus costs of sale. (Vol 20) 1933 Rang 151 (152) (DB).

[10] Condition imposed should not be too stringent. (Vol 11) 1924 Bom 515 (516) (DB).

[11] Price in proclamation is not an exact estimate—Court cannot compel decree-holder to bid up to or higher than proclaimed price. (Vol 13) 1926 Pat 140 (141) (DB).

[12] Bombay Local Government Rules, Rr. 11 and 15—Transfer of execution to Collector—Judgment-debtor minor—Permission to bid still can be granted by civil court. (Vol 23) 1936 Bom 189 (191) : 60 Bom 688 (DB).

[13] Collector executing decree can grant permission to bid, but cannot allow decretal amount being set off—That power is reserved to court (Vol 7) 1920 Bom 361 (362) : 44 Bom 346 (DB).

[14] Decree transferred to Collector—Civil Court has no power to entertain application by decree-holder for leave to bid at auction. (Vol 5) 1918 Bom 216 (217) : 42 Bom 621 (DB).

[15] Leave granted under rule 72 of O. 21, is binding on a superior court acting under S 63, CPC. (Vol 18) 1931 Bom 350 (354) : 55 Bom 473 (DB).

[16] Decree-holder applying to bid—No express permission granted, but he was allowed to bid—He should be assumed to have been permitted. (Vol 14) 1927 Pat 312 (312) : 6 Pat 432 (DB).

[17] Receiver is in a fiduciary position and has

Oudh

(1) For sub-rule (1), *substitute* the following :

"72. (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for or purchase the property, provided that the judgment-debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property : and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just."

(2) In sub-rule (2) for the words "with such permission" *read* the words "the property sold."

(3) *Delete* sub-rule (3).

Patna

(1) *Substitute* the following for sub-rule (1) :

"(1) No holder of a decree in execution of which property is sold shall be precluded from bidding for or purchasing the property unless an express order to that effect is made by the Court."

(2) In sub-rule (2), for the words "with such permission", *substitute* the words "the property."

(3) *Substitute* the following for sub-rule (3) :

"(3) Where notwithstanding an order made under sub-rule (1) a decree-holder purchases the property by himself or through another person, the Court shall, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale ; and the cost of such application and order and any deficiency of price which may happen on the re-sale and all expenses attending it shall be in the discretion of the Court."

Bombay

After Rule 72 the following shall be *inserted*, namely :

"R. 72A. If leave to bid is granted to the mortgagee of immoveable property, a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid."

[19-1-1917 and 16-1-1929.]

O. 21, R. 72 (*contd.*)

special opportunities of knowledge and if he is allowed to figure as a purchaser at an auction, his interest as buyer conflicts with his duties as receiver. Hence purchase by him should not be permitted. (Vol 22) 1935 Mad 421 (422) (DB) * (Vol 19) 1932 Cal 672 (673) : 59 Cal 956 (DB).

[18] Decree-holder not bidding up to price mentioned in sale proclamation—Court cannot dismiss execution. (Vol 21) 1934 Pat 345 (346) (DB).

[19] O. 21, R. 72 as applicable in N W F. Province allows decree-holder to bid at an auction unless he is specially debarred by order of court. (1936) 165 Ind Cas 554 (554) (Pesh).

[20] In United Provinces permission is not necessary. (Vol 14) 1927 All 681 (682) : 50 All 73.

2. Where a decree-holder purchases with such permission.—[1] Decree-holder bidding with permission of Court at auction sale is in the same position as ordinary purchaser. (Vol 20) 1933 oudh 124 (126) : 8 Luck 223 (DB).

[2] Where appellants, in their application for leave to bid at an execution sale, alleged certain facts which were not true, the appellants were held not entitled to confirmation of sale till they had made good their representations. Where a court grants permission to bid at an execution sale upon an inaccurate statement that certain conditions are fulfilled, the permission is conditional and the Court has power to refuse to confirm the sale apart altogether from R. 72 and from the provisions contained in R. 92 of O. 21, either under R. 86 or under its inherent powers, until the conditions are in fact fulfilled. (Vol 9) 1922 Pat 511 (514) : 1 Pat 235.

[3] Where a decree-holder deliberately misstated the value of property in sale proclamation and made higher bids through a benamidar, it was held that his

conduct was fraudulent and the sale should be set aside. (1911) 13 Cal L. Jour 312 (314) (DB).

3. Setting off decretal amount against purchase-money and rateable distribution.—[1] Decree-holder's right of set-off of decretal amount against purchase money does not alter substantial nature of transaction and the nominal receipt of sale proceeds in such a case must be held to amount to holding of assets by court where the rights of rival decree-holders to share in such proceeds are concerned. (1888) 11 Mad 356 (358) (DB).

[2] Right of decree-holder auction purchaser to claim set off of purchase money is subject to right of rateable distribution under S. 73. (Vol 20) 1933 All 666 (668) (DB). * (Vol 22) 1935 Bom 176 (178) : 59 Bom 310 (DB). (Decree-holder purchaser allowed to set-off decree amount against purchase money—Application for execution of decree against same judgment-debtor by other decree-holders pending in inferior Court before sale—Application by these to former Court for rateable distribution held proper.) * (Vol 7) 1920 Mad 731 (731).

[3] In case of a purchase by decree-holder in execution of his decree, claims for rateable distribution must be made before the conclusion of sale, since the assets would be deemed to have been realised by Court on the date of sale. (Vol 22) 1935 Mad 893 (894, 895) : 59 Mad 342. * (Vol 18) 1931 Bom 252 (254) (DB.). * (Vol 24) 1937 Cal 55 (56) (DB). * (Vol 20) 1933 Mad 804 (805) : 57 Mad 38 (DB). * (Vol 13) 1931 Mad 103 (105) (Where the amount of bid is equivalent to or less than the decretal amount, are assets deemed to be realised on date of sale though set-off ordered before sale.)

* [See also (Vol 17) 1930 Cal 761 (762) * (Vol 22) 1935 Lah 690 (691).] When a decree-holder has been given permission to bid and set-off and when the amount of the successful bid is less than the decretal amount, the whole of the set-off must be as made no

O. 21, R. 72 (*contd.*)

the date of sale, and the whole of the amount must be deemed to have been received or realised *coinstanti* the sale is made.]

4. Amount due on decree.—[1] When a decree-holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, the decree-holder must pay poundage as part of the costs of the execution of the decree. (Vol 16) 1929 All 266 (266) (DB).

5. Purchase without permission.—[1] Purchase by decree-holder without permission is only voidable and not void (Vol 9) 1922 PC. 336 (338): 49 Ind App 312: 1 Pat 733 (PC.) * (Vol 3) 1916 Bom 61 (63): 41 Bom 357 (DB) (It is mere irregularity) * (1907) 31 Bom 61 (64) (DB) * (Vol 10) 1923 Cal 302 (302) (DB). * (1909) 1 Ind Cas 645 (646) (DB) (Cal.) * ('41) (1941) 2 Mad L. Jour 943 (946). (Where a decree-holder purchases a property through benamidar, suit by him against the benamidar for recovery of possession lies.) * (Vol 14) 1927 Mad 1135 (1136). * (1909) 32 Mad 242 (249) (DB) * (1908) 13 Mad L. Jour 231 (235) (DB). * (1891) 14 Mad 498 (501) (DB).

[2] Where a decree-holder makes a benami purchase in contravention of O. 21, R. 72, Civil PC., the sale is only voidable, i.e., the sale is valid until set aside by an application made by the judgment-debtor. ('41) (1941) 2 MLJ 943 (945, 946) * (Vol 7) 1920 Bom 90 (91, 92): 44 Bom 352 (DB).

[3] Purchase by an undivided son in execution of a decree by father, is presumed to be a purchase made by decree-holder in the absence of evidence to show that purchase was made by son with his separate funds. (1880—81) 5 Bom 130 (131, 132) (DB).

[4] Under O. 21, R. 72, where the purchase price is either equal to or less than the decree amount, the right of the decree-holder who has been granted permission to set-off the purchase money against the decree amount is controlled only to this extent, namely that he is bound to bring into Court such sums alone as are due to these decree-holders whose applications for execution were pending on the date of the sale. (Vol 22) 1935 Mad 893 (895): 59 Mad 342 * (Vol 16) 1929 Oudh 235 (237): 4 Luck 635 (DB).

[5] Where a decree-holder in execution of his decree purchases property of judgment-debtor without leave of court, judgment-debtor's remedy is not by way of separate suit but by an application under O. 21, R. 72. (1898) 22 Bom 271 (277) (DB) * (Vol 24) 1937 Pat 50 (53) (DB).

[6] Where the decree-holder purchaser who is liable to share rateably with rival decree-holders in the sale proceeds fails to furnish the proportionate amount to the Court for distribution, a refund may be enforced by a summary process in execution instead of in a separate suit. (Vol 18) 1931 Pat 359 (361): 10 Pat 830 (DB) * (Vol 24) 1937 Nag 383 (384): ILR (1937) Nag 466 * (Vol 18) 1931 Pat 405 (407, 408): 11 Pat 250 (DB).

[7] Decree-holder permitted to bid and set-off decree amount against purchase money.—Decree-holder purchasing property.—Meanwhile, judgment-debtor adjudicated insolvent and after sale official receiver applying that decree-holder should be ordered to pay to him purchase-money.—Held that this could not be done. (Vol 22) 1935 Mad 907 (908).

[8] Decree awarding interest until date of realisation.—Decree-holder's purchase and set-off under O. 21, R. 72.—Date of realisation is date of sale and not date on which money is realised by decree-holder repetition ('39) (1939) 1 Mad L. Jour 466 (467) (DB).

[9] When property is sold in execution of decree, debt due under decree cannot be said to have been realised until sale is confirmed. Whether the purchaser is decree-holder or third party, the right of set-off conferred on decree-holder under O. 21, R. 72 (2) must also be dependent on sale being rendered absolute by confirmation. Debt due to decreeholder subsists as long as sale is not confirmed. Debt Conciliation Board can stay under S. 25, Debt Conciliation Act, proceedings for confirmation of sale. (Vol 31) 1944 Lah 325 (328) (DB). (Vol 30) 1943 Lah 97 overruled.

6. The Court may, if it thinks fit, set aside the sale.—[1] It is in the discretion of Court to set aside sale in which decree-holder has purchased without obtaining the necessary permission. (Vol 33) 1946 Mad 337 (339) (DB) * (1885) 11 Cal 731 (732, 733) (DB). (Unless the judgment-debtor is shown to have suffered substantial injury from such irregularity, such sale will not be set aside.)

[2] Where a decree-holder purchased property in spite of refusal of permission by court, it was held that he was guilty of abuse of process of court and that the sale could not be enforced. (1884) 10 Cal 757 (760) (DB).

[3] When a sale is set aside under R. 72 on account of the decree-holder's failure to obtain permission to bid, it is not necessary to find also that the judgment-debtor sustained substantial loss by the sale. (Vol 8) 1921 Mad 402 (402).

[4] Persons entitled under S. 73 to rateable distribution in the assets realised by sale and as such interested in the sale, may be entitled to apply for setting aside sale under O. 21, R. 72. (1903) 13 Mad L. Jour 231 (234) (DB).

[5] Where the decree holder purchaser sold the property to another for value, restitution is impracticable and such sale cannot be set aside on an application under O. 21, R. 72. (1903) 13 Mad L. Jour 231 (235) (DB).

7. Appeal.—[1] No second appeal lies from an order setting aside or refusing to set aside sale under R. 72 of O. 21. (1894) 21 Cal 789 (791) (DB) * (Vol 2) 1915 All 54 (55) (DB).

[2] An order giving or refusing leave to bid at an execution sale is only a ministerial order and not appealable. (Vol 16) 1929 Mad 908 (905). * (1911) 38 Cal 717 (720): 38 Ind App 126 (PC).

ORDER 21, RULE 72 A (Bombay) Note 1.

[1] Held that execution sale to mortgagee decree-holder without fixing a reserve price and for smaller amount than due under mortgage decree was vitiated by material irregularity vitiating sale. (Vol 17) 1930 Bom 290 (291): 54 Bom 348 (DB). (Note: The rule has since been amended making condition of reserve price discretionary.)

[2] Mortgagee decree-holder with permission to bid in general terms, purchasing property for amount less than principal, interest and costs, can recover balance from the mortgagor personally or from his estate. (Vol 15) 1928 Bom 123 (128): 52 Bom 459 (DB).

73. No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire or purchase by officers. any interest in the property sold.

[1882-S. 292 ; 1877, S. 292]

SALE OF MOVEABLE PROPERTY

74. (1) Where the property to be sold is agricultural produce, the sale shall be held,—

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
- (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and
- (b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

[See Rule 75 and Section 61.]

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

[See Rule 74 and Section 61]

PROVINCIAL AMENDMENTS

Calcutta

In sub-rule (2) *after* the words "where the crop from its nature does not admit of being stored," *insert* "or can be sold to greater advantage in an unripe state (*e. g.*, as green wheat)."

In sub-rule (2), *cancel* the word "and" between the words "tending" and "cutting" and *substitute* the word "or."

Lahore

In sub-rule (2), *after* the word "stored", *insert* "or can be sold to great advantage in an unripe state."
[12-5-1909 and 28-4-1938.]

Madras

In sub-rule (1), *after* the words "yet been stored" and *before* the words "the day of the sale," *add* the words "unless the Court decides to proceed under the provisions of sub-rule (2) hereunder."

In sub-rule (2), *after* the words "being stored" and *before* the words "it may be sold", *insert* the words "or can be sold to greater advantage in an unripe state," and *after* the words "and gathered" and *before* the words "and the purchaser," *insert* the words "or in such unripe state."
[13-10-1936.]

Nagpur

In sub-rule (2) *after* the words "being stored", *insert* the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state."
[29-6-1945.]

ORDER 21, RULE 73.—Note 1.

[1] Rule 73 is intended to prohibit all those who have anything to do with the machinery of the sale or having any interest in the result of the sale. (Vol 14) 1927 All 76 (77) : 49 All 292.

[2] Legal practitioner is not within purview of Rule (Vol 33) 1946 Mad 245 (246, 247) (FB) * (1887) 10 Mad 111 (112) (DB) (Vakil) * (Vol 16) 1929 Oudh 235 (237) : 4 Luck 635 (DB).

*[But see (Vol 16) 1929 Nag 805 (311)]

N.-W. F. P.

In sub-rule (2), *after* the words "being stored", *add* the words "or can be sold to greater advantage in an unripe state."

Oudh

In sub-rule (2), *after* the words "being stored", *insert* the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state."

Patna

Substitute the following for Rule 75 :

"Where the property to be sold is a growing crop which can be sold to greater advantage in an unripe or unripe state, it may be sold unripe, and the purchaser shall be entitled to enter on the land to do all that is necessary for the purpose of tending and reaping it. In all other cases the day of sale shall be so fixed as to admit of the crop ripening and being reaped before the sale." [7-1-1936.]

76. Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

[1882-S. 296 ; 1877-S. 253 ; 1859-S. 248. See Rule 80.]

77. (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively, bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

[1882-S. 297 ; 1877-S. 297 ; 1859-S. 251. See Rules 71 and 88.]

Objects and Reasons.

"In Rules 76 and 83 [now Rules 77 and 84] express reference has been made to a re-sale so as to make it clear that the default mentioned in those rules will attract the consequence indicated in Rule 70 [now Rule 71]. In this connection reference may be made to I. L. R. 7 Cal. 337."—S. O. R.

78. No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale: but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

[1882 S. 298 ; 1877 S. 298 ; 1859-S. 252. See R. 77. Cf. R. 50.]

ORDER 21, RULE 76—Note 1.

[1] The sale by a Court of negotiable instrument through a broker is permissive and not obligatory. (1867) 8 Suth WR 415 (419, 420) (DB).

ORDER 21, RULE 77—Note 1.

[1] The rule gives the officer conducting the sale a discretion to allow the purchase money to be paid at a reasonable time after the sale. (1872) 4 NW PHC R. 37 (39) (DB).

[2] Sale of the moveable property is complete when officer conducting sale declares who is purchaser and receives purchase money and grants receipt. (Vol 26) 1939 Nag 269 (270, 271) : ILR(1941) Nag 465 (DB).

ORDER 21, RULE 78—Note 1.

[1] Sale of moveable property becomes absolute automatically. (Vol 17) 1930 Lah 236 (236).

[2] There is no provision in the Code under which an auction sale of moveable property which has been duly confirmed by the execution Court can be set aside upon the application of the decree-holder or of the judgment-debtor. (Vol 6) 1919 Lah 176 (176) : 1919 Pun Re No. 12 & (Vol 14) 1927 All 41 (43).

[3] If there is an express assertion in the proclamation of sale that the goods sold are the property of the judgment-debtor, then the purchaser, if he has not got that for which he paid the price, is entitled to have the sale set aside and to recover the purchase money from the hands of the Sheriff or the execution creditor. (1878) 2 Bom 258 (266). (Though there is no provision corresponding to R. 93, purchase money in case of moveable property also can be recovered under general principles of law.)

[4] In a sale of moveable property, all that is sold is the right, title and interest of the judgment-debtor; and the real owner can recover the property or its value from the auction-purchaser. (Vol 13) 1926 Rang 214 (215) : 4 Rang 202.

[5] Person injured by irregularity in sale may sue for compensation. (Vol 21) 1934 Oudh 94 (95). (Sale officer dishonestly sending away decree holder to prevent raising bid—Decree holder may sue for damages. & (Vol 7) 1920 Nag 84 (85). (Goods described as of particular denomination—Goods not answering description—Purchaser can reject them. Suit for recovery of price paid can be maintained.)

[6] Money-decree is not moveable property. (Vol 11) 1924 Rang 21 (21) : 1 Rang 360 (DB).

Delivery of moveable property, debts and shares.

79. (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

[1882-Ss. 299, 300, 301 ; 1877-S. 299 ; 1859-Ss. 261, 266. See Rr. 43, 51 and 80. Cf. Rules 95 and 56.]

80. (1) Where the execution of a document or the endorsement of the party in whose name Transfer of negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely :—

A. B. by C. D., Judge of the Court of (*or as the case may be*), in a suit by E. F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

[1882-S. 302 ; 1877-S. 302 ; 1859-S. 267. See Rr. 34 and 51.]

81. In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct ; and such property shall vest accordingly.

Vesting order in case of other property.

[1882-S. 303 ; 1877-S. 303. See Rr. 74 to 77, 79 and 80. Cf. Rr. 92 and 94.]

SALE OF IMMOVEABLE PROPERTY

82. Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

[1882-S. 304 ; 1877-S. 304. See Ss. 7 (a) (iii), 8, 39 (1) (c), 65 and O. 50 R. 1 (a) (ii), and O. 51 R. 1.]

ORDER 21, RULE 79—Note 1.

[1] A usufructuary mortgage is a debt within the meaning of O. 21, r. 46—When such a debt is sold, delivery of it is made in the manner prescribed by O 21 r. 79, by the issue of written order prohibiting the creditor from receiving the debt and the debtor from making the payment thereof. (Vol 29) 1942 Pesh 66 (68).

[See also (Vol 4) 1917 Low Bur 134 (135).]

[2] Order issued to company under sub-r. (3)—Company cannot thereafter transfer the shares to any person—Auction-purchaser is entitled to priority over transferee from share-holder under an invalid transfer. (Vol 10) 1923 Mad 241 (244, 245) : 45 Mad 537 (DB.)

[3] It cannot be inferred from O. 21, R. 79 that the directors of a Company are compellable to accept the purchaser of shares at a Court sale, as the transferee. (Vol 3) 1916 Bom 147 (150) : 41 Bom 76 (DB.) (For the powers of the Directors of a Company to refuse to consent to the transfer of shares, see S. 34 Companies' Act (VII of 1913).

ORDER 21, RULE 80—Note 1.

[1] Purchaser of a promissory note in Court auction who has obtained a vesting order before date of his decree, can get a decree in a suit on the promissory note though there was no endorsement. (1911) 21 Mad L. Jour 422 (424) * (Vol 15) 1928 Mad 571 (578) (DB) (Rule is merely permissive and not mandatory).
[2] R. 80 of O. 21 empowers a Court to cancel a previous endorsement to enable an auction purchaser of a pro-note at a Court sale to realise his amount paid. (1911) 12 Ind Cas 913 (913) (Rang).

ORDER 21, RULE 81—Note 1.

[1] Mortgagee of moveables cannot follow property into the hands of auction-purchaser. (Vol 12) 1925 Rang 303 (303).

ORDER 21, RULE 82—Note 1.

[1] A munsif acting in his small cause jurisdiction cannot attach and bring to sale immovable property. (1884) 7 Mad 592 (595) (DB).

[2] Purchaser of immovable property in execution of a small cause decree acquires no title. (1872) 17 Suth WR 309 (311) (FB.)

83. (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

[1882-S. 305; 1877-S. 305; 1859-S. 243.]

ORDER 21, RULE 83.

Synopsis

1. Postponement of Sale.
2. "For such period as it think proper".
3. "Shall be paid . . . into Court."
4. Effect of private sale.
5. Confirmation of sale by Court.
6. Permission under S. 29 of the Guardian and Wards Act.
7. Rateable distribution.
8. Mortgage decrees—Sub-rule (3).
9. Appeal and Revision.

1. Postponement of sale.—[1] Judgment-debtor already having had sufficient time—Certificate for private sale need not be granted to him. (Vol 8) 1921 Lah 384 (385).

[2] Permission cannot be granted after sale is effected by judgment-debtor. (Vol 83) 1946 Lah 134 (135, 136) (FB.) * (10) 1910 Pun LR No. 143 Page 391 (392) : 1910 Pun Re No. 72 * (Vol 28) 1941 Mad 208 (211) (DB.) (Order that can be passed is for postponement of sale and not for postponement of confirmation.)

[3] Mortgage or lease under R. 83 can be executed by judgment-debtor alone and not by Court. (Vol 28) 1941 Mad 208 (211, 212) (DB).

2. "For such period as it thinks proper".—[1] Period of 20 years for postponement of sale was held to be too long—Six months was reasonable. (1871) 15 Suth WK 322 (323) (DB).

3. "Shall be paid . . . into Court."—[1] Payment to the judgment-creditor's pleader under the order of the Court is a payment into Court, the pleader being made the agent of the Court to receive the money. (1913) 21 Ind Cas 210 (210, 211) (DB) : (Cal.)

[2] Part of purchase-money paid to decree-holder as per order of Court and balance paid to judgment-debtor—Purchaser cannot be ordered to pay over again, the amount paid to the decree-holder but may be required to pay the amount paid to the judgment-debtor. (Vol 22) 1935 Lah 481 (481) (DB).

4. Effect of private sale.—[1] Court cannot empower a judgment-debtor to transfer any higher interest than he has and bind the interests of others in property. (Vol 7) 1920 Mad 231 (232) (DB).

[2] Prior incumbrancer is not affected by private alienation under O. 21, R. 83 (Vol 11) 1924 Lah 132 (135) (DB) * (1912) 9 All L. Jour 759 (762) (DB).

[3] Sale under R. 83 is private and not by or under order of Court—Mere grant of certificate cannot make it on behalf of Court—Nor can mere resemblance of language of R. 83 (2), proviso 2 to that of O. 21, R. 92, Civil PG, make sale under R. 83 one under orders of Court. (Vol 38) 1941 Mad 208 (212, 213, 214) (DB.)

[4] Mortgage and subsequent sale of same property by judgment-debtor under R. 83—Purchaser undertaking to discharge mortgage—Judgment-debtor satisfying decree by deposit of sale proceeds in Court—Mortgagee has prior title against purchaser. (Vol 28) 1941 Mad 203 (217) (DB).

5. Confirmation of sale by Court.—[1] Qualified permission granted—Cancellation of such permission does not affect any legal right of prospective purchaser as no legal rights were conferred. (Vol 21) 1934 Pesh 76 (76).

[2] Though a sale ordered by an inferior Court before the attachment of such property by a Court of higher grade is not null and void in consequence of such attachment, it does not follow that the latter Court has not also power to sell the property or confirm the sale under O. 21 R. 83. The Court of higher grade has concurrent jurisdiction to confirm the sale. (1895) 19 Bom 539 (544) (DB)

6. Permission under S. 29 of the Guardians and Wards Act.—[1] Where the judgment-debtor is minor for whom a guardian has been appointed under the Guardians and Wards Act, 1890, the certificate of the executing Court is not sufficient to validate a transfer under this rule ; it is necessary that the guardian should obtain the sanction of the Court that appointed him as guardian. (1899) 23 Bom 287 (290) (DB) * (Vol 9) 1922 Cal 150 (151) 49 Cal 911 (DB).

7. Rateable distribution.—[1] Money paid into Court by virtue of permission should be rateably distributed among all attaching decree-holders. (Vol 6) 1919 Mad 647 (648) : 41 Mad 616 (DB)

84. (1) On every sale of immovable property the person declared to be the purchaser shall deposit by purchaser pay immediately after such declaration a deposit of twenty-five per cent' and re-sale on default. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

[1882-S. 306; 1877 S. 306; 1859-S. 253 *Cf.* Rule 77. See Rr. 71, 85 and 86.]

Objects and Reasons. See Under Rule 77.

PROVINCIAL AMENDMENT

Oudh

(1) To sub-rule (2) *add* the following :

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets."

O. 21, R. 83 (*contd.*)

8. Mortgage decrees—Sub-rule (3).—[1] Rule 83 does not apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage on such property. (Vol 8) 1921 Lah 384 (385) * (Vol 11) 1924 Mad 234 (235) (DB) * (1896) 6 Mad L. Jour 187. (188).

9. Appeal and Revision.—[1] No appeal lies against an order passed under this rule. (1928) 109 Ind Cas 524 (525) (Lah) * (Vol 24) 1937 Pesh 64 (64).

ORDER 21, RULE 84.

Synopsis.

1. "Declared to be the purchaser."
2. Acceptance by Court, if necessary for completion of sale.
3. Deposit, Payment of.
4. Non-payment of deposit—Effect of.
5. Re-sale.
6. Sub-rule (2).
7. Interest.
8. Appeal.

1. "Declared to be the purchaser."—[1] Officer conducting sale can declare highest bidder to be purchaser. (Vol 26) 1939 Nag 269 (271) : ILR (1941) Nag 485 (DB).

[2] Stranger cannot become purchaser by deposit or even by consent of real bidder. (Vol 5) 1918 Oudh 439 (440) : 21 Oudh Cas 212.

[3] So long as the bid is not accepted by competent authority, sale is not complete. (Vol 15) 1928 Nag 111 (112) * (Vol 17) 1930 Lah 41 (42).

[4] Bidders at a court sale can withdraw their bids before the property is knocked down to them. (1891) 14 Mad 235 (236).

[But compare (Vol 15) 1928 Lah 249 (249).]

[5] Where a higher bid is made all preceding lower bids are impliedly refused. (Vol 7) 1920 Mad 911 (915, 916) : 42 Mad 776 (DB).

[6] Person declared purchaser has sufficient interest in property. (Vol 6) 1919 Mad 1014 (1024) : 41 Mad 474 (FB).

2. Acceptance by Court, if necessary for completion of sale.—[1] There is difference of opinion on the question whether acceptance by Court is necessary for completion of sale.

[a] Sale of property in auction held by Court does not become complete before its acceptance by Court.

(Vol 18) 1931 Cal 533 (584) : 58 Cal 788 (DB) * (Vol 22) 1935 All 204 (205) (DB). (Bidder applying before acceptance of Court for not enforcing sale on ground that he has bid under misapprehension—Court may allow application and order return of deposit * (Vol 16) 1929 Lah 673 (676) (Purchaser has not to deposit one-fourth of purchase-money unless bid has been finally accepted by Court.) * (Vol 16) 1929 Rang 12 (13) : 6 Rang 609. (Auction-purchaser whose bid is accepted by fall of hammer can withdraw offer before acceptance by Court without liability of paying deficit on resale.)

[b] It is only when the presiding officer closes the bidding and formally accepts the bid and declares the purchaser, that the sale is complete. Mere closing of the bid does not complete the sale. (Vol 10) 1923 Pat 525 (527) : 2 Pat 548 (DB) * (Vol 23) 1936 Lah 555 (557) (Sale is complete when property is knocked down to highest bidder—It is not open to Court to offer property to person offering higher amount.) * (Vol 20) 1933 Nag 123 (124) : 29 Nag LR 52 (Sale not held at head-quarters—Sale complete as soon as property is knocked down to highest bidder.) * (Vol 16) 1929 Rang 311 (312) : 7 Rang 425 (DB) (Officer conducting sale is to declare highest bidder as purchaser)

[See also (Vol 19) 1932 Lah 525 (526).]

[c] The Court has a quasi revisional jurisdiction in the matter. (Vol 2) 1915 Cal 815 (816) * (Vol 19) 1932 Rang 17 (18) : 9 Rang 608. (It will make a difference if there is a rule of practice that officer conducting sale shall not be entitled to accept bid.)

[d] Sale becomes complete when officer conducting sale accepted bid and deposit of 25 per cent was made—30 days prescribed by R. 92 are therefore to be counted from date of deposit. (Vol 6) 1919 Lah 309 (310).

[2] In a Collector's sale, the acceptance of the bid by the Collector is necessary for the completion of the sale. (1938) 1938 Nag L Jour 10 (12).

3. Deposit, Payment of.—[1] Failure of officer conducting sale to wait for payment of deposit is not material irregularity. (Vol 26) 1939 Nag 269 (272) : ILR (1941) Nag 485 (DB).

4. Non-payment of deposit—Effect of.—[1] An officer conducting a Court sale has no inherent power to extend the time for depositing the 25 per cent of the purchase-money, which is to be deposited immediately. (Vol 2) 1915 Oudh 140 (141).

[2] Failure to deposit 25 per cent of purchase-money immediately is only irregularity which does not affect validity of sale unless substantial injury is caused to judgment-debtor. (Vol 20) 1933 Oudh 345 (346) :

Time for payment in full of purchase-money. **85.** The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

[1882-S. 307 ; 1877-S. 307 ; 1859-S. 254. See rule 84.]

O. 21, R. 84 (*contd.*)

8 Luck 731 (DB) * (1922) 67 Ind Cas 427 (429) (Lah). (Vol 25) 1938 Pesh 86 (37) (DB) * (Vol 11) 1924 Rang 81 (22) (DB). (Delay to make deposit does not invalidate sale).

[See also (1891) 14 Mad 227 (228) (DB). (Commencement of sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by S. 306 of the Code of 1882 or the adjournment of the sale from time to time without sufficient ground is a mere irregularity.)]

[But see (Vol 2) 1915 Oudh 140 (141) (Failure to deposit immediately annuls the sale.)]

[3] If the deposit under O. 21, R. 84, is not paid at all, the sale is null and void. (1911) 15 Cal WN 350 (352) (DB).

5. Re-Sale.—[1] On an order that the property be resold forthwith under O. 21, R. 84 the original purchaser would be liable under O. 21, R. 71 for the deficiency on the resale. (Vol 15) 1928 Lah 249 (249) * (Vol 9) 1922 All 200 (201, 202) : 44 All 266 (FB) (The case should be held to overrule 5 All 316 and 30 All 273).

[2] Defaulting purchaser is not liable under R. 71 for deficiency on resale, if the resale is not held forthwith. (Vol 16) 1929 Lah 744 (745) * (Vol 24) 1937 Lah 924 (926) (Delay of 2 years) * (Vol 3) 1916 Lah 445 (446) (Six months intervening between default of auction-purchaser and final sale—Defaulting purchaser was not liable for loss. * (Vol 12) 1925 Oudh 397 (398) : 28 Oudh Cas 327 (Where the resale is held some months afterwards, the defaulting purchaser will not be liable especially in a case where he has been prejudiced by the delay).

[3] "Forthwith" means "as expeditiously as circumstances permit". The officer conducting the sale can hold the resale on the same day as the default in payment of deposit, if circumstances permit it to do so. (Vol 26) 1939 Nag 269 (272, 273) : ILR (1941) Nag 485 (DB).

[4] Execution sale—Failure of purchaser to deposit—Resale—Fresh proclamation not necessary. (Vol 3) 1916 Lah 445 (446).

[5] Auction sale held on 1st September and closed at 5 p.m.—Next two days being holidays, fresh proclamation issued on 4th September and sale held on 5th November, which resulted in deficiency—It was in auction bidder's interest that there should be fresh proclamation and so sale should be said to have been held "forthwith." (Vol 17) 1930 Mad 761 (762) : 53 Mad 900 (FB).

[See also (Vol 24) 1937 All 556 (557, 558) (Decree-holder auction purchaser's default in paying 25 per cent of purchase money—Property re-sold six months after sale, and on issue of fresh proclamation—Second sale held was re-sale within meaning of O. 21, R. 84.)]

6. Sub-rule (2).—[1] Deposit of 25 per cent is essential—If purchaser be decree-holder, it must be dispensed with by order of Court—Else sale is not complete. (Vol 21) 1934 Pesh 25 (27).

[2] Cl (2) R. 84 must be construed consistently with R. 72 (2) and R. 85 proviso. (Vol 22) 1935 Mad 893 (894) : 59 Mad 342.

[3] Court can dispense with deposit of purchase-money subject to the provisions of R. 72—Court allowing subsequent decree-holder purchaser to set off whole purchase-money against his debt knowing that there was another decree-holder entitled to rateable distribution—Sale should be set aside owing to material irregularity. (Vol 24) 1937 Pat 50 (52, 53).

[4] Payment of the 25 per cent deposit may be expressly or impliedly dispensed with. (Vol 16) 1929 Lah 492 (493).

[See also (Vol 18) 1931 Lah 78 (78) (Absence of an express order under R. 84 (2) exempting the decree-holder from the deposit of the requisite 25 per cent of the amount of the purchase-money does not make the sale incomplete.)]

[5] In N.-W.F. P., no permission is necessary for the decree-holder to bid at an auction in view of O. 21, R. 72, as applicable to that Province. It cannot be inferred, however, from this that the Court has under R. 84 (2) impliedly dispensed with the requirement of that rule requiring deposit of 25 per cent of the accepted bid. (1936) 165 Ind Cas 554 (555) (Pesh).

[6] An order dispensing with the deposit of 25 per cent may be made after the auction. But if auction-purchaser delays in applying under sub-rule (2), the deposit should not be dispensed with. (Vol 22) 1935 Pesh 123 (129, 124).

[7] R. 84 should be read with R. 72—Decree-holder's application for set-off pending—One-fourth purchase-money not deposited by decree-holder at sale—Sale is not nullity. (Vol 21) 1934 Pat 329 (330) (DB).

7. Interest.—[1] Decree-holder not being bound to withdraw deposit till confirmation of sale is entitled to interest up to confirmation (Vol 1) 1914 Cal 210 (211, 212).

8. Appeal.—[1] No appeal lies from order of resale under O. 21, R. 84—Even if decree-holder is auction-purchaser, that does not bring case under S. 47. (Vol 26) 1939 Lah 210 (210, 211) (DB) * (Vol 26) 1939 Lah 46 (Reversed).

ORDER 21, RULE 85.

Synopsis.

1. Applicability of the Rule.
2. "On the fifteenth day from the sale."
3. Where court or office is closed on the fifteenth day.
4. Proviso.
5. Extension of time for payment Material Irregularity.

1. Applicability of the Rule.—[1] Where, on an execution sale being confirmed in appeal, the auction-purchaser who had withdrawn his money on the sale being set aside by the lower court, is ordered to repay it, the time limit of 15 days provided by O. 21 R. 85 will not apply. (Vol 5) 1918 Mad 672 (672, 673) (DB).

PROVINCIAL AMENDMENTS

Madras

Between the words "purchase-money payable" and "shall be paid," *add* the words "and the amount required for the general stamp for the certificate under R. 94."

Nagpur

The following Explanation shall be *added* :

"*Explanation*.—When an amount is tendered on any day after 1 P.M. but paid into Court on the next working day between 11 A.M. and 1 P.M. the payment shall be deemed to have been made on the day on which the tender is made."

[29-6-1943]

Bombay

The following shall be *added* as Rule 85A :

"R. 85A. In cases where execution has been transferred to the Collector, for the purposes of Rr. 84 and 85, the purchaser shall be deemed to be entitled to a set-off under Rule 72 if he produces a certificate to that effect from the Court executing the decree."

[27-11-1936.]

86. In default of payment within the period mentioned in the last preceding rule, the depositor may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

[1882-S. 308 ; 1877-S. 308 ; 1859-S. 254. See Rr. 71, 84 and 15. Cf. R. 77.]

O. 21, R. 85 (*contd.*)

See ('38) 1938 Nag L Jour 207 (209) (DB). (O. 21 R. 85, has no application to a case where the purchaser has duly deposited the price but had withdrawn it on the sale being—set aside.)

2. "On the fifteenth day from the sale."—[1] Payment into Government Treasury is equivalent to payment into court for the purpose of O. 21 R. 85 (1884) 7 Mad 211 (212) (DB).

[2] A party who chooses to send money by post office should send it in such time as to reach the court in time. A payment in post office cannot be treated as payment in Court, as post office is not an agent of the Court. (1898) 22 Bom 415 (416) (DB).

[3] Purchaser bringing money on last day unable to deposit it owing to delay in passing challans in spite of his diligence—*Helad* purchaser had sufficiently complied with R. 85. (Vol 19) 1932 Pat 342 (343) * (Vol 21) 1934 All 817 (817) (DB). (*Bona fide* tender amounts to payment.)

[4] The purchaser can send the money to the court within time, if he is unable to attend in person. (1902) 25 Mad 535 (537).

3. Where court or office is closed on the fifteenth day.—[1] If the court and the office are closed on the fifteenth day from the sale on account of holiday, the purchaser can deposit the balance of purchase-money on the next re-opening day. (1908) 13 Mad L Jour 271 (272) (DB)* (1896) 20 Bom 745 (746) (Days on which the office is open, and the purchase-money could have been paid, are office days) * (Vol 16) 1929 Nag 305 (310).

4. Proviso.—[1] Where decree-holder is given permission to bid at the sale and set off the amount towards his decree, then if the amount of the bid minus the poundage is less than the decree amount the whole of the amount must be deemed to have been reached *eo instanti* the sale is made and there is no necessity for the purchaser to pay into court any amount. (Vol 18) 1931 Mad 103 (104).

[2] If the amount of the bid is greater than the decree amount, the decree-holder may be excused from depositing the twenty-five per cent on the date of sale, but will have to deposit the balance within fifteen days from the sale. (Vol 18) 1931 Mad 103 (105).

[3] When the decree-holder auction-purchaser who has obtained permission to set aside deposits, the differ-

ence between the amount for which he purchased the property and the amount due to him under the decree within 15 days from the date of the sale the provisions of O. 21 R. 85 are complied with. It is not necessary to deposit within that period the amount that may be payable rateably to other decree-holders. (Vol 30) 1943 Mad 318 (319, 320).

[4] Decree-holder permitted to bid to certain conditions—Conditions not fulfilled—Court can refuse to confirm sale. (Vol 9) 1922 Pat 511 (514) : 1 Pat 235.

[5] Claim by decree-holder auction-purchaser to set off decretal amount against purchase-money allowed—Failure to pay excess amount of one pie is ground for setting aside sale. (Vol 33) 1946 Pat 270 (271) (DB).

5. Extension of time for payment—Material irregularity.—[1] The court has no jurisdiction to extend time when default is made in depositing balance of the purchase-money within 15 days as required by O. 21, R. 85. (Vol 22) 1935 All 243 (244) : 57 All 658 (DB) * (Vol 19) 1932 Cal 126 (180) : 59 Cal 117 (DB).

[2] Time can be extended for payment of the balance of the purchase-money with the consent of all the parties concerned. (Vol 14) 1927 Lah 337 (338) ((Vol 10) 1923 Mad 48 Foll).

[3] Deposit by auction-purchaser—Time for deposit cannot be extended—If however extended and sale certificate issued, sale will not become nullity, there may be only an irregularity. (Vol 10) 1923 Mad 48 (49) (DB) * (Vol 11) 1924 Rang 81 (82).

[4] Auction-purchaser tendering three-fourths of purchase-money within time—Court extending time in view of pending objections to sale—In such case provisions of R. 85 are directory and not absolutely mandatory—Court held to have acted properly in refusing to set aside sale. (Vol 18) 1931 Lah 15 (16) * (Vol 19) 1932 Cal 126 (130) : 59 Cal 117 (DB).

ORDER 21, RULE 86.

Synopsis.

1. Scope of the Rule.
2. Forfeiture of deposit.
3. Deficiency in re-sale.
4. Forfeiture of claim to property.
5. Appeal.

Objects and Reasons.

"The Committee have altered the rule in order to prevent its being obligatory on the Court to forfeit the deposit in every case. The rule as it stands at present has caused hardship in certain circumstances, *vide* the case of *Sambasiva Ayyar v. Vydunada Sami* (I.L.R. 25 Mad 535)."—S.O.R.

87. Every re-sale of immovable property, in default of payment of the purchase-money Notification on within the period allowed for such payment, shall be made after the issue of a re-sale, fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

[1882-S. 309; 1877-S. 309; 1859-S. 255. See Rr. 66 to 68 and 86.]

PROVINCIAL AMENDMENT

Madras

For the words "of the purchase-money" substitute the words "of the amounts mentioned in Rule 85."

[28-10-1936.]

88. Where the property sold is a share of undivided immovable property and two or more Bid of co-sharer to persons, of whom one is a co-sharer, respectively bid the same sum for such have preference. property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

1882-S. 310; 1877-S. 310; 1861-S. 14. Cf. R. 77 (3)]

O. 21, R. 86 (contd.)

1. Scope of the Rule.—[1] Rule 86 of O. 21 lays a duty upon the Court to resell the property if the purchase-money has not been deposited within the period prescribed by the preceding R. 85. The performance of this duty is quite irrespective of any application being made by any party to the proceeding. (Vol 30) 1943 All 282 (283); ILR (1943) All 580 * (Vol 19) 1932 All 892 (893) (DB) * (Vol 25) 1938 Lah 198 (199); ILR (1938) Lah 97 (DB) * (Vol 26) 1939 Mad 57 (58) (DB) * (Vol 6) 1919 Pat 369 (370, 371) (DB).

[2] The discretion under O. 21, R. 86 is confined to the forfeiture and not to the re-sale of the property. (Vol 22) 1935 All 243 (244); 57 All 658 (DB) * (Vol 13) 1926 All 509 held as overruled * (Vol 26) 1939 Mad 57 (58).

[3] Decree-holder who has attached property purchasing property in auction sale held in execution of decree by another decree-holder—Purchaser allowed by Court to deposit sale price after deducting his decree amount—Application to set aside sale by judgment-debtor. Amount allowed to be set-off deposited by purchaser—Sale cannot be set aside as no substantial injury has been caused to judgment-debtor. (Vol 20) 1933 Rang 104 (105) (DB).

[4] An application for re-sale may be made at any time within three years under Article 181 of the Limitation Act and need not be made within what may be considered a "reasonable time" after the sale. (Vol 27) 1940 Mad 566 (568) (DB).

[5] R. 86 does not apply where High Court has made rules in exercise of Original civil jurisdiction—Calcutta High Court, Original Side Rules, Chap. 27 (Vol 17) 1930 Cal 324 (324, 325); 57 Cal 106.

2. Forfeiture of deposit.—[1] Under Rule 86, the Court has got a discretion to forfeit the deposit or not. (Vol 8) 1921 Nag 120 (121); 17 Nag LR 15 (Forfeiture should not be ordered unless there has been laxity causing waste of Court's time) * (1910) 32 All 380 (383) (Purchaser did not pay balance of purchase-money on notice of judgment-debtor's application to set aside sale—Sale set aside—Deposit not forfeited).

[2] Where there is no question of re sale, as where after the default by the purchaser, the judgment-debtor pays off the decree amount, it is not a proper case for ordering forfeiture. (Vol 21) 1934 Oudh 429 (429).

[3] Only initial deposit of twenty-five per cent can be forfeited. (Vol 25) 1938 Mad 905 (905) * (Vol 24) 1937 Sind 311 (312) (DB).

3. Deficiency in re-sale.—[1] Purchaser making default in paying balance—Decree-holder purchasing at re-sale and applying for attachment of the deposit by first purchaser owing to deficiency at re-sale—Application is proper. (Vol 12) 1925 P O 61 (63) * (1881) 7 Cal 337 (339) (DB).

4. Forfeiture of claim to property.—[1] On the failure of the auction-purchaser to deposit the full amount of the purchase-money payable by him on 15th day from the date of the sale, the sale at which the auction-purchaser purchased the property is automatically cancelled and he can have no interest in the property which was the subject of the sale. (Vol 30) 1943 All 282 (283); ILR (1943) All 580 * (Vol 28) 1941 Cal 85 (87).

5. Appeal.—[1] An order setting aside a sale in execution of a decree, because of the default of the auction-purchaser in depositing the purchase-money is not appealable. (Vol 7) 1920 All 253 (253).

ORDER 21, RULE 87—Note 1.

[1] Under this rule a fresh notification is not prescribed in the case of every re-sale, but only when the re-sale is in default of payment of purchase-money within the time allowed. Fresh notification is not necessary when the purchaser fails to deposit 25 per cent of purchase-money under O. 21 R. 84 (1889) 12 Mad 454 (459) (DB) * (Vol 24) 1937 All 556 (558, 559).

ORDER 21, RULE 88

Synopsis.

1. Scope and object of the Rule.
2. "Bid the same sum".
3. Duty of the officer conducting the sale.
4. Suit for pre-emption.
5. Appeal and revision.

1. Scope and object of the Rule.—[1] Object of R. 88 is to enable co-sharers in undivided property to keep out strangers if they so desire. (Vol 27) 1940 Nag 337 (339); ILR (1941) Nag 150 * (Vol 1) 1914 All 426 (427).

[2] Auction sale of share of undivided immovable property—Co-sharer's simultaneous bid—Right of pre-

89. (1) Where immovable property has been sold in execution of a decree, any person, Application to set aside either owning such property or holding an interest therein by virtue of a sale on deposit. title acquired before such sale, may apply to have the sale set aside on his depositing in Court—

- (a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

[1882-S. 310A.]

O. 21, R. 88 (*contd.*)

emption asserted—Requirements of R. 88 are complied with. (Vol 3) 1916 Oudh 123 (124).

[3] Rule is not applicable to sales held in execution of a decree of Revenue Court. (77) 1 All 277 (279) (DB).

[4] Property sold purporting to be entire property but actually only share in undivided property—Court shall accept bid of co-sharer in place of that of last bidder. (Vol 27) 1940 Nag 337 (338, 339) : ILR (1941) Nag 150. ("What is sold" in R. 88 must necessarily mean what is sold lawfully, and in the eye of the law.)

2. "Bid the same sum"—[1] This rule contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. Mere tender of the amount equal to the last highest bid does not satisfy the requirements of the Rule. (1881) 3 All 827 (828) (DB) * (1878—80) 2 All 850 (851) (DB).

3. Duty of the officer conducting the sale.—[1] Question whether entire property or share of undivided property is being sold is not to be decided by sale amin. (Vol 27) 1940 Nag 337 (339) : ILR (1941) Nag 150.

[2] Sale-officer appointed to conduct sale has no jurisdiction to determine claims under O. 21, R. 88—Civil Court has jurisdiction to go behind order of sale officer. (Vol 20) 1933 Oudh 401 (402, 403) : 9 Luck 77 (DB).

[3] When the full amount of the purchase-money has been duly paid by a claimant, the sale is not defeasible by the failure of the bidder to complete the deposit of the purchase money. (1874) 6 N.W.P. HCR. 273 (276) (DB).

4. Suit for pre-emption.—[1] Confirmation of sale under R. 88—Suit to set aside sale is barred by R. 92 (3). (Vol 10) 1923 All 186 (187) : 45 All 203 (FB).

[But see (1875) 7 N.W.P. HCR 97 (98) (DB).]

[2] Suit for declaration that the claimant has no right to pre-empt will lie. (1875-77) All 272 (273) (DB).

5. Appeal and revision.—[1] Sale of undivided share—Confirmation in favour of co-sharer—No appeal lies. (1881) 3 All 874 (875) (DB).

[2] Court proceeding on wrong view of scope and object of O. 21 R. 88—Interference in revision is necessary. (Vol 27) 1940 Nag 337 (340) : ILR (1941) Nag 150.

ORDER 21, RULE 89.

Synopsis.

1. Scope and object of the rule.
2. Applicability of this rule to sales under mortgage decrees.
3. Sales under decrees on award.
4. Sales by receiver.
5. Applicability of Order 9 to proceedings under this rule.
6. Immovable property.
7. Court, Meaning of.
8. Who may apply under this rule.
9. "By virtue of a title acquired before such sale."
10. "Any person owning such property or holding an interest therein"
11. Transferee before court-sale.
12. Transferee after court-sale.
13. Other persons interested.
14. Deposit in Court.
15. Deposit and application.
16. Failure to deposit full amount.
17. Mistake in calculating the amount to be deposited.
18. Conditional deposit.
19. A sum equal to five per cent.
20. Less any amount received.
21. "For payment to the decree-holder."
22. Sub-rule (2).
23. Limitation.
24. Appeal.
25. Revision.
26. Deposit—Suit for refund and contribution.
27. Local amendments.

1. Scope and object of the rule—[1] This rule gives the judgment-debtor a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction-purchaser for the loss of bargain

Objects and Reasons.

"Words have been added, so as to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of the rule. In other respects the Committee consider it advisable to adhere to the wording of the section. [i.e. S. 310A of the 1882 Code]. The proposal that the sale should be set aside on payment of the purchase-money instead of the amount specified in the proclamation is, in their opinion, fraught with danger; it would be obviously useless unless subsequent protection were given to the property, and such protection might lead to collusion, which would be most prejudicial to the decree-holder."—S.O.R.

PROVINCIAL AMENDMENTS

Allahabad

In sub-rule (1) of this rule, for the words "any person . . . before such sale," read the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."

Calcutta

In sub-rule (1), cancel the words "either owning such property or holding an interest therein by virtue of a title acquired before such a sale", and substitute the words "whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale)."

Lahore

In sub-rule (1), of this rule, for the words "any person . . . acquired before such sale", substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person." [7-4-1932.]

O. 21, R. 89 (contd.)

(Vol 30) 1943 PC 29 (31) : 70 Ind App 1 : ILR (1943) Kar (PC) 19 : 18 Luck 130 (PC) * ('99) 26 Cal 449 (452) (FB). (Per referring order of Maclean, C. J.)

[2] The rule must be strictly complied with before a sale is set aside. (Vol 28) 1941 Cal 159 (162) : ILR (1941) 1 Cal 147 * (Vol 27) 1940 Sind 181 (182) : ILR (1940) Kar 360 (DB).

[3] Equitable principles cannot override the provisions of this rule. (Vol 31) 1944 Bom 233 (235).

[4] The object of the rule is to prevent sale of immovable properties for inadequate prices at court sales. (Vol 3) 1916 Bom 57 (58) : 40 Bom 557 (DB) * (Vol 6) 1919 All 72 (74) : 42 All 7 (DB).

[5] The object of sub-rule (1) is to enable the person intending to apply under the rule to know the exact amount he has to deposit. (Vol 30) 1943 Bom 336 (337).

[6] This rule is not exhaustive and therefore sale under a mortgage decree can be set aside under O. 34, R. 5, though previous application under this rule was rejected. ('43) ILR (1943) 1 Cal 324 (333) * (Vol 15) 1928 Nag 265 (272) : 24 Nag LR 127 (FB).

[7] Where no application is made within the time limited, accompanied by the required deposit, the court must confirm the sale, even though decree-holder admits satisfaction. (Vol 9) 1922 Nag 248 : * 18 Nag LR 134 overruled. (Vol 18) 1931 PC 33 (35, 36) : 58 Ind App 50 : 27 Nag LR 95 (PC). (Approving 13 Cal L Jour 535 and overruling (Vol 9) 1922 Nag 248 : 18 Nag LR 134).

[8] Where this rule is complied, the sale must be set aside. (Vol 30) 1943 Bom 336 (337).

[9] The rule does not prevent setting aside a sale under the inherent powers of court in a case where the decree is otherwise adjusted, pursuant to an agreement with auction-purchaser by the decree-holder. (Vol 3) 1916 Cal 64 (65, 66) (DB) * (Vol 20) 1933 Mad 753 (754, 755) : (Vol 12) 1925 Oudh 128 (129) : (Vol 15) 1928 Pat 40 (43) (DB).

[*Also see S. 151 Note 2].

[10] Decree for restitution of conjugal rights—Sale under O. 21, R. 32 to compensate decree-holder for failure of judgment-debtor to satisfy decree—The rule does not apply. (Vol 20) 1933 Cal 96 (97).

[11] Once the proper amount has been deposited in time by the person entitled to make the application, the court must set aside the sale. (Vol 30) 1943 Bom 336 (338) * (Vol 24) 1937 Pat 113 (115) : 16 Pat 202 (FB). (Obiter) : (Vol 22) 1935 Mad 842 (847) : 58 Mad 972 (FB).

2. Applicability of this rule to sales under mortgage decrees.—[1] Under the old Code, there was a conflict of opinion as to whether the corresponding S. 310-A applies to sales under mortgage decrees. Now after amendment, the rule applies to sales in execution of mortgage decrees also. (Vol 8) 1921 Cal 169 (170) : 48 Cal 69 (DB).

[2] This rule applies to sales in execution of mortgage decrees passed on the original side of High Court (Vol 30) 1943 Bom 336 (338) : * (Vol 28) 1941 Cal 159 (162) : ILR (1941) 1 Cal 147 * ('37) ILR (1937) 2 Cal 606 (608).

[But see (Vol 4) 1917 Cal 51 (52) (Dissented from in (Vol 8) 1921 Cal 169 : 48 Cal 69).

[3] In a case of sale under mortgage decree, where the provisions of O. 34, R. 5 and this rule lead to conflicting results, the former will prevail over the latter. ('43) ILR (1943) 1 Cal 324 (331).

3. Sales under decrees on award.—[1] Decree passed in terms of award directing sale of immovable property—Rule applies to the sale held in pursuance thereof. (Vol 10) 1923 Cal 582 (583, 584) (DB).

4. Sales by receiver.—[1] A sale by the Official Receiver is not governed by this rule. (Vol 15) 1928 Rang 60 (61) : 5 Rang 768 (DB) (Not governed by Order 21).

[2] Sale by the Official Referee for realizing the assets of partnership—Rule does not apply. (Vol 8) 1921 Mad 484 (486, 487) (DB).

5. Applicability of Order 9 to proceedings under this rule.—[1] Provisions of O. 9 do not apply to an application to set aside sale under this rule. (Vol 13) 1926 Bom 377 (377, 378) : 50 Bom 457 (DB).

[2] A second application to set aside the sale after the dismissal for default of the first application is one for review. ('12) 22 Mad L. Jour 148 (149) (DB).

6. Immovable property.—[1] A simple mortgage bond is not immovable property within the

Madras

In sub-rule (1), for the words "any person, either owning . . . before such sale," substitute the words "the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property,"

At the end of sub-rule (1), insert the following proviso :

"Provided that where the immovable property sold is liable to discharge a portion of the decree-debt, the payment under clause (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay." [13-10-1936.]

Nagpur

In sub-rule (1), for the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person." [29-6-1943]

N.-W.F.P.

In sub-rule (1), for the words "either owning . . . before such sale," substitute the following words :

"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."

Oudh

In sub-rule (1), for the words "any person . . . before such sale," read the words, "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."

Patna

In sub-rule (1), for the words "any person, either owning . . . before such sale," substitute the words "the judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property at the date of the application under this rule."

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meaning of this rule. (Vol 11) 1924 All 796 (798) : 46 All 1917 (DB).

[2] A decree for sale in enforcement of a mortgage is not immovable property within the meaning of this rule. ('11) 8 All L Jour 1327 (1328).

[3] The interest of a mortgagee in a usufructuary mortgage is immovable property. (Vol 17) 1930 All 110 (111) : 52 All 232 (DB) * (Vol 9) 1922 Oudh 146 (147) : 25 Oudh Cas 78.

[4] Judgment-debtor owner of house and land on which it stood—Superstructure alone sold in execution—Held that superstructure was immovable property and an application would lie to set aside the sale. (1900) 3 Oudh Cas 236 (237).

7. Court, Meaning of.—[1] "Court" means a Civil Court only and therefore a deposits made in a revenue court to which decree is transferred for execution is not valid. (Vol 14) 1927 All 754 (754) (DB) * (Vol 5) 1918 All 192 (193) : 40 All 425 (DB).

[See however (Vol 16) 1929 Bom 189 (190) (DB). Under the rule making powers, the Bombay High Court has framed R. 91-A which provides for depositing money with the Collector to whom the decree has been sent for execution. (Vol 25) 1938 Bom 209 (209) (Do.)

[2] Deposit made in Collector's office—Money transferred to the Civil Court account and intimation sent within 30 days of sale—Deposit is good and valid. (Vol 18) 1931 All 303 (304).

8. Who may apply under this rule.—[1] Any question arising as to the right of a person applying under the rule should be decided by the Court. ('96) 23 Cal 393 (396) (DB) * (Vol 10) 1923 Pat 353 (353).

[2] The rule allows even persons, who are not parties to the suit, to apply to have a sale set aside. (Vol 6) 1919 Pat 501 (501, 502) : 4 Pat L Jour 340 (DB) * (Vol 6) 1919 Cal 468 (469) (DB) : ('13) 17 Cal WN 476 (477). (Vol 8) 1921 Mad 157 (159, 161, 163) : 44 Mad 554 (FB).

9. "By virtue of a title acquired before such sale"—[1] The words "by virtue of title acquired before such sale" apply to the words "owning such property" as well as to the words "holding an interest therein." (Vol 8) 1921 Mad 157 (160, 161, 163, 164) : 44 Mad 554 (FB) * (Vol 13) 1926 Nag 10 (13, 14) : 21 Nag LR 102.

10. Any person owning such property or holding an interest therein.—[1] Judgment-debtor who has not sold the property as also a purchaser from a mortgagor-judgment-debtor and bound by the decree can apply under this rule. ('98) 21 Mad 416 (417) (DB) * (Vol 10) 1923 Pat 490 (491) : 2 Pat 715 (DB) : (Vol 2) 1915 Sind 9 (10) : 9 Sind LR 86 (DB).

[2] Interim receiver appointed after sale of insolvent's property is not an owner by virtue of a title acquired before such sale and therefore cannot apply under this rule. (Vol 13) 1926 Mad 357 (357).

[3] An interim receiver expressly authorised by court can apply and the application will be deemed to be made on behalf of the owner of the property. (Vol 24) 1937 Mad 589 (590).

[4] A mortgagee of the property sold in execution is competent to apply. ('02) 29 Cal 1 (4, 10, 14, 24) (FB). (Overruling 5 Cal WN 63) * ('11) 33 All 481 (482) (DB) * ('98) 21 Mad 416 (417) * ('11) 1911 Pun WR No. 178 page 465 (466) * (Vol 12) 1925 Oudh 429 (431) : 28 Oudh Cas 221 (DB) * (Vol 23) 1936 Oudh 128 (129) : 11 Luck 708 (DB).

[5] The word 'property' means tangible property and does not mean merely the right, title and interest of the judgment-debtor alone. (Vol 15) 1928 Mad 1191 (1192) : 51 Mad 770 (DB) * (Vol 23) 1936 Oudh 128 (129) : 11 Luck 708 (DB).

[6] A mortgagee or lessee whose interest are not affected by the sale is also entitled to apply. (Vol 15) 1928 Mad 1191 (1192) : 51 Mad 770 (DB) * (Vol 10) 1923 All 127 (127, 128) * (Vol 2) 1915 All 76 (77, 78) * (Vol 7) 1920 Mad 290 (291) (DB) * (Vol 23) 1936 Oudh 128 (129) : 11 Luck 708 (DB).

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[7] Purchaser of property from the judgment debtor or any other person claiming by paramount title can apply under the rule. (Vol 10) 1923 Mad 487 (488, 489) (DB) * (Vol 14) 1927 Mad 327 (328).

[But see ('11) 15 Cal L Jour 83 (86) * (Vol 10) 1923 Mad 659 (660)]

[8] In the Punjab and North-West Frontier Province by reason of rule made by High Court, the interest in property need not be shown to have existed before sale; it is enough if there was an interest at the time of making the application. (Vol 22) 1935 Lah 51 (52) * (Vol 23) 1936 Lah 561 (562) * (Vol 21) 1934 Pesh 25 (26).

11. Transferee before court-sale.—[1] Transferee of immovable property from judgment-debtor after attachment but before the court-sale, is the owner of the property and can apply to set aside the sale. ('06) 30 Bom 575 (577) (DB) * (Vol 3) 1916 Bom 57 (57); 40 Bom 557 (DB) * (Vol 4) 1917 Cal 281 (283) (DB) * ('11) 1911 Pun W.R. No. 178 page 465 (466) * (Vol 14) 1927 Mad 445 (446) (DB) (Vol 10) 1923 Mad 659 Dissented from.) * (Vol 19) 1932 Nag 21 (22); 27 Nag LR 309. * (Vol 13) 1926 Nag 10; 21 Nag LR 102, Distinguished. * ('05) 8 Oudh Cas 189 (190).

[See however (Vol 10) 1923 Mad 659 (660).]

[2] By applying under this rule, the transferee of property under attachment does not seek to enforce any right to the detriment of the auction-purchaser who is the person having the claim under the attachment. (Vol 28) 1941 Pat 204 (204).

[3] A person to whom the judgment debtor has contracted, before the auction sale, to sell the property, can apply for setting aside the sale. (Vol 28) 1941 Pat 204 (204).

12. Transferee after court-sale.—[1] Transferee from judgment-debtor before confirmation of execution sale is not a person interested in the property by reason of a title acquired before such sale and cannot apply under this rule. (Vol 27) 1940 Sind 181 (184); ILR (1940) Kar 280 (DB) * (Vol 9) 1922 Cal 271 (273); 49 Cal 454 * (Vol 18) 1926 All 204 (209, 210, 211); 48 All 188 (FB). Overruling 34 All 186 * (Vol 8) 1921 Mad 157 (160, 161, 163); 44 Mad 554 (FB). (The following cases are, in view of this decision, no longer law—24 Mad L Jour 205; (Vol 7) 1920 Mad 410; 30 Mad 507; (Vol 1) 1914 Mad 46; 38 Mad 775; 30 Mad 214.) * (Vol 7) 1920 Mad 322 (324) (FB). (Mortgage) * (Vol 6) 1919 Pat 465 (466) (DB). * (Vol 9) 1922 Lah 302 (302) * (Vol 25) 1938 Sind 177 (179) * (Vol 24) 1937 Oudh 108 (109, 110).

[2] The judgment-debtor mortgaging property before confirmation of sale would still be the owner of the equity of redemption and will be entitled to apply. (Vol 12) 1925 Oudh 349 (350).

[3] Even where the transfer is by way of an absolute sale, a judgment-debtor can apply under this rule. (Vol 27) 1940 Sind 181 (184); ILR (1940) Kar 360 (DB) * (Vol 13) 1926 All 204 (208, 210, 211); 48 All 188 (FB). (Overruling 34 All 186). * (Vol 3) 1916 Bom 57 (57); 40 Bom 557 (DB) * (Vol 8) 1921 Mad 157 (160, 161, 163); 44 Mad 554 (FB) * (Vol 6) 1919 Pat 501 (502); 4 Pat L Jour 340 (DB) * (Vol 6) 1919 Pat 465 (466) (DB). * (Vol 25) 1938 Sind 177 (179, 180).

[But see ('11) 14 Oudh Cas 33 (35).]

[4] Execution of mortgage after court-sale—Mortgagor—judgment-debtor and mortgagee each depositing a portion of the money—The two applications may

be treated as one by the judgment-debtor, though mortgagee by himself cannot apply. (Vol 14) 1927 All 561 (562); 49 All 839 (DB).

13. Other persons interested—[1] The following persons are also entitled to apply under this rule:

[a] A beneficial owner in cases where the property has been sold in execution of a decree against his *benamidar*. ('08) 8 Cal L Jour 305 (307, 308) (DB).

[b] A *benamidar* transferee from the judgment-debtor. ('02) 29 Cal 1 (6, 15) (FB).

[c] A co-sharer in the property sold. ('08) 30 All 192 (196) (DB) * ('97) 1 Cal WN 114 (118) (DB).

[But see ('11) 38 Cal 1 (11) (DB). (Per Das, J.)

[d] Where the share of a member of a joint Hindu family is sold, the other members having an interest in the properties. (Vol 15) 1928 Mad 399 (400); 51 Mad 246.

[e] Where property is sold in execution of a decree against a Hindu widow, the reversioner to the estate though he has no interest *de proesenti*. (Vol 29) 1942 Cal 167 (170) (DB) * (Vol 1) 1914 Cal 338 (340) * (Vol 6) 1919 Pat 127 (127); 4 Pat L Jour (360) (DB).

[f] An under-raiyat. ('07) 11 Cal WN 742 (748) (DB) * (Vol 6) 1915 Cal 468 (468) (DB).

[But see ('02) 29 Cal 459 (461) (DB). (Dissented from in 11 Cal WN 742).]

[g] A *durmokaridar*. ('05) 32 Cal 107 (110) (DB).

[h] Purchaser of a portion of holding sold under a decree for arrears of rent. ('04) 8 Cal WN 232 (233) (DB) * ('04) 8 Cal WN 55 (57) (DB). ('10) 5 Ind Cas 561 (562) (DB) (Cal).

[i] Purchaser of portion of non-transferable holding, sold under a decree for arrears of rent. (Vol 14) 1927 Cal 817 (818); 55 Cal 108 (DB) * ('08) 7 Cal L Jour 282 (284) (DB).

[But see (Vol 2) 1915 Cal 356 (357) (DB) * (Vol 11) 1924 Pat 513 (515) * (Vol 2) 1915 Cal 590 (590) (DB).

[j] A trespasser who has entered into possession before court-sale, though his title is not completed by prescription. (Vol 11) 1924 Mad 723 (726) (DB).

[2] The following persons are not entitled to apply under this rule:

[a] The holder of a money decree who has attached the property sold. (Vol 2) 1915 All 160 (160) * (Vol 18) 1931 Bom 277 (278); 55 Bom 239 * ('02) 6 Cal WN 57 (58) (DB).

[b] A person having no title to the property or any interest therein and not in possession thereof, is not entitled to apply. (Vol 30) 1943 Mad 709 (709, 710) (DB) * (Vol 4) 1917 Pat 159 (160); 2 Pat L Jour 676 (DB) * (Vol 13) 1926 Nag 10 (13, 14); 21 Nag LR 102 * ('06) 28 All 84 (85, 86) (DB).

[c] A person in whose favour there is merely an agreement to sell property. ('99) 23 Bom 181 (184) (DB). * (Vol 10) 1923 Mad 659 (660).

[d] Person who holds decree for specific performance of contract of sale against a tenant of the property but who has not executed it. (Vol 23) 1936 Pat 119 (121).

14. Deposit in Court.—[1] Deposit is intended not merely for the benefit of the auction-purchaser and the decree-holder but also to maintain the solemnity of court sales. (Vol 31) 1944 Bom 233 (234).

[2] A deposit must be in *cash* and not by Government promissory notes or cheque. ('87) 14 Cal 321 (323) (DB) * (Vol 2) 1915 Low Bur 97 (97).

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[3] A tender by a person who is neither an attorney nor a *wakil* nor a *mukhtar* for the applicant is invalid. (Vol 18) 1931 All 449 (450); ('12) 9 All L Jour 12 (14) * (Vol 4) 1917 Mad 739 (740) (DB) * (Vol 24) 1937 Oudh 108 (110).

[4] Lodgment schedule properly signed—Actual payment may be made by any person. (Vol 11) 1924 Mad 483 (483) (DB).

[5] Judgment-debtor can pay money through even an agent without a power of attorney. (Vol 32) 1945 Mad 188 (189) : ILR (1945) Mad 566.

[6] A deposit is not a condition precedent to the *entertainment* of the application but is so to setting aside of the sale. (Vol 23) 1936 Pat 119 (120).

15. Deposit and application.—[1] An *application* for setting aside a sale is necessary. (Vol 12) 1925 Mad 639 (640) * (Vol 4) 1917 Mad 662 (662) (DB).

[2] The sale cannot be set aside on mere deposit without an application made in time. ('11) 9 Ind Cas 33 (33) (All) * ('12) 9 All L Jour 12 (14) * (Vol 6) 1919 Bom 130 (131) : 43 Bom 735 (DB) * (Vol 12) 1925 Mad 639 (640) * (Vol 9) 1922 Mad 83 (83) * (Vol 12) 1925 Oudh 411 (412) * (Vol 27) 1940 Pat 87 (88) : 18 Pat 210 (DB).

[But see ('05) 7 Bom LR 263 (264) (DB).]

[3] A mere lodgment schedule cannot be treated as an application. (Vol 18) 1926 Mad 620 (621) * (Vol 9) 1922 Mad 83 (83).

[4] A challan which sets out the purpose for which payment is made is enough to set aside a sale. ('98) 25 Cal 216 (218, 222) (DB) * (Vol 26) 1939 Cal 153 (154).

[5] An application for permission to deposit in court the decree-amount and a sum equal to five per cent of the purchase-money is an application to set aside the sale, even in the absence of an express prayer to set aside the sale. (Vol 20) 1933 Lah 210 (210, 211) * (Vol 15) 1928 Nag 111 (111) * (Vol 26) 1939 All 241 (241) : ILR (1939) All 403 (DB). (Following 63 Ind Cas 140 (All).)

[6] An application for challan or an application with a memo of deposit and its receipt can be amended by the inclusion of a prayer for setting aside a sale although the application for amendment is made beyond the period of limitation for an application to set aside the sale. (Vol 24) 1937 Mad 342 (343).

[7] The application may be *oral* or *written*. ('12) 9 All L Jour 12 (14) * ('21) 63 Ind Cas 140 (141) (All) * (Vol 1) 1914 Mad 209 (209). (Not necessary to be signed by applicant or his pleader.) * (Vol 4) 1917 Mad 662 (662) (DB) * (Vol 12) 1925 Oudh 411 (412).

[8] It will not be rendered invalid by the absence of a formal prayer for setting aside the sale. (Vol 4) 1917 Mad 225 (225, 226) * (Vol 10) 1923 Pat 159 (161).

[9] Nature of interest of applicant not disclosed—Application should not be rejected but furnishing of further particulars should be directed. (Vol 12) 1925 Nag 17 (18).

[10] The rule does not require tender also in addition to the application and deposit. (Vol 26) 1939 All 241 (241) : ILR (1939) All 403 (DB).

16. Failure to deposit full amount.—[1] A sale will not be set aside unless the *entire amount* is

deposited within 30 days from the date of the sale. ('11) 21 Mad L Jour 631 (635) * (Vol 12) 1925 Nag 30 (30) * (Vol 11) 1924 Nag 216 (218) * (Vol 15) 1923 Rang 236 (236) : 6 Rang 490 (DB) * ('99) 23 Bom 531 (535) (DB) * ('38) 1938 Mad W N 15 (16) (DB).

[2] A *part payment* coupled with an undertaking to pay the balance cannot be considered as a valid deposit. (Vol 9) 1922 Bom 193 (194) : 46 Bom 171 (DB).

[3] The failure to pay an additional amount to cover the poundage fee will not prevent the Court from entertaining the application. (Vol 18) 1931 All 756 (757) : 53 All 959 (DB) * ('97) 20 Mad 158 (159) (DB) * (Vol 25) 1938 Cal 523 (523) (DB).

[4] Even on the consent of a decree-holder a sale cannot be set aside on the part payment of the amount specified on proclamation. (Vol 16) 1929 Bom 215 (217) (DB).

[5] Benefit given under the rule cannot be waived. (Vol 31) 1944 Bom 233 (234).

[6] Deposit of full amount in the proclamation does not become invalid on it being found subsequently that the proclamation was incorrectly drawn up in not mentioning the full amount for which sale was made. (Vol 10) 1923 All 315 (317) (DB) * (Vol 22) 1935 Lah 423 (425) (DB).

[But see (Vol 21) 1934 Lah 790 (791)].

[7] A Court cannot refuse to set aside a sale merely because costs and interests not covered by the proclamation are not also deposited within time. (Vol 17) 1930 Oudh 9 (10).

[8] Decree against father and son directing father's interest to be sold first—Son's interest also sold for balance—Son need not deposit the whole of decree amount to apply to set aside sale in respect of his interest. (Vol 20) 1933 Mad 54 (55) (DB).

17. Mistake in calculating the amount to be deposited.—[1] Deficiency in deposit due to the wrong calculation by a prescribed officer acting in accordance with the rules and made good by the party though beyond thirty days as soon as it was pointed out will not affect the party. (Vol 17) 1930 Cal 802 (304) (DB) * (Vol 21) 1934 Pat 246 (246) * (Vol 20) 1933 Pat 515 (516, 517) * (Vol 17) 1930 Cal 249 (250) (DB) * ('98) 1 Oudh Cas 193 (196).

[2] Unless the mistake is that of a prescribed officer acting according to rules the party will not be saved even though he was misled by an officer of the Court. Otherwise no relief can be given to a party even though he is misled by an officer of the Court. ('99) 26 Cal 449 (458, 459, 460) (FB) * (Vol 3) 1916 Pat 290 (292) : 1 Pat L Jour 459 (DB).

[3] Mistake in calculating interest due to decree-holder and consequently lesser amount deposited—Deficit made good but beyond period of limitation—*Held* the rule was not complied with. (Vol 31) 1944 Bom 233 (234, 235).

[4] Trifling mistakes in making the deposit should be overlooked. (Vol 24) 1937 Pat 409 (410). (Deficit of four annas in deposit in favour of auction-purchaser in challan of deposit.)

18. Conditional deposit.—[1] Deposit must be *unconditional*. (Vol 27) 1940 Sind 181 (183) : ILR (1940) Kar 360 (DB) * (Vol 8) 1921 Bom 169 (171, 172) : 45 Bom 1094 (DB) * (Vol 15) 1928 Pat 193 (194) : 7 Pat 39 (DB) * (Vol 25) 1938 Sind 177 (182) * (Vol 22) 1935 Mad 842 (844, 847) : 58 Mad 972 (FB).

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[2] Where applicant said that if sale is not set aside money may be returned to him, it is not a conditional deposit. (Vol 14) 1927 All 561 (562) : 49 All 839 (DB).

[3] If the applicant prevents money from being available to the decree-holder *forthwith and unconditionally*, the deposit is bad. (Vol 19) 1932 Cal 216 (217, 218) (DB).

[4] The court has no power to order that the decree-holder should draw out the money only on his executing a security bond. (Vol 17) 1930 Mad 921 (923, 924) : 53 Mad 943.

[5] If, as soon as an objection to the conditional deposit is taken, the applicant withdraws his condition, the deposit is not invalid. ('12) 15 Cal L Jour 83 (85) * (Vol 10) 1923 Pat 418 (420) : 2 Pat 534 (DB) * (Vol 10) 1923 Pat 159 (160, 161).

[6] Subsequent condition cannot invalidate the deposit which was originally good. ('04) 8 Cal WN 355 (356) (DB).

19. A sum equal to five per cent.—[1] A sale cannot be set aside unless the five per cent of the purchase-money is also deposited. (Vol 28) 1941 Cal 159 (162) : ILR (1941) 1 Cal 147 * (Vol 21) 1934 Pesh 25 (26) * (Vol 11) 1924 Nag 216 (218).

[2] The five per cent is a solatium to the purchaser for the loss of a good bargain. (Vol 26) 1939 Pat 392 (396) : 18 Pat 404 (DB) * ('99) 26 Cal 449 (452) (FB).

[3] A decree-holder-purchaser is as much entitled to that *solatium* as an outside purchaser. (Vol 28) 1941 Oudh 505 (506) (*obiter*) * ('95) 1-95 All W N 140 (140) (DB) * (Vol 20) 1933 All 292 (293) : 55 All 200 (DB) * ('99) 26 Cal 449 (452, 458, 460) (FB) * ('99) 22 Mad 286 (288) (DB).

[4] A mere deposit of the five per cent without the decree amount is not a valid deposit. (Vol 20) 1933 Mad 598 (606) : 56 Mad 808.

(Note.—This case is overruled in (Vol 28) 1941 Mad 161 : ILR (1941) Mad 438 (FB) on another point).

[5] One of two joint decree-holders with permission to bid for himself alone is entitled to the whole five per cent on the sale being set aside. (Vol 14) 1927 Pat 288 (289) : 6 Pat 386 (DB).

[6] The rule does not provide for any compensation to the decree-holder. (Vol 27) 1940 Pat 191 (191).

20. Less any amount received.—[1] Amount deductible under clause (b) of sub-rule (1) need not have been received by the decree-holder *before* the sale. ('35) 39 Cal WN 829 (831) (DB) * ('87) ILR (1937) 2 Cal 606 (609, 610).

[2] The deductible amount need not have been paid to him *through the Court*. ('37) ILR (1937) 2 Cal 606 (609, 610).

[3] Amount adjusted in part or in full subsequent to the sale proclamation need not be deposited to have the sale set aside. (Vol 27) 1940 Mad 427 (430, 431) : ILR (1940) Mad 699 (FB) * (Vol 20) 1933 All 510 (511) : 55 All 697 * (Vol 21) 1934 Nag 21 (23, 26) : 31 Nag LR 67. * ('03) 6 Oudh Cas 68 (71) * ('37) ILR (1937) 2 Cal 606 (610) * (Vol 25) 1938 Cal 252 (253).

[4] Sale proceeds paid into Court is not money received by decree-holder and cannot be deducted from the amount to be deposited. (Vol 27) 1940 Pat 612 (612) * (Vol 10) 1923 Bom 299 (299, 300) (DB)

* ('99) 23 Bom 723 (725) (DB) * ('97) 1 Cal WN 703 (704, 705) (DB) * (Vol 3) 1916 Mad 1028 (1029) (DB) * (Vol 17) 1930 Pat 318 (319) : 9 Pat 310 (DB) * (Vol 25) 1938 Nag 54 (55) : ILR (1938) Nag 456.

[But see (Vol 17) 1930 All 843 (844, 845) : 53 All 152].

[5] Judgment-debtor privately selling property to auction-purchaser and applying that the purchase-money deposited by purchaser should be treated as deposit under this rule and sale set aside—Purchaser consenting to this course—Still this cannot be done as the purchase-money in Court cannot be dealt with by the purchaser till the sale is set aside. (Vol 24) 1937 Mad 270 (271, 272) : ILR (1937) Mad 828.

[6] Property sold in lots—Deposit in respect of one lot only made—Sale cannot be set aside even though decree-holder has no objection. (Vol 31) 1944 Mad 565 (566).

[7] A judgment-debtor is not entitled to take advantage of any deposit made independently by his co-judgment-debtor. (Vol 9) 1922 Mad 54 (54) * (Vol 3) 1916 Mad 717 (718) : 39 Mad 429 (DB).

[But see (Vol 1) 1914 Mad 8 (8, 9)].

[8] Money deposited by the judgment-debtor in Court and available to the decree-holder *without any obstacle of law* amounts to receipt by the decree-holder. (Vol 20) 1933 All 292 (293) : 55 All 200 (DB).

[See also (Vol 27) 1940 Sind 181 (185) : ILR (1940) Kar 360 (DB) . (Vol 20) 1933 All 292 : 55 All 200 followed].

[But see (Vol 20) 1933 Mad 263 (264) (DB)].

[See however (Vol 25) 1938 Sind 177 (181)].

[9] Sale proclamation specifying entire amount containing direction to sell certain items for part of the amount due—Deposit of that amount with five per cent is valid to set aside the sale in respect of those items. (Vol 13) 1926 Mad 765 (766, 767) (DB).

21. "For payment to the decree-holder."—

[1] The word "decree-holder" does not include other decree-holders who may be entitled to claim rateable distribution, and an applicant need not deposit amounts due to them also. ('13) 37 Bom 387 (392) : (DB) * (Vol 20) 1933 Lah 226 (226) : 14 Lah 55 * ('07) 31 Bom 207 (217) (DB) * ('96) 1 Cal WN 195 (196) (DB) * ('12) 23 Mad L Jour 585 (587).

[2] Decree attached by two persons who are substituted for the decree-holder-defendant—Deposit to set aside the sale brought about by only one of them—Both of them are entitled to the deposit. ('08) 12 Cal WN 800 (802) (DB).

[3] Same property attached in execution under several decrees—Sale under one of them set aside—Attachment in respect of others does not end. ('03) 13 Mad L Jour 221 (221) (DB).

[4] Sale under mortgage decree set aside—The mortgage lien is not revived—Decree-holder cannot resell it for any amount inadvertently left out in execution. (Vol 27) 1940 Pat 191 (191).

[5] Sale under decree in favour of mortgagee—Decree passed subject to paying prior charge out of sale proceeds—Sale set aside as the instance of subsequent mortgages—Decree-holder can draw the entire amount without deduction for prior charge. ('98) 8 Mad L Jour 135 (137) (DB).

[6] Upon a sale being set aside under this rule, the decree-holder is not entitled to claim interest from the

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date of sale till the date of deposit. (Vol 1) 1914 Low Bur 190 (190) (DB).

22. Sub-rule (2).—[1] A person who intends to impeach a sale under R. 90 cannot obtain the benefit of this rule at the same time. ('98) 8 Mad L Jour 56 (58) (DB).

[2] Where applications under both this rule and R. 90 are pending, the court must compel the applicant to elect between the two. (Vol 12) 1925 All 778 (779) : 47 All 850 (DB).

[But see (Vol 24) 1937 Nag 161 (162). (The Court cannot compel him to do so but he must himself withdraw the application under R. 90)].

[3] The existence of an application under R. 90 is no bar to the existence of an application under this rule and on the withdrawal of the former the latter can be proceeded with. (Vol 32) 1945 Cal 6 (12) : ILR (1943) 2 Cal 485 * ('96) 23 Cal 958 (960, 961) (DB) * ('98) 8 Mad L Jour 56 (58) (DB) * ('07) 10 Oudh Cas 141 (144) (DB).

[See also (Vol 25) 1938 Sind 177 (182)].

[4] A person whose application under R. 90 is *dismissed* is not disqualified from subsequently applying under this rule. (Vol 15) 1928 All 196 (197) * (Vol 5) 1918 Oudh 8 (9) : 20 Oudh Cas 329.

[5] An application made by a person under this rule is not barred by the pendency of an application under R. 90 by *another person*. ('08) 30 All 192 (196) (DB) * ('96) 23 Cal 682 (686) (DB). (This case is overruled in 25 Cal 703 (FB) on another point.)

[6] Where the applicant under R. 89 is a person on whom the interest of the applicant under R. 90 has devolved, the pendency of the application under R. 90 will bar the one under this rule. (Vol 24) 1937 Nag 161 (162).

[7] Where the same person first applies under R. 90 and then applies under R. 89 the latter application cannot be *entertained* till the previous one is pending. (Vol 24) 1937 Nag 161 (162).

[8] Application under this rule first and then an application under R. 90—Unless the latter is withdrawn the former application cannot be proceeded with. (Vol 27) 1940 Sind 181 (182) : ILR (1940) Kar 360 (DB).

[9] Application containing prayers both under R. 90 and R. 89—Prayer under R. 90 withdrawn—Application under R. 89 would be deemed to have been made on the date of such withdrawal. (Vol 27) 1940 Sind 181 (183) : ILR (1940) Kar 360 (DB).

[10] Sub-rule (2) will not apply if the application to set aside the sale does not come within the scope of R. 90 but comes within the scope of S. 47. ('09) 33 Bom 698 (702) (DB).

[11] An application containing grounds not covered by R. 90 may be combined with an application under this rule. (Vol 32) 1945 Cal 6 (11) : ILR (1943) 2 Cal 485.

[12] Irregularity in the conduct of or in publishing the sale cannot be taken as a plea in an application under this rule. ('01) 28 Cal 78 (76) (DB).

[13] Application under this rule made and withdrawn or dismissed—Application under R. 90 is not barred. (Vol 12) 1925 All 778 (779) : 47 All 850 (DB) * ('13) 17 Cal WN 476 (477, 488).

23. Limitation.—[1] The deposit must be made within 30 days of the date of the sale. ('11) 13 Cal L

Jour 467 (470) * (Vol 4) 1917 Mad 176 (176, 177) (DB) * (Vol 12) 1929 Nag 10 (11) * (Vol 23) 1936 Pat 119 (120).

[2] Time cannot be extended either under S. 148 or S. 5 of the Limitation Act to make the deposit. (Vol 21) 1934 Lah 875 (876) * (Vol 20) 1933 Rang 8 (9) * (Vol 4) 1917 Cal 554 (555) (DB) * (Vol 4) 1917 Pat 344 (344) : 2 Pat L. Jour 164 (DB) * ('12) 15 Cal L Jour 89 (93) * (Vol 15) 1928 Rang 286 (286) : 6 Rang 490 (DB).

[3] The inherent powers under S. 151 cannot be invoked to extend time. (Vol 4) 1917 Mad 176 (177).

[4] See AIR Commentaries on the Limitation Act 2nd (1942) Edition Art 166.

24. Appeal.—[1] Order setting aside a sale or refusing to set aside a sale under R. 92 is appealable *as an order*. (Vol 5) 1918 All 192 (194) : 40 All 425 (DB) * (Vol 4) 1917 Cal 554 (555) (DB) * ('11) 13 Cal L Jour 535 (542) (DB). (Sale set aside without notice to purchaser—He can appeal.) * ('11) 1911 Pun WR No. 173 page 465 (466) * ('12) 1912 Mad WN 756 (757) (DB) * (Vol 24) 1937 Pat 113 (116) : 16 Pat 202 (FB).

[2] An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immovable property. (Vol 7) 1920 Mad 290 (291).

[3] Value for jurisdiction stated in the suit determines the *forum* of appeal. ('11) 1911 Pun WR No. 173 page 465 (466).

[4] No second appeal will lie from an order under this rule read with R. 92 (Vol 24) 1937 Rang 537 (538) * (Vol 13) 1926 Mad 620 (621) * (Vol 11) 1924 Bom 495 (497, 498) : 48 Bom 688 (DB) * (Vol 7) 1920 Bom 60 (60) : 44 Bom 472 (DB) * (Vol 17) 1930 Cal 249 (250) (DB) * ('11) 38 Cal 389 (340) (DB) * (Vol 8) 1921 Lah 156 (157) * (Vol 6) 1919 Lah 309 (309) * ('12) 8 Nag LR 177 (178) * (Vol 17) 1930 Oudh 9 (9) * (Vol 12) 1925 Oudh 622 (623) : 30 Oudh Cas 86 * (Vol 3) 1916 Pat 307 (308) * (Vol 16) 1929 Rang 148 (148) : 7 Rang 37.

[5] Where a stranger purchases the property no appeal lies from an order. (Vol 12) 1925 Pat 525 (526) : 4 Pat 718 (DB).

[6] Order refusing to restore an application under this rule dismissed for default is not appealable. ('07) 29 All 596 (597, 598).

[7] An order confirming the sale is appealable. (Vol 20) 1933 Lah 210 (210).

[8] Order confirming sale under the inherent power of Court is not appealable. (Vol 24) 1937 Pat 113 (116) : 16 Pat 202 (FB).

[9] On dispute between third party to decree depositing money to set aside sale and the decree-holder, latter's application to withdraw money refused—Order of refusal is not appealable. (Vol 22) 1935 Mad 842 (847) : 58 Mad 972 (FB).

25. Revision.—[1] Order rejecting an application even where the applicant has complied with the terms of the rule is revisable. (Vol 18) 1931 All 756 (757) : 53 All 959 (DB) * (Vol 16) 1929 All 593 (595, 596) : 51 All 910 (DB) * ('97) 1 Cal WN 135 (136) (DB) * (Vol 10) 1923 Pat 159 (162) * (Vol 17) 1930 Oudh 9 (9, 10) (1900) 3 Oudh Cas 286 (288).

[2] Sale set aside even though applicant failed to comply with the terms of the rule—Order is open to revision. (Vol 16) 1929 Nag 10 (11).

90. ^a(1) Where any immovable property has been sold in execution of a decree, the

Application to set aside decree-holder, or any person entitled to share in a rateable distribution of sale on ground of irregularity or fraud. assets, or whose interests are affected by the sale may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

[1882-S. 311 ; 1877-S. 311 ; 1859-S. 256.]

O. 21, R. 89 (*contd.*)

[3] In the following cases order made under this rule was held to be revisable:—

[a] Insufficient deposit due to the Court Officer misleading applicant—Rejection of application on the ground of insufficiency of deposit. (Vol 17) 1930 Cal 249 (250) (DB).

[b] Dismissal for defect without asking for particulars. (Vol 12) 1925 Nag 17 (18, 19).

[c] Order made without jurisdiction. (Vol 3) 1916 Pat 290 (292) : 1 Pat L Jour 459 (DB).

[d] Court declining to accept deposit from judgment-debtor. (Vol 6) 1919 Pat 465 (466) (DB).

[e] Refusal to allow decree-holder to withdraw the deposit as it was made under protest. (Vol 22) 1935 Mad 842 (847) : 58 Mad 972 (FB).

[4] The following orders were held not open to revision:—

[a] Dismissal of application on merits. ('41) 1941 All WR (HC) 227 (228).

[b] Order though passed on an erroneous view of the law of limitation. (Vol 11) 1924 Pat 87 (88, 89) : 2 Pat 800 (DB) * (Vol 4) 1917 Mad 662 (662).

[c] Decision that 'Court' means a Civil Court. (Vol 14) 1927 All 754 (754). * (Vol 5) 1918 All 192 (193) : 40 All 425.

[d] Rejection on the ground that deposit was not made by a proper person. (Vol 18) 1931 All 449 (450)

[e] Rejection of application made beyond time. (Vol 6) 1919 Bom 130 (131) : 43 Bom 735.

[f] Order by Appellate Court setting aside sale on the ground that property is not liable to attachment by reason of S. 60. (Vol 24) 1937 Rang 537 (538).

[g] Order though based on an error of judgment on point of law. (Vol 24) 1937 Oudh 108 (111).

[5] Where no appeal lies no revision lies. ('02) 5 Oudh Cas 377 (379).

26. Deposit—Suit for refund and contribution.—[1] A person depositing money to set aside a sale of his property to satisfy decree against another cannot sue the decree-holder for the recovery of the amount. (Vol 8) 1921 Bom 169 (170, 171, 172) : 45 Bom 1094 (DB) * (Vol 20) 1933 Bom 239 (242) : 57 Bom 601 (DB) * ('07) 12 Cal WN 151 (152, 153) (DB) * ('42) 1942 Pat WN 172 (172) * (Vol 15) 1928 Pat 193 (194, 195) : 7 Pat 30 (DB) * (Vol 22) 1935 Mad 842 (845) : 58 Mad 972 (FB) * (Vol 17) 1930 Mad 921 (924).

[See however (Vol 28) 1941 Mad 635 (636) (DB) * (Vol 18) 1931 Mad 753 (755, 757, 759) (DB) * (Vol 25) 1938 Mad 493 (494, 495) (DB) (Reversing on Letters Patent Appeal, (Vol 22) 1935 Mad 961).]

[2] Sale set aside on the deposit by judgment-debtor—Execution found barred by limitation at the time of

execution sale—Judgment-debtor is entitled to restitution under S. 144. (Vol 30) 1943 All 267 (270) : ILR (1943) All 510 (DB) (Vol 29) 1942 All 14 reversed.)

[3] Sale set aside under the sub-rule—Decree-holder's application to withdraw deposit—Decree liable to be scaled down according to the Madras Agriculturists' Relief Act effect of which on the particular decree amounted to satisfaction or discharge—Decree-holder held not entitled to withdraw the deposit. (Vol 29) 1942 Mad 453 (454) * (Vol 32) 1945 Mad 520 (521).

[4] Payment under O. 21, R. 89 to set aside court-sale—Subsequent reversal of decree on appeal or setting aside of decree in suit brought for the purpose—Claim for restitution by refund of amount paid is maintainable. (Vol 27) 1940 Mad 725 (730).

[5] One of several judgment-debtors or any other person entitled to do so, making the deposit—He can sue the others liable to pay under the decree for contribution or reimbursement. ('11) 8 All L Jour 622 (624). (Claim regarding the five per cent is not tenable) * (Vol 1) 1914 All 330 (331, 332) : 36 All 272 (DB) * (Vol 1) 1914 Cal 338 (340) (DB) * (Vol 18) 1931 Pat 394 (400, 402) : 10 Pat 528 (DB) * ('18) 17 Cal L Jour 179 (182) * ('10) 38 Cal 1 (7) (DB). (Cannot recover the five per cent) * (Vol 4) 1917 Bom 141 (145, 147) : 42 Bom 556 (Do).

[But see (Vol 15) 1928 Rang 278 (280) : 6 Rang 500].

[6] Where the sale is set aside at the instance of a purchaser subsequent to the court-sale, the payment made by him is not lawful, even though he was allowed by the Court to apply and, therefore, he cannot sue for compensation. (Vol 17) 1930 Mad 644 (646).

27. Local Amendments.—[1] (Madras) See the following Cases:—

[a] (Vol 30) 1943 Mad 684 (684).

[b] (Vol 30) 1943 Mad 709 (709).

[2] (Oudh) See (Vol 33) 1946 Oudh 45 (46) : 20 Luck 525.

[3] (Nagpur) See (Vol 24) 1937 Nag 161 (161).

ORDER 21, RULE 90.

Synopsis.

1. Scope and applicability of the rule.
2. Immovable property.
3. Who may apply under the rule.
4. Auction-purchaser.
5. Persons entitled to rateable distribution.
6. "Any person whose interests are affected by the sale."
7. Strangers.

[a] *Note*.—This figure (1) within round brackets occurs in the Government Edition of the Code. It is not clear what purpose it serves as there is only one clause (with a proviso) in the rule. Apparently it is an error.

Objects and Reasons.

"The Committee have struck out the provisions as to irregularity in attaching the property, as such irregularity obviously cannot affect the price. They have introduced the words 'rateable distribution of assets' to clear up a doubt which has been the subject of discussion in several cases. They have altered the language of the proviso in order to meet the doubts which have been raised as to the evidence upon which the Court can act: *Tasadduk Rasul Khan V. Ahamad Husain* (ILR 21 Cal 66 (PC))."—S.O.R.

"Rule 90.—The words 'or fraud' have been added after the word 'irregularity'. We think that the existing law as contained in S. 311 of the present Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application made under S. 311, a decree and open to second appeal. This result, which often involves a considerable prolongation of these proceedings, is in our opinion undesirable. We think that applications for setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing whether they are based on the ground of irregularity or on the ground of fraud."—S. C. R.

PROVINCIAL AMENDMENTS.

Allahabad

For the words "provided that no" read the words "Provided that—

(a) no . . . or fraud ;"

and add the following proviso :

"(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up."

O. 21, R. 90 (contd.)

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| 8. Grounds on which a sale can be set aside. | 27. Sale after an order of stay of execution. |
| 9. Material irregularity in publishing or conducting the sale. | 28. Sale after attachment under Rule 53. |
| 10. Omission to attach property and irregularity in attaching property before sale. | 29. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings. |
| 11. Omission to issue notice. | 30. Non-representation of minor. |
| 12. Irregularities in publishing the sale—
Omission to publish or irregularity in publishing sale proclamation. | 31. Other instances of material irregularity. |
| 13. Misdescription of property. | 32. Fraud in publishing and conducting the sale. |
| 14. Omission or mis-statement of the value of the property. | 33. Combination among bidders. |
| 15. Omission to state the revenue or rent payable on the land. | 34. Substantial injury—Proviso. |
| 16. Omission or mis-statement of the encumbrances over the property. | 35. Applicant must have sustained substantial injury by reason of such irregularity or fraud. |
| 17. Other mistakes in the sale proclamation. | 36. Waiver of irregularity and estoppel. |
| 18. Omission to beat drum. | 37. <i>Bona fide</i> purchaser for value without notice. |
| 19. Irregularities in conducting the sale—
Sale within thirty days of the proclamation. | 38. Setting aside sale on grounds not taken in the application. |
| 20. Sale on a holiday. | 39. Setting aside sale in part only, if and when permissible. |
| 21. Omission to hold sale at stated time and place. | 40. Joinder of claims under Section 47. |
| 22. Sale of property in one lot though advertised for sale in separate lots. | 41. Applicability of Order 9 to applications under this rule. |
| 23. Irregularities regarding the order of sale of lots. | 42. Appeal. |
| 24. Other cases where the sale is not in terms of the proclamation. | 43. Revision. |
| 25. Irregularities in the grant of permission to bid. | 44. Local Amendments |
| 26. Sale after satisfaction of the decree. | 1. Scope and applicability of the rule.—[1]
If any irregularity or fraud in publishing or conducting a sale is a material one and has caused substantial injury to any party, the sale will be set aside at the instance of that party. (Vol 2) 1915 Mad 989 (993) : 38 Mad 387 (DB). |

Calcutta

Add the following to sub-rule (1) :

"or on the ground of failure to issue notice to him as required by Rule 22 of this Order."

Cancel the proviso and, *substitute* therefor the following :

"Provided—

- (i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,
- (ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up unless objection was made by him at the time in respect of the defect relied upon.

Lahore

Add the following proviso :

"Provided further that no such sale shall be set aside on any ground which the applicant could have put forward before the sale was conducted." [7-4 1932.]

Madras

After the first paragraph and before the present proviso to the rule, insert the following :

"Provided that the Court may, after giving notice to the applicant, call upon him before admitting the application, either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realized by the sale, whichever is less, or to deposit such amount in Court :

Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale."

In the present proviso after the word "Provided" insert the word "further." [13 10-1936.]

O. 21, R. 90 (*contd.*)

[2] A litigant has no common law right to set aside a Court sale apart from the rules in the Code. (Vol 27) 1940 Pat 264 (264) : 19 Pat 531 (FB).

[3] 'Sale' means auction-sale and not its confirmation. (Vol 30) 1943 Mad 199 (202) : ILR (1943) Mad 577.

[4] Even where the auction-purchaser is a stranger the sale will be set aside where there is material irregularity in publishing or conducting it. ('10) 11 Cal L Jour 499 (499) (DB).

[5] There must be an application for the purpose of setting aside a sale. (Vol 17) 1930 All 556 (557) (DB).

[6] An application signed by a duly authorized pleader is enough. (Vol 13) 1926 Lah 514 (514).

[7] Court cannot set aside the sale under its inherent powers. (Vol 17) 1930 Lah 789 (790) * (Vol 22) 1935 Mad 459 (464) (DB) (*Obiter.*) * (Vol 25) 1938 Rang 433 (435) (DB).

[8] When an application to set aside sale is barred by limitation the Court cannot set it aside under its inherent powers. (Vol 2) 1915 Mad 392 (395) (DB).

[9] The application need not be accompanied by a deposit as is necessary for an application under R. 89. (Vol 16) 1929 All 671 (672).

[10] A sale cannot be set aside under this rule on an application made under Rule 89. ('01) 28 Cal 73 (76) (DB).

[11] Application under R. 86—Application cannot be set aside under this rule.

[See (Vol 28) 1941 Pat 447 (449) (DB).]

[12] The application must be based on an irregularity or fraud in publishing or conducting the sale (Vol 13) 1926 Cal 829 (829, 830) (DB) * (Vol 21) 1934 Nag 250 (251) * (Vol 12) 1925 Mad 325 (326). * ('96) 19 Mad 219 (222, 227) (DB).

[13] The following objections are outside the scope of the rule.

[a] An objection that the sale is illegal and therefore null and void. (Vol 11) 1924 All 698 (699) * (Vol 24) 1937 All 407 (410).

[b] An objection that the Court had no jurisdiction to execute the decree or sell the property. (Vol 29) 1942 Pat 146 (147) (DB) * ('96) 18 All 141 (144, 145) (DB) * ('06) 28 All 273 (275) (DB).

[But see : (Vol 31) 1944 Mad 145 (146)].

[c] An objection that the property is not legally saleable. (Vol 29) 1942 Lah 153 (156) : ILR (1942) Lah 559 (FB) * ('85) 7 All 641 (642, 645) (DB) * (Vol 7) 1920 Pat 715 (715) (DB) * (Vol 22) 1935 All 1016 (1018) : 58 All 360 (DB) * (Vol 25) 1938 Nag 558 (559) : ILR (1941) Nag 381.

[d] An objection that the decree is invalid. (Vol 13) 1926 Cal 109 (110) (DB) * (1902) 29 Cal 395 (400) : 29 Ind App 99 (PC). (Plea that decree was invalid on the ground of fraud in obtaining it.

[e] An objection that the execution is barred by limitation. ('82) 6 Mad 237 (239) (DB) * (Vol 14) 1927 Oudh 488 (489) (DB) * (Vol 4) 1917 Pat 467 (467) : 2 Pat L Jour 157 (DB).

[f] Objection that no execution ought to have issued under the decree. ('11) 10 Ind Cas 625 (625) (DB) (Cal).

[14] The applicant must prove not only irregularity or fraud in the publishing or conducting of the sale but must also show that he has sustained substantial injury thereby. (Vol 30) 1943 Oudh 204 (207) (DB) * (Vol 11) 1924 Lah 592 (592) * (Vol 21) 1934 Pat 540 (541) (DB) * (Vol 4) 1917 Lah 136 (137) * ('11) 9 Ind Cas 252 (253) (Mad) * (66) 3 Bom H C R A 6 110 (112) (SB).

[15] Summary disposal without investigation of an application under this rule is not permitted. (Vol 12) 1925 Nag 289 (291) * (Vol 22) 1935 Mad 842 (847) : 58 Mad 972 (FB).

[16] Both the parties must be allowed to adduce evidence in respect of the several allegations made. (Vol 19) 1932 Pat 326 (327) : 11 Pat 542 (DB) * (Vol 21)

Nagpur

After the proviso to sub-rule (1), insert the following further proviso :

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

[29-6-1943.]

N.-W.F.P.

Add the following further proviso to sub-rule (1) :

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

Oudh

Add the following second proviso :

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

Patna

Substitute the following for the proviso to sub-rule (1) :

"(i) Provided that no application to set aside a sale shall be admitted,

(a) upon any ground which could have been, but was not put forward by the applicant before the sale was concluded, and

(b) unless the applicant deposits such amount not exceeding 12 1/2 per cent of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity of fraud."

[As amended on 20-3-1942.]

Add the following as sub rule (2) :

"(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any."

O. 21, R. 90 (contd.)

1934 Pat 540 (541) (DB) * (11) 9 Ind Cas 383 (364) (DB) (Cal).

[17] A decision under this rule must be based on findings arrived at on legal evidence. (Vol 19) 1932 Nag 14 (15) : 27 Nag L R 339 * (Vol 11) 1924 Mad 217 (218, 221) : 46 Mad 736 (DB).

[18] Parties can compromise the proceedings. (Vol 5) 1918 All 367 (368) (DB) * (09) 36 Cal 422 (429) (DB) * (Vol 16) 1929 Pat 400 (400) (DB) * (Vol 8) 1921 Pat 107 (108) : 6 Pat L Jour 253 (DB) * (Vol 16) 1929 Lah 886 (887).

[19] Where the proceedings are compromised all the parties affected must be parties to the compromise. (Vol 12) 1925 Cal 779 (780) (DB).

[20] The judgment-debtor and the decree-holder cannot, by a compromise between themselves, have the sale set aside behind the back of the auction-purchaser. (Vol 18) 1931 PC 33 (35, 36) : 58 Ind App 50 : 27 Nag LR 95 (PC). (Approving 10 Ind Cas 148).

[21] An execution sale vitiated by irregularity or fraud should ordinarily be set aside in its entirety. (Vol 15) 1928 Cal 349 (351) (DB).

[22] When the sale is by separate lots it need not be set aside in its entirety. (Vol 13) 1926 Cal 829 (829, 830) (DB).

[23] Sale by separate lots—Irrregularity or fraud vitiating sale of certain lots—Only sale of such lots will be set aside. (Vol 1) 1914 Cal 773 (774) (DB) * (10) 9 Ind Cas 1100 (1100) (DB) (Mad) * (Vol 23) 1936 Mad 121 (122) : 59 Mad 438 (DB).

[24] The parties are restored to the position which they occupied immediately before the sale on its being set aside under this rule. (Vol 28) 1941 Cal 58 (60) : ILR (1940) 2 Cal 334 * (Vol 14) 1927 Cal 511 (512) (DB).

[25] Purchaser put into possession—Judgment-debtor succeeding in the application can be restored to possession. (06) 9 Oudh Cas 101 (103) (DB).

[26] Judgment-debtor succeeding in the application can be compensated for loss of profit during the period of dispossession. (Vol 1) 1914 Cal 692 (693) (DB) * (Vol 17) 1930 Pat 280 (281, 282) : 9 Pat 685 (DB).

[27] The purchaser can recover from the judgment-debtor any money paid *bona fide* to save and preserve the property. (Vol 4) 1917 Cal 216 (217) (DB).

[28] If there was no irregularity or fraud interest on the purchase-money deposited by the auction-purchaser can be allowed. (Vol 8) 1921 PC 27 (27) : 48 Ind App 24 : 6 Pat L Jour 129 (PC).

[29] Rule applies to sales in execution of mortgage decrees. (1900) 25 Mad 244 (258, 266, 270) (FB) * (1900) 4 Cal WN 474 (479, 480) (DB).

[30] The rule is also applicable to sales by receivers appointed by Court. (04) 6 Bom LR 1140 (1145).

[31] The rule does not apply to the following sales.

[a] Sales under Bengal Tenancy Act. (Vol 3) 1916 Cal 719 (721) (DB).

[b] Sales by Official Receiver under Provincial Insolvency Act. (Vol 16) 1929 Lah 622 (623) * (Vol 19) 1932 Lah 320 (320) * (Vol 5) 1918 Mad 136 (136) (DB).

[See however (Vol 14) 1927 Nag 262 (263)].

[c] Sales under Madras Estates Land Act. (Vol 28) 1941 Mad 72 (72, 73) * (Vol 7) 1920 Mad 292 (293) : 43 Mad 351 (DB).

[d] Sale in auction and assignment by official liquidator with sanction of Court of a decree standing in the name of a company which has been wound up compulsorily. (Vol 25) 1938 Mad 176 (177) (DB).

[32] Sale can be set aside even after confirmation. (10) 11 Cal L Jour 489 (498) (DB) * (Vol 4) 1917

O. 21, R. 90 (*contd.*)

Pat 467 (467): 2 Pat L Jour 157 (DB) * ('09) 32 Mad 242 (252) (SB) * ('08) 35 Cal 61 (77) (FB).

[But see ('11) 9 Ind Cas 472 (474) (Low Bur)].

[33] Proceedings under O. 21, R. 90, C.P. Code, are clearly proceedings in execution. (Vol 29) 1942 Mad 727 (728) (DB).

2. Immovable property.—[1] A house attached to land is "immovable property". (Vol 17) 1930 All 513 (513).

[2] A debt secured by a mortgage of immovable property or a decree thereon is only movable property and this rule does not apply to a sale thereof in execution. ('02) 26 Bom 305 (310, 312) (DB) * ('02) 3 Cal WN 5 (6) (DB).

[See however (Vol 20) 1933 Lah 210 (211). (Mortgagee rights as well as mortgage rights are immovable property).]

[3] Decree for possession of immovable property is not immovable property. ('21) 64 Ind Cas 388 (390) (DB) (Cal).

3. Who may apply under the rule.—[1] Where after making an application under the rule the applicant dies, his legal representative can continue the proceedings. (Vol 19) 1932 Pat 234 (236): 11 Pat 424 (DB).

[See also Notes 6 to 9].

[2] Receiver in possession of property sold in execution has *locus standi* to apply for setting aside the sale. (Vol 32) 1945 Cal 387 (394) (DB).

[See however (Vol 30) 1943 Mad 199 (202): ILR (1943) Mad 577.]

4. Auction-purchaser.—[1] An auction-purchaser can apply under this rule. (Vol 7) 1920 Mad 145 (146) (DB) * (Vol 12) 1925 All 459 (461, 463): 47 All 479 (DB) * (Vol 20) 1933 Pat 435 (439): 12 Pat 665 (SB) (Vol 11) 1924 Pat 319 overruled * (Vol 9) 1922 Nag 113 (114) * (Vol 26) 1939 Nag 179 (182): ILR (1939) Nag 357 (DB). (Dissenting from (Vol 10) 1923 Nag 161) * (Vol 24) 1937 Nag 140 (142) * (Vol 14) 1927 Rang 301 (302): 5 Rang 516 * (Vol 31) 1944 Pesh 42 (44) (DB).

[But see (Vol 15) 1928 Cal 828 (830) * (Vol 19) 1932 Lah 468 (469, 470): 14 Lah 1 (DB). (Reversing (Vol 18) 1931 Lah 630 on Letters Patent Appeal) * (Vol 18) 1931 Sind 107 (110): 25 Sind LR 405 (DB) * (Vol 16) 1929 Rang 33 (33): 6 Rang 621 (DB) * (Vol 23) 1936 Bom 311 (312): 60 Bom 750.].

5. Persons entitled to rateable distribution.—[1] Persons entitled to rateable distribution can apply under this rule. (Vol 30) 1943 Mad 199 (200): ILR (1943) Mad 577 (DB) * (Vol 2) 1915 Cal 16 (16) (DB) * (Vol 14) 1927 Mad 67 (68) * (Vol 23) 1936 All 626 (627) (DB).

[See however (Vol 12) 1925 Sind 101 (101)].

[2] Person entitled to rateable distribution are those on whom such a right is conferred by S. 73 and not persons entitled to dividends under the Provincial Insolvency Act (Vol 30) 1943 Mad 199 (200): ILR (1943) Mad 577 (DB) * (Vol 4) 1917 Sind 33 (34): 10 Sind LR 189 (DB) * (Vol 3) 1916 Sind 20 (21): 10 Sind LR 53.

6. "Any person whose interests are affected by the sale."—[1] Under S. 311 of the old Code the expression "any person whose immovable has been sold" was held to mean "any person whose interests are affected by the sale". ('88) 15 Cal 488 (492) (FB).

[2] The judgment-debtor is a person whose "interests are affected by the sale". (Vol 26) 1939 Mad 193 (194) (DB).

[3] A proprietary or a possessory interest is not necessary, for, it may be a pecuniary or other interest. (Vol 11) 1924 Cal 786 (787): 51 Cal 495 (DB) * (Vol 14) 1927 Mad 783 (784) * (Vol 17) 1930 Pat 451 (452) * (Vol 26) 1939 Cal 146 (147): ILR (1939) 1 Cal 273 * (Vol 26) 1939 Nag 179 (181): ILR (1939) Nag 357 (DB).

[4] The following persons have been held to be affected by a sale under the following circumstances:—

[a] An attaching creditor in whose favour a decree has been passed. (Vol 19) 1932 All 2 (3): 53 All 753 (DB) * (Vol 21) 1934 Cal 474 (478) (DB) * (Vol 20) 1933 Mad 455 (456) (DB) * (Vol 20) 1933 Pat 445 (445) * (Vol 11) 1924 Cal 786 (787, 789): 51 Cal 495 (DB) * ('74) 11 Bom HCR 15 (18) (DB) * (Vol 26) 1939 Mad 193 (194) (DB).

[But see (1900) 4 Cal WN 542 (544) (DB)].

[b] A co-judgment-debtor under a mortgage decree, the sale of whose property is postponed until the sale of the property of the other, where such other property is sold for an inadequate price. (Vol 18) 1931 Pat 217 (217, 218) (DB) * (Vol 20) 1933 All 54 (55): 55 All 121 (DB).

[c] An attaching creditor before judgment in whose favour a decree has not yet been passed. (Vol 26) 1939 Mad 250 (253): ILR (1939) Mad 374 (FB) * (Vol 2), 1915 Mad 541 Overruled.

[See also (Vol 21) 1934 Cal 477 (478) (DB). (Decree obtained after sale but before application—Attaching creditor can apply).]

[But see (Vol 12) 1925 Cal 1103 (1104) * ('12) 16 Cal L. Jour 566 (567) (DB)]

[5] An applicant need not have any present interest in the property and hence a reversioner to a Hindu widow's estate can apply under this rule. (Vol 29) 1942 Cal 167 (169) (DB) (*Obiter*) * (Vol 15) 1928 Mad 1138 (1139) * (Vol 13) 1926 Mad 959 (960) * (Vol 16) 1919 Pat 127 (127): 4 Pat L Jour 360 (DB).

[6] A person who is entitled to specific performance of a contract to sell the property can apply under this rule.

[See (Vol 6) 1919 Pat 127 (127): 4 Pat L Jour 360 (DB).

[7] Judgment-debtor declared insolvent and property vested in the Official Receiver—He can apply in respect of property that belonged to him before adjudication. (Vol 27) 1940 Mad 569 (570) (DB) * (Vol 20) 1933 Mad 851: 57 Mad 89 (FB) followed) * (Vol 20) 1933 Mad 694 (694, 695).

[8] A defaulting auction-purchaser who would be able to make good the deficiency on a re-sale, and whose liability is only a contingent one, can apply under this rule. (Vol 20) 1933 Cal 815 (815) (DB).

[9] Irrespective of the nature of the interest it must exist at the time of sale and hence a person purchasing the property after the execution sale cannot apply under this rule. (Vol 26) 1939 Cal 146 (148): ILR (1939) 1 Cal 273 * (Vol 30) 1943 Mad 199 (201): ILR (1943) Mad 577 (DB).

[10] A decree-holder who attaches the property after the court-sale and before confirmation of the sale has no *locus standi* to apply under this rule to set aside the sale. (Vol 26) 1939 Mad 501 (502).

[11] An interim receiver in insolvency, of the judgment-debtor's properties, appointed after the execution

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sale but before its confirmation cannot apply under this rule. (Vol 80) 1943 Mad 199 (202) : ILR (1943) Mad 577 (DB).

[12] The following persons have been held entitled to apply as being persons "whose interests are affected by the sale".

[a] A real owner of property sold in execution of a decree against his benamidar. ('93) 20 Cal 418 (424, 425) (SB) * ('96) 19 Mad 167 (168).

[b] A judgment-debtor who has sold away his property. (Vol 13) 1926 Mad 217 (218) (DB) * (Vol 13) 1926 Cal 56 (58).

[c] The legal representative of a deceased judgment-debtor. ('90) 12 All 440 (446) (FB) * ('01) 25 Bom 337 (348) : 27 Ind App 216 (PC).

[d] Where the judgment-debtor is a minor, his guardian. (Vol 17) 1930 Nag 135 (136, 137) : 26 Nag LR 173.

[e] Where the judgment-debtor is a ward of Court, the Court of Wards. (Vol 4) 1917 Cal 745 (746) (DB).

[f] Where the judgment debtor is an adjudicated insolvent, the Official Receiver. (Vol 15) 1928 Mad 454 (455) * (Vol 3) 1916 Sind 20 (21) : 10 Sind L R 53 * (Vol 22) 1935 Mad 459 (461) (DB).

[See however (Vol 30) 1943 Mad 199 (201, 202) : ILR (1943) Mad 577 (DB)].

[g] A purchaser from the judgment-debtor *pendente lite*. (Vol 14) 1927 Mad 783 (784) * (Vol 20) 1933 Cal 788 (789).

[See however ('82) 8 Cal 367 (369) (DB)].

[h] A transferee of a tenure or occupancy holding sold in execution of a decree for arrears of its own rent. (Vol 12) 1925 Cal 925 (925) * ('05) 9 Cal W N 134 (140) (DB) * (Vol 12) 1925 Pat 461 (461, 462).

[i] One only of several co-sharer judgment-debtors. ('08) 30 All 192 (196) (DB).

[j] Receiver appointed in a suit for administration of property of the deceased judgment-debtor. (Vol 30) 1943 Bom 273 (277).

[k] Sale of joint family property in execution of decree against father—Sons can apply to set aside sale. (Vol 22) 1935 Pat 205 (206) : 14 Pat 436.

[13] The following persons have been held to have no *locus standi* to apply under the rule.

[a] Kudivaramdar where melvaram interest alone is sold. (Vol 28) 1941 Mad 653 (654).

[b] Attaching decree-holder where the property sold is insufficient to meet the demand of all the mortgagees, even if the sale was for a fair price. (Vol 26) 1939 Mad 193 (194) (DB).

[14] Judgment-debtor applying under the rule and then transferring property to another—Latter can continue application. (Vol 24) 1937 Nag 161 (162).

7. Strangers.—[1] Persons not parties to suit can also apply under this rule. The words "whose interests are affected by the sale" are wide enough to cover persons who are not parties to the suit. (Vol 23) 1936 Lah 969 (971).

[2] A person who claims the property sold by a title paramount, cannot apply under this rule. (Vol 23) 1941 Mad 680 (680, 681) * ('88) 15 Cal 488 (492) (FB) (Overruling 14 Cal 240) * (Vol 3) 1916 All 147 (148) : 38 All 358 (DB) * ('13) 20 Ind Cas 16 (17) (DB)

(All). * ('93) 16 Mad 476 (478) (DB) * (Vol 13) 1926 Nag 68 (71) * (Vol 10) 1923 Pat 451 (452) : 2 Pat 386 (DB) * (Vol 9) 1922 Upp Bur 22 (22) : 4 Upp Bur Rul 97.

[But see ('90) 12 All 440 (457) (FB)]. -

[3] Person whose property has been sold for another's debt should apply under O. 21, R. 58 and not under this rule. (Vol 28) 1941 PC 45 (46) : 20 Pat 791 : 68 Ind App 97 : ILR (1941) Kar (PC) 88 (PC).

8. Grounds on which a sale can be set aside.—[1] Before a sale can be set aside under this rule, it must be shown that there has been a material irregularity or fraud in publishing and conducting the sale. (Vol 28) 1941 Mad 630 (680) * (Vol 6) 1919 Cal 169 (170) (DB) * ('08) 12 Cal WN 757 (758, 759) * (Vol 19) 1932 All 369 (369) (DB) * (Vol 15) 1928 Lah 918 (918) * ('11) 1911 Pun LR No 222 P. 851 (852) * (Vol 12) 1925 Mad 729 (730) (DB) * ('19) 52 Ind Cas 167 (167) (U P B R) * (Vol 3) 1916 All 186 (187) (DB).

[2] To set aside a sale under this rule it must be shown that substantial injury has resulted to the applicant thereby. (Vol 19) 1932 All 369 (369) (DB).

[3] An illegal and void sale need not be set aside at all and can be ignored. (Vol 28) 1941 Pat 566 (570) (DB) * ('93) 15 All 324 (326, 327) (DB) * (Vol 12) 1925 All 551 (552) (DB) * ('11) 13 Cal L Jour 162 (164) (DB) * ('87) 1887 All WN 32 (32) (DB).

[4] Judgment-debtors proving a sale to be a nullity are entitled to a declaration that the sale did not affect their interests. (Vol 31) 1944 Cal 391 (391).

[5] A sale which is illegal and void need not be shown to have caused any injury to have it ignored. (Vol 27) 1940 Mad 206 (206) (DB) * ('89) 11 All 333 (338)

[But see ('95) 5 Mad L Jour 70 (73)].

[6] Other grounds than those contained under this rule are open to the decree-holder purchaser under S. 47. (Vol 20) 1933 All 192 (196) (DB).

[7] Distinction between an illegal and irregular sale is one of degree. (Vol 8) 1921 Mad-583 (585) : 44 Mad 35 (DB).

[8] To establish an illegality there must be shown some disregard of a positive provision of the law. (Vol 18) 1929 Mad 275 (279) (DB).

[9] Appeal against decree for sale pending—Though sale ought to be stayed under O. 41 R 6 (2) on application by judgment-debtor, sale proceeded with—This amounts to illegality. (Vol 27) 1940 Mad 82 (83, 84) : ILR (1940) Mad 420 (DB).

[10] Where all the requirements of R. 90 for setting aside sale are satisfied, the judgment-debtor cannot be refused the relief on the ground that his case stands on the border line regarding technicalities. (Vol 31) 1945 Lah 196 (199) : ILR (1944) Lah 280.

9. Material irregularity in publishing or conducting the sale.—[1] The term "irregularity" means "not being in conformity to the rules prescribed for regulating execution sales." ('95) 5 Mad L Jour 70 (73).

[2] Material irregularity is an irregularity in procedure in bringing the property to sale and does not include the irregularity of selling property not belonging to the judgment-debtor. (Vol 20) 1933 Pat 435 (440) : 12 Pat 665 (SB).

[3] The words "publishing or conducting the sale" refer respectively to the proclamation of sale under R. 66 and to the action of the sale officer. ('08) 32 Bom 572 (574) (DB).

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[4] Irregularity or fraud in sale proclamation is covered by rule. (Vol 24) 1937 Nag 140 (141).

[5] The words "conducting the sale" do not refer to anything done before the sale or any proceedings unconnected with the actual carrying out of the sale. ('85) 7 All 641 (645) (DB) * (Vol 7) 1920 Mad 481 (484) (DB).

[6] The rule does not cover objections to the saleability of the property. (Vol 29) 1942 Lah 153 (156) : ILR (1942) Lah 559 (FB).

[7] Material irregularities or fraud otherwise than in publishing or conducting the sale may be dealt with under S. 47. (Vol 28) 1941 Pat 566 (570) (DB).

10. Omission to attach property and irregularity in attaching property before sale.—[1] Omission to attach property prior to sale does not amount to an irregularity in publishing or conducting the sale. (Vol 14) 1927 Cal 847 (847) (DB) * (Vol 11) 1924 Rang 124 (124) : 1 Rang 533 * (Vol 32) 1945 Nag 97 (100) : ILR (1945) Nag 121.

[But see ('99) 21 All 311 (313) (DB) * (Vol 17) 1930 Lah 685 (686) * (Vol 13) 1926 Mad 211 (211, 215) * (Vol 31) 1944 Cal 14 (16)].

[2] Where there has been an attachment, an error in the warrant of such attachment is a mere irregularity which will not vitiate the sale. (1910) 6 Ind Cas 713, 715 : 1910 Pun Re No. 40 (DB) * (Vol 17) 1930 Lah 789 (791).

[3] The absence of notice of the attachment to the judgment-debtor is a mere irregularity which will not vitiate the sale. (1865) 2 Suth WR 74 (75) (DB).

11. Omission to issue notice.—[1] Omission to issue notice under Rule 22—Irregularity is one anterior to the publishing or the conduct of the sale. ('08) 32 Bom 572 (574) (DB).

[2] Failure to issue notice under R. 22 goes to the root of the jurisdiction of the execution Court and renders the sale illegal and void and therefore is a matter not governed by this rule. (Vol 28) 1941 Pat 481 (481, 482) (DB) * (Vol 28) 1941 Pat 566 (571) (DB).

[See however (Vol 20) 1933 Pesh 71 (72). (Failure to issue notice under R. 22 is a ground to act under this rule. * (Vol 7) 1920 Mad 1034 (1035) : 43 Mad 57 (DB) (Do.)

[3] There is a difference of opinion amongst the different High Courts as to whether absence of notice under R. 66 is a ground for acting under this rule. The following are the views.

[a] The irregularity is not one relating to the publication or the conduct of the sale and cannot be considered under this rule. (Vol 17) 1930 Mad 489 (489) * (Vol 12) 1925 Mad 1142 (1142) (DB) * (Vol 7) 1920 Mad 481 (484) * (Vol 6) 1919 Pat 396 (393) (DB).

[See however (Vol 22) 1935 Mad 459 (462) (DB)].

[b] Absence of the notice renders the sale void. (Vol 5) 1918 Low Bur 114 (114).

[c] Absence of notice under R. 66 is an irregularity in the publishing of the sale. ('13) 18 Ind Cas 715 (717) (DB) (Cal) * (Vol 25) 1938 Lah 152 (154) (DB) * (Vol 10) 1923 Lah 592 (593) : 4 Lah 243 (DB) * (Vol 6) 1919 Nag 19 (21) : 16 Nag LR 72 * (Vol 16) 1929 Nag 130 (131) : 23 Nag LR 58 * (Vol 26) 1939 Pesh 9 (11).

[4] Where a judgment-debtor dies before the proclamation of sale is drawn up and the proclamation is

drawn up without notice to his legal representatives, the sale held on the basis of such proclamation is void. (Vol 15) 1928 All 74 (76) : 49 All 830.

[5] The onus of proving that notice under R. 66 was not properly served is on the judgment-debtor. (Vol 20) 1933 Pat 640 (640) (DB).

[6] Where no notice under R. 66 is required to be given, the non-issue of notice is no ground for setting aside a sale. (Vol 13) 1926 Oudh 76 (76, 77) (DB).

[7] A sale pending an insolvency petition against the judgment-debtor is not bad for want of notice to the interim receiver (Vol 23) 1936 Mad 121 (122) : 59 Mad 438 (DB).

12. Irregularities in publishing the sale.—Omission to publish or irregularity in publishing sale proclamation.—[1] Failure to publish the sale proclamation is an irregularity within this rule. (Vol 13) 1926 Cal 577 (578) (DB) * (Vol 16) 1929 All 948 (949, 950) : 52 All 115 (DB).

[2] An irregularity in the preparation and service of sale proclamation is an irregularity within this rule. (Vol 17) 1930 Pat 153 (154) * ('13) 18 Ind Cas 715 (716) (DB) (Cal) * (Vol 26) 1939 Pesh 9 (12).

[3] Failure to affix sale proclamation to a conspicuous portion of the property is an irregularity within this rule. (Vol 16) 1929 All 948 (948, 950) : 54 All 115 (DB) * ('02) 6 Cal WN 44 (46) (DB) * (Vol 10) 1923 Lah 671 (671).

[4] Properties situate in several villages are distinct—Failure to proclaim sale at each village or property is an irregularity. ('13) 40 Cal 635 (643) : 40 Ind App 140 (PC) * ('85) 11 Cal 74 (76) (DB).

[See however ('11) 13 Cal L Jour 192 (198) (DB).]

[5] Property broke up into lots for the purpose of sale—They are not several properties for the purpose of publication of proclamation. (Vol 17) 1930 Lah 685 (687).

[6] Failure to affix copy of sale proclamation as required by R. 54 in the collector's office is an irregularity within this rule. ('91) 18 Cal 422 (426) (FB). (It is not an illegality. * (Vol 11) 1924 Mad 217 (219, 223) : 46 Mad 736 (DB) * (Vol 12) 1925 Lah 583 (584) (DB).

[7] Collector's office and District Judge's Court situate in the same compound—Copy of proclamation affixed in District Judge's Court—Sale widely advertised—Omission to affix sale proclamation is not material irregularity. (Vol 32) 1945 (PC) 178 (181) : 72 Ind App 287 (PC).

[8] Failure to direct an advertisement of sale in the Gazette is not an irregularity. (Vol 6) 1919 Lah 260 (261).

[9] Two lots each comprising several villages brought to sale—Sale proclamation affixed in each village not showing the lot of which that village was part—*Held* it was material irregularity. (Vol 20) 1933 Mad 225 (226, 227) : 56 Mad 356 (DB).

13. Misdescription of property.—[1] Misdescription of property, but parties knowing what had been attached and sold. Resulting irregularity does not vitiate the sale. (Vol 13) 1926 Nag 246 (248) * (Vol 20) 1933 Lah 1031 (1032) * (Vol 20) 1933 Cal 662 (663) (DB) * (Vol 4) 1917 Mad 967 (967) (DB) * (Vol 21) 1934 Pat 186 (187) (DB) * (Vol 32) 1945 Nag 83 (84) : ILR (1944) Nag 561.

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[2] On a fundamental misdescription misleading purchaser, a sale can be set aside. (Vol 30) 1943 Lah 129 (185) (DB) * (Vol 27) 1940 Mad 82 (85) : ILR (1940) Mad 420 (DB) * (Vol 12) 1925 All 459 (462, 464) : 47 All 479 (DB) * ('89) 12 Mad 19 (25) : 15 Ind App 171 (PC).

[3] The principle of Caveat Emptor cannot apply to such cases. (Vol 12) 1925 All 459 (462, 464) : 47 All 479 (DB).

[4] Non-specification of the share of the judgment-debtor in the property sold is a material irregularity. ('87) 1887 All WN 50 (51) (DB) * ('02) 6 Cal WN 526 (527, 528) (DB) * ('78) 3 Cal 544 (546) (DB).

[See however (Vol 18) 1931 Bom 367 (368) * (Vol 8) 1921 All 223 (224) (DB)].

[5] Lack of specification of extent of judgment-debtor's interest in joint family property does not invalidate proclamation or sale. (Vol 29) 1942 Mad 97 (99) (DB).

[6] A condition of sale requiring purchaser to assume certain facts and intended to cover a flaw which goes to the root of the title—Vendor believing the facts to be true—*Held* it was not misleading. (Vol 23) 1936 Cal 703 (705).

14. Omission or misstatement of the value of the property.—[1] A mere omission to state in the proclamation the estimated value of property will not amount to a material irregularity. (Vol 9) 1922 Lah 35 (36) * (Vol 3) 1916 All 186 (187) (DB) * (Vol 20) 1933 Cal 662 (663) (DB) * (Vol 18) 1931 Cal 490 (491) : 58 Cal 813 (DB) * (Vol 14) 1927 Mad 1009 (1009) (DB) * (Vol 15) 1928 Nag 281 (282) (DB) * (Vol 25) 1938 Lah 508 (508).

[2] Valuation of both parties given in proclamation without value fixed by Court—It is no material irregularity. (Vol 11) 1924 Cal 589 (592) (DB).

[3] Where in particular cases it is necessary to give the value to enable the bidders to judge the value of the property, the omission to do so may amount to a material irregularity. (Vol 30) 1943 Oudh 204 (207, 208) (DB) * (Vol 16) 1929 All 948 (948, 949) : 52 All 115 (DB) * (Vol 17) 1930 Nag 191 (192) * (Vol 22) 1935 Lah 390 (391).

[4] A deliberate misstatement made of the value to mislead possible bidders and prevent them from offering adequate prices or from bidding at all is a material irregularity. ('13) 40 Cal 635 (645) : 40 Ind App 140 (PC) * (Vol 32) 1945 Cal 6 (18) : ILR (1943) 2 Cal 485.

[See however (Vol 21) 1934 Pat 186 (187) (DB) (Under-valuation in sale proclamation is not always by itself sufficient to set aside sale)].

[5] Where a deliberate misstatement results in substantial injury, the sale will be set aside. (Vol 32) 1945 PC 67 (70) : 72 Ind App 104 : ILR (1945) Mad 601 : ILR (1945) Kar (PC) 142 (PC).

15. Omission to state the revenue or rent payable on the land.—[1] Omission to state the Government revenue or rent payable on the land is a material irregularity. (Vol 10) 1923 PC 93 (93, 94) (PC) * ('83) 9 Cal 656 (661) : 10 Ind App 25 (PC).

[2] A materially incorrect statement of such revenue or rent is a material irregularity. (Vol 2) 1915 Mad 939 (991) : 38 Mad 887 (DB) (1875-76) 3 Ind App 230 (239) (PC).

[3] Omission to state the *income* of the property is not a material irregularity. (Vol 15) 1923 Lah 918 (918) * (Vol 4) 1917 Lah 136 (137).

[See however (Vol 30) 1943 Oudh 204 (208) (DB)].

[4] Where no separate revenue is fixed on the portion of the estate sold, omission to mention revenue is not material irregularity. (Vol 32) 1945 (PC) 178 (180, 181) : 72 Ind App 287 (PC).

16. Omission or misstatement of the encumbrances over the property.—[1] An omission to state or a misstatement of the encumbrances on the property will be a material irregularity. (Vol 12) 1925 Oudh 424 (424) (DB) * (Vol 19) 1932 All 369 (369, 370) (DB) * ('86) 8 All 116 (117) (DB) * ('02, 6 Cal WN 836 (837) (DB) * ('81) 7 Cal 34 (40, 42) (DB) * ('87) 10 Mad 57 (62) (DB) * (Vol 16) 1929 Pat 588 (589) * (Vol 8) 1921 Pat 479 (480) (DB) * (Vol 22) 1935 Lah 962 (962) * (Vol 31) 1944 Mad 145 (146).

[2] An omission to mention encumbrances would not of itself, be injurious to the judgment-debtor. (Vol 20) 1933 All 546 (548, 550) : 55 All 519 (DB).

[3] An omission to mention an attachment in a sale proclamation is not a material irregularity. (Vol 24) 1937 Pat 50 (52) (DB).

17. Other mistakes in the sale proclamation.—[1] Part of decree satisfied—Sale proclamation advertising sale in satisfaction of entire amount due—There is a mere irregularity which does not render the sale a nullity. (Vol 4) 1917 Mad 739 (741) (DB).

18. Omission to beat drum.—[1] Omission to beat drum at the time of proclamation of sale is an irregularity within this rule. ('86) 10 Bom 504 (505) (DB) * (Vol 20) 1933 All 747 (747) : 55 All 182 (DB) * ('97) 20 Mad 159 (161) (DB).

[2] Omission to have the drum beaten at the time of the sale is not such an irregularity. (Vol 7) 1920 All 206 (207) (DB).

19. Irregularities in conducting the sale.—Sale within thirty days of the proclamation.—[1] Sale held within thirty days of the publication of the proclamation at the place where property is situate, or within thirty days of the affixture of the proclamation in the court-house is vitiated by a material irregularity ; but such sale is not *ipso facto* null and void. (Vol 25) 1938 Cal 699 (701) * (1894) 21 Cal 66 (69) : 20 Ind App 176 (PC).

20. Sale on a holiday.—[1] To hold a sale on a holiday is neither an illegality nor an irregularity within this rule. (1881) 3 All 333 (334) (DB) * ('82) 1882 All WN 169 (169) (DB).

[2] Holding of sale between the hours of prayer on Fridays, when the sitting of Court is suspended, does not amount to material irregularity. (Vol 27) 1940 Cal 265 (268) : ILR (1940) 1 Cal 1 (DB).

21. Omission to hold sale at stated time and place.—[1] Adjournment of sale without notice to judgment-debtor or purchasers is material irregularity within Rule 90. (Vol 30) 1943 Oudh 204 (209).

[2] Holding of sale on date not fixed for it, but within period during which monthly sales take place is not nullity. (Vol 28) 1941 Pat 507 (508).

[3] Sale held on day which it has been expressly proclaimed that it shall not take place is vitiated by illegality and is nullity. (Vol 27) 1940 Mad 206 (207) (DB).

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[4] Notification and holding of sale at a different place in contravention of Court's order is illegal. (Vol 8) 1921 Mad 583 (585, 586) : 44 Mad 35 (DB).

[5] Officer conducting sale can postpone it by not more than seven days for sufficient reasons. ('11) 39 Cal 26 (32) : 38 Ind App 200 (PC).

[6] Reasons for postponement must be recorded in writing and failure to do so will constitute a material irregularity. (Vol 19) 1932 All 369 (369) (DB).

[7] Postponement of sale by more than seven days—Holding sale without fresh proclamation is a material irregularity. (Vol 30) 1943 Mad 739 (741).

[See however ('10) 1910 Mad WN 684 (685) (DB)].

[8] Failure to fix the date and hour for a resale or adjourned sale is a material irregularity. (Vol 30) 1943 Oudh 204 (208) * (Vol 29) 1942 Cal 275 (276) : ILR (1941) 2 Cal 570 (DB) * (Vol 20) 1933 All 546 (549) : 55 All 519 * (Vol 14) 1927 All 241 (241) : 49 All 402 (DB) * (02) 6 Cal WN 48 (51) (DB) * ('97) 20 Mad 159 (161) (DB) * (Vol 12) 1925 Mad 631 (633) * (Vol 25) 1938 Nag 107 (109) : ILR (1938) Nag 836 (DB) * (Vol 32) 1945 Cal 434 (436) (DB).

[See however (Vol 22) 1935 All 182 (182, 183) (DB)].

[9] See also Notes on O. 21, R. 66.

22. "Sale of property in one lot though advertised for sale in separate lots."—[1] Property ordered and advertised to be sold in several lots—Sale in one lot is a material irregularity—But where there is no order for selling in several lots, sale can be in one lot though advertised to be sold in several lots. (Vol 4) 1917 Lah 136 (137).

[But see (69) 12 Suth W R 492 (493, 494) (DB)].

[2] Property advertised to be sold in one lot—No irregularity in selling it in several lots. ('98) 21 Mad 417 (419) (DB).

23. Irregularities regarding the order of sale of lots.—[1] Decree itself directing the order in which property is to be sold—Selling in any other order is a material irregularity. ('12) 16 Ind Cas 235 (236) (DB) (Cal) * (Vol 4) 1917 Mad 877 (879) (DB).

[2] Mortgage decree against a number of judgment-debtors with rights of contribution not directing order in which sale is to be held—Execution court should direct sale in consonance with equities *inter se* on their application and failure is a material irregularity. (Vol 12) 1925 Pat 148 (150, 151) (DB).

[3] Absence of direction in decree—Court adopting a particular way of sale but a better way possible—No irregularity is committed. (Vol 15) 1928 Mad 684 (685) (DB).

[4] Absence of direction in decree—Executing Court fixing the order—Order cannot be changed without notice to bidders. ('69) 12 Suth W R 281 (282) (DB).

[5] Executing Court not directing sale in any particular order—Items may be sold in a different order from that specified on the sale list. (Vol 18) 1931 All 159 (160) (DB) * (Vol 20) 1933 All 546 (547) : 55 All 19 (DB).

[6] In Madras lots are sold in the order in which they appear in the proclamation and any departure therefrom may amount to a material irregularity. (Vol 26) 1939 Mad 303 (303) : ILR (1939) Mad 216 (DB).

24. Other cases where the sale is not in terms of the proclamation.—[1] Encumbrance not mentioned in proclamation and an application to notify it rejected by Court—Decree-holder causing sale officer to announce it at time of sale is material irregularity. (Vol 12) 1925 Oudh 424 (424) (DB).

[2] Proclamation advertising sale subject to encumbrances—Property sold free of encumbrances without notice—There is material irregularity. ('11) 9 Ind Cas 383 (384) (DB) (Cal).

[3] Entire interest in property proclaimed for sale—On the sale date only a portion sold without fresh proclamation—There is no irregularity in the sale. (Vol 19) 1932 All 664 (664) * ('20) 11 Mad LW 477 (478, 479) (DB). * (Vol 11) 1924 Pat 803 (803) (DB).

[But see ('80) 6 Cal L Rep 237 (238) (DB). * (Vol 17) 1930 Lah 15 (16) * (Vol 26) 1939 Nag 241 (242) (DB).]

25. Irregularities in the grant of permission to bid.—[1] Decree-holder permitted to bid—Subsequent fixing without notice of a limit below which he was not to bid—Property sold at an under-value—*Held* there was material irregularity in the sale. (Vol 12) 1925 Oudh 381 (382).

[2] Three applications by decree-holder for permission to bid—First two not supported by affidavits as required by Madras Civil Rules of Practice but the last one so supported—*Held* there was no irregularity in granting permission. (Vol 12) 1925 Mad 729 (730) (DB).

26. Sale after satisfaction of the decree.—[1] Sale held under a decree recorded as satisfied is a nullity and is not covered by this rule. ('11) 9 Ind Cas 452 (452) (Low Bur) * (Vol 1) 1914 Cal 260 (263) : 20 Ind Cas 337 (340) (DB). * ('94) 16 All 5 (7, 9) (DB).

[2] Satisfaction of a decree not recorded—Application to set aside sale on the ground that the decree has been satisfied is not maintainable under this rule. (Vol 14) 1927 Lah 84 (84).

[3] Sale published and held within 90 days of the date of alleged satisfaction—There is no material irregularity and the matter is not governed by this rule. ('11) 10 Ind Cas 625 (625) (DB) (Cal).

27. Sale after an order of stay of execution.—[1] Sale held before communication of stay orders—It is a material irregularity. (Vol 7) 1920 Nag 12 (13).

[But see (Vol 9) 1922 All 282 (282)].

[2] Sale held after communication of stay is a nullity. (Vol 12) 1925 Oudh 424 (424, 425) (DB).

28. Sale after attachment under Rule 53.—[1] A sale held in contravention of an attachment of the decree effected under R. 53 is invalid. (1905) 32 Cal 1104 (1106) (DB).

29. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.—[1] Execution taken against wrong representative—Sale is not a nullity though it may amount to a material irregularity. ('01) 25 Bom 337 (347, 348) : 27 Ind App 216 (1'C) * (Vol 25) 1938 Mad 945 (946).

[2] Sale held during the lifetime of the judgment-debtor, but confirmed after his death without impleading his legal representatives on the record, is not void. (Vol 16) 1929 Oudh 235 (237) : 4 Luck 635 (DB).

[3] Properties attached during the lifetime of decree-holder—Sale after his death—Legal representatives not impleaded—Still sale is not irregular. (1880) 3 All 759 (765) (DB).

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[See however (Vol 33) 1946 Pat 133 (134). (Sale is void against the deceased debtor's interest.)]

30. Non-representation of minor.—[1] A sale held in execution against a minor is not void because of the non-appointment of a guardian in the execution proceedings. (Vol 23) 1936 Mad 99 (99) (DB) * (Vol 22) 1935 Pat 483 (484) (DB) * (Vol 14) 1927 Nag 198 (199) : 23 Nag L R 146 * ('96) 23 Cal 686 (689) (DB) * (Vol 20) 1933 Mad 833 (836) (DB) * ('85) 61 Cal L Jour 322 (327) * (Vol 28) 1941 Lah 47 (49).

[2] Sale held without notice to guardian *ad litem* under O. 21 R. 22 is one without jurisdiction and will be set aside. (Vol 27) 1940 Pat 62 (64) (DB).

[3] Non-appointment of guardian for minor in execution proceedings will be a material irregularity within this rule. ('13) 40 Cal 635 (649) : 40 Ind App 140 (PC) * (Vol 13) 1926 Cal 109 (112) (DB).

[4] Sale under decree in a suit against minor not represented in such suit is void, though he was represented in the execution. (Vol 20) 1933 Cal 627 (629) : 60 Cal 753 (DB).

[5] Judgment-debtor adjudged insane subsequent to decree—Guardian not appointed in execution proceedings—Sale is vitiated by material irregularity. ('96) 19 Mad 219 (227, 228) (DB).

31. Other instances of material irregularity.—The following have been held to constitute material irregularity within the meaning of this rule.

[a] Collusion between the decree-holder and the judgment-debtor. (Vol 12) 1925 Pat 461 (462).

[b] Disparaging remarks by the decree-holder about the property calculated to deter bidders from bidding. ('80) 5 Cal 308 (310) (DB).

[c] Omission in the execution of a mortgage decree of the name of the subsequent mortgagee. (Vol 3) 1916 Pat 64 (65) : 1 Pat L Jour 261.

[d] Holding sale in court-room without notice to the public. (Vol 20) 1933 All 161 (162) (DB).

[e] Confirmation of sale before application under this rule is decided. (Vol 20) 1933 All 137 (138) (DB).

[f] Sale of property in possession of receiver without leave of court. (Vol 30) 1943 Bom 273 (277) * (Vol 11) 1924 Cal 1055 (1055) (DB) * (Vol 23) 1936 Pat 572 (576) (DB) * (Vol 32) 1945 Mad 13 (15) (DB).

[g] Giving time to produce a person offering a higher bid and sale in his favour. (Vol 16) 1929 All 671 (672).

[h] Allowing bidder for several lots to deposit 25 per cent at the conclusion of the sale of all the lots. (Vol 3) 1916 All 186 (189) (DB).

[i] Refusal to accept a higher-bid by the decree-holder and acceptance of lower bid (Vol 16) 1929 Oudh 26 (29) : 4 Luck 93 (DB).

[j] Sale of mortgaged property in execution of decree for costs against mortgagee decree-holder. (Vol 8) 1921 Cal 382 (383) (DB).

[k] Arbitrary closing down of sale when another is willing to offer higher bid. (Vol 23) 1936 Lah 555 (567) (DB).

[l] Omission to record the bid of a bidder in sale. (Vol 22) 1935 Oudh 154 (155) (DB).

[m] Sale not finished on the date mentioned in the proclamation and no formal order of adjournment—

Sale held next day held irregular. (Vol 31) 1944 Cal 331 (332).

[2] In the following cases, the sale was held to be void on the ground of illegality.

[a] Omission to serve notice under Rule 22 (Vol 27) 1940 Pat 62 (64) (DB) * (Vol 1) 1914 PC 129 (131) : 42 Cal 72 : 41 Ind App 251 (PC) * (Vol 11) 1924 Mad 431 (436, 438) : 47 Mad 288 (FB).

[Also see O. 21, R. 22 Notes 3 and 5].

[b] Judge omitting to sign the order of attachment and sale notification. ('85) 7 All 506 (510) (PC).

[c] Selling subject to a mortgage when decree directs sale free from the mortgage. ('93) 20 Cal 599 (602) (DB).

[d] Decree-holder deterring persons by threats and intimidation from attending and bidding at the sale ('81, 1881 All WN 106 (106) (DB).

[3] The following circumstances have been held to constitute no irregularity:

[a] Omission to make an application for sale as required by rule 66. (Vol 17) 1930 Lah 685 (686) * (Vol 4) 1917 Lah 136 (138).

[b] Knocking down the sale to a lower bidder, when the higher bidders are not *bonafide* and have no money to deposit as required. (1861) 9 Moo Ind App 324 (341, 342) (PC).

[c] Sale without notice to a receiver not in possession of the property sold. (Vol 16) 1929 Rang 311 (312) : 7 Rang 425 (DB).

[d] Conducting a sale from day to day and fixing a date for bringing the sale to an end. (Vol 20) 1933 Mad 225 (227) : 56 Mad 356 (DB).

[e] Reduction of upset price during the conduct of the sale without notice to the judgment-debtor. (Vol 26) 1939 Mad 198 (194) (DB).

32. Fraud in publishing and conducting the sale.

—[1] An application can be made under this rule to set aside a sale on the ground of fraud in publishing and conducting the sale. (Vol 3) 1916 All 184 (185) (DB) * (Vol 2) 1915 Mad 150 (155) (DB).

[2] Inclusion of fraud in this rule takes applications setting up fraud in publishing and conducting the sale out of the scope of S. 47 (Vol 10) 1923 Lah 592 (593) : 4 Lah 243 (DB) * (Vol 22) 1935 Cal 356 (357).

[See (Vol 28) 1941 Pat 566 (570) (DB)].

[3] "Fraud" means "that which is dishonest and morally wrong" and does not include an irregularity. ('11) 33 Cal 622 (626) (DB) * (Vol 30) 1943 Pat 88 (96) : 21 Pat 682 (DB).

[4] The applicant must prove by clear and definite evidence the existence of fraud. ('09) 1909 Pun L R No. 151 P. 691 (693) (DB).

[5] General and vague allegations of fraud are not enough. (1913) 17 Cal WN 524 (526) (DB) * (Vol 8) 1921 Pat 145 (147) : 6 Pat L Jour 319 (DB).

[6] Mere proof of suspicious circumstances is not enough. ('09) 1909 Pun L R No. 151 P. 691 (700) (DB).

[7] An inference of fraud from established facts taken together as a whole can be drawn by the Court. (Vol 10) 1923 PC 73 (76) (PC) * (Vol 31) 1944 Pat 40 (40).

[8] The fraud of the decree-holder would be sufficient and the auction-purchaser need not have been a

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party to it. (Vol 15) 1928 All 352 (354) * ('02) 6 Cal WN 283 (285, 288) (DB) * (Vol 10) 1923 Pat 435 (435).

[But see ('97) 20 Mad 10 (12) (DB)].

[9] A mere undervaluation of property will not amount to fraud. (Vol 13) 1926 Cal 577 (578) (DB) * (Vol 9) 1922 Pat 507 (511) : 2 Pat 65 (DB) * ('02) 26 Bom 543 (549) (DB) * (Vol 12) 1925 Pat 521 (521).

[10] A wilful misstatement of value evidencing a deliberate design to get the property sold for a low price will amount to fraud. (Vol 9) 1922 Pat 507 (510, 511) : 2 Pat 65 (DB) * (1911) 15 Cal WN 965 (969) (DB).

[11] Any wilful misstatement in the sale proclamation calculated to affect the price of the property may amount to fraud. (Vol 15) 1928 Mad 1138 (1139).

[12] A great discrepancy between the value of the property stated in the proclamation and the real value is strong evidence of fraud. (Vol 20) 1933 Cal 339 (340).

[13] Clerk of the pleader representing decree-holder, purchasing the property in auction without informing the decree-holder—Such a purchase is abuse of confidence and amounts to fraud. (Vol 12) 1925 Oudh 381 (382, 383).

[14] Sale by decree-holder in contravention of an agreement not to sell if payment was made before a time amounts to fraud. (Vol 5) 1918 Pat 297 (298) : 3 Pat L Jour 645.

[15] Bailiff's false representation as to the nature and interest put to sale to a person, who was not aware of the sale proclamation, amounts to fraud. (Vol 23) 1936 Rang 327 (327) (DB).

[16] Decree-holder's keeping judgment-debtor in ignorance of the execution, culminating in the sale at which he purchased the property for very much less than its real value, is an act amounting to fraud. (Vol 22) 1935 All 868 (871) : 58 All 249 (DB).

[17] The following circumstances were held not to amount to fraud :

[a] Mere want of diligence (Vol 8) 1921 Pat 145 (147) : 6 Pat L Jour 319 (DB).

[b] Fact that certain property alleged to be wrongly sold was not included in the mortgage property decreed to be sold. (Vol 15) 1928 All 704 (705).

[c] Dissuasion by judgment-debtor's pleader of plaintiff from bidding at sale on the false assurance that he had instructions to apply for adjournment—Auction-purchaser is not guilty of the misrepresentation. (1911) 8 All L Jour 587 (592, 593) (PC).

33. Combination among bidders.—(1) Agreement not to bid in sale against one another by two or more persons is not unlawful. (Vol 30) 1943 Pat 88 (96) : 21 Pat 682 (DB) * ('94) 18 Bom 342 (346) (DB).

[2] Proof of an agreement between the decree-holder and the bidders that they will not bid against one another does not amount to proof of fraud in the sale. (1900) 23 Mad 227 (233, 234) : 27 Ind App 17 (PC) (Affirming 19 Mad 315 on this point.)

[3] A combination aimed at suppression of competition is fraudulent ; but where the object is to make a fair bargain or even where it is for the division of property for the convenience of purchasers, it is not fraudulent. ('07) 6 Cal L Jour 111 (115, 116) (DB).

34. Substantial injury—Proviso.—[1] A Court has no jurisdiction to set aside a sale under this rule without making an enquiry into the question of substantial injury. (Vol. 5) 1918 Pat 352 (352) (DB).

[See ('01) 25 Bom 337 (348) : 27 Ind App 216 (PC)].

[2] A mere proof of irregularity or fraud alone is of no avail without proof of substantial injury sustained by the plaintiff. (1912) 39 Cal 26 (32) : 38 Ind App 200 (PC) * (Vol 24) 1937 All 407 (410) (DB).

[3] It does not matter whether that substantial injury is suffered by him in his capacity as a decree-holder or as an individual. (Vol 20) 1933 All 161 (162) (DB).

[4] The onus of proving substantial injury lies on the applicant (Vol 12) 1925 Pat 148 (149) (DB) * (Vol 31) 1944 Mad 145 (146).

[5] "Injury" means loss which is wrongful. ('03) 7 Cal WN 439 (440) (DB) * (Vol 12) 1925 All 459 (462) : 47 All 479 (DB).

[6] Loss must be *substantial*. (Vol 14) 1927 Cal 873 (874) * (Vol 13) 1926 Pat 202 (203) : 4 Pat 696 (DB).

[But see (Vol 33) 1946 Mad 337 (338) (DB)].

[7] Fact that the price realized at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss. (Vol 9) 1922 Pat 550 (551) : 1 Pat 214 (DB).

[8] A denial of opportunity to purchase the property is a substantial injury. (Vol 20) 1933 All 161 (163) (DB).

[9] Material irregularity in sale resulting in the fetching of inadequate price—Fact that value of property did not exceed decree amount and the balance could not be realised, because of limitation, will not bring the case under the rule. (1912) 16 Cal WN 1022 (1023) (DB).

[10] The fact that sale of property of a third person, who claims adversely to the judgment-debtor, may cast a cloud upon his title is not a substantial injury within the meaning of this rule. (Vol 28) 1941 Mad 680 (681).

[11] Judgment-debtor, who had no interest or had only doubtful claim to the property at the time of sale, and the sale fetched what cannot be called an inadequate price, is not materially prejudiced. (Vol 23) 1936 Pat 26 (27) (DB).

35. Applicant must have sustained substantial injury by reason of such irregularity or fraud.—[1] An applicant to have a sale set aside must show that he sustained substantial injury as a *result* of such material irregularity or fraud. (Vol 30) 1943 Oudh 204 (207) : 18 Luck 547 (DB) * ('83) 9 Cal 656 (660, 662) : 10 Ind App 25 (PC) * (1907) 5 Cal L Jour 240 (242) (DB) * (1905) 32 Cal 502 (507, 508) (FB) * (1889) 12 Mad 19 (26) : 15 Ind App 171 (PC) * (1888) 15 Cal 488 (491) (FB) * (Vol 32) 1945 PC 178 (179, 180) : 72 Ind App 287 (PC).

[2] The Court cannot presume from the proved existence of irregularity and injury that the latter occurred by reason of the former, unless such is shown to have been caused by the irregularity. ('89) 9 Cal 656 (660, 662) : 10 Ind App 25 (PC) * ('89) 12 Mad 19 (25, 26) : 15 Ind App 171 (PC) * ('85) 11 Cal 200 (210, 213) (FB).

[3] The relationship between the irregularity and

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loss may be established either by direct evidence or inferred from the nature of the irregularity and the extent of the inadequacy of the price. (Vol 32) 1945 PC 178 (179, 180) : 72 Ind App 287 (PC) * (Vol 14) 1927 All 241 (242) : 49 All 402 (DB) * (Vol 16) 1929 All 948 (949, 950) : 52 All 115 (DB) * (Vol 16) 1929 Pat 588 (590) * (Vol 17) 1930 Lah 15 (16) * (Vol 20) 1933 Cal 662 (664) (DB) : (31 Cal 815 followed) * (Vol 20) 1933 Mad 225 (227) : 56 Mad 356 (DB) * (Vol 25) 1938 Mad 174 (175).

[But see (Vol 4) 1917 Mad 967 (967) (DB) : 21 Cal 66 : 20 Ind App 176 (PC) followed].]

[4] In order to connect the injury with the irregularity or fraud, the applicant should point out some facts from which the Court can reasonably infer such an injury. (Vol 1) 1914 All 325 (325) (DB) * (Vol 22) 1935 Mad 459 (463) (DB) * (Vol 25) 1938 Lah 152 (154) (DB) * (Vol 25) 1938 Mad 174 (175) (DB).

[5] Where in a sale proclamation, the property is undervalued and it has been sold at an inadequate price, the sale may be set aside. (1911) 15 Cal W N 577 (578) (DB) * ('21) 57 Ind Cas 640 (641) (DB) (Pat) * ('09) 1 Ind Cas 246 (247) (DB) (Cal) * (Vol 25) 1938 Mad 720 (720) (DB) * (Vol 22) 1935 Mad 459 (463) (DB).

[6] Irregularity and understatement of probable price of the property—Court may infer without any other evidence that injury has resulted. (Vol 13) 1926 Mad 959 (960) * (Vol 22) 1935 Mad 438 (439).

[7] A mere inadequacy of price is no ground for setting aside a sale. (Vol 27) 1940 Cal 265 (268) : ILR (1940) 1 Cal 1 (DB) * (Vol 12) 1925 Mad 202 (203) (DB) * (Vol 13) 1926 Lah 588 (588) * (Vol 25) 1938 Lah 508 (508) * (Vol 25) 1938 Mad 174 (175) * (Vol 22) 1935 Pat 242 (242).

[8] The inadequacy in the price must have been occasioned by some irregularity. (Vol 28) 1941 Pat 440 (441) (DB) * (Vol 12) 1925 Mad 729 (730) (DB) * (Vol 21) 1934 Nag 250 (251).

[9] In the absence of proof to the contrary, the presumption is that the price fetched at a court-sale is adequate. (Vol 20) 1933 All 218 (223) : 55 All 221 (DB).

[10] In the following cases substantial injury was held to be the result of irregularity or fraud :

[a] Irregularity in fixing value. ('13) 21 Ind Cas 592 (593) (Mad) (DB).

[b] Irregularity in proclaiming incumbrance. (Vol 12) 1925 Oudh 424 (424) (DB).

[c] Time of sale on adjourned date not specified. (Vol 2) 1915 Oudh 124 (126) : 18 Oudh Cas 1.

36. Waiver of irregularity and estoppel.—[1] Judgment-debtor served with notice under R. 66 or with knowledge of contents of proclamation before it is issued, neglecting to object to the proceedings, will not be allowed to object to the sale under this rule. (Vol 17) 1930 All 865 (866) (DB) * (Vol 2) 1915 Mad 989 (992) : 38 Mad 387 (DB) * (Vol 21) 1934 Bom 348 (349) : 58 Bom 564 * (Vol 14) 1927 All 513 (514) : 49 All 788 (DB) * (Vol 17) 1930 Bom 290 (291) : 54 Bom 348 (DB) * (Vol 15) 1928 Cal 823 (331) (DB) * (Vol 17) 1930 Lah 685 (686) * (Vol 11) 1924 Mad 217 (218, 220) : 46 Mad 736 (DB) * (Vol 18) 1931 Pat 63 (64) (DB) * (Vol 11) 1924 Pat 111 (112) : 2 Pat 916 (DB) (This case is overruled in (Vol 12) 1925 Pat 474 : 5 Pat 1 (SB) on another point). * (Vol 32) 1945 Cal 434 (436) (DB).

[See however (Vol 24) 1937 Pat 493 (493) (DB)].

[But see (Vol 17) 1930 Nag 191 (193)].

[2] The reason for the rule is to prevent the judgment-debtor from coming forward to make the whole proceedings infructuous after lying low till the sale is complete. ('89) 12 Mad 19 (25) : 15 Ind App 171 (PC). (Following 9 Cal 656 : 10 Ind App 25 (PC).

[3] Where the sale itself was one without jurisdiction, the failure of judgment-debtor to raise an objection when notice was issued is immaterial (Vol 18) 1931 Oudh 398 (399) (DB).

[4] Where the judgment debtor had consented to the irregularity before sale, he cannot afterwards complain of it under this rule. (Vol 16) 1929 Mad 275 (277) (DB) * (Vol 21) 1934 Cal 251 (253) (DB).

[5] Judgment-debtor applying and obtaining adjournment of a sale must be deemed to have admitted the correctness of the proclamation or at least the absence of mistake or irregularity likely to mislead. ('77) 3 Ind App 230 (240) : 26 Suth WR 44 (48) (PC) * (Vol 32) 1945 PC 67 (70) : 72 Ind App 104 : ILR (1945) Mad 601 : ILR (1945) Kar PC 142 (PC).

[6] Waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. (Vol 25) 1938 PC 230 (231, 232) : 32 Sind LR 879 (PC).

[7] Judgment-debtor consenting to waive irregularity at the time of postponement of the sale cannot object to the sale afterwards. (Vol 13) 1926 Cal 577 (578) (DB) * (Vol 5) 1918 Cal 293 (294) (DB) * (Vol 22) 1935 Pat 483 (485) (DB).

[8] Where the judgment-debtor was not aware of the facts to which he was bound to object, there can be no waiver or estoppel. (1911) 13 Cal L Jour 192 (197) (DB) * ('07) 6 Cal L Jour 62 (67 to 70) (DB) * (Vol 2) 1915 Mad 989 (993) : 38 Mad 387 (DB).

[9] The burden of proving knowledge of the judgment-debtor of facts from which intention on his part to waive his right to object lies upon the decree-holder. (Vol 32) 1945 PC 67 (70) : 72 Ind App 104 : ILR (1945) Mad 601 : ILR (1945) Kar (PC) 142 (PC).

[10] In the following instances, it has been held that there is no waiver :

[a] Judgment-debtor agreeing to waive on condition the sale is postponed—Court refusing postponement. ('10) 5 Ind Cas 489 (490) (DB) (Cal).

[b] Waiver of the issue of a fresh proclamation only—Any objection on the ground of an irregularity in the publication of the *original* proclamation is not waived. ('11) 14 Cal L Jour 346 (351) (DB).

[c] Sale postponed on waiver of fresh proclamation by judgment-debtor—Refusal of subsequent application for fresh proclamation by attaching decree-holder—The decree-holder can question the sale on that ground. ('01) 24 Mad 311 (315, 316) (DB).

[d] A judgment-debtor waiving a fresh proclamation will not be deemed to have waived the non-specification of the hour of adjourned sale. ('01) 6 Cal WN 48 (54) (DB).

[e] Bidding by the applicant at the sale will not amount to a waiver of the irregularity in holding sale on a court-holiday. (Vol 16) 1929 Lah 673 (675).

[f] Statutory duty cast upon the Court cannot be waived. (Vol 29) 1942 Pat 238 (239) : 21 Pat 281 (DB) * (Vol 14) 1927 Rang 84 (85) (DB).

[But see (Vol 28) 1941 Pat 440 (442) (DB)].

[11] Judgment-debtor's objection made before sale overruled—The same ground can be urged in an application to set aside the sale. (Vol 17) 1930 Oudh 81 (82) :

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5 Luck 481 (DB) * (Vol 15) 1928 Pat 25 (27) : 6 Pat 588 (DB).

[12] Debtor obtaining time to pay decree amount on condition that his pending application under this rule will be dismissed on his failure—If he fails, he will be estopped from continuing it. ('02) 29 Cal 577 (580) (DB).

[13] A question of waiver is a mixed question of law and fact. ('11) 13 Cal L Jour 192 (202) (DB).

37. Bona fide purchaser for value without notice.—[1] A sale can be set aside under this rule, even though the purchaser is a *bona fide* one for value and stranger. (Vol 10) 1923 Cal 538 (541) (DB) * (Vol 4) 1917 Mad 42 (42) (DB) * (Vol 10) 1923 Pat 435 (435).

[2] Proceedings or suit to set aside sale on the plea that decree and execution are tainted by fraud and collusion—The *bona fide* purchaser for value may resist it with success. ('66) 10 Moo Ind App 454 (473, 474) (PC) * (Vol 24) 1937 Pat 644 (645) (DB).

38. Setting aside sale on grounds not taken in the application.—[1] The following are the divergent views as to whether a sale can be set aside on grounds not taken in the application :

[a] Sale cannot be set aside on objections not expressly taken in the application. (Vol 19) 1932 Lah 576 (576) (DB) * ('99) 21 All 140 (142) (DB) * (Vol 6) 1919 Lah 260 (261) * ('11) 1911 Pun LR No. 102 P. 407 (408).

[aa] Further particulars may be furnished even beyond thirty days, which may be treated as an amendment of original application. (Vol 13) 1926 All 305 (305) : 48 All 286.

[b] Court can even in appeal set aside sale under its inherent powers on a ground not taken. (Vol 11) 1924 Mad 778 (778).

[c] Irregularity patent on the record itself—Court can set aside even if it is not specifically taken. (Vol 26) 1939 Nag 258 (260).

[2] A new ground requiring evidence cannot be taken for the first time in appeal. (1900) 23 Mad 227 (234) : 27 Ind App 17 (PC) * ('83) 9 Cal 656 (663) : 10 Ind App 25 (PC).

39. Setting aside sale in part only, if and when permissible.—[1] Where a sale was in several lots and the irregularity and injury can be allocated to one part only, a sale in respect of that part can be set aside. But where the irregularity affects the whole sale and injury cannot be allocated to any one part, a sale cannot be set aside in part only (Vol 20) 1933 Pat 223 (224) : 12 Pat 181 (DB) * (Vol 32) 1945 Cal 434 (437) (DB).

[But see (Vol 23) 1936 Mad 121 (122) : 59 Mad 438 (DB)].

[2] Application under the rule by some judgment-debtors dismissed—Sale set aside on a subsequent application by another debtor—Setting aside of the sale will take effect only for his benefit. (1937) 41 Cal WN 224 (225) (DB).

[See however (Vol 26) 1939 Nag 258 (260)].

40. Joinder of claims under section 47.—[1] Same application may combine both prayer for reliefs under S. 47 and this rule. (Vol 27) 1940 Bom 277 (279) : ILR (1940) Bom 633 * (Vol 15) 1928 Pat 272 (272) : 7 Pat 231 (DB).

[But see (Vol 29) 1942 Lah 153 (160) : ILR (1942) Lah 559 (FB) * ('96) 18 All 141 (143, 144) (DB)].

[2] Every application to set aside a sale involves a question falling within the scope of S. 47. (Vol 4) 1917 Mad 924 (925) (DB) * (Vol 4) 1917 Mad 877 (879) (DB).

[See (Vol 21) 1934 Nag 21 (27) : 31 Nag LR 67].

[3] Where the application falls within the scope of this rule and S. 47, a second appeal against an order on such an application is barred by S. 104. (Vol 4) 1917 Mad 924 (925) (DB) * (Vol 11) 1924 Mad 778 (779).

[4] Where the matter falls within S. 47 *alone*, even though the application purports to be under this rule also, the order will be appealable as a decree. (Vol 19) 1932 Cal 672 (674) : 59 Cal 556 (DB) * (Vol 13) 1926 Cal 1219 (1220) (DB) * (Vol 11) 1924 Mad 431 (432) : 47 Mad 289 (FB) * (Vol 12) 1925 Mad 1142 (1142) * (Vol 11) 1924 Rang 124 (124) : 1 Rang 533 * (Vol 11) 1924 All 693 (699) (DB).

[5] Application containing grounds coming both under S. 47 and this rule—Portion of the order under S. 47 is open to second appeal. (Vol 11) 1924 Mad 431 (432) : 47 Mad 288 (FB).

[See however (Vol 8) 1921 Pat 145 (149) : 6 Pat L Jour 319 (DB) * (Vol 11) 1924 Pat 67 (68) (DB)].

[6] Application in substance one under this rule—The mere fact that it is made under S. 47 will not make it appealable. (Vol 21) 1934 Pat 627 (628) (DB).

41. Applicability of Order 9 to applications under this rule.—[1] Provisions of O. 9 do not apply to proceedings under this rule. (Vol 13) 1926 Lah 109 (109) * (Vol 18) 1931 All 594 (594, 595) (DB) * (Vol 14) 1927 Cal 933 (939) (DB) * (Vol 13) 1926 Cal 773 (775, 777) : 53 Cal 679 (DB) * (Vol 6) 1919 Pat 192 (193) : 4 Pat L Jour 135 (FB).

[See however (Vol 27) 1940 Mad 569 (569, DB)].

[But see ('09) 2 Ind Cas 156 (156) (DB) Cal].

[2] The Court has inherent power to dismiss an application under this rule for default, where the applicant fails to appear in support of application. (Vol 25) 1938 Mad 495 (495) : ILR (1938) Mad 636 (DB).

[3] The Court has got inherent power to set aside an order under this rule passed *ex parte* or to restore an application dismissed for default. (Vol 18) 1931 All 594 (594, 595) (DB) * (Vol 18) 1921 Pat 293 (295) * (Vol 8) 1921 Sind 55 (56) : 17 Sind LR 105 (DB) * (Vol 15) 1923 All 301 (301).

42. Appeal.—[1] An appeal against an order, setting aside or refusing to set aside a sale, lies. (Vol 28) 1941 Mad 653 (653) * ('11) 13 Cal L Jour 535 (540) * (Vol 14) 1927 Lah 631 (632) * (Vol 15) 1928 Lah 414 (416) * (Vol 11) 1924 Pat 346 (347) (DB) * (Vol 19) 1932 Nag 14 (15) : 27 Nag LR 339 (Vol 5) 1918 Upp Bur 28 (28) : Upp Bur Rul 139 * ('85) 7 All 253 (255, 256) (FB) * (Vol 26) 1939 Mad 482 (483) : ILR (1939) Mad 349 * (Vol 26) 1939 Sind 62 (64) : ILR (1939) Kar 417 (DB).

[But see (Vol 31) 1944 Pesh 42 (43) (DB)].

[2] An order on an application under this rule, whether made on the ground of material irregularity or on the ground of fraud, is not open to second appeal by virtue of the provisions of section 104. (Vol 30) 1943 Cal 237 (238) : ILR (1942) 2 Cal 561 * (Vol 20) 1933 Mad 838 (838) * (Vol 5) 1918 All 209 (210) : 40 All 122 (DB) * (Vol 19) 1932 Cal 203 (204) (DB) * (Vol 12) 1925 Lah 624 (625) : 6 Lah 250 (DB) * (Vol 10) 1923 Lah 592 (593) : 4 Lah 243 (DB) * (Vol 16) 1929 Mad 624 (624) * (Vol 17) 1930 Nag 58 (59) * (Vol 4)

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

[1882-S. 313 ; 1877-S. 313.]

91. The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

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1917 Oudh 45 (45) * (Vol 11) 1924 Pat 803 (803) (DB) * (Vol 5) 1918 Pat 297 (298) : 3 Pat L Jour 645 (DB) * (Vol 5) 1918 Upp Bur 80 (31) : 2 Upp Bur Rul 139 * (Vol 25) 1938 Nag 107 (107) : ILR (1938) Nag 436 (DB) * (Vol 22) 1935 Rang 521 (521) * (Vol 26) 1939 Sind 62 (63) : ILR (1939) Kar 417 (DB) * (Vol 23) 1936 All 763 (764) : 58 All 1003 (DB).

[But see (Vol 17) 1930 Nag 191 (192)].

[3] Objection to sale not falling under this rule but falling under S. 47.—Decision on such objection will be open to second appeal. (Vol 29) 1942 Pat 146 (147) (DB) * (Vol 11) 1924 All 698 (699) (DB) * (Vol 23) 1936 Lah 573 (574).

[4] Order by a single Judge of High Court in appeal or revision against an order on application under this rule.—No appeal lies under Letters Patent. (Vol 4) 1917 All 325 (326) : 39 All 191 (DB) * (92) 14 All 226 (232) (FB) * (Vol 12) 1925 Lah 624 (625) : 6 Lah 250 (DB).

[5] An appeal to the Privy Council will lie against an order of the High Court under Rule 92. ('13) 40 Cal 635 (648) : 40 Ind App 140 (PC).

[6] An order dismissing an application under this rule for default is appealable under Order 43 Rule 1. (Vol 16) 1929 Cal 407 (409) : 56 Cal 969 (DB) + ('10) 5 Ind Cas 493 (494) (DB) (Cal).

[But see (Vol 13) 1926 Cal 773 (778) : 53 Cal 679 (DB). (Dissented from in (Vol 16) 1929 Cal 407 : 56 Cal 969) * ('07) 10 Oudh Cas 171 (172) (DB)].

[7] Appeal cannot be refused on the ground that there is no distinct order confirming the sale. (Vol 16) 1929 Cal 407 (409) : 56 Cal 969 (DB).

[8] An order refusing to restore an application dismissed for default is not appealable. ('86) 10 Bom 433 (434) (DB) * (Vol 14) 1927 Cal 938 (938) (DB) * ('04) 31 Cal 207 (209) (DB) * (Vol 13) 1926 Lah 109 (109) * ('88) 11 Mad 819 (821) (DB) * ('07) 10 Oudh Cas 353 (354).

[But see (Vol 3) 1916 Cal 221 (222) (DB) * (Vol 3) 1916 Cal 613 (614) (DB) * (Vol 7) 1920 Oudh 177 (178) : 23 Oudh Cas 349].

[9] An application by the Official Receiver to set aside a sale in execution is one under this rule and no second appeal lies in such a case. (Vol 19) 1932 Cal 203 (204) (DB).

[10] In an appeal from an order confirming the sale, the purchaser in auction is a necessary party. (Vol 20) 1933 Lah 324 (325) * (Vol 23) 1936 Lah 478 (479) (DB). (Affirming on Letters Patent Appeal. (Vol 22) 1935 Lah 802).

[11] Judgment-debtor subsequent to the dismissal of his application to set aside sale adjudicated insolvent on an application by a creditor filed after the sale.—Judgment-debtor can appeal against the order of dismissal. (Vol 27) 1940 Mad 569 (70) (DB) (Vol 20) 1933 Mad 851 : 57 Mad 89 followed.) * (Vol 20) 1933 Mad 851 (851) : 57 Mad 89 (FB).

[12] Application under this rule and S. 47 dismissed.—Appellate Court confirming part relating to dismissal of application under this rule directing applicant to file fresh application under S. 47.—Held, the order is bad and should have been one requiring the lower

Court to proceed under S. 47. (Vol 28) 1941 Mad 28 (29) : ILR (1941) Mad 203 (FB). (Application under O. 21 R. 90 and S. 47 for setting aside sale dismissed so far as it related to O. 21 R. 90).

43. Revision.—[1] Application under O. 21, R. 90 (Madras amendment) dismissed for applicant's default to furnish security—No second appeal lies—Revision is competent. (Vol 28) 1941 Mad 28 (29) : ILR (1941) Mad 203 (FB).

[2] Refusal of application under O. 21 R. 90 on ground that applicant had no *locus standi* to apply—Revision lies. (Vol 28) 1941 Mad 653 (654) (Vol 8) 1921 Mad 157 : 44 Mad 554 (FB) (Followed)

44. Local Amendments.—For cases decided under local amendments made to the rule by different High Courts, see the following Cases:—

[a] Order 21 Rule 90 (Calcutta)—('38) 42 Cal WN 661 (665) (DB).

[b] Order 21 Rule 90 (Lahore)—(Vol 29) 1942 Lah 153 (160) : ILR (1942) Lah 559 (FB) (Vol 24) 1937 Lah 309 and (Vol 26) 1939 Lah 113 : ILR (1939) Lah 103 overruled * (Vol 25) 1938 Lah 508 (508) * (Vol 26) 1939 Lah 222 (222).

[c] Order 21 Rule 90 (Madras)—(Vol 29) 1942 Mad 509 (510) (DB) * (Vol 28) 1941 Mad 652 (653) (DB) * (Vol 28) 1941 Mad 28 (30) : ILR (1941) Mad 203 (FB) * (Vol 27) 1940 Mad 624 (625) * (Vol 31) 1944 Mad 313 (313, 314) : ILR (1944) Mad 815 (DB) * (Vol 32) 1945 Mad 13 (14) (DB).

[d] Order 21 Rule 90 (N.-W.F.P.)—(Vol 25) 1938 Pesh 52 (53).

[e] Order 21 Rule 90 (Oudh)—(Vol 22) 1935 Oudh 336 (336).

[f] Order 21 Rule 90 (Patna)—(Vol 24) 1937 Pat 260 (261) * (Vol 25) (1938) Pat 240 (241) : 17 Pat 107 (DB) * (Vol 26) 1939 Pat 243 (252) : 18 Pat 227 (FB) * (Vol 28) 1941 Pat 440 (442) (DB) * (Vol 27) 1940 Pat 264 (270) : 19 Pat 531 (FB) * (Vol 24) 1937 Rang 419 : 1937 Rang LR 268 (FB) (distinguished.)

[g] Order 21 Rule 90 (Nagpur)—(Vol 30) 1943 Nag 330 (331) : ILR (1944) Nag 159 * (Vol 32) 1945 Nag 83 (86) : ILR (1944) Nag 561.

ORDER 21, RULE 91.

Synopsis.

1. Scope of the rule.
2. Saleable interest.
3. Who may apply under this rule.
4. Necessary parties to application.
5. Compensation for loss of property bought at Court-sale.
6. Appeal.

1. Scope of the rule.—[1] A Court sale carries no guarantee that the property is the property of the judgment-debtor and the auction-purchaser takes the risk, and bears the loss if it is subsequently discovered not to be the property of the judgment-debtor. There is, therefore, no warrant, for the proposition that a sale by the Court of property which subsequently turns out to belong to the auction-purchaser confers a valid title. (Vol 14) 1927 Mad 394 (395) : 50 Mad 639. (It makes no difference that

PROVINCIAL AMENDMENT

Bombay

The following shall be *added* as Rule 91A :

"R. 91A. Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under Rule 89, 90 or 91, and in the case of an application under Rule 89, the deposit required by that rule, if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule, framed by the Local Government under Section 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of Rules 89, 90 and 91." [9-2-1925.]

O. 21, R. 91 (*contd.*)

the auction-purchaser is the decree-holder) * (Vol 22) 1935 All 910 (911) (DB). (There is no warrant of title at an auction-sale and what is sold is merely the right, title and interest of the judgment-debtor and it is for the purchaser, whether he is a decree-holder or stranger, to ascertain the title for himself.) * (Vol 20) 1933 All 63 (64) : 54 All 948 (DB). (Execution sale—No warranty of title.) * (Vol 11) 1924 Cal 172 (173) (DB) * (Vol 18) 1931 Nag 116 (116) : 27 Nag LR 318 (There is no implied warranty of title either by the decree-holder or the Court in execution sales) * (Vol 21) 1934 Oudh 233 (236) (DB). (Only remedy is to claim refund).

[2] O. 21, Rule 91 comes into operation in those cases where, in spite of the prescribed procedure having been regularly followed, property has been sold in which the judgment-debtor has no saleable interest. (Vol 20) 1933 Pat 435 (440) : 12 Pat 665 (SB) * (Vol 26) 1939 Nag 179 (182) : ILR (1939) Nag 357 (DB).

[3] When a person, having knowledge that the judgment-debtor has no saleable interest in the property, purchases it in the execution sale, he cannot be entitled to the benefit of the provisions of O. 21 R. 91, which are designed for the protection of persons who innocently and ignorantly purchase valueless property. (1881) 3 All 527 (527) (DB).

[4] Rule does not apply where purchaser does not act in good faith, but has abused processes of Court for fraudulent purposes. (Vol 20) 1933 Pat 684 (685) (DB).

[5] Sale of property in execution of decree—Decree-holder purchaser—Property sold subsequently found not to belong to judgment-debtor—Sale is not void—Remedy of decree-holder is only to set aside sale under O. 21 R. 91. (Vol 22) 1935 Mad 340 (341). (Application is governed by Limitation Act, Art. 166) * (Vol 22) 1935 All 889 (890) (DB). (Sale confirmed and becoming absolute—Application to set aside sale on ground that judgment-debtor had no saleable interest is not competent.) * (Vol 12) 1925 Pat 106 (111) : 3 Pat 947 (DB) (No separate suit lies for recovery of purchase-money on ground of judgment-debtor not having saleable interest in property.)

[6] If sale is confirmed, auction-purchaser cannot reopen matter by application for further execution unless he gets order confirming sale set aside. (Vol 25) 1938 All 593 (601) : ILR (1938) All 922 (FB) * (Vol 14) 1927 Mad 835 (836, 837) (DB) * (Vol 14) 1927 Mad 894 (895) : 50 Mad 639 (DB) * (Vol 23) 1936 Pat 97 (100, 101) : 15 Pat 308 (FB).

[But see (Vol 11) 1924 Pat 273 (274) : 1 Pat 829 (DB). (Other remedies to set aside sale are not barred.)]

[7] Rule does not apply to sales held under Bengal Tenancy Act. (Vol 13) 1926 Cal 738 (739, 740).

[8] Rule does not apply to sales held by Registrar under Chapter 27, Calcutta High Court Rules. (Vol 16) 1929 Cal 207 (209).

[9] Execution sale of property—Suit for declaration by third party that he is owner of that property—Application by auction-purchaser to be allowed not to pay one-fourth deposit purchase-money and balance to decree-holder till result of declaration suit—Application is not under this Rule. (Vol 18) 1931 Lah 244 (245) (DB).

2. Saleable interest.—[1] The purchaser in an auction sale under R. 91 has a right to apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. However, that right is limited to the case where the judgment-debtor has absolutely no saleable interest in the property. (Vol 29) 1942 Bom 306 (308) : ILR (1942) Bom 704 * (1888) 9 Cal 217 (220) (DB) * (Vol 12) 1925 Pat 702 (702) (DB). (There is no provision in the Code for allowing adjustments between the parties after the sale has been held.)

[2] Where the interest is different from one described in the proclamation or very much more limited, no relief can be granted to auction-purchaser, unless it is possible to say that there is nothing left to be sold. (Vol 29) 1942 Bom 306 (308) : ILR (1942) Bom 704 * (1903) 10 Cal L Jour 492 (494) (DB) * (1883) 9 Cal 626 (627) (DB) * (Vol 13) 1926 Nag 17 (19) : 24 Nag LR 48.

[See also (Vol 11) 1924 Pat 355 (357, 359). Purchase of property with defective title cannot be set aside if no fraud or omission on decree-holder's part is proved].

[3] Property sold in execution—Proclamation showing mortgage as collusive or without consideration—Mortgage subsequently found not collusive—It cannot be said that the judgment-debtor had no interest in the property as he has an equity of redemption. (Vol 32) 1945 Mad 40 (42). (Auction-purchaser cannot recover money paid from decree-holder).

[4] Several parcels of immovable property sold in one lot—Judgment-debtor having interest only in one parcel—Rule does not apply. (1912) 23 Mad L Jour 108 (109) (DB).

[5] Fact that property sold is subject to mortgage does not mean that judgment-debtor has no saleable interest. (Vol 5) 1918 Pat 636 (637) : 3 Pat L Jour 516 (The case is overruled, on another point in (Vol 20) 1933 Pat 435 : 12 Pat 665 (SB)).

3. Who may apply under this rule.—[1] It is only the auction-purchaser who can apply under this rule. (1906) 1 Nag LR 167 (168).

[2] Judgment-debtor's executor can purchase in his private capacity and can apply under this rule. (Vol 2) 1915 Cal 536 (539) (DB).

4. Necessary parties to application.—[1] Person alleged by auction-purchaser to be real owner is not necessary party to application under this rule. (Vol 1) 1914 Mad 318 (319).

5. Compensation for loss of property bought at Court-sale.—[1] Third party claimant establishing

92. (1) Where no application is made under rule 89, rule 90 or rule 91, or where such Sale when to become application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

[1882-Ss. 312, 314 ; 1877-Ss. 312, 314 ; 1859-Ss. 256, 257. See S. 65.]

O. 21, R. 91 (contd)

title to property sold in execution—Right of auction-purchaser to apply for refund of purchase-money arises only after setting aside sale by application under O. 21 R. 91—Where such procedure is not followed, Court cannot order refund under its inherent powers. (Vol 25) 1938 Pat 447 (449, 450) * (Vol 24) 1937 All 18 (19).

[2] Decree-holder in execution of joint decree against certain persons attaching certain property and purchasing it himself—Subsequently half of the property lost—Decree-holder consequently seeking by execution to recover half of purchase-money. Decree-holder is not entitled to get back his money. (Vol 18) 1931 All 377 (378) : 53 All 496 (DB) * (Vol 8) 1921 Cal 115 (117) (DB).

[3] Court sale—Judgment-debtor found to have title only to part of property sold—Suit by auction-purchaser to recover proportionate part of purchase-money is not maintainable (Vol 32) 1945 Mad 363 (364) : ILR (1945) Mad 789 (DB) * (1905) 27 All 537 (539) (DB) * (Vol 6) 1919 Lah 253 (253, 254) : 1919 Pun Re No. 52 (DB).

[4] Purchaser applies to set aside the sale on the ground that this had been under a misapprehension as to what was to be sold—Held O. 21 R. 91 did not apply to the case (1893) 20 Cal 8 (10) : 19 Ind App 154 (PC) * (Vol 2) 1915 Cal 548 (550) (DB) * (1884) 10 Cal 368 (372) * (Vol 1) (1914) Low Bur 142 (142, 143).

[5] Decree-holder grossly negligent in describing that whole field belonged to his judgment-debtor—Auction-purchaser paying full price—Subsequently auction-purchaser deprived of half-field—Auction-purchaser can claim refund of half of purchase-money in separate suit. (Vol 18) 1931 Nag 116 (118) : 27 Nag L R 318.

[6] Suit by auction-purchaser claiming refund of portion of purchase-money on ground that area sold wrongly described in sale proclamation—Decree-holder's offer to pay back purchase-money refused—Auction-purchaser not entitled to compensation. (1902) 29 Cal 370 (374).

[7] Auction-purchaser not misled by anything done or said by sale officer is not entitled to have sale set aside on ground of his mistake. (Vol 19) 1932 All 403 (404) (DB).

6. Appeal.—Objection by judgment-debtor on the ground that he has no saleable interest—Objection dismissed—Appeal lies from the order of dismissal. (Vol 12) 1925 Oudh 618 (619) : 28 Oudh Cas 175 (DB).

R. 91-A—Note 1 (Bombay Amendment)

[1] Rule 91-A of O. 21 (Bombay amendment) is conditional. It provides for what is to be the effect if an application is made to the Collector to set aside a

sale. But if no application is made to him, the Rule never comes into operation. There is nothing to compel an applicant to make his application to the Collector rather than to the Civil Court. (Vol 25) 1938 Bom 209 (209).

ORDER 21, RULE 92.

Synopsis.

1. Scope of the rule.
2. Court, Meaning of.
3. Necessary parties and notice to them.
4. Suit to set aside or restore sale.
5. Plea of irregularity or fraud in defence.
6. Suits to set aside sales under other Acts.
7. Court-fee on a plaint in suit to set aside sale.
8. Sale held by Collector—Confirmation.
9. Confirmation before thirty days.
10. Compromise after sale but before confirmation.
11. Appeal.

1. Scope of the rule.—[1] A sale should be confirmed where no application is made under R. 89, 90 or 91 or where such application is made and disallowed. (Vol 29) 1942 Mad 608 (609) * ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC) * ('76) 3 Ind App 230 (236) (PC).

[2] The Court should confirm the sale, even without an application by, or the presence of, the party concerned. (Vol 17) 1930 Nag 134 (135) + (Vol 20) 1933 Lah 99 (100) : 13 Lah 761 * (Vol 25) 1938 Mad 307 (312) (DB).

[3] The Court cannot confirm the sale without disposing of any pending application under R. 89, 90 or 91. (Vol 29) 1942 Cal 480 (481) (DB).

[4] Where the purchaser is a stranger, subsequent adjustment of the decree by the decree-holder and judgment-debtor is no ground for refusing confirmation. (Vol 28) 1941 Cal 159 (162) : ILR (1941) 1 Cal 147 * (Vol 18) 1931 PC 33 (34) : 58 Ind App 50 : 27 Nag LR 95 (PC) [(Vol 9) 1922 Nag 248 : 18 Nag LR 134 and (Vol 15) 1928 Nag 43, overruled].

[5] Upon confirmation, the sale will become absolute. (Vol 8) 1921 Mad 498 (507) (DB) * ('12) 12 Mad L Tim 311 (312) (DB).

[6] The rule requires an order confirming the sale and in the absence of such order, the sale will not automatically get confirmed. (Vol 21) 1934 Cal 822 (823) * (Vol 25) 1938 Oudh 221 (223) : 14 Luck 186 (DB) * (Vol 24) 1937 Mad 560 (561, 562) * ('37) 1937 Oudh WN 1153 (1156).

PROVINCIAL AMENDMENTS

Allahabad

In sub-rule (1), *after* the words "the Court shall," *insert* the words "subject to the provisions of Rule 58 (2)."
Madras

In sub-rule (2), *after* the words "within thirty days from the date of sale," *insert* the following words :

"and in case where the amount deposited has been diminished owing to any cause not within the control of the depositor—such deficiency has been made good within such time as may be fixed by the Court."
[P. Dis. 56 of 1927.]

Nagpur

In sub-rule (1), *after* the word "make," *insert* the words "subject to the provisions of Rule 58 (2)."
[29-6-1943.]

Oudh

In sub-rule (1), *after* the words "the Court shall," *insert* the words "subject to the provisions of Rule 58 (2)."

Patna

In sub-rule (1), *after* the words "the Court shall," *insert* the words "subject to the provisions of Rule 58 (2)."

O. 21, R. 92 (*contd.*)

[See however (Vol 14) 1927 Cal 881 (882) (DB) (Express order of confirmation is not necessary) + (Vol 2) 1915 Lah 9 (9) : 1915 Pun Re No. 81 (Do)].

[7] Absence of application under R. 89, 90, and 91 does not oust the power of Court under S. 47 to take notice of any objection by the judgment-debtor and refuse confirmation of the sale. (Vol 28) 1941 Pat 566 (570) (DB) * (Vol 26) 1939 All 368 (369) : ILR (1939) All 385 (DB) + (Vol 23) 1936 Pat 308 (305) (DB).

[8] Under its inherent powers, the Court can refuse to confirm the sale or can set it aside where it has been misled by the decree-holder or where there has been abuse of the process of Court. (Vol 10) 1923 Mad 635 (636, 638) : 46 Mad 583 (DB) * (Vol 20) 1933 Mad 399 (401) * (Vol 17) 1930 Lah 208 (210) * (Vol 2) 1915 Oudh 140 (142) * ('81) 6 Cal 103 (106) (DB) * (Vol 17) 1930 Lah 793 (794) * (Vol 13) 1926 Nag 17 (18) : 24 Nag LR 48 * (Vol 12) 1925 Sind 253 (254) : 18 Sind LR 130 (DB).

[See (Vol 16) 1929 All 485 (491, 492) (DB). (Where the remedy is time-barred, it cannot be given by the use of inherent powers)].

[9] A sale can be set aside on the ground of adjustment of decree by the parties before sale though Court was made aware of it only after the sale. (Vol 26) 1939 Lah 326 (327).

[10] A sale is not liable to be set aside merely on the ground that application for execution was time-barred. ('18) 19 Ind Cas 377 (378) Cal (DB) * ('85) 11 Cal 376 (378) (DB) * ('83) 6 Mad 237 (238) (DB) * Vol 4) 1917 Pat 467 (467) : 2 Pat L Jour 157 (DB).

[But see ('70) 13 Suth WR 273 (275) (DB) * (Vol 25) 1938 All 89 (90) (DB).

[11] A sale is not liable to be set aside on the ground that the decree has been amended. (Vol 12) 1925 All 264 (266) (DB) + (Vol 13) 1926 All 41 (42) (DB).

[12] The inherent power of the Court cannot be invoked where there is another remedy available for getting the sale set aside. (Vol 25) 1938 Rang 433 (435) (DB) * (Vol 24) 1937 Lah 416 (417).

[13] Allegation by third party that the conduct of another third party misled him from attending sale and bidding—The Court has no jurisdiction under S. 151 to set aside the sale on his application. (Vol 26) 1939 Cal 161 (162).

[14] Sale in favour of stranger-purchaser—Decree set aside in appeal before confirmation of sale—Sale must be confirmed in spite of the reversal of decree and

S. 151 should not be called in aid to set it aside. (Vol 28) 1941 Mad 399 (400).

[But see (Vol 12) 1925 Nag 60 (61) : 20 Nag LR 168 * (Vol 8) 1921 Nag 121 (122) (DB)].

[See however (Vol 7) 1920 Cal 99 (101) (DB). (Court may refuse to confirm sale)].

[15] The rule has no application to cases where the sale is a nullity. (Vol 20) 1933 Mad 598 (605) : 56 Mad 808.

[Note.—Case overruled in (Vol 28) 1941 Mad 161 (171) : ILR (1941) Mad 81 (FB) on another point].

[16] The Court can declare the sale to be void where the sale is a nullity. (Vol 23) 1936 Mad 205 (214) : 59 Mad 461 (FB).

[17] Where an application is made to set aside a sale under the inherent powers of the Court after 30 days of sale relying on S. 18 of the Limitation Act, the confirmation of the sale is no bar to the application. (Vol 11) 1924 All 261 (262) : 46 All 153 * ('98) 26 Cal 727 (731) (DB) * ('02) 6 Cal WN 283 (285) (DB).

[18] Where an application is made under R. 90 after the expiry of thirty days from the date of the sale, relying on S. 18 of the Limitation Act, confirmation of sale is no bar to the maintainability of the application. (Vol 10) 1923 All 232 (234) : 45 All 316 (DB).

[19] Court under its inherent powers can order restitution where the sale is set aside subsequent to the purchaser obtaining possession. (Vol 17) 1930 Pat 280 (281, 282) : 9 Pat 685 (DB) * (Vol 5) 1918 Pat 52 (53) : 2 Pat L Jour 206 (DB).

[20] Order setting aside the sale remits the parties to their position before the date of the sale. (Vol 25) 1938 Cal 362 (363).

[21] Ss. 15 and 21 of C. P. Debt Conciliation Act do not affect the power of Civil Court under O. 21 R. 92 to confirm sale held in execution. (Vol 26) 1939 Nag (282) (287) : ILR (1939) Nag 654 (DB) * (Vol 25) 1938 Nag 273 (275) : ILR (1939) Nag 104.

2. Court, Meaning of.—[1] "Court" means the Court which held the sale. (Vol 21) 1934 Cal 822 (823).

3. Necessary parties and notice to them.—[1] If no application under R. 89, 90 or 91 is made within time, the sale cannot be set aside under this rule. See (Vol 12) 1925 All 236 (237) : 47 All 304 (DB).

O. 21, R. 92 (*contd.*)

[2] Before setting aside a sale under this rule notice of the application should be given to all persons affected by the order thereon. ('94) 13 Bom 594 (596) (DB) * ('83) 7 Bom 424 (424, 425) (DB) * ('96) 23 Cal 393 (396) (DB) * (Vol 8) 1921 Lah 156 (157) * (Vol 11) 1924 Pat 507 (500) * (Vol 12) 1926 Cal 157 (158) (DB) * ('12) 39 Cal 687 (689) (DB) * (Vol 8) 1921 Pat 54 (55) : 6 Pat L Jour 16 (DB).

[3] Notice must be given to the auction-purchaser. (Vol 25) 1938 Pesh 14 (15) * (Vol 26) 1939 Sind 62 (64) : ILR (1939) Kar 417 (DB).

[4] Judgment-debtor dying before confirmation—No notice is necessary to his legal representative. (Vol 14) 1927 Oudh 23 (24) (DB).

[5] An order setting aside the sale, made without giving affected persons an opportunity of being heard, is without jurisdiction. ('16) 32 Ind Cas 891 (893) (BR) Mad * (Vol 8) 1921 Pat 293 (294) (DB) * (Vol 25) 1938 Pesh 14 (15).

[But see (Vol 20) 1933 Cal 464 (466) * (Vol 15) 1928 Cal 267 (268) (It is only a wrong order.)]

[6] Sale with an individual settled by Court and confirmed on the same day, on an agreement between decree-holder and some of the judgment-debtors omitting to issue notice, is illegal. (Vol 16) 1929 All 671 (672).

[7] It is not necessary that the notice should be given within thirty days of the date of sale. ('13) 37 Bom 387 (390) (DB) * (Vol 15) 1923 Lah 413 (414) * (Vol 16) 1929 Mad 763 (764) : 52 Mad 861 (DB) * (Vol 19) 1932 Pat 255 (256) : 11 Pat 504 (DB) * (Vol 11) 1924 Pat 37 (38) : 2 Pat 800 (DB) * (Vol 17) 1930 All 167 (168) * (Vol 22) 1935 Cal 502 (503) : 62 Cal 286 (DB).

[8] Persons who would be affected by an order under this rule need not be described as parties in the application; it is sufficient if the notice required by this rule is given to them. (Vol 16) 1929 All 593 (596) : 51 All 910 (DB) * ('13) 37 Bom 387 (391) (DB) * (Vol 10) 1923 Cal 394 (396, 397) (DB) * (Vol 15) 1928 Lah 414 (417) * (Vol 15) 1928 Lah 418 (419) * (Vol 16) 1929 Mad 763 (764) : 52 Mad 861 (DB) * (Vol 19) 1932 Pat 255 (256) : 11 Pat 504 (DB) * (Vol 11) 1924 Pat 37 (37, 38) : 2 Pat 800 (DB) * (Vol 1) 1914 Oudh 307 (307) : 17 Oudh Cas 306 * (Vol 22) 1935 Cal 502 (503) : 62 Cal 286 (DB).

[See (Vol 17) 1930 Pat 318 (318, 319) : 9 Pat 310 (DB). (But in an appeal he must implead him in the beginning)].

[See however (Vol 15) 1928 Cal 189 (189) * (Vol 6) 1919 Cal 510 (510) (DB) * ('12) 39 Cal 881 (883) (DB) * (Vol 16) 1929 Lah 778 (779) (DB) * (Vol 17) 1930 Nag 5 (5) : 26 Nag I.R. 127 * (Vol 8) 1921 Pat 498 (498) * ('93) 15 All 407 (409) * ('37) 167 Ind Cas 166 (166) (Lah).

[9] Decree holder dead on the date of application impleaded by *bona fide* mistake—Legal representative brought on record beyond period of limitation—Held, failure to implead him in time did not defeat the application. (Vol 19) 1932 Cal 733 (733) (DB).

[10] Where the auction-purchaser is alleged to be a benamidar for a third party, it is not necessary to give notice to the latter under this rule. ('02) 29 Cal 682 (686) (DB).

[11] Applicants for rateable distribution are not entitled to notice under this rule. (Vol 18) 1931 Mad 465 (466, 467) : 55 Mad 64.

[But see (Vol 6) 1919 Mad 869 (870) * (Vol 24) 1937 Mad 539 (591)].

4. Suit to set aside or restore sale.—[1] Disposal of application on merits is not necessary for the operation of the bar under sub-rule (3) and hence an application dismissed as being time barred will bar a subsequent suit to set aside the sale. (Vol 30) 1943 Bom 273 (277, 278).

[2] A suit to set aside an execution sale on grounds covered by Rr. 89, 90 and 91 is barred by sub-rule (3). ('07) 29 All 196 (202) : 34 Ind App 37 (PC) * ('90) 17 Cal 769 (772) (FB).

[But see (Vol 8) 1921 All 327 (328) (DB) * (Vol 3) 1916 Lah 301 (302)].

[3] Sub-rule (3) in no way controls the provisions of O. 21, R. 63. (Vol 32) 1945 Pat 189 (192) : 23 Pat 961.

[4] A suit to set aside a sale in execution on grounds other than those covered by Rr. 89, 90 and 91 is not barred by sub-rule (3). (Vol 19) 1932 Cal 126 (128) : 59 Cal 117 (DB) * (Vol 12) 1925 Pat 376 (378) (DB) * ('85) 7 All 450 (452) (DB) * ('11) 21 Mad L Jour 652 (654) (PC) (So assumed).

[See however (Vol 25) 1938 Lah 690 (691)].

[5] In the following cases it was held that this sub-rule did not operate to bar the suit to set aside the sale.

[a] Where decree and sale are attached on the ground of fraud. ('02) 29 Cal 895 (400) : 29 Ind App 99 (PC) * (Vol 22) 1935 All 470 (475) : 57 All 690 (DB).

[b] Where sale is attached on the ground of want of jurisdiction. (Vol 15) 1928 All 527 (530, 532) : 51 All 346 (DB) * ('81) 3 All 206 (210) (FB) * (Vol 7) 1920 Bom 30 (30) : 44 Bom 551 (DB) * ('90) 17 Cal 699 (703) (FB) * (Vol 23) 1936 Mad 205 (214) : 59 Mad 461 (FB).

[c] Where the sale itself is a nullity or the sale officer had no authority to sell the property. (Vol 22) 1935 All 470 (475) : 57 All 690 (DB).

[d] Where the right is not extinguished by the rejection of an application under Rr. 89, 90 or 91. (Vol 27) 1940 Sind 251 (254) : ILR (1940) Kar 447 (DB).

[e] Suit by mortgagor to recover property not included in mortgage but sold under mortgage decree and purchased by mortgagees. (Vol 15) 1928 All 863 (864, 865) : 50 All 686 (DB) * (Vol 16) 1929 All 673 (673).

[6] A suit, questioning an order dismissing an application to set aside a sale held by the Insolvency Court is not barred by this rule. (Vol 10) 1923 Lah 224 (225) (DB).

[7] Auction-purchaser can sue for damages for loss caused by the decree-holder's fraud in regard to the sale. (Vol 24) 1937 Pat 532 (533) : 16 Pat 196 (DB).

[See however (Vol 22) 1935 Nag 80 (81)].

[8] Sale confirmed on a compromise between parties—Compromise subsequently declared void—Held the confirmation of sale also became void and the application to set aside sale should be heard on merits. (Vol 21) 1934 All 433 (434).

5. Plea of irregularity or fraud in defence.—[1] Dismissal of an application under R. 90 operates as *res judicata* and purchaser's suit for possession cannot be resisted on the same grounds. (Vol 4) 1917 Cal 193 (198) (DB) * ('09) 31 All 599 (603) (DB) * (Vol 3) 1916 Cal 465 (467) (DB).

O. 21, R. 92 (*contd.*)

[2] A plea in defence cannot be raised after confirmation of the sale on the grounds coming under R. 90, though no application was made and dismissed. (Vol 16) 1929 Cal 374 (378, 379) : 57 Cal 403 (FB) * ('12) 17 Ind Cas 126 (126) (Mad) (DB) * ('13) 24 Mad L Jour 70 (72) (DB).

[But see (Vol 13) 1926 Bom 33 (34, 36) (Obiter)].

[3] A third person cannot impeach the title of the auction-purchaser on the ground of any alleged irregularities in the execution sale. (Vol 14) 1927 Cal 82 (83, 84) (DB).

[4] Dismissal of the application made under R. 89 or R. 90 will not preclude the mortgagor-judgment-debtor from setting up the defence plea that the property sold was not included either in the mortgage or the decree thereon. (Vol 8) 1921 Mad 279 (280) (DB).

[5] Judgment-debtor or his representative cannot plead satisfaction of the decree by an uncertified payment in a suit for possession, whether by decree-holder or stranger purchaser, especially after the confirmation of the sale. (Vol 32) 1945 Mad 161 (164) : ILR (1945) Mad 827 (FB). (21 Mad 356 and other like cases overruled).

6. Suits to set aside sales under other Acts.—[1] Public Demands Recovery Act (Bengal Act III of 1913) (See S. 25 of Act 3 of 1913).

[2] This rule does not apply to sales held under the Bengal Tenancy Act. (Vol 8) 1921 Pat 54 (55) : 6 Pat L Jour 16 (DB).

[3] A suit is not maintainable to set aside or to confirm a sale held under Act 8 of 1885. ('91) 18 Cal. 481 (483) (DB) * (Vol 8) 1921 Pat 54 (57) : 6 Pat L Jour 16 (DB). (Reversing (Vol 6) 1919 Pat 240).

[But see (Vol 5) 1918 Pat 125 (125) : 3 Pat L Jour 122 (DB)].

[4] Revenue sale under Act XI of 1859 where there is no arrears of revenue is void and can be set aside. ('98) 25 Cal 838 (842) : 25 Ind App 151 (PC) (Do).

[5] A suit will lie to set aside a sale held under the Madras Estates Land Act (Vol 14) 1927 Mad 1035 (1036, 1037) : 51 Mad 76 (DB) * (Vol 13) 1926 Mad 190 (191) : 49 Mad 490 (DB).

7. Court-fee on a plaint in suit to set aside sale.

[1] A suit to set aside a sale for arrears of revenue is not a suit for a mere declaration without consequential relief. (Vol 11) 1924 Cal 731 (732) : 51 Cal 216 (DB).

[2] The plaint in the suit to set aside a revenue sale should be stamped as in a suit for recovery of the property sold. ('81) 9 Cal L Rep 231 (232) (DB).

8. Sale held by Collector—Confirmation.—[1] The Collector to whom a decree has been transferred for execution is not a Court executing the decree. (Vol 12) 1925 All 146 (149) : 47 All 217 (DB).

[2] The Civil Court is the proper Court to confirm a sale held by the Collector. ('96) 1896 Pun Re No. 83 page 261.

9. Confirmation before thirty days.—[1] No sale can be confirmed or can become absolute before the expiry of thirty days from the date of the sale. ('03) 13 Mad L Jour 231 (234) (DB) * ('87) 9 All 411 (413) (DB) * ('84) 7 Mad 512 (514) (DB). (Case under S 312 of the old Code—The period allowed there was 60 days.) * (Vol 23) 1936 Pat 164 (166).

[2] A sale becomes complete only where the bid is

accepted and the bidder declared the purchaser. (Vol 21) 1934 Oudh 25 (27) : 9 Luck 393 (DB).

10. Compromise after sale but before confirmation.—[1] Confirmation of sale held over under a compromise till a date fixed for payment of decree amount—Court passing orders that “the darkhast is allowed to be withdrawn for the present”—Held, that sale should be confirmed on failure to pay the amount as agreed. (Vol 20) 1933 Bom 358 (359) : 57 Bom 616 (DB).

[2] Conditional order of confirmation that the sale should be set aside on the term of the compromise regarding payment being fulfilled, can be passed by the Court. (Vol 29) 1942 Pat 344 (345) (DB).

11. Appeal.—[1] An order under this rule setting aside or refusing to set aside an execution sale is appealable under O. 43 R. 1 (i) of the Code. (Vol 27) 1940 Sind 251 (253) : ILR (1940) Kar 447 (DB) * (Vol 26) 1939 Mad 482 (483) : ILR (1939) Mad 349 * (Vol 24) 1937 Pat 113 (115, 116) : 16 Pat 202 (FB) * (Vol 20) 1933 Lah 210 (210, 211) * (Vol 9) 1922 All 90 (90) : 44 All 209 (DB) * ('85) 7 All 253 (256) (FB) * (Vol 4) 1917 Cal 554 (555) (DB) * ('02) 29 Cal 548 (552) (DB) * ('12) 1912 Mad WN 756 (757) (DB) * (Vol 19) 1932 Nag 14 (15) : 27 Nag LR 339.

[2] An order merely confirming the sale in the absence of an application to set it aside is not appealable. (Vol 16) 1929 Lah 778 (779) (DB) * (Vol 16) 1929 All 671 (672) * (Vol 14) 1927 Oudh 23 (24) (DB).

[See however (Vol 23) 1936 Oudh 172 (172) (DB)].

[But see ('89) 11 All 333 (337) (DB)].

[3] An order confirming sale without disposing of an application to set aside is not appealable. (Vol 29) 1942 Cal 480 (481) (DB).

[4] An order refusing to confirm a sale on the ground that the decree had been satisfied, is not appealable. (Vol 16) 1929 Lah 438 (439).

[5] An order setting aside a sale *suo motu* under the Court's inherent powers is not appealable. (Vol 12) 1925 Sind 253 (254) : 18 Sind LR 130 (DB).

[6] No second appeal will lie from an order setting aside or refusing to set aside a sale under this rule. (Vol 23) 1936 All 763 (764) (DB) * (Vol 23) 1936 Lah 969 (971) * ('99) 23 Bom 531 (534) (DB) * (Vol 19) 1932 Cal 203 (204) (DB) * (Vol 19) 1932 Lah 530 (531) (DB) * (Vol 20) 1933 Nag 72 (73) : 29 Nag LR 92 * (Vol 4) 1917 Oudh 45 (45) * (Vol 5) 1918 Upp Bur 30 (31) : 2 Upp Bur Rule 139 * (Vol 23) 1936 Oudh 172 (172) (DB) * (Vol 26) 1939 Sind 62 (63) : ILR (1939) Kar 417 * (Vol 23) 1936 Pat 119 (120) * (Vol 25) 1938 Nag 107 (107) : ILR (1938) Nag 436 (DB).

[7] Appeal against order refusing to set aside in which the auction-purchaser is not impleaded should be dismissed. ('37) 167 Ind Cas 166 (167) (Lah) * (Vol 23) 1936 Lah 478 (479) (DB) (Affirming on Letters Patent Appeal (Vol 22) 1935 Lah 802).

[See however (Vol 24) 1937 Lah 263 (265)].

[8] The auction-purchaser is not a necessary party to an appeal against an order setting aside a sale where he shows no interest either although served with notice. (Vol 25) 1938 Nag 525 (527) : ILR (1940) Nag 302 (DB).

[9] Pending appeal against order refusing to set aside sale, the sale does not become complete within Art. 180 of the Limitation Act, even though

93. Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

[1882-S. 315 ; 1877-S. 315 ; 1859-S. 258.]

O. 21, R. 92 (*contd.*)

confirmed by Court. (Vol 21) 1934 PC 134 (136) : 61 Cal 945 : 61 Ind App 248 (PC).

[10] An auction-purchaser can appeal from an order passed in a proceeding to set aside a sale. (Vol 26) 1939 Sind 62 (64) : ILR (1939) Kar 417 (DB).

[11] A judgment-debtor, who was declared insolvent during the sale proceedings, has no *locus standi* to appeal from an order confirming the sale. (Vol 23) 1936 Lah 368 (368).

ORDER 21, RULE 93.

Synopsis.

1. Where a sale of immovable property is set aside under Rule 92.
2. Right of decree-holder to withdraw purchase money before confirmation of sale.
3. Sale set aside for want of saleable interest.
4. Suit for purchase-money in such cases.
5. Sale set aside for irregularity.
6. Interest.
7. Value of improvement effected by him.
8. Poundage fee.
9. Limitation.
10. Order under this rule, Executability of.
11. Appeal and revision.

1. Where a sale of immovable property is set aside under Rule 92.—[1] Sale set aside but not under R. 92—Auction-purchaser not entitled to refund under this rule, merely because judgment-debtor had no saleable interest. (Vol 80) 1943 Bom 288 (292) : ILR (1943) Bom (400) (DB) * (Vol 20) 1933 All 63 (68) : 54 All 948 (DB) * (Vol 23) 1936 Mad 50 (55) : 59 Mad 202 (FB) (1912) 23 Mad L Jour 497 and (Vol 6) 1919 Mad 498 overruled * (Vol 25) 1938 Pesh 66 (67) (DB). (Execution sale confirmed and application by auction-purchaser to be put in possession—Possession not given on account of decree passed in favour of another in regular suit claiming property as his own—Application for refund by auction-purchaser is not one under O. 21 R. 93, nor can he get refund in execution proceedings.

[2] As long as the order setting the sale aside subsists, it must attract the operation of R. 93 (Vol 15) 1928 Cal 267 (268).

2. Right of decree-holder to withdraw purchase-money before confirmation of sale.—[1] Purchase-money may be paid to decree-holder before sale is confirmed—But decree-holder cannot claim it as of right. (Vol 2) 1915 Cal 297 (298) (DB) (12 Cal 252 followed). * (Vol 25) 1938 Nag 54 (54) : ILR (1938) Nag 456.

3. Sale set aside for want of saleable interest.—[1] Auction-purchaser purchasing properties in one lot—To some of them judgment-debtor subsequently found to have no title—Auction-purchaser cannot claim refund of proportionate purchase-money under this rule. (Vol 17) 1930 Mad 856 (856) (DB) * (1886) 9 Mad 437 (439) (DB).

[But see (13) 1913 Pun LR No. 79 Page 300. (Auction-purchaser is entitled under O. 21 R. 93 to recover his money or some part of it even when the judgment-debtor has some saleable interest in the property sold)].

[2] This rule, which repeals S. 315 of the old Code, makes it clear that the purchaser is not entitled to apply for refund of purchase-money unless the sale is set aside under R. 92, (Vol 5) 1918 Mad 1286 (1287). (S. 315 of old Code compared with the present rule.)

[3] Sale set aside—Money withdrawn—Court has inherent powers to order for refund on sale being confirmed—On appeal. (Vol 4) 1917 Pat 495 (497) : 2 Pat L Jour 361 (15 Cal L Jour 187 Relied on and commented upon ; 16 Cal L Jour 83 Not foll.)

4. Suit for purchase-money in such cases.—[1] Under S. 315 of the Code of 1882, corresponding to this rule, it was held that the purchaser could file a separate suit for purchase-money. (1913) 35 All 419 (423, 424) (DB) * (1911) 35 Bom 29 (33, 34) (DB) * (1910) 37 Cal 67 (69) (DB) * (1906) 10 Cal WN 274 (276) (DB) * (1910) 7 Mad L Tim 232 (232) (DB) * (1894) 17 Mad 228 (230) * (1893) 16 Mad 361 (363) * (1888) 11 Mad 269 (273).

[But see (1910) 5 Low Bur Rul 58 (67) (FB)].

[2] There is a conflict of decisions under the present Code, as to whether a separate suit for refund of purchase-money will be where it is found that the judgment-debtor had no saleable interest in the properties sold. The following views have been expressed—

[a] The auction-purchaser's right of suit has been taken away under this Code and his only remedy is one prescribed in R. 91 and in R. 93. (Vol 25) 1938 All 593 (601) : ILR (1938) All 922 (FB) * (Vol 22) 1935 All 470 (473) : 57 All 690 (DB) * (Vol 8) 1921 All 377 (381) : 43 All 60 (DB) * (Vol 5) 1918 All 325 (326) (DB) * (Vol 4) 1917 All 363 (364) : 39 All 114 (DB) * (Vol 26) 1939 Cal 310 (311, 312, 313) : ILR (1939) 1 Cal 452 * (Vol 25) 1938 Cal 263 (268, 269) : ILR (1938) 1 Cal 512 (DB) * (Vol 11) 1924 Cal 172 (172, 173) (DB) * (Vol 10) 1923 Cal 85 (87) : 50 Cal 115 * (1921) 64 Ind Cas 628 (629) Cal * (Vol 7) 1920 Cal 791 (751) (DB) * (Vol 5) 1918 Cal 505 (506) (DB) * (Vol 5) 1918 Cal 148 (149) (DB) * (Vol 12) 1925 Lah 467 (468, 469) : 6 Lah 283 (DB) * (Vol 12) 1925 Lah 199 (201) * (Vol 8) 1921 Nag 60 (63) * (Vol 6) 1919 Nag 96 (96) : 15 Nag LR 140 * (Vol 5) 1918 Nag 259 (262) * (Vol 4) 1917 Nag 203 (203) * (Vol 7) 1920 Oudh 308 (311) : 22 Oudh Cas 42 * (Vol 25) 1938 Pat 150 (151, 152) (DB) * (Vol 12) 1925 Pat 106 (110) (DB) * (Vol 28) 1941 Pesh 41 (42, 43) * (Vol 7) 1920 Low Bur 158 (159) * (Vol 6) 1918 Low Bur 99 (101) : 10 Low Bur Rul 76 * (Vol 15) 1928 Rang 272 (273) : 6 Rang 468.

[b] Where the purchaser is induced to buy the property on account of fraud, misrepresentation or gross neglect of duty on the part of decree-holder, he can sue for purchase-money. (Vol 15) 1928 All 704 (705) * (Vol 9) 1922 Bom 205 (206, 207) : 46 Bom 833. (Such a suit would depend upon different evidence and would be of a different character from a suit for refund of

94. Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who Certificate to purchaser. at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

[1882-S. 316 ; 1877-S. 316 ; 1859-S. 259.]

O. 21, R. 93 (*contd.*)

purchase-money on the mere ground that the judgment-debtor had no saleable interest in the property sold.) (39 All 114 and (Vol 3) 1916 Mad 290 : 39 Mad 803) * (Vol 25) 1938 Cal 263 (268, 269) : ILR (1938) 1 Cal 512 (DB) * (Vol 15) 1928 Mad 152 (152, 153) (DB). (Where he succeeds in recovering money from decree-holder, starting point for decree-holder's application for fresh execution is date of payment of the amount.) * (Vol 5) 1918 Nag 245 (246).

[See also (Vol 24) 1937 Nag 140 (142). (Where there is fraud or negligence of decree-holder, auction-purchaser is entitled to sue him for refund of purchase-money on ground of failure of consideration)].

[c] Rr. 92 and 93 do not apply and the auction-purchaser has a right under the substantive law for refund of purchase-money and the suit is maintainable. * (Vol 1) 1914 All 252 (252) : 36 All 529 (DB) * (Vol 13) 1926 Cal 971 (972, 973, 974) : 53 Cal 758 (DB) * (Vol 13) 1926 Cal 297 (299) (DB) * (Vol 19) 1932 Lah 401 (411, 412) : 13 Lah 618 (FB). (Suit being for recovery of money, paid under mistake of fact is maintainable under equity). * (Vol 11) 1924 Lah 115 (115) : 4 Lah 354 (DB) * (Vol 23) 1936 Mad 50 (55) : 59 Mad 202 (FB) * (23 Mad L Jour 487 and (Vol 6) 1919 Mad 498 overruled). * (Vol 5) 1918 Nag 103 (105) * (Vol 24) 1937 Oudh 286 (286, 287) : 13 Luck 138 (DB) * (Vol 24) 1937 Oudh 145 (146) : 12 Luck 626. (Decree-holder can sue for refund from another decree-holder to whom payment has been made by way of rateable distribution). * (Vol 17) 1930 Oudh 148 (161, 162) : 5 Luck 552 (FB) (Per FB, Shrivastava J, contra) * (Vol 27) 1940 Rang 1 (6, 7) : 1939 Rang LR 649 (FB).

[d] Rule of caveat emptor is not to be extended to cases where purchaser is decree-holder and sale is found to be nullity in another suit. (Vol 20) 1933 All 218 (222) : 55 All 221 (DB).

[3] Where the sale has taken place under the Code of 1892, right of the auction-purchaser to a separate suit for refund of purchase-money, must be determined with reference to the old Code. (Vol 10) 1923 Cal 85 (90) : 50 Cal 115 * (Vol 7) 1920 Mad 550 (551) (DB).

[4] Auction-purchaser deprived of property due to finding in another suit—Auction-purchaser is entitled to apply for refund under S. 47. (Vol 10) 1923 All 394 (396) : 45 All 369 (FB).

[See also (1875-77) 1 All 568 (579) (FB)].

5. Sale set aside for irregularity.—[1] Stranger purchaser can sue for poundage fee paid and interest on deposit on sale being set aside for irregularities by decree-holder. (Vol 3) 1916 Mad 290 (290, 292, 293) : 39 Mad 803 (DB).

6. Interest.—[1] Under O. 21, R. 93, the Court has power to award interest when a sale is set aside and the refund of purchase-money is ordered, although the security bond under which the money has been paid to the decree-holder does not reserve interest. (Vol 8) 1921 PC 27 (27) : 48 Ind App 24 : 6 Pat L Jour 129 (PC) * (Vol 5) 1918 Cal 511 (511, 512) (DB) * (Vol 16) 1929 Lah 617 (618) (DB) * (Vol 29) 1942 Mad 423 (424) : ILR (1942) Mad 691 (DB). (Executing Court has full discretion to order interest or refrain from doing so.

* (Vol 5) 1918 Mad 353 (356) : 40 Mad 1009 (DB). (Interest at only Court rate should be awarded) * (1885 8 Mad 101 (103) (If the purchaser himself has contributed to the loss he has incurred, interest may be refused.)

[See (1883) 5 All 864 (866) (FB)].

[2] Decree-holder cannot be ordered to pay interest if purchase-money was lying throughout in the Court. (Vol 30) 1943 Mad 235 (236).

7. Value of improvements effected by him.—[1] Stranger purchaser in auction sale is entitled to compensation for improvements upon reversal of sale irrespective of his *bona fides*. (Vol 13) 1926 Nag 160 (161).

8. Poundage fee.—[1] Sale set aside—Poundage paid cannot be refunded by Court—Most that can be done is to make recommendation to Revenue Authorities that particular case is fit one for refund. (Vol 21) 1934 Mad 409 (410).

[2] When a third party purchaser at a Court auction has had to pay poundage fees and the sale is afterwards set aside, it is doubtful as to from whom the poundage fee is recoverable, viz., judgment-debtor or decree-holder. (Vol 4) 1917 Mad 217 (218).

9. Limitation.—[1] For limitation period for application under this rule, see Art. 181 of the Limitation Act, and for limitation for a suit to recover purchase-money, see Art. 62. See also the undermentioned case. (Vol 28) 1941 Mad 751 (751, 752) (DB). (Order setting aside execution sale appealed against—Application by auction-purchaser under O. 21, R. 93 for refund of poundage and interest on purchase-money already recovered by him—Limitation runs from date of appellate decree.)

10. Order under this rule Executability of.—[1] A purchaser who has obtained an order for refund of the purchase-money, can execute the order as if it were a decree. (Vol 6) 1919 Mad 894 (895) (DB).

11. Appeal and revision.—[1] Order granting or refusing refund of purchase-money under this rule—Appeal does not lie. (Vol 27) 1940 Bom 210 (213, 214) : ILR (1940) Bom 370 (DB). (Order directing refund) * (1890) 12 All 397 (399) (Order refusing refund passed) * (Vol 26) 1939 Mad 740 (742) (DB) * (Vol 24) 1937 Mad 779 Reversed). * (Vol 4) 1917 Mad 217 (217) (DB) (Order for refund of purchase-money to third party purchaser does not fall under S. 47).

[2] Execution sale set aside—Order directing judgment-debtor to refund poundage fees to auction-purchaser, without notice to him, is without jurisdiction and should be set aside in revision. (Vol 4) 1917 Mad 217 (218) (DB).

ORDER 21, RULE 94.

Synopsis.

1. "The Court shall grant a certificate."
2. Certificate if transfers title.
3. To whom certificate should be granted.
4. Contents of certificate of sale.
5. Construction of Sale Certificate.
6. Amendment or Certificate.

PROVINCIAL AMENDMENTS.

Nagpur

Add a comma after the word "sold" and insert the words "the amount of the purchase-money" between the word "sold" and the word "and."
[29-6-1943.]

Patna

Substitute the following for Rule 94 :—

"Where a sale of immovable property has become absolute, the auction-purchaser shall file the sale certificate stamp within fifteen days from the date of confirmation of the sale, and the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute. If the necessary stamp for the sale certificate is not filed within the prescribed period the sale may, if the Court thinks fit, be set aside."

O. 21 R. 94 (contd.)

7. What passes at Court Sale.

8. Effect of new interpretation of law on sale.

9. Effect of certificate of sale.

10. Certificate if operates as res judicata.

11. Limitation.

12. Registration of sale certificates.

13. Court-fee on application for sale certificate.

14. Appeal.

1. "The Court shall grant a certificate".—[1] The Rule is mandatory and a Court cannot withhold a sale certificate from an auction-purchaser who is otherwise entitled to it merely to compel him to meet the claim of a third party. (Vol 4) 1917 Pat 697 (697) : 1 Pat L Jour 446 * (Vol 23) 1936 Bom 137 (138).

[2] In granting a certificate it is the duty of the Court not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. Its action in granting the certificate is ministerial and not judicial. (Vol 12) 1925 Pat 615 (616) : 4 Pat 760.

[3] A sale by a Receiver is not a sale by the Court but a sale under the Court and in such cases the Court does not grant a sale certificate nor does it confirm the sale. (Vol 13) 1926 All 124 (126) : 48 All 209.

[4] The Court having given the purchaser a certificate of sale is under no obligation to give him another for the sole purpose of evading penalty, which he has incurred by not having presented in the first instance to Court a paper properly stamped for it. (1885) 9 Bom 526 (527) (DB).

2. Certificate if transfers title.—[1] The title of the auction-purchaser dates only from the confirmation of the sale and does not relate back to the date of sale. He is therefore not entitled to rent for the intervening period. (1911) 9 Ind Cas 25 (25) (All).

[2] Under the old Code, in the absence of S. 65, it was held that the purchaser had an equitable interest after sale, till confirmation and grant of certificate. See the following case. (1887) 11 Bom 588 (590) (DB) * (1907) 11 Cal WN 158 (160) (DB) * (Vol 2) 1915 Mad 805 (806, 807).

[3] A sale certificate does not create title. It is merely evidence of title. (Vol 7) 1920 Cal 435 (436) : 47 Cal 1108 * (Vol 25) 1938 All 471 (473) * (Vol 25) 1938 Mad 232 (233) * (Vol 31) 1944 Nag 305 (306) : ILR (1945) Nag 296. (It is only *prima facie* and not conclusive evidence to title).

[But see (1911) 7 Nag L R 134 (135)].

[4] Sale certificate is not essential for purchaser's title. (Vol 1) 1914 Oudh 306 (306).

3 To whom the certificate should be granted.—[1] The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O. 20, R. 94 C.P.O. and not his proposed vendee. (Vol 7) 1920 Cal 101 (103).

[2] If there are joint purchasers the certificate should be issued in the names of all of them. (Vol 12) 1925 Cal 164 (165) : 51 Cal 992 (DB).

[3] After the sale has become absolute, sale certificate can be granted to the legal representatives of deceased purchaser under O. 21 R. 94. (1900) 24 Bom 120 (122) (DB).

[4] Court cannot issue a sale certificate to an undisclosed principal of auction-purchaser. (Vol 15) 1928 Sind 54 (54).

[5] Court can grant a sale certificate to an assignee of an auction-purchaser. (Vol 23) 1936 Bom 137 (138).

[But see (Vol 25) 1938 All 471 (472). (Sale certificate cannot be issued in name of third party by virtue of transfer or arrangement made by auction-purchaser with such person).]

4. Contents of certificate of sale.—[1] What is sold at a judicial sale of immovable property in execution of a money decree can be nothing but the property attached and that property is conclusively described in and by the schedule to the order of attachment. Where an existing property is accurately described in the schedule, a certificate of sale cannot be issued in respect of different property, treating the case as one of misdescription when it is really one of identity (1914) 41 Cal 590 (598, 599, 600) : 41 Ind App 38 (PC).

[2] Claims admitted by parties or established by decree should be entered in the Sale Certificate. (1894) 18 Bom 175 (177) (FB).

[3] Certificate of sale should not furnish material for fresh litigation. (Vol 19) 1932 Bom 210 (212).

[4] Sale Certificate should bear date of sale confirmation. (Vol 23) 1936 Mad 733 (735) (DB).

5. Construction of Sale Certificate.—[1] Sale Certificate is the document of title and its plain meaning cannot be lightly ignored by reference back to other documents and it cannot be argued that the property could not have been sold and so must be taken not to have been sold. (Vol 27) 1940 All 121 (134) (DB) * (Vol 9) 1922 PC 252 (253) : 48 Ind App 155 : 44 Mad 483 (PC) * (Vol 10) 1923 Mad 48 (49). (It cannot be loosely construed).

O. 21 R. 94 (*contd.*)

[2] Court cannot go behind sale certificate in subsequent proceeding. (Vol 14) 1927 Mad 311 (312, 317).

[3] There is nothing in O. 21 R. 94 which makes a certificate of sale conclusive as to the property sold. It is determinative as to the date from which property actually sold vests in the purchaser and as to the identity of purchaser, in the absence of fraud or the like. (1903) 27 Bom 334 (339) (DB).

[4] Evidence to contradict terms of sale certificate cannot be given—But in case of ambiguity it may be admitted for interpretation—Evidence Act (1872), S. 92. (Vol 1) 1914 Cal 305 (306) * (1877) 26 Suth WR 104 (105) (DB) (An auction-purchaser could not be allowed to adduce evidence for the purpose of showing that he had purchased anything more than what the sale certificate showed him to have purchased) * (1876) 25 Suth WR 401 (403). (Where a sale certificate is correct in relation to any part of the object of sale, and can, with the help of extraneous assistance, be used to identify it, then such evidence is admissible to show what was intended to be sold).

[5] Construction of sale certificate—Test is what Court intended to sell and what purchaser intended to purchase. (Vol 4) 1917 Pat 4 (5) * (1871) 15 Suth WR 490 (492) (DB).

[6] Where a person brings a suit for possession of a land brought by him at the auction sale under the mortgage decree in his favour, although no reference can be made to the mortgage decree in order to construe the sale certificate or explain any ambiguity therein, such reference in order to identify property in the sale certificate with that claimed in the plaint is competent. (Vol 17) 1930 Cal 235 (236) (DB) (Vol 9) 1922 PC 252 : 48 Ind App 155 : 44 Mad 483 (PC) Dist * (1911) 13 Cal L Jour 660 (662) * (1874) 21 Suth WR 93 (93) (DB) * (1867) 7 Suth WR 245 (246) (DB).

[7] Sale of two adjoining properties *A* and *B* to two purchasers *X* and *Y* respectively—*X*'s Sale Certificate by mistake, mentioning property *B* as property sold to him and *Y*'s Sale Certificate mentioning *A* as property sold to him—*X* and *Y* entering into possession of *A* and *B* respectively, that is the correct properties—*Y* claiming after several years that he is entitled to property *A* according to sale certificate—*Held* that though he may be technically entitled to the property he must hold it in trust for *X* and that *X* cannot be ousted from *A*. (Vol 28) 1941 All 9 (13).

[8] The boundaries of the property sold as given in a sale certificate prevail over the areas mentioned therein and a purchaser takes the plots as defined by the boundaries. (1913) 18 Cal L Jour 541 (543).

[9] When a sale certificate contains only a general description of the boundaries of the whole area sold, without any specification of the boundaries of plots sold, the Paimash and survey number of the plots must be taken as a far more correct specification of what was sold than the boundaries. (1912) 22 Mad L Jour 161 (165).

[10] Sale certificate—Village described as "aslimai dakhili"—It includes main village as well as villages appurtenant thereto—Bengal Rent Recovery Act, 1865 (Vol 4) 1917 Pat 4 (5).

6. Amendment of Certificate.—[1] A Court has inherent jurisdiction to amend a sale certificate incorrectly describing the property actually sold. (Vol 1)

1914 Cal 527 (528) * (1313) 20 Ind Cas 583 (589) (Cal) (DB). (Correction of a wrong towji number).

[2] A Court has no jurisdiction to amend a certificate of sale so as to show the purchase of a larger share of the property than what was stated in the sale proclamation. (1913) 18 Ind Cas 725 (725) (Cal) (DB).

[3] A Sale certificate should not be amended without notice to the judgment-debtor. (Vol 9) 1922 Mad 63 (64, 65) * (1875) 23 Suth WR 301 (302, 303) (DB). (Sale certificate granted—Ex-parte order amending it is illegal).

7. What passes at a Court Sale.—[1] The legal effect of an execution sales depends upon the status of the decree-holder at the time proceedings for sale are taken and not at the time of actual sale. (Vol 4) 1917 Cal 2 (4) : 45 Cal 294 (DB). (Sale in execution of rent decree).

[2] In an auction sale the Court does not guarantee title. It simply conveys the right, title and interest of the parties to the suit in the property. (1911) 33 All 45 (47).

[3] When property is sold in execution of a decree ordinarily, all right, title and interest therein which the judgment-debtor had in possession, reversion, remainder, or in expectancy would pass to the purchaser, unless the Court limits the operation of the conveyance. (Vol 4) 1917 Cal 19 (20) * (1894) 17 Mad 228 (230). (Purchaser's right is subject to the condition that the purchaser may recover back his purchase-money when he finds the judgment-debtor had no saleable interest at all).

[4] *A*, a legatee, under a will agreed to sell the bequeathed property to *B*, and received full consideration before obtaining Letters of Administration for which the execution of the deed was postponed. Meanwhile the property was attached, sold and purchased by *C*, who sued for possession. Held, *C* obtained the right, title and interest of *A* who was bound to hand over the property to *B* owing to the receipt of consideration before attachment and therefore *C* could not oust *B*. (1911) 12 Ind Cas 831 (832) (Rang).

[5] Where a person purchases the share of a coparcener in certain items of joint family property and subsequently at a family partition other items are allotted to the share of that coparcener, it is not open to the auction-purchaser to compel that coparcener to give properties in substitution of those which had been sold at the Court sale. (Vol 7) 1920 Mad 316 (317) : 43 Mad 309.

[6] Court ordering property subject to two mortgages to be sold subject to both—Sale certificate mentioning only subsequent mortgage—This omission merely cannot raise presumption that prior mortgagee gave up his charge on the property. (Vol 19) 1932 Lah 56 (57).

[7] The plaintiff who is in possession of land on payment of consideration under a contract of sale, has an interest in the property, which could be purchased in the auction sale and plaintiff cannot recover the property from the auction-purchaser on getting a registered conveyance that prior mortgagee gave up after the defendant's purchase. (Vol 5) 1918 Cal 923 (925).

[8] The title of the purchaser at a sale in execution of a mortgage decree relates back to the date of the mortgage where the mortgagee is the purchaser (1911) 9 Ind Cas 840 (840) (Cal).

[9] Assignee of a decree-holder auction-purchaser of

95. Where the immovable property sold is in the occupancy of the judgment-debtor or of

Delivery of property in some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

[1882-S. 318; 1877-S. 318; 1859-S. 263. See S. 74 and O. 21, R. 35.]

O. 21 R. 94 (contd.)

undivided share is entitled to sue for partition without obtaining formal possession—Suit is not barred by S. 47 (Vol 3) 1916 Mad 430 (430).

[10] When a sale certificate recites that the whole property sold is subject to a mortgage and that the defendant's right of redemption is sold, the right to redeem of any other coparcener of the defendant is not barred. (Vol 3) 1916 Bom 61 (63): 41 Bom 357.

[11] For a fuller discussion of the topic see AIR Commentaries, Order 21, Rule 94, Note 8.

8. Effect of new interpretation of law on sale.—

[1] If by the law as then understood, the parties intended only a limited interest in the property to be conveyed by the sale certificate, subsequent change of law would not entitle the purchaser to get absolute right in the property under the sale certificate. (1904) 27 Mad 131 (142, 143): 31 Ind App 1 (PC).

9. Effect of certificate of sale.—[1] The purchaser's title becomes complete on the issue of the certificate and he is entitled to apply for possession of the property. (1893) 17 Bom 228 (229).

[2] Where a purchaser at a sale in execution was named in the sale certificate as "mother and guardian of her infant son", the title to the property was held to be vested by the certificate in the minor absolutely. (1869) 12 Suth W R 236 (238).

10. Certificate if operates as *res judicata*.—[1] Persons who were parties to a sale in execution of a decree cannot question the title of auction-purchaser. (Vol 6) 1919 Oudh 132 (132): 21 Oudh Cas 400 * (Vol 6) 1919 Pat 309 (310). (An auction-purchaser of land is not bound by a statement in the sale certificate as to the situation of the land purchased by him).

[2] The expression "so far as regards . . . through or under them" in S. 316 of the Old Code clearly means that no interest of the third party is affected by the sale certificate. (1911) 33 All 45 (47).

[3] Where in a rent suit the holding is sold in execution of a decree, an entry in the sale certificate, though it would not stop the landlords who were not parties to the rent suit, would be strong evidence against them under S. 13 of the Evidence Act. (1913) 20 Ind Cas 753 (754) (Cal).

[4] Where the plaintiff and defendant were both mortgagees and in a certificate granted to the plaintiff in execution of his decree, on the mortgage, properties belonging to the defendant were included and on defendant's refusal to give up possession, plaintiff brought the suit for possession, it was held that fraud is not the only ground upon which a sale can be set aside, at any rate when the decree-holder is the purchaser and that the matter was not *res judicata* since the ownership of different items was not in dispute in the previous suit. (1909) 19 Mad L Jour 1 (3) (DB).

[5] The effect of the reversal of a certificate of sale of a tenure is that as between the tenure-holder and

the purchaser or his representative-in-interest, the latter becomes liable to make restitution to the former but a decree for rent obtained by the latter and a sale held on the basis thereof are not affected by the subsequent cancellation of the certificate of sale. (Vol 3) 1916 Cal 376 (379).

11. Limitation.—[1] There is no period fixed during which an auction-purchaser has to make an application to obtain a sale certificate. (1910) 5 Ind Cas 263 (264) (All).

[2] Auction-purchaser of land applying for certificate—Provisions of Indian Limitation Act, relating to applications do not apply. (1882) 4 Mad 172 (173) (DB) * (1882) 6 Bom 586 (587) (DB).

12. Registration of sale certificate.—[1] Registration of sale certificate is not compulsory. (1883) 5 All 84 (85, 86) (DB) * (1884) 7 Mad 248 (252) (DB). (By registration of certificate, purchaser does not acquire priority as against a mortgagee whose mortgage is optionally registrable).

13. Court-fee on application for sale certificate.—[1] As O. 21, R. 94 does not require any formal application to be made for a certificate of sale, no written application is compulsory. If it be in writing, it need bear no stamp. (1889) 13 Bom 670 (671) (DB).

[2] It is purchaser's duty to bear expenses of proper stamp for sale certificate—Stamp Act, S. 29 (f). (Vol 17) 1930 Bom 392 (393) (FB).

[3] Sale-certificate issued to purchaser insufficiently stamped—Court can issue another without prejudice to questions of penalty or purchaser can apply to Collector to get error rectified under Stamp Act, S. 41.—(Obiter). (Vol 17) 1930 Bom 392 (394) (FB).

14. Appeal.—[1] No appeal lies from an order amending or refusing to amend sale certificate. (1901) 23 All 476 (478) * (1899) 26 Cal 529 (531) (DB).

ORDER 21 RULE 95.

Synopsis.

1. Scope.
2. Delivery of possession to the purchaser.
3. Immovable property.
4. Limitation for application.
5. Application if a step-in-aid of execution.
6. Procedure under this rule.

1. Scope.—[1] An order for delivery made on an application under O. 21, R. 95 cannot be treated as a mere general order to be worked in subsequent execution proceedings or as one including both such general order and an order executing it. (Vol 6) 1919 Mad 1001 (1004) (DB).

[2] Rule 95, in its very nature, gives no scope for the judgment-debtor to apply under it. (Vol 32) 1945 Bom 386 (388) (DB) * (Vol 5) 1918 Pat 61 (61, 62) (DB) (Rent decree, execution of—Homestead put to

O. 21 R. 95 (contd.)

sale—Decree-holder purchasing it and taking possession—Application for restoration of possession by tenants—Held, tenants could not go behind sale and recover possession under O. 21, R. 95).

[3] Failure to make application under O. 21, R. 95 does not extinguish title. (Vol 31) 1944 Cal 328 (328) (DB).

[4] Application under R. 95 can be made even before resistance while one under R. 97 cannot be made before resistance. (Vol 11) 1924 All 495 (497, 498, 502); 46 All 693 (FB).

[5] Claim for mesne profits cannot take matter outside scope of O. 21, R. 95 and overcome bar of S. 47. (Vol 31) 1944 Cal 328 (328) (DB).

2. Delivery of possession to the purchaser.—

[1] Purchaser can apply for delivery of possession in spite of judgment-debtor's application to set aside sale. (Vol 17) 1930 Cal 86 (89); 56 Cal 608 (DB).

[2] Transferee from auction-purchaser can apply for possession of property transferred. (Vol 5) 1918 All 405 (405); 40 All 216 (DB) & (1905) 28 Mad 87 (89) (DB).

[3] The counter-petitioners, obstructing delivery of property to the auction-purchaser derived their title from the judgment-debtor subsequently to the attachment, under which the auction sale was held. Held, the Court must order delivery to the auction-purchaser. (1910) 8 Mad L T 376 (376) (DB).

[4] The Court is not bound under R. 95 to see that delivery is actually effected. (Vol 13) 1926 Mad 385 (385) (DB).

[5] Possession means such possession as nature of property is capable of. (Vol 15) 1928 Oudh 251 (255); 3 Luck 506 (FB) * (Vol 21) 1934 Pat 119 (120). (Mode of delivery of possession does not depend on discretion of Court but depends on nature of property.)

[6] The Civil Procedure Code prescribes two modes of delivery of possession based upon the nature of the property concerned, *viz.*, actual possession under R. 95 and symbolical possession under R. 96. The Code does not prescribe that in respect of a particular property there can be two modes of giving possession either to a decree holder or to an auction-purchaser, one "symbolical" and the other "actual". (Vol 19) 1932 Pat 145 (147); 11 Pat 165 (DB) * (Vol 7) 1920 Lah 30 (32).

[7] Symbolical possession against judgment-debtors who are parties to execution proceedings amounts to actual possession. (Vol 7) 1920 Lah 30 (32, 33) * (Vol 4) 1917 All 312 (312); 39 All 460 (DB).

[8] Delivery of possession to auction-purchaser—Possession of judgment debtor thereafter is that of trespasser—Auction-purchaser taking possession does not commit any criminal act. (Vol 9) 1922 Pat 197 (199); 23 Cr L Jour 321 (DB).

[9] person put in possession of field with crop under O. 21, R. 95. He is entitled to cut the crop. (Vol 23) 1936 Cal 167 (168); 37 Cr L Jour 324.

3. Immovable property.—[1] Usufructuary mortgage debt is not immovable property—O. 21, R. 95 does not apply. (Vol 19) 1932 Mad 283 (284); (Mode of delivery is by prohibitory order under O. 21 R. 79 (3)).

[But see (Vol 27) 1940 All 431 (432) : ILR (1940) All 596.]

4. Limitation for application.—See Art. 180, Limitation Act.

5. Application if a step-in-aid of execution.—See Art. 182, Limitation Act.

6. Procedure under this rule.—[1] Property in possession of judgment debtor—Purchaser can get possession out of Court or by application under R. 95. (Vol 17) 1930 Cal 586 (587).

[2] Attempted delivery of actual possession—No objection by judgment-debtor—Objection only by tenants—Delivery as far as the former is concerned must be held to be complete. (Vol 23) 1936 Mad 733 (739) (DB).

[3] Summary procedure under O. 21, Rr. 95 and 96 does not bar suit for possession by auction-purchaser. (Vol 18) 1931 Pat 241 (245, 246); 10 Pat 670 (FB) * (Vol 13) 1926 All 120 (121) * (1887) 14 Cal 644 (648, 649) (DB).

[4] An application for delivery of possession under O. 21, R. 95 rejected being beyond time—Suit for possession is not barred. (1907) 29 All 463 (466).

[5] Auction-purchaser delivered possession according to law—Subsequently dispossessed—Remedy not by way of application under O. 21, R. 95 but by way of a fresh suit. (81) 5 Bom 387 (392).

[6] Mortgage decree against executors in their representative capacity—Sale of property—Purchaser cannot by proceeding under Rr. 95 and 97 obtain possession against beneficiaries under will—Beneficiaries possession is not "on behalf" of executors. (Vol 24) 1937 Cal 301 (303).

[7] Mortgage decree against Hindu father—Decision in partition suit that father fully represented the sons and that the decree was binding on them—They must be treated as parties to mortgage decree and delivery of possession can be ordered against them under this rule. (Vol 24) 1937 Mad 582 (584).

[8] If there is some person other than the judgment-debtor who is not his representative and not holder of the property on his behalf and who resists or obstructs possession, auction-purchaser's application under this rule must be dismissed. (Vol 11) 1924 All 495 (497); 46 All 693 (FB) * (Vol 24) 1937 Mad 108 (108).

[9] A prior mortgagee purchasing property in execution of a decree of his mortgage cannot be considered to be a judgment-debtor within the meaning of S. 2 (10) with regard to a decree on a subsequent mortgage. He cannot, therefore, be compelled to deliver possession unless his debt is redeemed. (Vol 17) 1930 Bom 221 (222, 223).

[See also (Vol 21) 1934 Pat 215 (215). (First mortgagee in possession in execution of his decree—Puisne mortgagee cannot dispossess first mortgagee under O. 21, R. 95 without redeeming him.)]

[10] Where possession was ordered to be delivered under this rule, it was held that the decree-holder was entitled to get possession without the property being burdened with huts etc., erected on the property by the judgment-debtor and that it was not necessary that the order should specifically mention the removal of such burden. (Vol 20) 1933 Cal 469 (471); 34 Cr L Jour 826 (DB).

[But see (Vol 21) 1934 Cal 751 (751); 62 Cal 52 (DB). (Possession by demolition of structures cannot be granted under R. 95).]

[11] No proclamation by beat of drum is necessary. (Vol 21) 1934 Nag 172 (174); 35 Cr L Jour 1213.

[12] Purchase of a share—Possession taken by beat of drum is effective delivery under R. 95. (Vol 15) 1928 Oudh 251 (256); 3 Luck 506 (FB).

96. Where the property sold is in the occupancy of a tenant or other person entitled to

Delivery of property in occupancy of tenant. rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

[1882-S. 319; 1877-S. 319; 1859-S. 264.]

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER.

97. (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[1882-Ss. 328, 334; 1877—S. 334; 1859—Ss. 226, 268. See S. 74 and O. 21, R. 35.]

PROVINCIAL AMENDMENT.

Patna

Add the following as sub-rule (3) :

"(3) The provisions of Section 5 of the Limitation Act, 1908, shall apply to applications under this rule."

O. 21 R. 95 (*contd.*)

[13] House purchased by auction-purchaser locked—Court has power even to direct breaking open lock to put purchaser in possession. (Vol 21) 1934 Pat 119 (119, 120).

[14] Obstruction caused by person claiming to be occupancy tenant—Court should investigate into matter and if claim of obstructor is found to be *bona fide*, decree-holder's application should be dismissed in so far as he claims physical possession—But symbolical delivery should be ordered. (Vol 22) 1935 Mad 547 (548) : 58 Mad 936 (DB).

[But see (Vol 22) 1935 Rang 159 (159) (DB)].

[15] Decree-holder auction-purchaser is not entitled himself to remove judgment debtor forcibly from the premises the possession of which has been granted to him. That power is with the Civil Court bailiff who has been issued warrant for this purpose. (1903) 5 Bom LR 977 (978) (DB).

[16] Application under, complete inquiry is not necessary in all cases. (Vol 22) 1935 Rang 159 (159) (DB).

ORDER 21, RULE 96—Note 1.

[1] Possession which is given under O. 21 R. 96 is symbolical possession. (Vol 10) 1923 Nag 237 (238).

[2] Symbolical possession is given only where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R. 96 and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery, i. e., where he gets no possession at all. (Vol 5) 1918 Mad 207 (208) (DB).

[3] An order directing delivery of possession to a purchaser under O. 21, R. 96, C.P.C. is a judicial order. (Vol 5) 1918 Mad 180 (182) (DB).

[4] Order under R. 96 passed—Court cannot thereafter stop issuing warrant for delivery. (Vol 14) 1927 Oudh 304 (304) (DB).

[5] Property sold subject to lease but period of lease not notified in proclamation—Purchaser is entitled only to constructive possession until expiry of lease. (Vol 14) 1927 Rang 127 (128) (DB).

[See also (Vol 22) 1935 Mad 547 (548) : 58 Mad 936 (DB) (Obstruction caused by person claiming to be occupancy tenant—Court should investigate into matter and if claim of obstructor is found to be *bona fide*, decree-holder's application should be dismissed in so far as he claims physical possession—But symbolical delivery should be ordered).

[6] An auction-purchaser of the share of a judgment-debtor can sue for partition of his share without obtaining formal delivery of possession under O. 21, R. 96, C. P. C. (Vol 3) 1916 Mad 430 (431, 432) (DB) * (Vol 14) 1927 Sind 199 (201). (Judgment-debtor other than a Hindu co-partner in joint possession with a third party—Auction-purchaser may sue for partition but Court will not refuse to assist him in obtaining possession under Rr. 95 and 96).

[See also (Vol 1) 1914 All 511 (511) : 36 All 181 (DB). (Auction-purchaser purchasing undivided share in house—Effective possession should be given under R. 35 (2) and R. 95 and not under R. 96.)

[7] Symbolical possession obtained under O. 21, R. 96 operates as actual possession against judgment-debtor but will not be binding on third parties. (Vol 23) 1936 Mad 571 (572) * (Vol 5) 1918 Oudh 184 (185) : 21 Oudh Cas 70. (Formal possession under O. 21, R. 96 is no possession at all against a stranger).

[8] Delivery of symbolical possession under circumstances in which O. 21, R. 95 does not apply is not a nullity. (1907) 17 Mad L Jour 598 (599) (DB).

[9] One cosharer in exclusive possession of specific plot by private arrangement—Purchaser of his right, title and interest obtaining symbolical possession is entitled to actual possession—His transferee has same rights. (Vol 4) 1917 Cal 232 (233) (DB).

ORDER 21, RULE 97.

Synopsis.

1. Applicability.
2. Decree for possession.
3. Fresh application for delivery, if can be made.
4. Remedies of person obstructed.
5. Appeal.

O. 21, R. 97 (*contd.*)

1. **Applicability.**—[1] It has been held in the undermentioned case that the provisions of Rule 97 come into operation only when either the delivery of possession has been ordered by the Court, or, at any rate an attempt to obtain possession has been made by the decree-holder out of Court. (Vol 11) 1924 All 495 (498, 500) : 46 All 693 (FB).

[2] The undermentioned cases hold that O. 21 R. 97 has no application to resistance to obtain possession out of Court and in the absence of attempt on the part of Court to give delivery in execution. (Vol 20) 1933 Cal 246 (250) : 60 Cal 8 (DB) * (Vol 29) 1942 Mad 505 (507) (DB). (R. 97 applies only where property is sold by Court in execution proceedings and requirements of R. 95 are fulfilled—(Vol 20) 1933 Cal 246 : 60 Cal 8 foll).

[3] There must be some overt act of opposition to delivery of possession. (Vol 11) 1924 All 495 (500, 501) : 46 All 693 (FB).

[But see (Vol 12) 1925 Rang 374 (375). (Investigation may be ordered even in anticipation of obstruction, i.e., before actual obstruction has been caused.)]

[4] The person resisting need not be actually present at the obstruction. (Vol 13) 1926 Mad 353 (354).

[But see (Vol 11) 1924 Rang 261 (262) (DB). (The "resistance or obstruction" contemplated by R. 97, O. 21, C. P. Code is some overt act of "resistance or obstruction" to the giving of possession by some person who is present at the time.)]

[5] The locking of the house by the judgment-debtor at the time when auction-purchaser seeks possession amounts to resistance or obstruction. (Vol 17) 1930 Bom 375 (377) : 54 Bom 479.

[6] The executing Court has no jurisdiction to start upon an enquiry under O. 21, R. 97 either *suo motu* or upon the application of a prospective objector in absence of a complaint by the decree-holder under O. 21, R. 97 about resistance or obstruction of delivery of possession to him. (Vol 22) 1935 Nag 212 (212, 213) : 31 Nag L R 408 * (Vol 18) 1931 Lah 686 (687) * (Vol 15) 1928 Lah 215 (216). (Obstruction to bailiff in delivery of possession to decree-holder—Court ordering possession to decree-holder and restraining obstructors on bailiff's report—No application by decree-holder nor notice given to obstructors regarding investigation—Court has no jurisdiction to proceed with the enquiry)

[See also (Vol 10) 1923 Lah 145 (146)].

[7] Application under R. 97—Before passing orders Court must hold enquiry. (Vol 30) 1943 Pesh 59 (60).

[8] Oral application is sufficient—Court expressing intention to investigate—Parties taking part in investigation—Implied application may be inferred—Parties cannot in subsequent suit plead non-investigation. (Vol 18) 1931 Lah 13 (14).

[9] Decree-holder's counsel present when report of obstruction placed before Court—Further proceedings would be deemed to be at decree-holder's instance. (Vol 21) 1934 Lah 193 (194).

[10] Court has to see *prima facie* whether there is any just cause for resistance. The question of title need not be gone into thoroughly. (Vol 20) 1933 All (57) (59) : 54 All 1031 (DB).

[11] Purchaser of property certificate sale in possession of property in good faith—Claim under S. 21 by another purchaser in execution of money decree dismissed—No title suit brought within

one year by claimant—Subsequent petition under O. 21 R. 97—Court is not entitled to go into question of title and order dismissing claim is conclusive (Vol 21) 1934 Pat 50 (51, 52).

[12] Application under O. 21 R. 97—Auction-purchaser present but adducing no evidence—Other party examining witness and Court passing orders—There is sufficient investigation. (Vol 22) 1935 Cal 267 (268) (DB).

[13] Suit for possession by auction-purchaser is maintainable in spite of his remedy under O. 21, R. 97. (Vol 6) 1919 Nag 31 (34) (DB).

[14] Rule applies to decree for possession under S. 9, Specific Relief Act. (Vol 13) 1926 Mad 353 (353).

[15] O. 21, Rr. 97, 98 and 99—These provisions are applicable to proceedings under Madras Hindu Religious Endowments Act, S. 78. (Vol 22) 1935 Mad 612 (614) : 59 Mad 36.

[16] Provincial Insolvency Act (1907) Ss. 18 (3), 20 and 47—Sale by Official Receiver—Purchaser obstructed in taking possession—Insolvency Court has no jurisdiction to inquire into alleged resistance. (Vol 6) 1919 Mad 595 (596) (DB).

[17] The failure to apply for removal of obstruction is not a default of the auction-purchaser which would necessitate the dismissal of his application for delivery, except perhaps in a case where he was ordered by the Court to put in an application under O. 21 R. 97 and he failed to do so. (Vol 31) 1944 Mad 60 (61).

[18] Resistance to possession—Decree-holder's application complaining resistance—Application by person obstructing possession to stay execution entertained as another suit with regard to property in dispute pending—Court has no discretion to stay execution under S. 151 and must investigate into decree-holder's application under Rr. 97 and 98. (Vol 16) 1929 Lah 694 (695).

2. **Decree for possession.**—[1] A decree for partition of immovable property is a decree for possession within the meaning of O. 21, R. 97. (1893) 16 Mad 127 (129, 130) (DB).

[2] R. 97 applies also to person entitled to order for possession—Order for receiver to obtain possession—Application under O. 21, R. 97 made on his behalf is proper. (Vol 26) 1939 Cal 494 (496).

3. **Fresh application for delivery, if can be made.**—[1] The Court may issue a second warrant for delivery of possession where on a previous occasion the attempt to obtain delivery was resisted and the obstruction was acquiesced in. (Vol 8) 1921 Mad 559 (561) * (Vol 20) 1933 Bom 457 (458, 459) (FB).

[But see ('10) 1910 Pun W R 45 (112)].

[2] If the holder of a decree for possession applies for delivery of possession but is resisted or obstructed in obtaining possession it is not obligatory on him to proceed under O. 21, R. 97 ; he may either apply again for execution of the decree or he may institute a suit for possession against the persons obstructing if they are third parties. (1884) 8 Bom 602 (608) (DB).

[See also (Vol 22) 1935 Mad 803 (808) : 58 Mad 893 (FB) (If in delivery proceedings the judgment-debtor is quiescent, raises no objection and makes no opposition either before the *amin* or before the Court, but a third party objects and on account of the third party's objection physical possession of the property cannot be given, it is the duty of the Court to note the fact and to order the delivery of such possession as the

98. Where the Court is satisfied that the resistance or obstruction was occasioned without Resistance or obstruction by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

[1882—Ss. 329, 330; 1877—Ss. 329, 330; 1859—Ss. 227, 228]

PROVINCIAL AMENDMENTS.

Allahabad

After the words "at his instigation," wherever they occur, add the words "or on his behalf," and after the words at the end of the rule, "thirty days," add the words "(thirty days), and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensation made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree." [12-11-1939]

Calcutta

Insert the words "or on his behalf" after the words "at his instigation" occurring twice in the rule.

Lahore

(1) After the words "at his instigation" wherever they occur add the following words:
"or on his behalf."

(2) Add the following at the end of the rule:

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance." [7-4-1932 and 29-6-1944]

O. 21 R. 97 (contd.)

matter then be capable so far as the judgment-debtor is concerned.

[3] Failure of decree-holder purchaser to proceed under R. 97 within time under Limitation Act, Art. 187—Fresh application for possession under R. 95, is not barred. (Vol 1) 1914 Mad 117 (117) (DB) * (Vol 28) 1941 Nag 322 (323) : ILR (1942) Nag 633 * (1890) 18 Mad 504 (507) (DB).

[4] If the original obstruction was by third parties and not by the judgment-debtor or any person claiming through him, a second application for delivery of possession under R. 95 is not maintainable and a separate suit must be brought by the purchaser to determine his right to the property (1904) 26 All 365 (367) (DB) * (Vol 10) 1933 Nag 369 (370).

[5] Final decree and obtaining of delivery of possession by decree-holder as against judgment-debtor—Dispute between decree-holder and transferee from judgment-debtor *pendente lite* regarding mutation—Second application of decree-holder for delivery of possession as against such transferee is one under O. 21, R. 11 and not under O. 21, R. 97. (Vol 20) 1933 All 201 (202) : 55 All 235 (DB).

[6] Application for delivery of possession by auction-purchaser—Declaration obtained by another that auction-purchaser had obtained no right—Declaration set aside on appeal—Auction-purchaser is entitled to avail of fresh cause of action for subsequent application for delivery of possession—S. 9, Limitation Act, is not applicable. (Vol 22) 1935 Cal 333 (335) : 62 Cal 66 (DB).

4 Remedies of person obstructed.—[1] Auction-purchaser other than decree-holder—Resistance to possession—He can apply for fresh writ of possession without applying under R. 97. (Vol 6) 1919 Pat 425 (430) : 4 Pat L Jour 94 (FB).

[2] Auction-purchaser can maintain a suit for possession. (1887) 10 Mad 53 (55) (DB).

[3] Decree in ejectment against lessee at instance of lessor is binding not only upon lessee but also upon his sub-tenants. The sub-tenant is liable to be evicted

in execution of a decree under O. 21, R. 35 and it is not necessary for the decree-holder to proceed under O. 21, R. 97. (Vol 19) 1932 Cal 241 (243) : 59 Cal 739 (DB).

5. Appeal—[1] Decree for restitution under S. 144—Obstruction by stranger—Application under O. 21, R. 97 dismissed—Order is appealable. (Vol 21) 1934 Pat 109 (109) : 13 Pat 108 (DB).

[2] A suit brought by M against J for possession of certain property was decreed and in execution of that decree M obtained possession. The decree obtained by M was set aside in appeal. L made an application to transfer to him the possession of the property granted to M in execution of his decree. K resisted claim of L and claimed that he was entitled to possession. The Court passed orders treating the proceedings under S. 144.

Held, that the proceedings of the Court must be treated as proceedings under O. 21, R. 97 as that was the correct procedure to be followed in the case and therefore no appeal lay against the order. (Vol 17) 1930 All 415 (416) (DB).

See also notes on S. 47.

ORDER 21, RULE 98.

Synopsis.

1. Scope and applicability.
2. Presidency Small Cause Court.
3. "Just Cause".
4. "Is still resisted or obstructed."
5. Appeal.

1. Scope and applicability.—[1] Obstruction not at instigation or on behalf of judgment-debtor—O. 21, R. 98 does not apply—Remedy of decree-holder is to file suit for possession. (Vol 30) 1943 Pesh 85 (86) * (Vol 7) 1920 Cal 706 (708) : 47 Cal 907 * (Vol 3) 1916 Mad 820 (821) (R. 98 applies only when obstruction is caused by judgment-debtor or some one at his instigation.) * (Vol 23) 1936 Mad 733 (739).

Nagpur

- (1) After the word "instigation," in both places where it occurs, insert the words "or on his behalf," and
 (2) Substitute a comma for the full stop at the end of the rule and add the following :

"and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

[29-6-1943.]

N.-W.F.P.

After the words "at his instigation" wherever they occur add the words "or on his behalf," and after the words "in the civil prison" add the words "at the expense of the Crown."

Oudh

After the words "at his instigation", wherever they occur, insert the words "or on his behalf" and after the words "thirty days" at the end of the rule, add the words "and may order the person or persons whom it holds responsible for such resistance or objections (obstructions) to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any

Resistance or obstruction by person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

[1882-Ss. 331, 335; 1877-Ss. 331, 335; 1859-Ss. 229, 269.]

O. 21 R. 98 (contd.)

[2] Plaintiff believing *bona fide* that person sued is proper legal representative of his debtor—Decree obtained against him without fraud or collusion—Other legal representatives would be bound by decree although not impleaded in suit—They are judgment-debtors within the meaning of O. 21, R. 98. (Vol 26) 1939 Mad 477 (478, 479).

[3] The mere fact that a decree would operate as *res judicata* against a person not actually party to it will not make him a judgment-debtor within the meaning of this rule. (40) ILR (1940) All 87 (90).

[4] No order under this rule can be passed against person who was in possession on his own account though his resistance was at the instigation of the judgment-debtor. (81) 3 Mad 81 (85).

[5] Tenants of judgment-debtor unless occupancy tenants are bound by decree and therefore an application under this rule is maintainable against them. (Vol 18) 1931 Mad 534 (535).

[6] Application under this rule can be maintained against a transferee *pendente lite*. (Vol 12) 1925 Cal 1243 (1243, 1244) * (Vol 8) 1921 Mad 559 (559) (DB).

[7] An application under this rule is maintainable against a subsequent purchaser from the judgment-debtor in execution of a money decree against him. (Vol 7) 1920 Mad 943 (944) (DB).

[8] An order under this rule can be passed only on an application made under R. 97. No order under this rule can therefore be passed under this rule on an application for possession under R. 95. (Vol 15) 1928 Lah 215 (216) * (Vol 24) 1937 Mad 366 (366) (Order under this rule can be passed only after notice to judgment-debtor and investigation of the case as contemplated by R. 97 (2)).

[9] R. 98 does not apply to case of person resisting official assignee in taking possession of insolvent's property as the official assignee is neither the holder of a decree for possession nor a purchaser in execution. (Vol 27) 1940 Nag 233 (234, 235) : ILR 1941 Nag 757 (DB).

[10] Proceedings under R. 98—Decree-holder is not party—Question as to the construction of decree cannot be decided on. (Vol 13) 1926 Cal 985 (986) (DB).

2. Presidency Small Cause Court.—[1] The Presidency Small Cause Court has power to direct removal of improper obstruction by judgment-debtor under this rule. (Vol 11) 1924 Mad 74 (74).

3. "Just Cause."—[1] Sale by auction-purchaser to one of the judgment-debtors is a just cause within R. 98 for resistance by such judgment-debtor to delivery of possession in execution of decree. (Vol 15) 1928 Mad 806 (809) * (1890) 18 Mad 504 (507, 508) (DB) * (1910) 8 Mad L Tnn 388 (388) (DB).

4. "Is still resisted or obstructed"—[1] The Court has no power to direct imprisonment unless a fresh order for delivery of possession has been passed and such order also is resisted. (Vol 30) 1943 Pesh 56 (59).

5 Appeal.—[1] When the decree-holder is the auction-purchaser and is resisted by the judgment-debtor an order made under rule 98 is appealable as a decree. (Vol 12) 1925 Pat 478 (479) : 4 Pat 726.

[2] Proceedings under O. 21, R. 98 by decree-holder auction-purchaser against judgment-debtor—Order is not appealable even though Court decided rights of decree-holder. (Vol 13) 1926 Cal 985 (986) (DB).

[3] See also notes under S. 47.

ORDER 21, RULE 99—Note 1.

[1] The rule applies only where the resistance or obstruction has been occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor. (1911) 21 Mad L Jour 407 (409, 410) (DB).

[2] If a third person is in possession of the property sold under Court's auction the executing Court should make a summary enquiry under Rr. 97 and 99 and if he is found to be in possession in good faith, the decree-holder should be left to seek his remedy by suit under R. 103, O. 21. (1910) Pun L R No. 64 Page 171 (172) : 1910 Pun Re. No. 14,

PROVINCIAL AMENDMENTS

Allahabad

For the words in brackets, "(other than the judgment-debtor)" read the words in brackets "(other than persons mentioned in Rules 95 and 98 hereof)."

Calcutta

Insert the words "to have a right" after the words "in good faith."

[3-2-1933.]

Madras

For the words in brackets "(other than the judgment-debtor)" read the words in brackets "(other than those mentioned in Rule 98)."

[13-10-1936.]

Nagpur

Substitute "(other than the persons mentioned in rule 95 or 98)" for "(other than the judgment-debtor)."

[29-6-1943.]

N.-W.F.P.

For the words "(other than the judgment-debtor)" substitute the words "(other than the persons mentioned in Rules 95 and 98)."

Oudh

For the words in brackets "(other than the judgment-debtor)," read the words in brackets, "(other than the persons mentioned in Rules 95 and 98 hereof)."

Patna

For the brackets and words "(other than the judgment-debtor)," substitute the brackets and words "(other than the persons mentioned in Rules 95 and 98)."

[7-1-1936.]

O. 21 R. 99 (contd.)

[3] If a decree-holder while attempting to execute a decree for possession is resisted by a third party, in possession in good faith on his own account, the case is covered by R. 99 and not R. 102, which only applies to cases where the judgment-debtor has transferred his right or his possession to the party resisting. (1910) 8 Ind Cas 805 (805) (Mad).

[4] A sub-tenant cannot claim to be in possession of property on his own account within the meaning of O. 21, R. 99 and if his immediate landlord is the tenant and judgment-debtor he cannot be in possession on account of some person other than the judgment-debtor. The words "on his own account" in R. 99 can only refer to a person who claims to be in possession on his own title, or as tenant of some person other than the judgment-debtor. (Vol 9) 1922 Bom 449 (451): 46 Bom 887.

[5] An owner of premises suing for possession may find it advantageous to join all the persons in possession of the suit premises, to avoid difficulties which may otherwise arise when he attempts to execute his decree; but the non-joinder will not enable a sub-tenant to resist delivery of possession to the owner in execution of his decree for ejectment against his lessee. (Vol 9) 1922 Bom 273 (274): 46 Bom 528.

[6] G obtaining lease from E—Lessee not to sublet without lessor's consent—G subletting to W—E suing G for possession and obtaining decree—In obtaining possession E resisted by W—E applying under R. 97—As W's tenancy began before suit for possession E's remedy was by suit against W. (Vol 7) 1920 Cal 706 (708).

[7] Mortgage decree against executors in their representative capacity—Sale of property—Purchaser cannot by proceeding under Rr. 95 and 97 of Order 21, obtain possession against beneficiaries under the will. (Vol 24) 1937 Cal 301 (301, 303).

[8] Under Hindu Law unmarried sisters have a right to residence in the family dwelling-house until they are married and if the house be sold in execution of a decree for debts incurred by the last male holder or his legal representatives, they can resist the auction-purchaser from ousting them out of their portions in their actual occupations till suitable arrangement is

made for them. (Vol 7) 1920 Mad 106 (107): 43 Mad 635 (DB).

[9] Where obstruction is caused by a person who although a purchaser *pendente lite*, has entered into possession by reason of his having paid off a prior possessory mortgage, O. 21, R. 99, is applicable. (Vol 13) 1926 Oudh 610 (611): 2 Luck 269.

[10] Auction-purchaser resisted in obtaining possession of the purchased property by some members of the family to which the property belonged but who were not made parties to the suit, case falls under O. 21, R. 99. Remedy of the purchaser is by a regular suit to obtain physical possession of the share of those judgment-debtors. (1912) 14 Ind Cas 282 (283) (Mad).

[11] The word "possession" in O. 21, Rule 99 does not mean merely actual physical possession. It includes constructive possession. (1901) 25 Bom 478 (480, 481).

[12] Rule 103 of O. 21, applies only when order under Rr. 98, 99 or 101 is passed. (Vol 10) 1923 Lah 145 (146).

[13] An order passed by the Subordinate Judge on an application by the person obstructing, directing the decree-holder to file a suit against the persons in possession and obstructing decree-holder to take possession is not one which is passed under O. 21, R. 99 and the failure of the decree-holder to file such a suit does not under O. 21, R. 103, make it conclusive as between the decree-holder and those persons. (Vol 15) 1928 Lah 672 (674).

[14] No Order can be passed under O. 21, Rule 99 without an enquiry and adjudication, however summary, of the rights of parties. (Vol 16) 1929 Mad 69 (72).

[15] O. 21, R. 103 makes it clear that an order under this rule becomes conclusive only after such an investigation as follows on an application under R. 97 or R. 100. (Vol 18) 1931 Lah 686 (687).

[16] Decision in favour of party, not judgment-debtor under R. 99 is conclusive so far as question of possession is concerned until set aside by suit under R. 103. (Vol 7) 1920 Lah 517 (520): 1 Lah 57 (DB).

[17] Claim under O. 21, R. 58 dismissed for default—Property sold—Purchaser obstructed by claimant in taking possession—Remedy of claimant was by a fresh

100. (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where Dispossession by decree-holder or purchaser. such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[1882-S. 332; 1877-S. 332; 1859-S. 230.]

O. 21 R. 99 (*contd.*)

suit and he cannot ask the Court to hold investigation of the claim under O. 21, R. 99. (1912) 16 Cal W N 882 (884).

[18] Order under O. 21, R. 99 when proper procedure has not been followed, does not operate as *res judicata*. (Vol 10) 1928 Mad 514 (516, 517) (DB).

[19] S. 19 of the Bengal Civil Courts Act does not restrict O. 21, R. 99, C P Code and a claim preferred under O. 21, R. 99 must be investigated by the executing Court, irrespective of the value of the property. (1510) 11 Cal L Jour 478 (481) (DB).

[20] It has been held in the undermentioned cases that when a Court investigates a claim to property sought to be taken in execution of a decree it should not confine itself to the mere question of possession but must decide on the title to the property in dispute. (1905) 27 All 453 (456) * (1890) 14 Bom 627 (632) (DB).

[21] Order under R. 99 dismissing decree-holder's application, is not appealable—Remedy is by suit. (Vol 18) 1931 Cal 574 (576) : 58 Cal 808 (DB) * (1907) 9 Bom LR 936 (940) * (Vol 17) 1930 Lah 363 (363) * (Vol 6) 1919 Oudh 356 (357). (Although purchaser is decree-holder no appeal lies against order passed under O. 21, R. 99), (During sale proceedings of mortgaged property mortgagor gave long leases—Mortgagee auction-purchaser applying under R. 97—Leases—Held collusive—Court declining to interfere with lessee's possession and passed order under R. 96—Order held amounting to dismissal of application under R. 99) * (Vol 24) 1937 Pat 186 (187) (DB). If lower Appellate Court entertains appeal, High Court can interfere under appellate or revisional jurisdiction.

[22] A Court can order, by its inherent powers, delivery of possession to the decree-holder, where the property is in the possession of a third person having no *bona fide* claim of the property on his own account. (1910) 14 Cal W N 836 (837) (DB).

ORDER 21 RULE 100.

Synopsis.

1. Scope of the rule.
2. "Persons other than the judgment-debtor."
3. "Is dispossessed."
4. Dispossession under Collector's orders.
5. "By the purchaser thereof."
6. Nature of inquiry under this rule—See Notes under O. 21, R. 101.
7. Limitation.

1. Scope of the rule.—[1] Provisions of R. 100 are mandatory—Court must investigate claim on fulfilment of conditions in R. 100 (1)—Investigation under Rr. 100 and 101 restricted to question of possession only—Dismissal of applicant's declaratory suit is no bar to his subsequent application under R. 100. (Vol 24) 1937 Oudh 400 (400, 401) (DB).

[2] Claim dismissed—No suit filed under R 63—

Application under R. 100 is not maintainable. (Vol 22) 1935 Pat 122 (123).

[3] Order under R. 100—Appropriate remedy for aggrieved party is by way of suit especially when there is no hardship by such procedure. (Vol 23) 1936 Mad 940 (940).

[4] Delivery of possession of wrong property in execution of decree to auction-purchaser—Application objecting to delivery is not covered by S. 47 and O. 21, R. 100 but by S. 151. (Vol 16) 1929 Pat 391 (393) (DB).

[5] Doctrine of *lis pendens* applies where lease is executed of the property in respect of which an application under O. 21, R. 100 is pending in a Revenue Court. (Vol 22) 1935 Oudh 462 (464) : 11 Luck 283. (Remedy under this rule is not barred because alternative remedy by way of suit is available to tenants under Oudh Rent Act S. 108 cl. (10).

2. "Persons other than the judgment-debtor."

[1] The word 'judgment-debtor' will include a representative of the judgment-debtor, the word 'representative' being taken to mean all persons who are bound by the decree. (Vol 10) 1923 Pat 76 (82) : 24 Cr L Jour 279 * (Vol 4) 1917 Pat 597 (597, 593) : 2 Pat L Jour 478 (DB). (Purchaser of portion of occupancy holding being representative cannot apply).

[2] Sons of judgment-debtor are *prima facie* bound by decree against their father and are not persons other than judgment-debtor. (Vol 22) 1935 Pat 253 (253) (*Obiter*).

[3] Purchaser of whole or part of non-transferable holding is representative of judgment-debtor—He is not entitled to object to sale under O. 21, R. 100. (Vol 5) 1918 Pat 483 (484) : 3 Pat L Jour 579 (DB) * (Vol 13) 1926 Cal 956 (956) * (Vol 27) 1940 Pat 670 (671) (Private purchaser from recorded tenants not recognised by landlord is representative.) * (Vol 24) 1937 Pat 562 (563) * (Vol 16) 1929 Pat 227 (228) * (Vol 4) 1917 Pat 597 (597, 598) : 2 Pat L Jour 478 (DB).

[See however (Vol 26) 1939 Pat 253 (253) (DB). (Purchaser of transferable holding can apply under O. 21, R. 100).]

[But see (Vol 15) 1928 Cal 792 (794) (DB). (A person purchasing non-transferable occupancy holding in decree against tenant—Landlord obtaining decree against recorded tenant and attaching holding—Purchaser is not judgment-debtor within R. 100, but one in possession on his own account.) * (Vol 14) 1927 Cal 156 (157) : 53 Cal 913 (DB). (Purchaser of whole occupancy tenancy non-transferable by custom).

[4] Mortgagee of judgment-debtor is not his legal representative and is not bound by litigation against mortgagor—He can apply under O. 21, R. 100. (Vol 26) 1939 Pat 263 (263) * (Vol 4) 1917 Lah 888 (889). (Usufructuary mortgagee) * (Vol 9) 1922 Pat 408 (1) (408) : 1 Pat 159.

[5] Party bound by decree applying to set aside in execution—Application is under S. 47 and not under

101. Where the Court is satisfied that the applicant was in possession of the property on *Bona fide* claimant to be his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

[1882-Ss. 332, 335.]

O. 21 R. 100 (*contd.*)

O. 21, R. 100. (Vol 20) 1933 Mad 569 (570). (Representative of party in suit cannot apply under this rule.) * (1895) 17 All 478 (481).

[6] S. 332 now (O. 21, R. 100) applies where in execution of a decree, a person not a party to the suit is dispossessed. His dispossession does not give him a cause of action within the jurisdiction of Mamlatdar. (1896) 20 Bom 351 (354) (FB) * (1895) 17 All 222 (225). (Application by usufructuary mortgagee in possession against whom no decree is passed) * (Vol 5) 1918 Mad 911 (912) : 40 Mad 964 (DB) * (Party exonerated for misjoinder) * (Vol 6) 1919 Nag 120 (121) : 15 Nag L R 146. (Mortgage suit—Person discharged on his pleading paramount title is not party to suit) * (Vol 25) 1938 Pat 90 (91). (Applicant not party to mortgage suit found to be in possession—Application should be allowed even if his possession might be subject to mortgage right of decree holder.) * (Vol 20) 1933 Pat 581 (581). (Transferee of a share of a sharah moyaian)

[7] Purchase of property by decree-holder and confirmation of sale—Application for possession of property by one of parties to suit under O. 21, R. 100—Alternative relief for crops as party under S. 47 cannot be entertained. (Vol 20) 1933 Mad 482 (483, 484).

[8] Lessees of a mortgagor impleaded as defendants in mortgage suit—Claim by them under O. 21 R. 100—Enquiry should be made into the question of title under S. 47 C. P. C. (Vol 15) 1928 Mad 1270 (1270) (DB).

[9] Where the judgment-debtor is dispossessed of land which is outside the decree, his remedy lies in an application for restoration under S. 47, C. P. C. and not by separate suit. (Vol 8) 1916 All 104 (105, 106) : 38 All 339 (DB).

[10] When a person is in possession of the property by receipt of rent or otherwise, and the tenant in actual possession is dispossessed of the property by the decree holder or auction-purchaser, the landlord is the person who is dispossessed of the property within the meaning of O. 21 R. 100 and is entitled to be restored to possession. (1906) 33 Cal 487 (491, 493) (DB).

[See also (1871) 15 Suth W R 70 (71) (DB). (Possession by receipt and enjoyment of rent is as good in law as actual occupation.)]

3. "Is dispossessed."—[1] Court has no jurisdiction to pass order under R. 100 if there is no *dispossession* of the applicant. (Vol 22) 1935 Pat 253 (253, 254).

[2] R. 100 does not apply in cases where there has been only symbolical delivery of possession. (Vol 20) 1933 Cal 144 (144) * (Vol 10) 1923 Cal 601 (602) : 50 Cal 311 * (1903) 30 Cal 710 (712).

[3] Objector in his application under O. 21, R. 100 contending firstly that he was in actual possession despite formal delivery to decree-holder—He alternately praying that if legal effect of formal delivery to decree-holder be dispossession he (objector) should be given possession—Application is competent. (Vol 25) 1938 Nag 442 (443).

[4] Application under, entertained by Court even where dispossession had taken place after termination

of execution proceedings—Decision held not erroneous and even if erroneous should not be interfered with by High Court. (Vol 25) 1938 Cal 192 (192).

[5] If a person is dispossessed of his property in a suit between third parties and he being aware of it does not apply under O. 21, R. 100 to the Court and remains dispossessed his title will be extinct by efflux of time under Limitation Act. (1904) 27 Mad 262 (267) (DB).

4. Dispossession under Collector's orders.—

[1] The rule does not apply where the execution of the decrees has been transferred to the Collector. If a person is wrongly ousted or dispossessed under the Collector's orders he should apply to the Collector and not to the Court. (1913) 37 Bom 488 (490).

[2] When a decree is transferred to a Collector or for execution, the Court which passed the decree is *functus officio*, for the time being but when the Collector has exhausted his powers, all matters requiring to be done, and usually regarded as done in execution must be done by the Court which passed the decree. (Vol 1) 1914 Bom 252 (253) : 38 Bom 673 (DB).

5. "By the purchaser thereof."—[1] R. 100 includes auction-purchaser's legal representative. (Vol 20) 1933 Cal 293 (293).

6. Nature of enquiry under this rule.—See Notes under O. 21, R. 101.

7. Limitation.—[1] Petition under O. 21, R. 100 Civil P. C., without joining sub-purchasers for want of knowledge of sub-purchase—Sub-purchasers subsequently joined, but after 80 days—Petition is not barred—Limitation Act (1908) S. 5 and Art. 165. (Vol 18) 1931 Cal 385 (387) : 58 Cal 55.

[2] Application under Civil P. C., O. 21, R. 100 dismissed without investigation—Person dispossessed is not bound to bring suit within one year—Art 11-A does not apply. (Vol 5) 1918 Mad 554 (554) (DB).

[3] If an objection under O. 21, R. 100, is allowed, the period of limitation for suit by auction-purchaser for declaration of title to the property begins to run from the date when objection is allowed. (Vol 4) 1917 All 426 (427).

[4] Dismissal of application under O. 21, R. 100, on the ground that there was no dispossession—Subsequent dispossession—Suit for possession is not governed by Limitation Act, Art. 11-A. (Vol 10) 1923 Cal 601 (602) : 50 Cal 311 (DB).

[5] Symbolical possession delivered. No dispossession within O. 21, R. 100.

[See also A. I. R. Commentary on the Limitation Act, 1908, Arts. 11-A and 165].

ORDER 21 RULE 101.

Synopsis.

1. Scope and applicability.
2. Procedure under the old Code.
3. "On his own account."
4. Nature of inquiry under this rule.
5. Applicability of O. 9.
6. Appeal.
7. Revision.

O. 21 R. 101 (contd.)

1. Scope and applicability.—[1] This rule applies to the proceedings under the Madras Estates Land Act, 1908 by S. 192 of that Act. (Vol 22) 1935 Mad 309 (310) (DB).

[2] Order 21 generally does not apply to sales by Official Receiver. (Vol 28) 1941 Mad 75 (76). (Remedy of person dispossessed by such sale is under S. 4. Provincial Insolvency Act and not under O. 21 R. 100.)

[3] Order 21, R. 101 which directs that a *bona fide* claimant who has been dispossessed in execution shall be restored to possession does not apply to a transferee *pendente lite*. (Vol 5) 1918 Mad 673 (674) (DB).

[See also O. 21 R. 102.]

2. Procedure under the old Code.—[1] As to the procedure under the Code of Civil Procedure, 1882 see the following cases:—

[a] The Civil Procedure Code of 1908 does not provide for the investigation of the claim of an objector who does not derive title under the judgment-debtor. The provision to that effect in S. 335, Act 14 of 1882, has not been reproduced in the new Code. (Vol 5) 1918 Mad 165 (165) (DB).

[b] An order under S. 335 C.P.C. (1882) is conclusive as between the parties and if it is not set aside by suit within one year, it cannot be questioned in any subsequent suit as between the same parties, whether the possession given to auction-purchaser is symbolical or not. (Vol 2) 1915 Mad 586 (587) (DB).

[c] If a claim is investigated under Sec. 331 of the Code of Civil Procedure of 1882 by a Court of inferior jurisdiction in respect of property the value of which exceeds the limit of its pecuniary jurisdiction the decision will not operate as *res judicata* in a subsequent title suit. (1910) 11 Cal L Jour 478 (483) (DB).

[d] *Scope*—The legislature could never have intended that the investigation into the claim might be defeated by a preliminary objection as to the pecuniary jurisdiction of the Court. (1910) 11 Cal L Jour 478 (483) (DB).

[e] The person dispossessed in execution of a decree preferred a claim under S. 332, Civil Procedure Code. The petition having been allowed with costs, the decree-holder instituted a suit to set aside the summary order and for a declaration of his right to the property. A decree was passed in favour of the plaintiff. Thereupon the claimant applied for execution of the order for costs in the claim case. *Held* that, as the decree expressly declared that the order had no effect, the execution for costs could not proceed, even though the decree did not specifically refer to costs incurred in the petition. (1895) 5 Mad L Jour 252 (253).

3. "On his own account"—[1] Rules 100 and 101 apply to cases of joint possession as well. (Vol 18) 1931 Cal 385 (387) : 58 Cal 55 * (Vol 25) 1938 Nag 442 (443, 444) * (Vol 10) 1923 Nag 52 (53) : 18 Nag L R 206 * (Vol 20) 1933 Pat 132 (133).

[2] A person in joint possession with the judgment-debtor of a certain land as a member of a joint family or otherwise, can claim to be in possession of the land in good faith on his own account within O. 21 R. 100, C.P.C. and the effect of an order in his favour will be to place him in joint possession with the execution purchaser. (Vol 1) 1914 Cal 186 (187) (DB). * (Vol 10) 1923 Nag 52 (53) : 18 Nag L R. 206 * (Vol 11) 1924 Pat 506 (507). (A joint auction-purchaser in possession can apply under R. 100.)

[But see (1893) 17 Bom 718 (721). (A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account.)]

[3] Specific share in property cannot be restored to claimant—He can only get joint possession. (Vol 18) 1931 Cal 385 (387) : 58 Cal 55 * (1910) 11 Cal L Jour 61 (64).

[See however (Vol 25) 1938 Nag 442 (444). (Decree for possession of fields against judgment-debtor entitled only to certain share in fields—Judgment-debtor's co-owners on application under O. 21, R. 100 are not entitled to possession of entire set of fields but only to the extent of their share.)]

[4] If the claimant under R. 100 was in possession though without a good title or even as a trespasser but on his own account or on account of some person other than the judgment-debtor he is entitled to succeed under R. 101. (Vol 14) 1927 Cal 339 (340). (Application by transferee of claimant whose claim under R. 58 was dismissed—*Held* competent.)

[5] A mortgagee of an occupancy holding is in possession of it on his own account and not on account of the mortgagor within R. 101; consequently the purchaser of an occupancy holding in execution, cannot oust the mortgagee in possession summarily but must first annul the incumbrance. (Vol 1) 1914 Cal 580 (580) (DB) * (1878-80) 2 All 94 (95) (DB).

4. Nature of inquiry under this rule.—[1] Application under O. 21, R. 100, is in nature of summary suit. (Vol 5) 1918 Pat 486 (487) : 3 Pat L Jour 250 (DB).

[2] However short and summary the investigation may be, an order under O. 21, R. 101, must be based upon the merits of the application, that is, an opinion on such facts as are before the Court as to whether the applicant was in possession or not. A mere dismissal in default or for non-prosecution is not an order under O. 21 R. 101. (Vol 4) 1917 Nag 53 (54) : 14 Nag L R 66.

[3] The test as to whether an order has properly been passed under O. 21, R. 101 is whether there was an investigation and the order was passed as the result of such investigation. (Vol 4) 1917 Nag 53 (54) : 14 Nag L R 66 * (Vol 24) 1937 Oudh 400 (400, 401) (DB). (Provisions of R. 100, O. 21 are mandatory—Court must investigate claim on fulfilment of conditions in R. 100 (1).)

[See also (Vol 16) 1929 Mad 69 (72) (DB). (With reference to order passed under O. 21, there is an enquiry and adjudication, however summary of the rights of parties).]

[4] The investigation under Rr. 100 and 101 is restricted to the question of possession only and even though the applicant may not have good title to the property, if he can show that he was not in possession on behalf of the judgment-debtor but on his own account he must under R. 101 be put in possession of the property. (Vol 24) 1937 Oudh 400 (401) (DB) * (1878-80) 2 All 94 (95, 96) (DB). (The investigation under O. 21, R. 101 is summary one—Court should confine to the question of possession and should not decide question of title.) * (Vol 13) 1926 Mad 1127 (1128). (Court cannot enquire into the equities in favour of auction-purchaser.) * (Vol 5) 1918 Mad 911 (912) : 40 Mad 964 (DB).

[5] Decision of the Court in a summary proceeding under O. 21, R. 100 is strictly speaking not a decision

O. 21 R. 101 (*contd.*)

as to title and is also not necessarily final. (Vol 25) 1938 Pat 150 (153) (DB).

[6] Scope—Questions as to validity of original decree, *lis pendens* and whether opposite party derives title by kabala or compromise decree, are questions which are outside scope of decision in summary proceeding under O. 21, R. 100. (Vol 17) 1930 Pat 416 (417). (Court cannot go behind original decree and hold that it is collusive.) * (Vol 8) 1921 Mad 612 (615) (DB). (Court should confine itself to the decree.) * (Vol 22) 1935 Pat 230 (230). (Court must confine itself to language of specific provision and doctrine of *lis pendens* will not apply.) * (Vol 11) 1924 Pat 506 (507). (Question of *benami* cannot be gone into under R. 58 or R. 100 of O. 21.)

[7] No declaratory order can be passed under the rule. (Vol 14) 1927 Nag 300 (301).

[8] Whether requirements of O. 21, Rr. 100 and 101 have been satisfied is question of fact which must be determined before any order can be passed on the application. (Vol 29) 1942 Pat 279 (281) (DB.)

[9] Events subsequent to delivery of possession must be considered. (Vol 20) 1933 Cal 584 (585) : 60 Cal 685 (DB).

[10] Application under—Court should allow parties to adduce evidence. (Vol 22) 1935 All 457 (457).

[11] Application under R. 100—Decree-holder asked to begin—After his examination witnesses of claimant examined—It amounts to irregularity. (Vol 18) 1931 Mad 534 (536).

[12] The only order contemplated by O. 21, R. 101 is an order putting the applicant into possession of the property, so that an order refusing to put the applicant into possession would be merely an order rejecting his application and not an order falling under R. 101. (Vol 4) 1917 Bom 133 (134) : 42 Bom 10 (DB).

[13] Finding of fact arrived at in proceedings under O. 21, R. 100 would not be *res judicata* in a subsequent suit. (Vol 27) 1940 Cal 16 (17).

[14] A right to possession upon redemption is not a right to the present possession of the property. An order under O. 21, R. 101, C.P.C. becomes conclusive under R. 103 only so far as the present right to possession of the property is concerned. It does not affect a party's right to possession upon redemption. (Vol 8) 1921 Nag 69 (70) : 17 Nag LR 33.

[15] Remedy of unsuccessful claimant under R. 58 is by suit only—Scope under Rr. 58 and 100 being same he cannot again apply under R. 100. (Vol 20) 1933 Cal 233 (234) (DB).

[16] Application for delivery of possession by auction-purchaser dismissed for default—Subsequent application for same relief—Objection by claimant allowed—Suit for declaration of title by auction-purchaser—Limitation begins to run from the date when objection is allowed. (Vol 4) 1917 All 426 (427) (DB).

[17] Possession obtained in execution—Subsequent dispossession—Application for restoration dismissed for failure to produce or summon witnesses—No order held passed under O. 21, R. 101 which could be conclusive in absence of suit within period allowed by Limitation Act, Art. 11 (a). (Vol 4) 1917 Nag 53 (54, 55) : 14 Nag LR 66.

5. Applicability of O. 9.—[1] Proceedings under O. 21, R. 100 are part of execution and O. 9 does not apply to such proceedings as do not fall within S. 47. (Vol 16) 1929 Mad 757 (762) : 52 Mad 899 (FB) * (Vol 1) 1914 Cal 126 (127) : 41 Cal 1 (DB).

[2] An application under O. 21, R. 100 cannot be regarded as an application in execution ; therefore by force of S. 141, O. 9, R. 9 applies to applications under it. (Vol. 10) 1923 Pat 239 (241) : 2 Pat 372 (DB) * (Vol. 32) 1945 Pat 132 (132, 133).

[See also (Vol 5) 1918 Pat 486 (486) : 3 Pat L Jour 250 (DB). (Claim under O. 21, R. 100 dismissed for default—Party not bound by decree can obtain re-hearing under O. 9, R. 9.)]

[3] Where a party starts a case under O. 21, R 100 and allows it to be dismissed for default, he has his remedy under R. 103 and the case need not be restored under S. 151. (Vol 21) 1934 Cal 653 (654).

[4] Application under—Claim allowed in the absence of decree-holder—Whole case not placed before the Court. Case should be reheard under Civil P.C., S. 151. (Vol. 15) 1928 Cal 179 (179, 180).

[5] Case under O. 21, Rs. 100 and 101 is not suit within meaning of O. 9, R. 4 which therefore does not apply to it. (Vol 6) 1919 Pat 540 (541).

6. Appeal.—[1] Order deciding question about delivery of possession in execution arising between decree-holder and defendant against whom suit is dismissed under S. 47 and hence appealable. (Vol 3) 1916 Mad 1008 (1010) (DB) * (Vol 20) 1933 Cal 680 (680) : 60 Cal 832 (DB). (Order under R. 100 and S. 47—Second appeal lies.)

[2] Order on objection by judgment-debtor to sale of some property though disposing of objections by strangers to deliver possession remains one under S. 47 and is appealable. (Vol 3) 1916 Mad 727 (727, 728) (DB).

[3] Under R. 103, no appeal lies from an order passed under R. 101. (Vol 4) 1917 Lah 406 (406) : 1917 Pun Re. No. 57.

[See also (Vol 4) 1917 Bom 133 (134) : 42 Bom 10 (DB). (Application under O. 21, R. 100—Order dismissing application is "one made under R. 100" within R. 103—Party against whom order is made though not judgment-debtor cannot appeal under S. 47.)]

[4] T got decree for sale subject to prior mortgage and purchased it himself in sale—Possession obtained through Court—Application of prior mortgagee for restoration of possession—Order held not appealable. (Vol 1) 1914 All 467 (468) (DB).

7. Revision.—[1] A party against whom an order under O. 21, Rr. 98, 99 or 101 is made, has the right to proceed under O. 21, R. 103 and therefore he cannot be allowed to have the order rectified in revision. (*11) 1911 Pun L R No. 129 Page 482 (483).

[See however (Vol 25) 1938 Cal 577 (578). (Order under O. 21, R. 100—Separate suit though maintainable revision cannot be said to be *mala fide*.)]

[2] Where an application is brought in revision against an order restoring a purchaser from the judgment-debtor of a non-transferable occupancy holding to possession under O. 21, R. 101, the High Court of Calcutta as a rule does not interfere in revision because another and better remedy by way of suit is open to the parties. (Vol 17) 1930 Cal 343 (348). [(Vol 5) 1918 Pat 483 : 3 Pat L Jour 579 Diss. from.]

102. Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

[1882-S. 333; 1877-S. 333; 1859-S. 231.]

103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

[1882-Ss. 332, 335.]

O. 21 R. 101 (contd.)

[3] High Court can interfere in revision against order under R. 101 to correct error or illegality. (Vol 18) 1931 Cal 385 (386); 58 Cal 55.

[4] An erroneous order based on misconstruction of a provision of law holding applicant to be not entitled to apply under O. 21, R. 100 is revisable. (Vol 11) 1924 Pat 506 (507).

[5] Where the lower Appellate Court erroneously entertains an appeal against an order made under O. 21, R. 101 the High Court can set aside the appellate Court's decision under S. 115 of the Code. (Vol 10) 1923 Bom 214 (215) (DB).

[6] Order under O. 21, R. 101 by Deputy Collector can be revised only by High Court under Madras Estates Act and not by District Collector. But High Court cannot revise District Collector's order refusing to interfere with Deputy Collector's order. (Vol 22) 1935 Mad 309 (310) (DB).

ORDER 21 RULE 102—Note 1.

[1] A transferee *pendente lite* cannot get the benefit of the procedure under Rr. 99 and 101. (1912) 39 Cal 220 (224) (DB) * (1911) 8 Ind Cas 805 (805) (Mad) * (Vol 5) 1918 Mad 673 (674) (DB).

[2] Where before determining what item fell to the share of the decree-holder particular items of property in the possession of a vendee from judgment-debtor were delivered to decree-holder.

Held, that such a contention could have been put forward by the judgment-debtor and it is difficult to see why the transferee from the judgment-debtor pending execution could not put forward the same contention. An objection of such a nature is not one under O. 21, R. 99 or R. 101, but one under S. 47 and his objection would prevail in spite of a notice served upon him that certain items are to be delivered to decree-holder. (Vol 18) 1926 Mad 968 (969).

[3] It has been held in the undermentioned case that O. 21, R. 102 does not apply to involuntary sale. (Vol 22) 1935 Pat 230 (230) * (Vol 33) 1946 Pat 134 (135, 136); 24 Pat 695 (DB). (Suit for partition by A against C decreed and certain property allotted to A—Pending suit, property purchased by B in execution of money decree obtained by B against C—A resisted by B in taking possession—R. 102 does not apply and A's application under R. 97 can be dismissed—A can bring separate suit for possession).

[4] The undermentioned case holds that rule 102 covers transfers whether voluntary or involuntary. (Vol 26) 1939 Cal 709 (710); ILR (1939) 2 Cal 63.

[5] Purchaser in charge-decree is also representative of judgment-debtor—Such purchaser applying for possession—Purchaser in private sale obstructing—

Application under O. 21, R. 97 dismissed—R. 102 does not apply as decree was not one for possession. (Vol 31) 1944 Mad 11 (12, 13) (DB).

ORDER 21 RULE 103.

Synops's.

1. Scope.
2. Suit under a different title.
3. "Any party against whom an order is made."
4. "Order shall be conclusive."
5. Parties to suit.

1. *Scope*.—[1] Rule 103 applies only when order under Rr. 98, 99 or 101 is passed. (Vol 10) 1923 Lah 145 (146) * (Vol 23) 1936 Mad 940 (940).

[2] Suit must be brought within one year from date of order under Art. 11-A, Limitation Act—Suit brought after one year is barred. (1886) 10 Bom 604 (609) * (1902) 26 Bom 730 (734) * (Vol 7) 1920 Lah 517 (520); 1 Lah 57 * (Vol 3) 1916 Lah 298 (299) * (Vol 7) 1920 Pat 123 (124); 5 Pat L. Jour 652.

[See also (Vol 17) 1930 Bom 505 (506). (Where no suit is filed within time against order under O. 21, R. 103, time taken in revision proceedings cannot be excluded under S. 14, Limitation Act.)]

[3] The words "any party" in O. 21, R. 103 refer to any party to the petition and not to the decree under execution. (Vol 7) 1920 Mad 126; 43 Mad 696.

[4] Decree-holder's own property sold by mistake—Application by him under R. 100 dismissed—Decree-holder must sue under this rule. (Vol 9) 1922 Mad 63 (63).

[5] Person present at attachment not raising objection under O. 21, R. 58—Subsequently objection raised under R. 100—His suit under R. 103 is not barred by estoppel. (Vol 18) 1931 Lah 598 (598).

[6] The rule does not bar an application for rehearing an application in execution matters. The rule clearly lays down that the petitioner may bring a suit if he chooses. (1910) 12 Cal L Jour 6 (7) (DB).

[7] Use of word "may" in R. 103 suggests that what is contemplated is the establishment of a right and remedy by a suit is indicated—If such right is established it is not necessary to institute suit. (Vol 24) 1937 Mad 582 (583, 584).

[8] Right of suit under R. 103 is not restricted by S. 47. (Vol 6) 1919 Mad 554 (554) (DB) * (Vol 12) 1925 Mad 1198 (1199).

[9] Suit under R. 103 though brought on strength of title must be brought within one year. (Vol 16) 1929 Bom 379 (380, 381); 53 Bom 668 (DB).

O. 21 R. 103 (*contd.*)

[10] Plaintiff may prove his right to present possession in a suit under O. 21, R. 103 without showing that he was in actual possession at the date of the summary order against him. (Vol 8) 1921 Mad 317 (318): 44 Mad 227 (DB).

[See (Vol 23) 1936 Lah 530 (532). *A* succeeding in getting his title proved as against *C*—*B* mortgagee from *C* while *C* was in wrongful possession—In execution of decree by *A* against *C*, *B* resisting execution—*A* bringing suit against *B* under O. 21, R. 103—*B* not showing adverse possession for 12 years—*A* held entitled to decree for possession.

[11] Plaintiff's right to present possession of property established—Order of removal of his obstruction must be set aside—His disposssession pending suit does not matter. (Vol 26) 1939 Bom 508 (510).

[12] Suit filed under O. 21, R. 103 to contest order made under Rr. 98, 99 or 101—Its scope is establishment of right or title by which plaintiff claims present possession. (Vol 22) 1935 Bom 144 (148)* (Vol 25) 1938 Pat 433 (434): 17 Pat 164 (DB)* (Vol 24) 1937 Pat 615 (616) (DB)* (Vol 22) 1935 Sind 129 (130). (Claimant is not required to set aside adverse order but to establish his right.)

[13] Suit contemplated by R. 103 is not one under S. 9, Specific Relief Act. (Vol 19) 1932 All 703 (704).

[14] Decree-holder purchasing property in execution—On resistance by third party, in taking possession, decree-holder filing suit under R. 103 against him—Defendant, being third party cannot contest validity of decree. (Vol 24) 1937 Cal 88 (91).

[15] A suit instituted under R. 103 is not a continuation of the summary application but an independent proceeding. (1904) 6 Bom L R 301 (302).

[See also (Vol 27) 1940 Mad 627 (628). (Evidence given on special oath under the Oaths Act (1873) in claim proceedings under R. 100 is not conclusive proof in suit under R. 103).]

[16] The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession is forced to institute a suit under R. 103 does not shift the burden of proof on to him. (Vol 12) 1925 Sind 201 (201).

[17] Suit under O. 21, R. 103 decreed—Plaintiff who has lost possession during its pendency can be put into possession. (Vol 27) 1940 Oudh 1 (7): 15 Luck 43.

[18] Where parties arrayed on opposite sides are parties to a suit within S. 47, Civil P. C. neither R. 103 nor Art. 11-A, Limitation Act, applies. (Vol 14) 1927 Mad 952 (953) (DB).

[19] Neither a judgment-debtor nor his representative can file a suit under this rule. (Vol 30) 1943 Mad 381 (383): ILR (1943) Mad 702.

[20] Co-sharer land-lords in possession implored as *pro forma* defendants to suit but not to execution proceedings—Application by landlords under R. 100 dismissed—Suit by landlords under R. 103—Held under circumstances of case landlords ought not to be regarded as judgment-debtors. (Vol 14) 1927 Pat 404 (405) (DB).

[21] Special right to bring suit for declaration of present right to possession is not taken away by proviso to S. 42, Specific Relief Act. (Vol 21) 1934 Nag 169 (169)* (Vol 25) 1938 Pat 558 (559) (DB).

2. Suit under a different title.—[1] The suit contemplated by R. 103 is a suit by a person who is

kept out of possession of the property purchased in execution of the decree and claims possession under his auction-purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the defendant. (Vol 12) 1926 Cal 377 (377).

[2] If the title which is put forward as the basis of a suit is the same as the title which was put forward in execution proceedings as the basis for an order in a party's favour then O. 21, R. 103 would be a bar to a suit brought after limitation period prescribed in Art. 11-A but not otherwise. (Vol 33) 1916 Mad 324 (326)* (Vol 33) 1946 Mad 76 (77, 78).

[3] Suit for partition by a purchaser from a Hindu co-parcener is not barred by a prior decision against him in a suit by him for declaration of his right to possession under O. 21, R. 103. (Vol 13) 1926 Mad 683 (684): 49 Mad 596 (DB).

[4] Where the basis of the claim in the suit is the same as that put forward in the miscellaneous objection proceedings to the present possession. Art. 11-A, Limitation Act, would apply, but where the basis of the claim in the suit is distinct and different and the possession claimed is not present possession but only by way of consequential relief to the decree being set aside, the Article cannot apply. (Vol 14) 1927 Bom 184 (187): 51 Bom 158.

[5] Suit for redemption—Failure to file suit under R. 103 or within three years of Criminal Court's order refusing right to present possession does not bar the suit for redemption. (Vol 15) 1928 Nag 97 (98): 23 Nag L R 164* (Vol 33) 1946 Mad 324 (326)* (Vol 8) 1921 Nag 69 (70): 17 Nag L R 33.

[But see (Vol 26) 1939 Pat 7 (13): 18 Pat 155 (DB). (Application under R. 100 dismissed—Suit for redemption falls under R. 103).]

[6] Objection under R. 99 dismissed—Suit to enforce mortgage-lien over property is not barred. (1902) 29 Cal 25 (29).

[7] Claim of applicant under O. 21, R. 97 for possession of whole of homestead—Opposite party claiming a share—Claim dismissed under R. 99—Suit by applicant for partition and possession of his share is not barred. (Vol 25) 1938 Cal 384 (384): ILR (1938) 1 Cal 685.

3. "Any party against whom an order is made." —[1] Order spoken of in R. 103 does not include orders passed without investigation. (Vol 13) 1926 Nag 423 (425): 22 Nag LR 94* (Vol 15) 1928 Cal 179 (180) (Suit under the rule should be subsequent to investigation under R. 100.)* (1910) 14 Cal V N 346 (351) (DB)

[2] Court should come to definite conclusion on matter under inquiry—If it declines to give any decision, it will not be conclusive so as to bar suit instituted more than one year from date of order. (1899) 9 Mad L Jour 175 (176, 177)* (1907) 34 Cal 491 (493)* (Vol 18) 1931 Lah 636 (637)* (1904) 27 Mad 25 (26)* (Vol 1) 1914 Mad 121 (123) (DB).

[3] Mere dismissal for default or for non-production of evidence is not an order under R. 101 and does not bar a suit more than a year after the order. (Vol 4) 1917 Nag 53 (54): 14 Nag LR 66.

[4] Application of claimant allowed for default of appearance of decree-holder—There is no order against decree-holder within this rule. (Vol 15) 1928 Cal 179 (180)* (1878-79) 3 Bom 241 (241).

PROVINCIAL AMENDMENTS

Order 21, Rules 104 to 140 (ALLAHABAD)

The following rules shall be *added* to Order XXI :

R. 104. When the certificate prescribed by S. 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record-room.

R. 105. Every attachment of movable property under R. 43, of negotiable instruments under R. 51, and of immovable property under R. 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

R. 106. When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application for an order for sale a certificate from the Sub-Registrar within whose sub-district such property is situated, showing that the Sub-Registrar has searched his book Nos. I and II and their indices for the twelve years preceding the mortgage or attachment as the case may be and stating the encumbrances, if any, which he has found on the property.

R. 107. Where an application is made for the sale of land, or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887-I—288-10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question.

O 21 R. 103 (*contd.*)

[5] Application under O. 21, R. 97 dismissed as time barred—Order of dismissal is not order under R. 98, R. 99 or R. 101. (Vol 27) 1940 All 525 (527, 528). (Order 21, R. 103 is no bar to appeal from such order.)

[6] An order made upon an application under R. 100 O. 21, dismissing the application is an order "made under R. 100" within meaning of those words in R. 103. (Vol 4) 1917 Bom 133 (134) : 42 Bom 10.

[7] Order under R. 95 is not one under R. 97 and therefore R. 103 does not apply. (Vol 11) 1924 All 495 (499) : 46 All 693 (FB).

4. "Order shall be conclusive."—[1] Rules 97 to 103, O. 21, contemplate that the decision in favour of a party not being a judgment-debtor under R. 99 is conclusive in so far as the question of possession is concerned unless and until a suit is brought by the party against whom the order is made under R. 103. (Vol 7) 1920 Lah 517 (520) : 1 Lah 57 * (Vol 4) 1917 Cal 5 (5, 6) * (Vol 38) 1946 Mad 76 (77, 78) (Title of obstructors upheld—No suit by decree-holder for one year—Order becomes conclusive.) * (Vol 5) 1918 Mad 165 (165) * (Vol 11) 1924 Sind 97 (99) : 17 Sind LR 63.

[See however (Vol 21) 1934 Lah 457 (458). (Objection not falling under R. 97—Dismissed—Suit under R. 103 is not maintainable.)]

[2] Order passed against manager of joint Hindu family is conclusive against junior members of family. (Vol 27) 1940 Mad 636 (639) * (Vol 24) 1937 Oudh 401 (402) (DB).

[3] The bar created by R. 103 must be given effect to even in a suit instituted prior to the order under R. 101. (Vol 11) 1924 Mad 602 (602) (DB).

[4] The order is conclusive even when the party against whom it is made is not the plaintiff but a defendant. (Vol 4) 1917 Cal 5 (5) (DB) * (Vol 24) 1937 Mad 866 (866, 867) * (Vol 11) 1924 Sind 97 (99) : 17 Sind LR 63.

[5] The word "conclusive" indicates that the order is to be final and therefore neither open to be questioned in a separate suit nor open to an appeal. (Vol 24) 1937 All 742 (749) : ILR (1937) All 921 (FB) * (Vol 20) 1933 All 959 (960) (No revision or appeal lies.) * (Vol 1) 1914 All 467 (468) (DB) * (Vol 18) 1931

Cal 574 (576) : 58 Cal 808 (DB) * (Vol 4) 1917 Lah 406 (406) : 1917 Pun Re. No. 57 * (Vol 31) 1944 Mad 11 (12, 13) (Purchaser in charge decree applying for possession—Purchaser in private sale obstructing—Application under R. 97 dismissed—No appeal lies against order of dismissal—Remedy is by way of suit under R. 103.) * (Vol 6) 1919 Oudh 356 (357).

[See however (Vol 20) 1933 All 57 (59) : 54 All 1031 (DB). (Order also falling under S. 47—R. 103 does not prohibit second appeal).]

[6] Order directing the decree-holder to file a suit against persons offering resistance—Failure to file a suit does not make it conclusive. (Vol 15) 1928 Lah 672 (673, 674).

[7] If an order for delivery of possession were left unenforced within the time allowed by law and if the auction-purchaser institutes a suit for possession then it is quite open to the party against whom the order was passed to plead in defence that the plaintiff has no title to recover. (Vol 5) 1918 Mad 165 (165, 166) (DB).

5. Parties to suit.—[1] Suit under R. 103—Judgment-debtor is a proper party if not a necessary party. (Vol 25) 1938 Nag 300 (302).

[2] Suit against obstructor—Judgment-debtor need not be impleaded—(Vol 22) 1935 Sind 129 (131).

Local Amendment

ORDER 21, Rule 104 (Oudh)—Note 1.

[1] Rule 104 and following rules do not involve any question of attachment—Effect of notice under Rule 104 is to give warning to garnishee. (Vol 26) 1939 Oudh 86 (87) (Meaning of debt explained.)

ORDER 21, RULE 105 (All.)—Note 1.

[1] The provision in Rule 105 is directory not mandatory—Omission to record reasons in order of appointment does not make attachment illegal. (Vol 22) 1935 All 490 (491) : 36 Cr L Jour 545.

ORDER 21, RULE 106 (All.)—Note 1.

[1] The omission to file a certificate required by R. 106 will disentitle the decree-holder to have process issued on his application, but the application will not on that account cease to be in accordance with law and cannot therefore be dismissed. (Vol 17) 1930 All 188 (189) (DB).

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

R. 108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under S. 68, the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

R. 109. The certificate of the Sub-Registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

R. 110. The result of the enquiry under R. 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purpose of the enquiry.

R. 111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

R. 112. The costs of the proceedings under Rr. 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

R. 113. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

R. 114. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

R. 115. When an application is made for the attachment of live-stock or other movable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

R. 116. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

O. 21 R. 106 (All.)—(contd.)

[2] Sale in violation of the statutory provisions of Rr. 66, 106 and 110 is liable to be set aside if it results in underselling the property. (Vol 19) 1932 All 55 (57).

ORDER 21, RULE 107 (Oudh)—Note 1.

[1] No second appeal lies from order passed under O. 21, R. 107. (Vol 23) 1936 Oudh 167 (168) (DB).

ORDER 21, RULE 110 (All.)—Note 1

[1] Sale in violation of the statutory provisions of Rr. 66, 106 and 110 is liable to be set aside if it results in underselling the property. (Vol 19) 1932 All 55 (57).

ORDER 21, RULE 112 (Oudh)—Note 1.

[1] Order 21, R. 112 allows an appeal against an order of the court in a proceeding under O. 21, R. 107 (Vol 23) 1936 Oudh 167 (168) * (Vol 30) 1943 Oudh 192 (194).

ORDER 21, RULE 117 (All.)—Note 1.

[1] Supurdar in good faith handing over property to third person is liable to pay its price. (Vol 23) 1936 All 555 (556) (DB).

ORDER 21, RULE 122 (All.)—Note 1.

[1] R. 12 is the only rule which applies to movables like ornaments only—Property handed over to surety—Action approved by Court—Surety becomes officer of Court and is liable under S. 145. (Vol 18) 1931 All 567 (570) : 54 All 263 (FB). (Vol 13) 1926 All 406 : 48 All 510 Overruled.)

[2] Supurdar of property attached is always responsible to *amin* and cannot hand over property to *amin* without the *amin*'s directions. (Vol 21) 1934 All 357 (358) (DB).

[3] Commissioner appointed to attach movables—He appointing supurdar without permission of Court for convenience—Act approved by Court—Supurdar is liable. (Vol 22) 1935 All 737 (738).

R. 117. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act 1871, and committed to the custody of the pound-keeper, who shall enter in a register

- (a) the number and description of the animals;
- (b) the day and hour on and at which they were committed to his custody;
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

R. 118. For every animal committed to the custody of the pound-keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under S. 12 of Act No. I of 1871.

And the sums so levied shall be sent to the Municipal or District Board, or the notified area as the case may be, under whose jurisdiction the pound is. [21-11-1942.]

R. 119. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under S. 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

R. 120. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

R. 121. Animals attached and committed as aforesaid shall not be released from custody by the pounds keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in Rule 118.

[Note.—The reference to R. 118 seems to be a mistake for Rule 117—Ed.]

R. 122. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

R. 123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

R. 124. The fee for the services of each such person shall be payable in the manner prescribed in R. 116. It shall not be less than four annas and shall ordinarily not be more than six annas per diem. The Court may in its discretion allow a higher fee; but if it does, it shall state in writing its reasons for allowing an exceptional rate.

R. 125. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge:

Provided that where the amount does not exceed Rs. 5, it may be paid to the *sahna* by money order on requisition by the amin, and the presentation of the certificate may be dispensed with.

R. 126. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

R. 127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

ORDER 21, RULE 123 (ALL).—Note 1.

[1] Previous permission of Court is necessary only when a guard or watchman is put in special charge under R. 123. (Vol 22) 1935 All 737 (738).

[2] The permission of the Court required by R. 123 is permission to appoint a *sahana* or *sahanas*. (Vol 18) 1931 All 567 (578): 54 All 263 (FB).

ORDER 21, RULE 124 (ALL).—Note 1.

[1] Rule 124 applies to the appointment of watchmen or guards also known as "*sahanas*" who are

usually appointed to guard standing crops in fields or crops which are cut and stacked and other places where attached goods have been kept. (Vol 18) 1931 All 567 (570): 54 All 263 (FB).

[2] The execution Court alone can settle the fee to be paid to the custodian and it has to be paid by the decree-holder. (87) 1937 All L Jour 160 (161).

ORDER 21, RULE 125 (ALL).—Note 1.

[1] Execution Court cannot adjudicate on a dispute between the decree-holder and his "*sahanas*". (Vol 22) 1935 All 102 (102).

R. 128. When any sum levied under R. 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

R. 129. The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

R. 130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by O. 21, Rr. 22, 66 and 107.

GARNISHEE ORDERS

R. 131. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decrees and the cost of execution.

R. 132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

R. 133. If the garnishee disputes his liability, the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried, as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

R. 134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person, or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

R. 135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

R. 136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised, although such order or the judgment may be set aside or reversed.

R. 137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction: Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

R. 138. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

ORDER 21, RULE 131 (All.)—Note 1.

[1] Money left with the mortgagee for payment to creditors is not a debt as contemplated by R. 131 and cannot be attached. (Vol 21) 1934 All 954 (956).

[2] Where an objection is raised to a notice issued under this rule and the objections are disallowed, the court should pass an order under O. 21, R. 133 (Vol 21) 1934 All 770 (772).

[3] Word 'charge' is not limited to charge created by act of parties—Sale by judgment-debtor of attached property—Part of consideration left with vendee to be paid to vendor's decree-holder—There is debt due by vendee to vendor and such debt is secured by charge—Garnishee proceedings are not applicable. (Vol 27) 1940 All 500 (502, 503, 504) : ILR (1940) All 681 (DB).

ORDER 21, RULE 132 (All.)—Note 1.

[1] The right of parties to recover from each other is not affected by the order of payment passed against garnishee. (Vol 21) 1934 All 1056 (1057).

ORDER 21, RULE 139 (All.)—Note 1.

[1] An order against the garnishee has the force of a decree which virtually becomes part and parcel of the original decree passed in the suit. It supplements the decree passed in the original suit. (Vol 21) 1934 All 1056 (1057)

[See also (Vol 25) 1938 All 254 (255, 256). (Application for garnishee order allowed and liability of garnishee held to exist—Order has force of decree).]

R. 4. If attached property (other than live-stock) is not sold under the proviso to R. 43, O. 21, or retained in the village or place where it is attached, it shall be brought to the court-house at the decree-holder's expense and delivered to the proper officer of the Court. In the event of the decree-holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then unless such payment has previously been made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment.

R. 5. When live-stock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in Rule 3 of this Order :

Provided that live-stock shall not be left in the charge of any person under clause (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under clause (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance.

R. 6. When for any reason, the attaching officer shall find it impossible to obtain compliance with the requirements of the preceding rule so as to entitle him to leave the attached live stock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected.

R. 7. Whenever it shall appear to the Court that live-stock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may, if necessary, direct the attachment to cease and the live-stock to be returned to the person in whose possession they were when attached. The Court may order the decree-holder to pay any expenses so incurred in providing for the care and maintenance of the live-stock and may direct that any sum so paid, shall be refunded to the decree-holder by any other party to the proceedings.

R. 8. If under a special order of the Court live-stock is to be conveyed to the Court, the decree-holder shall make his own arrangement for such removal and if he fails to do so, the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment.

R. 9. Nothing in these rules shall prevent the judgment-debtor or any person claiming to be interested in attached live-stock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court.

R. 10. The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale proceeds of the attached property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

R. 11. In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose, or to restore it to its owner if so ordered or failing in the case of live-stock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings.

R. 12. When property other than live-stock is brought to the Court, it shall immediately be made over to the nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently stored, or kept on the Court premises or in the personal custody of the nazir, he may, subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by the decree-holder in advance for such period as the Court may from time to time direct.

R. 13. When attached live-stock is brought to Court under special order as aforesaid it shall be immediately made over to the nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court.

R. 14. If there be a pound maintained by Government or local authority in or near the place where the Court is held, the nazir shall, subject to the approval of the Court, be at liberty to place in it such live-stock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the nazir and shall receive from the nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

R. 15. If there be no pound available, or, if in the opinion of the Court, it be inconvenient to lodge the attached live-stock in the pound, the nazir may keep them in his own premises or he may entrust them to any person selected by himself and approved by the Court.

R. 16. All costs for the keeping and maintenance of the live-stock shall be paid into Court by the decree-holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court, the attachment shall be withdrawn and the live-stock shall be at the disposal of the person in whose possession it was at the time of attachment.

R. 17. So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor.

[8-11-1933.]

Order 21, Rule 104 (LAHORE)

Add the following rule :

R. 104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8. R. 11, subject to the provisions of O. 7, R. 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order. [24-11-1927.]

Order 21, Rules 104 to 114 (ODH)

Add the following rules:

R. 104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court, or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

R. 105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

R. 106. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

R. 107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

R. 108. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

R. 109. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order or the judgment may be set aside or reversed.

R. 110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction :

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

R. 111. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

R. 112. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force, and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

R. 113. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47.

R. 114. The following form shall be used under the provisions of Rule 104 or Order 21 :

EXECUTION CASE No.

OF 19 .

Decree-holder,

Versus

Judgment-debtor.

To

WHEREAS it is alleged that a debt of Rs. _____ is due from you to the judgment-debtor :
Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached ; take notice that you are hereby required on or before the _____ day of _____ 19 _____
to pay into this Court the said sum of Rs. _____ to deliver, or account to the nazir of this Court for the

moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this day of 19

Munsif.
Subordinate Judge.

At

Order 21, Rule 104 (PATNA)

Add the following rule :

"R. 104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11 subject to the provisions of O. 7, R. 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order."

Order 21, Rule 104 (SIND)

Add the following as Rule 104 :

"R. 104. (1) Subject to the provisions of sub-rules (3) and (4) the address for service filed under Rule 19 of Order VII or Rule 11 of Order VIII, or, if the address has been subsequently altered under Rule 24 of Order VII or under Rule 12 of Order VIII, the amended address shall hold good during all execution proceedings.

(2) Every application for execution shall state the address for service given by the opposite party in the Court which passed the decree or the Court to which the decree was last transferred for execution and notices and processes shall issue to such address.

(3) Rules 22, 23, 24 and 25 of O. VII shall apply, so far as may be, to execution proceedings.

(4) If an appeal or an application for review or revision against the decree or order sought to be executed is pending at the time when the application for execution is filed, the provisions of R. 38 of O. XLI shall, so far as may be, apply to such execution proceedings.

(5) Nothing in sub-rules (1) to (3) shall apply to the notice prescribed by R. 22 of O. XXI."

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

[See Section 146.]

GENERAL.

ORDER 22. (GENERAL)—Note 1.

[1] Order 22 deals with the devolution of interest by the operation of law and not by act of parties. (Vol 14) 1927 Mad 698 (695).

[2] Order 22 applies only when suit or appeal is pending. (Vol 19) 1932 Sind 220 (220) : 26 Sind LR 362.

[3] Order 22 does not apply to private reference to arbitrators. (Vol 28) 1941 Mad 129 (147).

[4] By virtue of O. 22, R. 12 provisions of Rr. 3, 4 and 8 do not apply to execution proceedings—Right to execute decree does not abate by not bringing legal representatives of judgment-debtor on record within any specified time. (Vol 27) 1940 Cal 171 (173) : ILR (1939) 2 Cal 173.

[5] Order 41, R. 20 is not intended to override the provisions of O. 22. (Vol 22) 1935 Mad 175 (177).

[6] Order 22 is inapplicable to revision applications. (Vol 7) 1920 Sind 120 (121).

[7] Order 22 has no application to application for leave to appeal to Privy Council. (Vol 21) 1934 Sind 36 (37) : 28 Sind LR 150.

[8] The provisions of O. 22, regarding abatement do not apply to applications for review. (Vol 20) 1933 Sind 260 (201, 202) : 28 Sind LR 167.

[9] Order not applicable when suit has been disposed of—Plaintiff dying after dismissal of suit—Legal representative may appeal from decree without applying to be brought on record. (Vol 26) 1939 Lah 34 (34).

[10] When a suit abates on death of defendant because the representatives of the deceased are not brought on record, his representatives cannot come to court and ask for costs. (1912) 22 Mad L Jour 439 (440).

[11] Appeal abating, the right to costs also abates. (Vol 11) 1924 Rang 217 (218) : 2 Rang 91.

[12] Section 146 of the Code does not override O. 22 of the Code. (Vol 29) 1942 Rang 15 (17) : 1941 Rang LR 371 (374).

[13] Provisions of O. 22 applies to revision applications. (Vol 25) 1938 Mad 115 (116, 117) * (1913) 18 Cal L Jour 141 (142) (DB). (Principle of R. 11 applies).

[But see (Vol 26) 1939 Oudh 277 (277, 278) : 15 Luck 26. (There is no rule of limitation governing application for substitution of parties in revision application) * (Vol 20) 1933 Sind 200 (202) : 28 Sind LR 167.

[14] Non-compliance with the procedure laid down in O. 22, would not involve an utter want of jurisdiction, but would be a mere irregularity, so long as the decrees passed is between persons living. (Vol 18) 1931 All 746 (747) (DB).

No abatement by party's death if right to sue survives **1.** The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

[1882-S. 361; 1877-S. 361; 1859-S. 99. See S. 146.]

*** ORDER 22, RULE 1—Synopsis.**

1. Scope and applicability.
2. Right to sue.
3. Personal rights.
4. Right to sue in respect of torts.
5. Right to sue in representative capacity.
6. Death of party after decree.
7. Partial abatement.
8. Death of party pending appeal.
9. Death of party, pending second appeal.

1. Scope and applicability.—[1] Though O. 22 R. 1 does not in terms provide that the death of a party shall cause suit to abate if the right to sue does not survive, that is clearly the practical effect of the rule. (1895) 22 Cal 92 (97, 98).

[2] Continuance of suit depends, not on qualification of person claiming to be representative of deceased, but on nature of suit. (Vol 18) 1931 Lah 293 (294): 13 Lah 116 (DB) * (1912) 8 Nag LR 113 (121).

[3] Death of party—Suit in state of suspense—Court can do no valid act. (Vol 16) 1929 Mad 802 (803): 52 Mad 933 (DB).

2. Right to sue.—[1] The expression 'right to sue' means the right to seek relief. (Vol 4) 1917 Upp Bur 14 (15): 2 Upp Bur 105.

[2] "Right to sue" means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. (Vol 14) 1927 Nag 343 (344) * (1909) 36 Cal 799 (800). (Application for probate by executor—Death of executor—Right of continuing proceedings does not survive to legal representative.)

[3] "Right to sue" and "Cause of action" are synonymous terms. (Vol 14) 1927 Oudh 156 (157): 2 Luck 464.

[4] "Right to sue" in R. 1 when used for appeals under R. 11 must be construed as the right to prosecute by law or to obtain relief by means of legal procedure. (Vol 1) 1914 Mad 708 (709): 38 Mad 1064.

3. Personal rights.—[1] In cases of personal actions, that is where relief sought is personal to the deceased the right to sue does not survive to his representatives. (Vol 17) 1930 Lah 703 (705): 12 Lah 1 (Right to office such as mahant) * (Vol 7) 1920 Bom 225 (225): 44 Bom 446. (Right to recover damages for breach of a contract of marriage) * (Vol 6) 1919 Cal 197 (197): 45 Cal 862. (Right of a residuary legatee to obtain a grant of administration) * (1909) 36 Cal 799 (800). (Right of executor to apply for probate) * (1906) 33 Cal 1163 (1168) (Right to obtain leave to sue in 'forma pauperis') * (Vol 30) 1943 Mad 646 (646, 647) * (Vol 15) 1928 Mad 278 (278, 279): 51 Mad 697 * (Vol 29) 1942 Nag 99 (101): ILR (1942) Nag 650. (Father's right to sue in respect of seduction of daughter).

[2] Suit by widow to claim personal rights cannot be continued by reversioner after death (Vol 18) 1931 Lah 675 (676) (DB).

[3] Proceedings regarding appointment of guardian—Original applicant dying—Application abates. (Vol 15) 1928 Lah 456 (458).

[4] Declaration that plaintiff's excommunication did not affect his status as member of *biradari* granted but no damages—Appeal by defendant—Plaintiff dying—Plaintiff's right to sue being personal is extinguished—Appeal abates—(Vol 30) 1943 Oudh 14 (15): 18 Luck 578.

[5] Suit against officer of the temple, for loss of income of temple by obstructing worship. On death of defendant, *held* that cause of action was personal and suit abated. (1898) 8 Mad L Jour 180 (181, 182).

[6] Suit by Mohamedan to recover possession of minor daughters alleged to be detained by defendants—Defendant dies pending suit—Suit continued in the name of defendant's widow on ground that daughters were in her possession. *Held* that the cause of action came to an end at defendant's death. (1901) 25 Bom 574 (582).

[7] Agreement to submit dispute to arbitration—One party applying to have agreement filed—Death of party pending proceedings—*Held* contract to refer to arbitration was not personal—Suit did not abate. (1904) 27 Mad 112 (116) (DB).

[8] Suit by minor for repudiating will made by father—Death of minor—Cause of action held not personal to minor—Legal representatives held entitled to prosecute suit. (Vol 2) 1915 Mad 655 (656).

[9] *Held* in this case that the right to continue appeal filed against deceased plaintiff was not personal—His widow could be joined as respondent. (1887) 9 All 131 (134) (FB) (Per Oldfield, J.).

[10] But personal action would not abate if final judgment had been obtained before party's death, and the benefit of the judgment would go to his legal representatives. (1887) 9 All 131 (134) (FB).

4. Right to sue in respect of torts.—[1] Personal injuries are wrong to person, which do not necessarily cause damage to the estate of the person wronged and the right of action does not survive in such cases. (Vol 8) 1921 Mad 1 (8): 44 Mad 357 (FB) * (Vol 2) 1915 Lah 378 (378): 1915 Pun Re No. 62.

[2] Cause of action for malicious prosecution does not survive to the legal representatives of the deceased plaintiff. (Vol 7) 1920 Pat 841 (842): 4 Pat L Jour 676 * (Vol 13) 1926 All 610 (611, 612): 48 All 630.

[3] Suit for malicious prosecution—Death of defendant—Suit abates. (Vol 9) 1922 Upp Bur 7 (8): 4 Upp Bur 73 * (1889) 13 Bom 677 (681) * (Vol 8) 1921 Mad 1 (8): 44 Mad 357 (FB) * (Vol 13) 1926 Mad 243 (243, 244): 49 Mad 208 (Claim to recover incidental expenses for defending prosecution does not survive.)

[4] Guardian of minor during his minority taking possession of his property and managing it—Suit by minor against guardian for accounts alleging that guardian appropriated either property or value of property belonging to minor—Suit does not abate after death of guardian. (Vol 28) 1941 All 187 (191, 192): ILR (1941) All 642.

[5] Remedy for wrongful act can be pursued against estate of deceased wrongdoer, where property belonging to another or its proceeds have been appropriated by deceased. (Vol 19) 1932 Oudh 165 (166): 8 Luck 35.

[6] Suit by Hindu for recovery of loss sustained due to representations by defendants to him—Death of

O. 22 R. 1 (*contd.*)

plaintiff—Cause of action survives to his heirs. (1912) 11 Mad L Tim 240 (241).

5. Right to sue in representative capacity.—[1] Representative suit does not abate by plaintiff's death. (Vol 18) 1931 Mad 590 (591): 54 Mad 770 * (Vol 17) 1930 Lah 282 (282) * (Vol 12) 1925 Mad 244 (244). (A suit under S. 92 or an appeal therefrom does not abate) * (Vol 27) 1940 Pat 180 (184): 18 Pat 723. (Appeal) * (Vol 24) 1937 Pat 149 (150, 151) (Provisions of O. 22 cannot be made applicable to suits or appeals in representative capacity, under O. 1, R. 8 or S. 92).

[2] Suit by partner on behalf of firm—Death of partner pending suit—No abatement. (Vol 13) 1926 All 351 (352).

[3] Death of one of several members of joint Hindu family—Others continue to represent family. (Vol 3) 1916 All 159 (159).

[4] Suit by presumptive reversioner for declaration that alienation or adoption by widow is not valid—Upon his death suit can be continued by next presumptive reversioner. (Vol 2) 1915 PC 124 (125): 38 Mad 406: 42 Ind App 125 (PC).

[5] Hindu woman, in possession of estate, represents it—Suit for recovery of possession by her can be continued after her death, pending suit, by persons entitled to succeed her. (Vol 3) 1916 All 34 (35): 38 All 111.

[6] Suit by unmarried daughter to recover father's property—Married sisters, *pro forma* defendants, can continue suit on death of plaintiff. (Vol 3) 1916 All 34 (36): 38 All 111.

[7] It is the representative of agent, who dies pending suit, instituted on his principal's behalf that can continue the suit and not the principal. (1907) 17 Mad L Jour 116 (117).

[8] Appeal does not abate when a special officer, who is made a respondent, on behalf of a municipality, dies. Municipality is a corporation and never dies. (Vol 24) 1937 Pat 588 (588, 589).

[See also Notes on O. 1, R. 8 and O. 30 R. 4.]

6. Death of party after decree.—[1] Suit terminated in decree—Death of plaintiff after decree—Suit does not abate. (Vol 7) 1920 Pat 809 (810) (Even if suit is based on personal right) * (Vol 26) 1939 Lah 492 (493, 494): ILR (1940) Lah 447 (Execution proceeding can be continued by heir of plaintiff.) * (Vol 29) 1942 Cal 390 (393) (Do) * (Vol 32) 1945 Pat 380 (383, 385): 24 Pat 314 (No abatement after passing of preliminary decree.)

[2] Code does not contemplate representatives of judgment-debtor being placed on record after appellate decree has been passed. (1894) 13 Bom 224 (227).

[3] Judgment-debtor dying after decree—Decree-holder need not implead all heirs. (Vol 19) 1932 All 263 (264) (DB).

[4] Suit for partition by joint tenant—Defendant co-tenant being dead after preliminary decree, his personal legal representative could be brought on record though plaintiff alleges his right to whole by survivorship but plaintiff cannot get whole property in the same suit. (Vol 11) 1924 Mad 309 (310).

[5] Plaintiff securing damages in a suit for malicious prosecution against defendant—Defendant appealed—Appeal dismissed—Second appeal by defendant—Defendant's death pending appeal—Appeal continued by his heirs—Held that, final decision having been given against defendant in his life-time suit does not abate. (1903) 26 Mad 499 (500).

7. Partial abatement.—[1] Suit for removal of trustee for breach and framing of scheme—Defendant dying pending suit—Suit as regards scheme does not abate. (Vol 13) 1926 Mad 162 (162, 163): 48 Mad 688.

[2] Question whether property is private or public trust—Defendant contending it to be private trust—Cause of action survives against his sons on defendant's death. (Vol 21) 1934 All 315 (316, 317) (DB).

8. Death of party, pending appeal.—[1] On death of appellant pending appeal against order appointing a guardian, appellant's legal representative can continue the appeal (Vol 11) 1924 Mad 484 (484): 47 Mad 459 * (Vol 4) 1917 Lah 385 (386).

[2] Death of judgment debtor during appeal—Legal representatives not brought on record—Admission of appeal is nullity against them. (Vol 8) 1921 Lah 219 (220).

[3] Suit for damages for malicious search dismissed—Death of plaintiff during appeal—Held suit abated. (Vol 5) 1918 Mad 1100 (1101.)

[4] Suit for damages by way of compensation for personal injury decreed—Tort-feasor appealing—Plaintiff putting cross-objection claiming more damages—Death of tort-feasor pending appeal—Cross-objections abate. (Vol 16) 1929 Lah 807 (808): 11 Lah 1.

[5] Suit for malicious prosecution partly decreed and partly dismissed—Appeal and cross-objections preferred—Plaintiff dying pending appeal—Cross-objections abate but not appeal. (Vol 21) 1934 Nag 119 (120, 121): 30 Nag LR 186.

[6] Suit for dismissal of defendant from service, does not abate owing to death of defendant during pendency of appeal. (1910) 33 Mad 162 (163).

[7] Suit to set aside sale of ancestral land decreed—Appeal—Plaintiff dying pending appeal—Right to continue appeal survives to representative. (Vol 8) 1921 Lah 52 (53): 2 Lah 189.

[8] Suit for declaration that defendant was not lawful wife of plaintiff—Pending appeal both parties died—Held that right to continue appeal did not survive. (Vol 6) 1919 Lah 18 (18): 1919 Pun Re No. 87.

[9] Suit for declaration that alienation by defendant would be void after her death dismissed—During pendency of plaintiff's appeal defendant died—Held plaintiff's claim abated. (1913) 1913 Pun LR No. 46 page 176 (178): 1913 Pun Re No. 65 (DB).

[10] Suit by some of tenants-in-common against others—Death of one plaintiff pending appeal—Held, other plaintiffs could carry on the proceedings. (Vol 19) 1932 Sind 220 (221): 26 Sind LR 362.

9. Death of party, pending second appeal.—[1] Decree for damages set aside in appeal—Death of defendant during pendency of appeal—Held suit did not abate. (Vol 4) 1917 Upp Bur 14 (15): 2 Upp Bur LR 105.

[2] Dismissal of suit for damages for malicious prosecution in first Court or in Court of Appeal—Plaintiff seeking to enforce same claim in appeal or second appeal—Appeal or second appeal abates on death of either party and cannot be continued even in respect of costs. (Vol 24) 1937 Nag 216 (217): ILR (1938) Nag 280.

[3] Suit by plaintiff for expenses incurred in prosecuting defendants for defamation—Suit dismissed by lower Courts—Pending second appeal plaintiff appellant dying—Cause of action held did not survive to legal representative of deceased. (Vol 31) 1944 Mad 405 (406).

2. Where there are more plaintiffs or defendants than one, and any of them dies, and where

Procedure where one of the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

[1882-S. 362 ; 1877-S. 362 ; 1859-S. 100.]

ORDER 22 RULE 2—Synopsis.

1 Scope.

2. Right to sue surviving to surviving plaintiffs.

3. Right to sue surviving against surviving defendants.

4. Suit includes appeal.

1. Scope.—[1] Word "Survive" in O. 22, R. 2, is used in its ordinary sense of outliving. (Vol 16) 1929 Sind 225 (226) : 24 Sind LR 167 (DB).

[2] The word 'alone' does not mean that no one else should be entitled to sue or be liable to be sued, it only means that the survivor or survivors should be entitled to sue or be liable to be sued independently of others, i.e., without joining others—Suit can be continued by surviving plaintiff if he had an independent right of suing. (Vol 11) 1924 Rang 376 (376) : 2 Rang 486.

[3] Where the right to sue is fully represented by the surviving plaintiff or defendant already on record R. 2 applies ; and when it would not be fully represented unless some person not already on record is added as a party, R. 3 or R. 4 applies. (Vol 20) 1933 Nag 95 (97) : 29 Nag LR 12.

[4] There can be no abatement if the facts come within the provisions of this rule. (Vol 17) 1930 Cal 270 (272).

[5] One of the respondents dying—Legal representatives already on record in another capacity—Entry should be made under R. 2 and R. 4 is not applicable. (Vol 8) 1921 Oudh 209 (213) : 24 Oudh Cas 374 (DB).

[6] One of 'several defendants' appealing—Appeal declared to have abated on his death—No application made by his legal representatives to be brought on record—Other defendants not joining as appellants, cannot claim to have order of abatement set aside. (Vol 18) 1931 All 349 (349, 350) : 53 All 521 (DB).

[7] O. 22 R. 2 is not limited in its application to cases, in which the right of suit survives against the surviving defendants, by reason of some circumstance antecedent to the suit. (1906) 4 Cal L Jour 568 (570) (DB).

[8] Purchase of deceased respondent's interest by surviving respondent after institution of suit—O. 22, R. 2, applies. (Vol 14) 1927 Lah 501 (503) (*Per Jai Lal J ; Dalip Sing J. Contra*).

[9] The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively. (Vol 23) 1936 Pat 548 (549) : 15 Pat 326 (DB).

[10] On the death of any plaintiff or defendant when the surviving plaintiffs or defendants alone can sue or be sued, Court will make entry to that effect and proceed, there being no abatement. No application is necessary for that purpose. (Vol 16) 1929 All 347 (347).

[11] If the conditions of this rule are satisfied, the suit can be proceeded with even if it had been filed against a dead person along with others who are his legal representatives. (Vol 16) 1929 Lah 440 (440) (DB).

[12] Two co-widows impleaded to represent estate of their husband—Death of one of them pending appeal—Application for substitution of other widow is not necessary and O. 22, R. 2 applies. (Vol 20) 1933 Pat 464 (468) : 12 Pat 778 (DB).

[13] Cases contemplated by O. 22, R. 2 are those where, e.g., suits are filed by or against executors or trustees, or against joint tort-feasors, or against the members of a joint Hindu family on the death of one of whom his interest in the subject-matter would cease—The rule does not contemplate any defence being made by the legal representatives of a deceased defendant. (Vol 25) 1938 Bom 6 (8) : ILR (1938) Bom 61.

[14] Legal representative already on record—O. 22, R. 2 applies—No petition for substitution is necessary. (Vol 29) 1942 Pat 120 (126).

2. Right to sue surviving to surviving plaintiffs.

—[1] Religious Endowments Act (20 of 1863) S. 7.—Suit instituted by a committee appointed by the Government—Death of a member of committee pending suit—Suit does not abate—Surviving members can continue it. (Vol 21) 1934 Cal 328 (333) : 61 Cal 80 (DB).

[2] Suit by creditor to set aside fraudulent transfer by debtor—Some parties (creditors) dying—Legal representatives not substituted in time—Suit does not abate. (Vol 13) 1926 Lah 167 (168) : 7 Lah 12.

[3] Suit by two brothers—Death of one pending suit leaving no son—Other brother having sons—He can apply as manager of the joint family for substitution and continue suit and there is no abatement. (Vol 21) 1934 Pat 559 (561) : (Vol 15) 1923 Pat 250 : 7 Pat 285 (distinguished).

[4] Reversioner's right to challenge alienation by widow is not joint but individual—Suit by two nearest reversioners for declaration that alienations by widow are null and void, dismissed—During pendency of appeal one of them died but the legal representatives not brought on record—Surviving reversioner held solely entitled to prosecute appeal. (Vol 26) 1939 All 526 (528).

[5] Two daughters were joint owners of a house mortgaged by their mother—One daughter sued for possession of half share—She succeeded—The other then sued for her half share but died during pendency of suit—*Held* that the right to sue then accrued to the first daughter and that the other when she had, and had not represented the entire estate so as to bind the former. (1912) 15 Ind Cas 833 (834, 835) (Oudh).

[6] Suit by some landlords that certain tenancy had extinguished and for declaration that certain persons had no occupancy right—Death of some plaintiffs pending suit—Legal representatives not brought on record—Suit is for benefit of all landlords and does not abate either wholly or in part. (Vol 20) 1933 Lah 654 (655).

3. (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

[1882-Ss. 363, 365, 366 ; 1877-Ss. 363, 364, 365, 366 ; 1859-Ss. 101, 102.]

Objects and Reasons.

See Objects and Reasons under Rule 4.

O. 22 R. 2 (contd.)

[7] One of plaintiffs transferring all his rights to his co-plaintiff—Death of former during pendency of suit—Suit does not abate and decree is not nullity. (Vol 26) 1939 Oudh 196 (203).

[8] Representative suit with leave of Court—Death of plaintiff—Others can proceed with suit after bringing it to notice of Court—No substitution necessary. (Vol 22) 1935 Cal 413 (415, 416).

3. Right to sue surviving against surviving defendants.—[1] Suit against joint tenants—Death of one of several defendants—Legal representatives not brought on record—Defendants are jointly and severally liable—Suit does not abate. (Vol 7) 1920 Pat 801 (802).

[2] Where in a suit for the recovery of a War bond or its value against several defendants the sum received by each defendant out of total proceeds of the bond could be ascertained, held, that though some of the defendants die pending suit, the suit does not abate against surviving defendants as the cause of action still survives against them. (Vol 11) 1924 Rang 127 (128) : 1 Rang 618 (DB).

[3] If a sole proprietor of a business sued in the firm's name dies and no substitution is made within time, the suit abates. (Vol 9) 1922 Cal 408 (409) : 49 Cal 524.

[4] Defendant 1 dead—Application to bring legal representatives of deceased filed after limitation—Suit held abated as it did not fall under O. 22, R. 2 and it could not proceed against defendant 2 alone. (Vol 24) 1937 Lah 455 (456).

[5] The liability of joint tort-feasors is joint and several and the cause of action would on the death of one of them, survive as against the others. (Vol 3) 1916 Lah 133 (135) : 1915 Pun Re No. 106.

[6] All joint debtors sued—One dying—The legal representatives need not be substituted. (Vol 8) 1921 Lah 357 (358) (DB).

[7] Suit on mortgage executed by member of joint Hindu family—Death of mortgagors subsequent to preliminary decree—Final decree passed without bringing on record heirs of deceased on record is binding on surviving members—Suit does not abate as against them. (Vol 17) 1930 Bom 367 (368).

[8] Right to sue surviving against surviving defendant in his own capacity and not as representative of deceased—R. 2 applies—If surviving as representative then R. 4 applies. (Vol 18) 1931 Pat 164 (166) : 10 Pat 341 (DB).

4. Suit includes appeal.—[1] This rule applies to appeals as the word 'suit' includes appeal. (Vol 11) 1924 Rang 376 (376) : 2 Rang 486.

[2] Pre-emption suit by several plaintiffs—Suit dismissed—One of the plaintiffs dying during pendency of appeal—Appeal can be proceeded with by the other plaintiffs. (Vol 15) 1928 All 345 (348) : 50 All 792 (PB). ((Vol 14) 1927 All 543 : 49 All 756 ; (Vol 12) 1925 All 108 : 47 All 100 and (Vol 10) 1923 All 211 : 45 All 286 overruled).

[3] Appeal does not abate if the surviving plaintiffs appear to be the sole legal representatives, though they have not been specifically joined. (Vol 12) 1925 Rang 95 (96) : 2 Rang 445.

[4] Where an appeal was filed on behalf of several defendants and it appeared that some of the appellants had died before the institution of the appeal, held, that the appeal could proceed as, even, if those appellants had not appealed, the remaining appellants could have appealed nevertheless on a ground common to all the defendants. (Vol 3) 1916 Lah 401 (402).

[5] Suit under Ben. Ten. Act S. 105 by proprietor—Defendant claiming rent free—Contention disallowed—Appeal by defendant—Permanent putni lease granted by proprietor—Death of proprietor—Representatives not substituted—Right to appeal survives to putnidar alone—Hence appeal was competent without representatives of deceased respondent. (Vol 30) 1943 Cal 570 (572) : ILR (1943) 1 Cal 144.

[6] Where the representatives of deceased respondent are not brought on record within time and if the appeal can proceed to final decision even without them the appeal does not abate. (1907) 30 Mad 67 (69).

[7] Suit for partition—Two defendants filing appeal—Death of one pending appeal—Dead appellants, legal representatives not brought on record—Surviving appellant continuing appeal—Court has power to hear appeal and if necessary to reverse the entire decree. (1903) 27 Bom 284 (286).

ORDER 22 RULE 3—Synopsis.

1. Scope and applicability of the rule.
2. Rule applies to appeals.
3. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.
4. On an application made in that behalf.
5. Shall cause the legal representative of the deceased plaintiff to be made a party.
6. Legal representative.
7. Two or more legal representatives.
8. Wrong person as legal representative.

O. 22 R. 3 (contd.)

9. Joint Hindu family and legal representatives.
10. Legal representatives of deceased plaintiff or appellant already on record in another capacity.
11. Determination of the question as to who is the legal representative.
12. What pleas may be taken by a legal representative.
13. Minor as legal representative.
14. Insolvent legal representative.
15. The suit shall abate so far as the deceased plaintiff is concerned.
16. Death after preliminary and before final decree.
17. Suits under O. 1, R. 8 of the Code.
18. Effect of abatement on the rights of parties.
19. Award of costs.
20. Revision.
21. Appeal.

1. Scope and applicability of the rule.—[1] The rule does not apply where a plaintiff dies after decree ('81) 3 Mad 236 (238) (DB) * (Vol 14) 1927 Oudh 156 (157) : 2 Luck 464 (DB) * (Vol 24) 1937 Rang 199 (200).

[2] The right to sue must survive to a "legal representative" as defined by section 2, sub-section (11). (Vol 23) 1936 Pat 123 (124) : 15 Pat 82 (DB) * (Vol 30) 1943 Bom 239 (241) (DB).

[3] Where the deceased plaintiff had no interest in the suit, his legal representatives need not be made parties and the rule will not apply. (Vol 8) 1921 Lah 357 (358) (DB) * (Vol 19) 1932 Lah 641 (643) : 13 Lah 483 (DB) * (Vol 1) 1914 All 113 (113) (DB).

[4] Where a plaintiff dies, the suit cannot be dismissed for default of appearance under Order 9. O. 22 will apply to such cases. (Vol 22) 1935 Nag 189 (190) : 31 Nag LR 374.

[5] The principle of the rule applies to cases before the Deputy Commissioner under the Chota Nagpur Tenancy Act. (Vol 10) 1923 Pat 29 (29) : 2 Pat 243 (DB).

[6] The principle of this rule does not apply to proceedings in an application for probate. (Vol 19) 1932 Cal 206 (207) (DB).

[7] The rule applies to proceedings under the U. P. Encumbered Estates Act of 1934. (Vol 26) 1939 All 717 (717) : ILR (1939) All 592 (DB).

2. Rule applies to appeals.—[1] The provisions of this rule apply also to appeals and so failure to bring on record legal representatives of an appellant dying pending appeal will result in its abatement so far as he is concerned, where his right of appeal does not survive to the remaining appellant. (Vol 22) 1935 All 640 (641).

[2] Two independent appeals filed against the same decree by the opposite parties thereto—Plaintiff-appellant dying during pendency, his legal representatives impleaded in his appeal—Defendant-appellant not impleading them cannot claim that the impleading in the other appeal ensures to the benefit of his appeal also. (Vol 18) 1931 Mad 277 (277).

[3] Even in cases where the suit would have abated by reason of the right to sue not surviving on the death of the plaintiff, the right to appeal may survive. ('87) 9 All 131 (134) (FB) * ('02) 26 Bom 597 (605, 608) (DB) * (Vol 8) 1921 Lah 52 (53) : 2 Lah 189 (DB).

[4] Partial representation of deceased appellant—Decree passed is not a nullity. (Vol 32) 1945 Bom 126 (126) (DB).

3. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.—[1] This rule will apply only where the right to sue does not survive, to the surviving plaintiffs alone. (Vol 16) 1929 All 347 (347) * (Vol 29) 1942 Pat 120 (126, 127) (DB).

[2] If the right to sue survives to the surviving plaintiff alone the case is not within this rule. (Vol 15) 1928 All 345 (348) : 50 All 792 (FB) * (Vol 22) 1935 Lah 879 (880) (DB).

[3] Where the right to sue survives to a contending defendant, the rule cannot apply. ('10) 8 Ind Cas 859 (859) (Mad).

[4] Where the defendant on whom the right to sue survives is only a *pro forma* defendant the rule applies. ('12) 11 Mad L Tim 409 (415) (DB).

[5] Death of insolvent pending his appeal against the order of adjudication—The appeal can be continued by his legal representative. (Vol 29) 1942 Bom 759 (159) : ILR (1942) Bom 175 (DB) * (Vol 29) 1942 Lah 211 (213) : ILR (1942) Lah 746 (FB) [(Vol 15) 1928 Lah 119 : 9 Lah 306 and 1888 Pun Re No. 69 overruled.] * (Vol 24) 1937 All 435 (437) : ILR (1937) All 616 (DB).

4. On an application made in that behalf.—

[1] Without an application the Court cannot *suo motu* add a legal representative. (Vol 21) 1934 All 465 (468) (DB) * (Vol 20) 1933 All 111 (111) * (Vol 23) 1936 Pat 266 (266) (DB).

[2] The application can be made even by a defendant or respondent. (Vol 13) 1926 All 156 (157) (DB).

[3] Where there are several legal representatives it is not necessary that the application need be made by all of them. ('12) 6 Low Bur Rul 52 (52) (DB) * ('86) 10 Bom 220 (223) (DB).

[4] Application made *bona fide* by person ultimately found not to be a legal representative—Held there was sufficient compliance with the rule. ('10) 20 Mad L Jour 398 (400) (DB) * (Vol 26) 1939 Mad 148 (149).

[5] A person who fails to apply in time cannot rely on the application of another wherein his representative character is denied. (Vol 6) 1919 Nag 150 (151, 152) : 15 Nag LR 21.

[6] Party to suit dying after decree—No separate application by representative necessary to file an appeal—Appeal itself may be treated as an application for substitution ('82) 1882 All W N 73 (73) (DB).

5. Shall cause the legal representative of the deceased plaintiff to be made a party.—[1] The Court is bound to implead the legal representatives as parties on an application made in that behalf. ('01) 26 Bom 317 (319) (DB).

[2] Where there is a dispute as to who is the legal representative, the question should be decided, under rule 5. ('94) 17 Mad 209 (211).

O. 22 R. 3 (contd.)

[3] Legal representative not expressly added but allowed to continue suit—He will be deemed to have been brought on record. ('93) 1893 All WN 181 (181).

[4] The mere fact that a *vakalatnama* is filed by a pleader on behalf of the legal representative and the appeal was heard and decided will not cure the defect arising out of non-pleading of the legal representative. ('11) 9 Ind Cas 977 (977, 978) (All).

[5] Father co-plaintiff in suit dying—Sons refuse to be impleaded as his representatives—Impleading them as *pro forma* defendant is sufficient compliance with the rule. (Vol 26) 1939 Pat 225 (228) (DB).

[6] A Court to which a case has been sent on remand has jurisdiction to act under this rule. ('04) 7 Oudh Cas 17 (18) (DB).

[7] Suit dismissed for default of plaintiff in ignorance of his death—Application by sons to be brought on record—Court can restore suit under S. 151 and substitute sons as plaintiffs. (Vol 22) 1935 Nag 189 (190): 31 Nag LR 374.

6. Legal representative.—[1] See S. 2(11).

[2] Persons recorded as representing estate of deceased person—It does not amount to any decision on the question of his capacity and it may be shown subsequently that he was a representative of a different person. (Vol 25) 1938 All 256 (258): ILR (1938) All 425 (DB).

[3] If A allows his benamidar, B, to sue in his own name, he cannot, on the death of B, claim to come in as B's legal representative. (Vol 31) 1944 Mad 27 (27).

[4] If a legal representative dies, his own legal representatives who have received assets of the previous deceased will represent him. (1900) 22 All 367 (369, 370) (DB).

[5] Widow dying pending suit by her to declare that an alleged adoption by her did not in fact take place—Her husband's nearest heir should be impleaded as legal representative. (Vol 31) 1944 Bom 243 (243).

7. Two or more legal representatives.—[1] The expression "legal representative" includes all of them where there are more than one. ('94) 16 All 211 (212) (DB).

[2] All the legal representatives should be brought on record and if any of them refuses to join as plaintiff or appellant he must be made a defendant or a respondent. ('13) 11 All L Jour 719 (720) * (Vol 33) 1946 Cal 299 (302).

[3] The following are the views of different High Courts as to whether suit or appeal abates on the failure to bring all the legal representatives on record.

[a] The suit or appeal abates. (Vol 19) 1942 All 358 (361): ILR (1942) All 671 (DB) * ('08) 30 All 117 (118) (DB) * (Vol 12) 1925 Sind 2 (3, 4) (DB).

[See however (Vol 20) 1938 All 91 (93)].

[b] Where one or more of the legal representatives are unknown or are unwilling to join, omission to implead them does not result in abatement. (Vol 16) 1929 Cal 26 (27) (DB) * (Vol 20) 1933 Cal 498 (500).

[c] *Bona fide* application by all representatives willing to join in the suit saves the suit or appeal from abatement. ('86) 19 Bom 220 (223) (DB) * (Vol 7) 1920 Lah 228 (229): 1 Lah 481 (DB) * (1900) 23 Mad

125 (132) (DB) * (Vol 14) 1927 Mad 1071 (1071, 1072) * (Vol 10) 1923 Nag 101 (102): 18 Nag LR 21 * (Vol 4) 1917 Oudh 34 (35): 20 Oudh Cas 67 (DB).

[See also (Vol 29) 1942 Oudh 189 (193): 17 Luck 297 (DB). (Death of appellant—Number of heirs taking definite share in the inheritance—One of them not added—Abatement is only in part and not *in toto*).

[4] Defendant or respondent served with notice not raising the objection that there were other representatives also cannot raise that objection subsequently to plead abatement of suit or appeal. (Vol 15) 1928 All 532 (533): 50 All 857 (DB) * (Vol 25) 1938 All 256 (258): ILR (1938) All 425 (DB).

[5] Where the legal representatives of a deceased person constitute a joint Hindu family and the manager of the family is brought on record, it is not necessary to bring on record the other members of the family. (Vol 23) 1936 Pat 3 (5) (DB).

8. Wrong person as legal representative.—

[1] It is the duty of the defendant to enquire and ascertain who the legal representatives of the deceased plaintiff are. (Vol 8) 1921 Lah 60 (60) * ('03) 26 Mad 224 (228) (DB).

[2] The objection that any person is not a legal representative must be taken by the defendant at the earliest possible opportunity and failure to do so will preclude him from subsequently raising the objection at a late stage. ('03) 27 Bom 162 (162, 186, 187) (DB) * (Vol 8) 1921 Lah 60 (60) * ('03) 26 Mad 224 (228) (DB).

[3] Where the defendants by agreement allowed a particular person to be recorded as the legal representative of a deceased plaintiff such a person continues to be so in the appeal also. (Vol 31) 1944 Oudh 162 (190): 20 Luck 108 (DB).

9. Joint Hindu family and legal representatives.—

[1] Where a co-parcener in a joint Hindu family dies, the survivors are not his legal representatives. (Vol 24) 1937 Lah 328 (329) * (Vol 8) 1921 Lah 34 (35): 2 Lah 114 (DB) * (Vol 5) 1918 Bom 165 (166): 42 Bom 504 (DB).

[See (Vol 28) 1941 Bom 23 (25): ILR (1941) Bom 177 (FB) * (Vol 5) 1918 Bom 165: 42 Bom 504 held no longer good law so far as Hindu 'son' of the deceased is concerned) * (Vol 24) 1937 Oudh 327 (328): 13 Luck 241 (DB) * (Vol 22) 1935 Pat 275 (288): 14 Pat 732 (FB)].

[But see (Vol 12) 1925 Pat 123 (124): 3 Pat 853 (DB) * (Vol 25) 1938 All 163 (164) * (Vol 28) 1941 Pat 596 (599): 20 Pat 755 (DB).]

[2] By force of S. 53, a son or other descendant of a Hindu having joint family property liable for the debts is a "legal representative" of the ancestor. (Vol 26) 1939 Pesh 45 (46, 47) (DB) * (Vol 23) 1936 Bom 456 (458, 459) * (Vol 24) 1937 Mad 785 (785) * (Vol 28) 1941 Bom 23 (24): ILR (1941) Bom 177 (FB) * (Vol 28) 1941 Lah 447 (450).

[3] Death of sole appellant who was a Hindu leaving a widow and only son—Son impleaded—Appeal does not abate. (Vol 30) 1943 Bom 457 (457, 458): ILR (1943) Bom 575.

[4] Joint family member sued in his individual capacity—Persons entitled to succeed to his separate property may be impleaded as legal representatives even if they are his surviving co-parceners. (Vol 27) 1940 All 99 (100): ILR (1940) All 153 (FB) *

O. 22 R. 3 (*contd.*)

(Vol 31) 1944 Lah 473 (476, 477) (Whether father left separate property or not son can be impleaded. The widow also can be impleaded).

[5] Where the deceased co-parcener was the *managing member* of the family representing the family, the succeeding managing member is, his legal representative. (Vol 18) 1931 Bom 484 (489) : 55 Bom 709 (DB) * (Vol 12) 1925 Mad 456 (457) (DB) * (Vol 27) 1940 Nag 278 (282) : ILR (1941) Nag 632 (DB).

[6] Managing member of the family dead—Succeeding managing member brought on record—Other members need not be impleaded. (Vol 4) 1917 Oudh 34 (85) : 20 Oudh Cas 67 (DB).

[7] In the case of a suit by a separated Hindu his heirs will be his legal representatives. ('04) 27 Mad 106 (109) (DB).

[8] In a suit by a member of a joint Hindu family on a personal contract his heirs will be his legal representatives. (Vol 6) 1919 All 189 (190) : 41 All 515 (DB) * (Vol 25) 1938 Bom 451 (453) (DB).

[9] Where the minor plaintiff dies after the institution of a suit for partition and before the Court has found that the partition is for his benefit, the suit does not abate, but his legal representative can proceed with the trial and obtain a decree on his showing that the suit, when instituted, was for the benefit of the minor. (Vol 20) 1933 Mad 890 (903, 912, 913) : 57 Mad 95 (FB). (Overruling (Vol 5) 1918 Mad 379 : 41 Mad 442).

[But see (Vol 22) 1935 Bom 54 (61) (DB)].

[10] Where after a preliminary decree for partition the minor plaintiff dies, his heirs will be his legal representatives. ('96) 19 Mad 345 (346) (DB).

[11] Alienation by father—Son born after alienation and son previously born suing to set aside—Death of latter pending suit—After-born son cannot continue suit as he is not the legal representative. (Vol 30) 1943 Bom 239 (241) : ILR (1943) Bom 423 (DB).

[12] Right of Hindu son to question alienation arises by reason of his being member of joint family and not as legal representative of his deceased brother during whose life-time the cause of action arose. (Vol 22) 1935 Mad 431 (432).

10. Legal representatives of deceased plaintiff or appellant already on record in another capacity.—[1] Legal representatives already on the record, in another capacity—An application to bring them in as legal representatives is unnecessary. (Vol 30) 1943 Nag 15 (15) : ILR (1943) Nag 17 (DB) * (Vol 29) 1942 Pat 120 (127) (DB) * (Vol 15) 1928 Lah 893 (894) : 10 Lah 531 (DB) * (Vol 15) 1928 Lah 43 (44) (DB) * (Vol 26) 1939 All 672 (673) : ILR (1939) All 713 (DB) * (Vol 32) 1945 Bom 126 (128) (DB).

[See however (Vol 21) 1934 Nag 165 (165) : 31 Nag LR 81].

11. Determination of the question as to who is the legal representative.—[1] A decision as to who is the legal representative is for the limited purpose namely prosecution of the suit and is not to be conclusive of his rights. (Vol 10) 1923 Nag 209 (209).

12. What pleas may be taken by a legal representative.—[1] A legal representative is added for the purpose of deciding the rights and disabilities of the *original parties* and not those of the legal representatives themselves. (Vol 11) 1924 Lah 45 (46) : 4 Lah 72 (DB) * (13) 19 Ind Cas 255 (256) (All).

[2] The representative can only take up the suit at the stage at which it was left when the original plaintiff died, and to continue it. (Vol 9) 1922 Mad 49 (50).

[3] The representative must rely on the same cause of action and on the same title as the deceased plaintiff. ('95) 22 Cal 92 (98, 99) * (Vol 30) 1943 Pat 433 (441).

[4] It is not open to the representative to assert his own individual or hostile title in the suit. (Vol 9) 1922 Mad 49 (50) * (Vol 17) 1930 Mad 593 (593).

[5] The defendant is not entitled to raise against the legal representative any defence other than those which he could have raised against the deceased plaintiff. ('96) 19 Mad 345 (347) (DB).

13. Minor as legal representative.—[1] Though a minor is entitled to be impleaded as a legal representative of a deceased plaintiff, he must be represented by a next friend. (Vol 29) 1942 Pesh 9 (10) * (Vol 11) 1924 Mad 813 (814).

14. Insolvent legal representative.—[1] An insolvent legal representative of a deceased appellant cannot continue the appeal where the official receiver intervened by an application to continue the appeal though he subsequently withdrew it. (Vol 25) 1938 Mad 420 (421) : ILR (1938) Mad 578 (FB).

15. The suit shall abate so far as the deceased plaintiff is concerned.—If on the death of a plaintiff or appellant, no application to implead his legal representatives is filed within the prescribed time, the suit or appeal will abate. (Vol 28) 1941 Cal 347 (349, 351) : ILR (1941) 1 Cal 137 * (Vol 20) 1933 Rang 234 (234) (DB) * (Vol 4) 1917 Low Bur 132 (133) * ('96) 18 All 332 (333) (DB) * (Vol 30) 1943 Nag 13 (16) : ILR (1943) Nag 17 (DB).

[2] Where an application has been made, the suit or appeal will not abate even if the application is rejected. (Vol 8) 1921 Nag 23 (24) : 17 Nag LR 45.

[3] It is immaterial that the application was made by a wrong person, if it was made *bona fide*. ('10) 20 Mad L Jour 398 (400) (DB).

[4] The impleading of the legal representative in an interlocutory matter in the suit will save it from abatement. (Vol 12) 1925 Pat 145 (145) (DB).

[5] Impleading of a legal representative in a *cross-appeal* will not save the *appeal* from abatement. (Vol 6) 1919 Lah 318 (318, 319) (DB).

[6] The abatement takes place automatically and no separate order to that effect is necessary. (Vol 13) 1926 All 217 (220) : 48 All 334 (FB) (Vol 9) 1922 All 209 : 44 All 459 over-ruled.) * (Vol 7) 1920 All 284 : 42 All 540 upheld) * (Vol 12) 1925 Lah 598 (598) (DB) * (Vol 13) 1926 Lah 234 (235) : 7 Lah 73 (DB) * (Vol 4) 1917 Mad 285 (288) (DB) * (Vol 24) 1937 Bom 401 (406) : ILR (1937) Bom 602 (DB).

[7] Any decree passed in the suit in disregard or in ignorance of an abatement will, to that extent, be set aside on appeal. (Vol 16) 1929 Lah 119 (120).

[8] Where a sole plaintiff dies the whole suit will abate. ('80) 5 Cal 139 (141).

[9] In the case of death of one of two or more plaintiffs the abatement will, in the first instance, be only so far as he is concerned. (Vol 22) 1935 All 640 (641).

[10] Partial abatement on death of one of the plaintiffs—Apart from its effect upon the whole suit or the rights of other parties depending on their nature—it will be limited to the deceased plaintiff only. ('98) 22 Bom 718 (721) (DB) * (Vol 15) 1928 Lah 737 (737, 738) * ('01) 25 Mad 426 (428) (DB).

O. 22 R. 3 (*contd.*)

16. Death after preliminary and before final decree.—[1] There can be abatement of a suit on account of the death of a party after a preliminary and before a final decree. (Vol 29) 1942 Pat 340 (340) (DB) * (Vol 27) 1940 Bom 318 (321) : ILR (1940) Bom 689 (DB) * (Vol 20) 1933 Rang 318 (319, 320) : 11 Rang 446 (DB) * (Vol 16) 1929 Cal 430 (430) : 57 Cal 235 (DB) * (Vol 8) 1921 Cal 551 and (Vol 13) 1926 Cal 308 held not to be good law.) * (Vol 17) 1930 Lah 329 (330) * (Vol 15) 1928 Mad 914 (918) : 51 Mad 701 (FB) ((Vol 10) 1923 Mad 237 : 45 Mad 872 and (Vol 11) 1924 Mad 786 overruled.) * (Vol 16) 1929 Nag 142 (144) : 27 Nag LR 119 (FB) * (Vol 14) 1927 Oudh 561 (561) (DB) * (Vol 14) 1927 Oudh 156 (157, 158) : 2 Luck 464 (DB) * (Vol 18) 1931 Pat 57 (57) (DB). (Authority of (Vol 6) 1919 Pat 430 : 4 Pat L Jour 240 (FB) doubted.) * (Vol 32) 1945 Pat 380 (383, 385) : 24 Pat 314 (DB) * (Vol 23) 1936 Cal 540 (541) * (Vol 23) 1936 Cal 540 (541) (DB) * (Vol 24) 1937 Lah 164 (166) : 17 Lah 817 (DB) * (Vol 24) 1937 Sind 208 (209) : 30 Sind LR 428 (DB).

[But see ('10) 5 Ind Cas 272 (273) (DB) (Cal) * (Vol 14) 1927 Bom 156 (157) (DB) * (Vol 13) 1926 Sind 20 (21) * (Vol 17) 1930 Cal 422 (423, 424) : 57 Cal 148 (DB).

[2] The Allahabad High Court before amendment of R. 12 held that a suit will abate even after preliminary decree on failure to bring the legal representatives on record. But the amendment has removed the difficulty by making this rule inapplicable to such cases. (Vol 21) 1934 All 465 (468) (DB).

[3] Where after a preliminary decree the defendant dies and the Court passes a final decree against him without bringing his legal representatives on the record, the final decree is a nullity. But, where there are several defendants one of whom dies after the preliminary decree and a final decree is passed without bringing his legal representatives on the record, the final decree will be valid as against the other defendants. (Vol 29) 1942 Pat 340 (340) (DB) * (Vol 23) 1936 Cal 698 (699) (DB).

[4] One of several defendants dying—Final decree passed without impleading his representatives—Final decree will be valid as against the others. (Vol 26) 1939 Cal 403 (407) : ILR (1939) 1 Cal 493 (DB).

17. Suits under O. 1, R. 8 of the Code.—[1] Person appointed by order of Court under O. 1, R. 8 to defend suit on behalf of class—Death of such persons—His legal representatives need not be brought on record. (Vol 26) 1939 Lah 572 (575, 576) : ILR (1940) Lah 199 (DB).

18. Effect of abatement on the rights of parties — [1] An abatement under the rule will, in the first instance, be only so far as the deceased party is concerned and not of the whole suit or appeal. (Vol 17) 1930 All 211 (212).

[2] Where the right or relief claimed in the suit is an *indivisible* one existing in all the plaintiffs *jointly* or in or against all the appellants *jointly*, the whole suit or appeal, will fail by reason of an abatement with respect to one of them. (Vol 29) 1942 Sind 157 (159) : ILR (1942) Kar 435 (DB) * (Vol 7) 1920 Cal 168 (169) (DB) * (Vol 13) 1926 Lah 474 (476) (DB) * (Vol 19) 1932 Lah 281 (286) : 13 Lah 70 (DB) * (Vol 19) 1932 Pat 327 (329) : 11 Pat 538 (DB) * (Vol 32) 1945 All 21 (22) : ILR (1945) All 1 (DB).

[3] Where the right or relief is divisible or exists

individually in each, an abatement with respect to one or some alone will not cause the entire suit or appeal to fail. (Vol 30) 1943 Oudh 260 (260) * (Vol 10) 1923 Nag 101 (102) : 18 Nag LR 21 * (Vol 20) 1933 Lah 938 (940) (DB) * (Vol 19) 1932 Cal 134 (134) : 58 Cal 1341 * (Vol 20) 1933 Lah 179 (182) : 14 Lah 218 * (Vol 15) 1928 All 345 (348, 350) : 50 All 792 (FB). (Suit for pre-emption—(Vol 10) 1923 All 211 : 45 All 286 * (Vol 12) 1925 All 109 : 47 All 100 ((Vol 14) 1927 All 543 : 49 All 756 overruled) * (Vol 12) 1925 Mad 235 (236).

[4] In appeals to which O. 41, R. 4 is applicable an abatement with respect to one of the appellants will cause the appeal to fail. (Vol 29) 1942 Sind 157 (160) : ILR (1942) Kar 435 (DB) * (Vol 27) 1940 Pat 346 (351) : 19 Pat 870 (FB) ((Vol 27) 1940 Pat 341 : 19 Pat 172 overruled.) * (Vol 22) 1935 Lah 478 (479) (DB) * (Vol 21) 1934 Lah 206 (207, 208) : 15 Lah 667 (DB) * (Vol 20) 1933 All 733 (734, (DB) * (Vol 22) 1935 All 640 (641) * (Vol 21) 1934 Cal 703 (704) : 61 Cal 879 (DB) * (Vol 19) 1932 Cal 134 (135) : 58 Cal 1341 * (03) 27 Bom 284 (286) (DB) * (Vol 5) 1918 Mad 794 (801) : 40 Mad 846 (DB) * (Vol 3) 1916 Oudh 188 (192) (DB).

[But see (Vol 28) 1941 Oudh 155 : 16 Luck 382 * (Vol 28) 1941 Pesh 36 (36) (DB)].

[5] If the nature of the appeal is such that it cannot be heard in the absence of any of the appellants, the provisions of O. 41 R. 4 cannot be invoked and the whole appeal will fail. ('09) 4 Ind Cas 385 (386) (All) * (Vol 15) 1928 Cal 824 (824) (DB) * (Vol 17) 1930 Lah 174 (175) (DB) * (Vol 14) 1927 Pat 44 (44) (DB) * (Vol 20) 1933 Cal 787 (788) (DB).

[See however (Vol 16) 1929 Cal 519 (520, 521) : 56 Cal 622 (DB)].

[6] Test to determine whether failure to bring the legal representative of deceased appellant will result in the abatement of entire appeal is to see whether by deciding the appeal so two contrary decisions will come into existence. (Vol 22) 1935 Pat 4 (5).

[7] A judgment given in ignorance of an abatement is null and void. (Vol 12) 1925 Bom 290 (291) (DB) * (Vol 10) 1923 All 414 (414) (DB).

[8] Remedy of the legal representative in cases where the suit or appeal has abated is not to sue again on the same cause of action but to have the suit revived. ('09) 33 Mad 167 (169) (DB).

19. Award of costs.—[1] Power to award costs in proper cases exists in Courts and this power is not restricted by this rule. (Vol 7) 1920 Mad 289 (290) : 43 Mad 284 (DB).

[2] The power can also be exercised by an Appellate Court. ('82) 8 Cal 440 (441, 442) (DB).

[3] Appeal by two plaintiffs in a suit under S. 92—One dead and surviving appellant not solvent—Order for costs can be made against estate of deceased appellant also. (Vol 21) 1934 All 1 (4) : 55 All 687 (DB).

20. Revision.—[1] Order impleading a person who did not seek or was sought to be impleaded on the application of another who was found not to be the legal representative is revisable. (Vol 6) 1919 Nag 150 (152) : 15 Nag L R 21.

21. Appeal.—[1] An order allowing a person to be brought on the record as the legal representative is not appealable (Vol 12) 1925 All 431 (432) : 47 All 741 (DB) * (Vol 32) 1945 Lah 298 (304, 305) (FB).

4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

[1882-S. 368 ; 1877-S. 368 ; 1859-S. 104. See S. 52]

Objects and Reasons.

"Rules 3 and 4.—Rules 3 and 4 have been amended so as to provide that if no application for substitution is made within the time allowed by law the suit shall abate. We have struck out the provision that the Court may make an order declaring the abatement as in our opinion it is unnecessary and likely to give rise to difficulty." S. C. R.

O. 22 R. 3 (contd.)

[2] An order refusing to recognise a person as the legal representative is not appealable. (Vol 30) 1943 Oudh 24 (27) (DB) * (Vol 2) 1915 All 158 (158) : 37 All 272 (DB) * ('81) 3 All 844 (845) (DB) * (Vol 13) 1926 Mad 586 (591) : 49 Mad 450 (FB) ((Vol 7) 1920 Mad 424 : 43 Mad 812 over-ruled.) * (Vol 18) 1931 Lah 235 (236) * (Vol 11) 1924 Oudh 114 (114) * (Vol 7) 1920 Lah 8 (8, 9) : 1 Lah 493 (DB).

[3] The reason is that such an order does not adjudicate upon the rights of parties on any point or points in controversy in the suit and is therefore not a decree. (Vol 19) 1932 All 466 (466) (DB) * (Vol 7) 1920 Lah 8 (9) : 1 Lah 493 (DB) * (Vol 11) 1924 Mad 813 (814).

[4] An order bringing on record the legal representative of a deceased appellant is not a judgment within the meaning of clause 15 of the Letters Patent. (Vol 20) 1933 Mad 417 (417) : 56 Mad 689 (DB).

[5] Where the order merely recognises an abatement which has already taken place it cannot be regarded as a decree. But where it is passed on an adjudication upon the rights of parties on applications other than under O. 22 R. 9 it amounts to a decree and is appealable. (Vol 3) 1916 Lah 245 (247) : 1916 Pun Re No. 128 (FB).

[6] Casual mention in the order that right to sue did not survive does not make the order appealable. (Vol 32) 1945 Lah 298 (304, 305) (FB).

[7] An order directing an abatement is not appealable by a person who is not a party to the suit. (Vol 7) 1920 Lah 8 (9) : 1 Lah 493 (DB).

[See (Vol 13) 1926 Mad 586 (591) : 49 Mad 450 (FB). (Question left open).]

[8] An order rejecting an application that the suit might be declared to have abated is not appealable. ('95) 17 All 286 (288) (DB).

[9] That an order or rejection of a petition for substitution under this rule does not *ipso facto* cause the suit to abate. (Vol 8) 1921 Nag 23 (24) : 17 Nag L R 45.

[10] Decree dismissing the suit as having abated is appealable by a party thereto. (Vol 30) 1943 Mad 569 (570) * (Vol 26) 1939 Nag 39 (40) : I L R (1940) Nag 324 (DB) * ('95) 18 Mad 496 (498) (DB).

[11] An order dismissing an appeal or cross objection as having abated is appealable as a decree. (Vol 26) 1939 Nag 39 (40) : I L R (1940) Nag 324 (DB).

[12] An application made for substitution on the automatic abatement of a suit, must be deemed to be made under R. 9, and an order on such application would be appealable under order 43. (Vol 11) 1924 Lah 424 (424).

ORDER 22, RULE 4—Synopsis.

1. Scope and applicability of the rule.
2. Rule applies to appeals.
3. Suit against municipality.
4. Suit against devasthanam.
5. Where right to sue survives against persons other than the surviving defendant or defendants.
6. "On an application made in that behalf."
7. Limitation to implead legal representative.
8. "Shall cause the legal representative of the deceased defendant to be made a party."
9. Two or more legal representatives.
10. Wrong person as legal representative.
11. Joint Hindu family and legal representative.
12. Legal representatives already on record in another capacity.
13. Succession Act and legal representative.
14. Pro forma defendant or respondent.
15. What pleas may be taken by a legal representative.
16. Effect of decree against legal representative of deceased defendant.
17. "The suit shall abate as against the deceased defendant."
18. Decree against a dead person.
19. Where a suit or appeal abates against deceased defendant or respondent only.
20. When suit or appeal abates against all, as a whole.
21. Inherent power to add legal representative after abatement.
22. Appellate Court and abatement.
23. Award of costs.
24. Rehearing of suit or appeal.
25. Revision.
26. Appeal.

PROVINCIAL AMENDMENT.

Calcutta

- (1) At the end of sub-rule (3) *delete* the period and *add* the words : "except as hereinafter provided."
 (2) *Insert* the following as sub-rule (4) :

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

[2-4-1938]

Madras

- (1) *Remove* the period at the end of sub-rule (3) and *add* the following : "except as hereinafter provided."
 (2) *Insert* the following as new sub-rule (4) :

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

[P. Dis. No. 4 of 1927.]

O. 22 R. 4 (*contd.*)

1. Scope and applicability of the rule.—[1] If a case falls within R. 2, this rule is excluded. (Vol 13) 1926 Lah 607 (608) : 7 Lah 399 (DB) [(Vol 14) 1926 Lah 37, doubted.]

[2] If a case falls within this rule, R. 10 will be excluded. (Vol 12) 1925 All 431 (432) : 47 All 741 (DB) : (Vol 14) 1927 All 272 (272) : 49 All 310 (DB) * (92) 16 Bom 27 (28) (DB).

[3] The rule has been held to be inapplicable to an investigation into an application for permission to sue in *forma pauperis*. (83) 7 Bom 373 (376) (DB).

[4] The rule applies to proceedings under S. 21-A if the Punjab Alienation of Land Act. (Vol 22) 1935 Lah 443 (444).

[5] A counter claim stands on the same footing as a cross suit and hence this rule applies to it. (Vol 27) 1940 Bom 117 (118) : ILR (1940) Bom 10.

[6] The rule will not apply if death of the defendant was before the institution of the suit. (08) 31 Mad 86 (88) (DB) * (Vol 24) 1937 Lah 794 (795) (DB).

[7] The rule will not apply where the death of the defendant was after decree in suit. (05) 28 Mad 361 (362) (DB).

[8] Where the sole defendant died before the institution of the suit, the suit will have to be dismissed as being against law. (Vol 1) 1914 Cal 895 (896) (DB) * (Vol 6) 1919 Cal 257 (258) * (Vol 3) 1916 Mad 440 (441) (DB) * (23) 1928 Mad WN 240 (241) * (Vol 7) 1920 Sind 82 (83) (DB).

[9] Where the defendant who died before the institution of the suit was one of two or more defendants the suit may be proceeded with after removing his name and passing where necessary an order under O. 1, R. 10. (Vol 13) 1926 Lah 153 (153, 154) * (Vol 15) 1928 Lah 359 (360) : 9 Lah 526 (DB).

[10] If the right to sue does not survive at all the rule will not apply. (Vol 8) 1921 Lah 890 (891) (DB) * (Vol 22) 1935 All 106 (107) (DB) * (Vol 20) 1933 Cal 61 (63) (DB).

[11] The rule does not apply to cases where defendant dies after a preliminary decree is passed in the suit. (Vol 27) 1940 Bom 318 (321, 322) : ILR (1940) Bom 689 (DB).

[12] If the right survives against the surviving defendants alone, R. 2, and not this rule, will apply. (Vol 30) 1943 Cal 570 (572) : ILR (1943) 1 Cal 144 (151) (DB) * (06) 4 Cal L Jour 568 (570, 571) (DB) * (Vol 20) 1933 Nag 95 (99) : 29 Nag LR 12 * (Vol 21) 1934 Pat 427 (428, 429) (DB).

2. Rule applies to appeals.—[1] This rule applies to a case where a respondent dies, pending appeal. (04) 31 Cal 487 (494) : 31 Ind App 71 (PC).

[2] The words "right to sue" in this rule should be taken to mean "right to appeal" in cases where a party dies after decree in the suit, but pending appeal. (Vol 21) 1934 All 1029 (1030) (DB).

[3] Where the appeal has been filed in a Court not having jurisdiction, there can be no abatement. (Vol 22) 1935 All 92 (93) (DB).

[4] The rule applies to the case of the death of a respondent whether he was a plaintiff or a defendant in the original suit. (1900) 22 All 480 (483) * (05) 28 Mad 495 (499) (DB).

[5] Whether abatement in an appeal is partial or total will have to be decided with reference to the nature of the decree appealed against. (Vol 17) 1930 Lah 651 (658).

[6] An appeal against the order of adjudication does not abate on the death of the insolvent (Vol 29) 1942 Bom 159 (159) : ILR (1942) Bom 175 (DB) * ((Vol 15) 1928 Lah 119 : 9 Lah 806) and (Vol 19) 1932 Lah 121 : 13 Lah 396, dissented from).

[7] The provisions of sub-rule (4) framed by the High Court of Madras, are applicable to appeals also. (Vol 22) 1935 Mad 236 (238) : 55 Mad 752 (DB).

3. Suit against Municipality.—[1] Municipality superseded by government and special officer appointed—Decree in a suit against municipality represented by special officer—During appeal municipality restored—Held that commissioners need not be brought on record as representatives of the special officer. (Vol 24) 1937 Pat 588 (588).

[But see (Vol 25) 1938 Lah 83 (84)].

4. Suit against devasthanam.—[1] Omission to bring on record another trustee on the original trustee representing in suit ceasing to be such does not cause abatement. (1937) 1937 Mad WN 465 (477) (DB).

5. Where right to sue survives against persons other than the surviving defendant or defendants.—

[1] In the following cases it was held that right to sue did not survive against surviving defendants alone.

[a] Where pending appeal against a decree for joint possession one of the respondents dies. (1900) 22 All 430 (433).

[b] In a suit for accounts and dissolution of partnership if one of the partners dies. (1904) 31 Cal 487 (494) : 31 Ind App 71 (PC).

[c] Suit against sons as joint representatives of their father's estate—Death of one pending appeal—Right held did not survive against others alone. (Vol 8) 1921 Lah 160 (161) (DB).

[2] The rule does not apply if the right to sue survive against the surviving defendants alone. (Vol 31) 1944 All 240 (240) : ILR (1944) All 344.

O. 22 R. 4 (contd.)

6. "On an application made in that behalf."—[1] Any person interested can apply for the addition of the proper representative. (Vol 10) 1923 Mad 679 (682) (DB).

[2] In the absence of a proper application by anybody else the plaintiff must apply to bring the legal representatives on record. (Vol 19) 1932 Nag 144 (146) : 28 Nag LR 69.

[3] Where an application has been made the failure to file therein an exhaustive list of legal representatives will not cause abatement. (Vol 32) 1945 Oudh 196 (197) : 20 Luck 305 (DB).

[4] The mere fact that a legal representative has been impleaded in another independent proceeding will not obviate the necessity for an application under this rule. (Vol 14) 1927 Mad 707 (708).

[See however (Vol 12) 1925 Mad 777 (777) * (Vol 6) 1919 Mad 1026 (1027) (DB)].

7. Limitation to implead legal representative.

[1] S. 5 of the Limitation Act does not apply to an application under this rule. (Vol 1) 1914 All 94 (95) : 36 All 255 (DB) * (Vol 9) 1922 Lah 131 (131) (DB);

[But see (Vol 26) 1939 All 717 (718) : ILR (1939) All 492].

[2] An abatement can be set aside for sufficient cause under R. 9 (Vol 16) 1929 Lah 129 (130) : 10 Lah 816 (DB).

[3] For period of Limitation for presenting an application under this rule see Arts. 177, 181 and AIR Commentaries on the Limitation Act, 2nd (1942) Edition.

8. "Shall cause the legal representative of the deceased defendant to be made a party."

—[1] Before proceeding further with a suit where the defendant has died, the Court must bring on record the legal representative and till then no orders excepting formal or processual can be passed. (Vol 18) 1931 Lah 73 (74) * (Vol 16) 1929 Pat 101 (101) * ('02) 12 Mad L Jour 188 (189) (DB).

[2] If the suit is disposed of without impleading the legal representatives re-trial will be ordered. (Vol 11) 1924 Lah 33 (34) (DB) * (Vol 3) 1916 Mad 574 (575) : 39 Mad 886 (DB).

[3] The Court itself must correct the records in terms of its order substituting the names of the representatives and the plaintiff or respondent is not obliged to see that is so done. (Vol 24) 1937 Bom 401 (406) : ILR (1937) Bom 602 (DB).

[4] Where some person who is not an heir *ex concessis* is substituted as necessary for the determination of the suit, the plaint should be amended by making the necessary allegations on which the liability of the added person is based. (Vol 20) 1933 Cal 314 (315) (DB).

9. Two or more legal representatives.—[1]

The following are the different views on the question whether impleading only one of several legal representatives will save the suit from abatement :

[a] Impleading only one of several representatives is enough to save suit from abatement. (Vol 29) 1942 All 324 (326) : ILR (1942) All 448 (DB) * (Vol 15) 1922 All 532 (533) : 50 All 857 (DB) * (Vol 11) 1924 Bom 420 (421) (DB) * (Vol 22) 1935 Bom 287 (290) * ('02) 26 Mad 230 (234) (DB) * (Vol 15) 1928 Mad 1199 (1199, 1200) * (Vol 12) 1925 Pat 551 (551, 552) : 4 Pat 320 (DB) * (Vol 18) 1926 Pat 276 (276) (DB) * ('13) 1913 Pun L R No. 51 Page 194 (197) (DB) * (Vol 25) 1938 Pesh 4 (5) (DB).

[b] *Bona fide* application to bring in all who can be ascertained by the exercise of due care and caution

will save abatement. (Vol 14) 1927 Lah 6 (7, 8) : 1 Lah 438 (DB) * (Vol 22) 1935 Lah 712 (713) (DB) * (Vol 28) 1936 Mad 336 (337) : 59 Mad 660 (DB).

[c] The person brought on record if as a matter of fact represents the estate and is so brought on without objection at the time, there will be no abatement. (Vol 10) 1923 Rang 114 (116) : 4 Upp Bur Rul 150.

[d] There will be no abatement only against the person impleaded. (Vol 10) 1923 Nag 101 (102) : 18 Nag LR 21 * (Vol 32) 1945 Nag 271 (272) : ILR (1945) Nag 691.

[e] Unless all are brought on record the suit will abate (Vol 12) 1925 Sind 2 (3, 4) (DB) * (Vol 13) 1926 Sind 20 (21) (DB).

[2] Defendants not taking the objection that all representatives are not impleaded at the proper stage will be estopped from raising it in subsequent proceedings. (Vol 17) 1930 Sind 147 (148) (DB) * (Vol 20) 1933 Cal 325 (328) : 60 Cal 87 (DB).

[3] If some of the legal representatives are specially dispensed with, and the suit cannot proceed in their absence, the whole suit will abate. (Vol 4) 1917 Cal 98 (98) (DB).

[4] Failure to bring on record the legal representatives who died subsequent to his impleading does not vitiate the proceedings. (Vol 28) 1936 Mad 336 (338) : 59 Mad 660 (DB). (In this case there was the additional factor that the plaintiff did not know about the death of one of the legal representatives.)

[5] Suit brought *bona fide* without fraud or collusion omitting to implead some who should or might have been joined—Decree will be binding on all, on the ground that the estate has been sufficiently represented. (Vol 29) 1942 Oudh 216 (217) : 17 Luck 720.

[See however (Vol 26) 1939 Lah 277 (279).]

10. Wrong person as legal representative.

—[1] A decree obtained against a wrong representative will ordinarily be not binding on the true representative or on the estate of the deceased defendant. (Vol 28) 1941 Pat 299 (300) * (Vol 7) 1920 All 323 (328) : 42 All 497 (504) (DB) * (Vol 11) 1924 All 717 (718) * ('13) 15 Bom LR 41 (44) (DB) * (Vol 3) 1916 Mad 726 (727) (DB).

[2] Decree obtained against a wrong representative will bind—

[i] where the plaintiff acted *bona fide* ;

[ii] when the decree obtained is free from fraud or collusion;

[iii] where the person wrongly impleaded was so impleaded in a representative capacity and the decree was passed against him as representing the estate of the deceased ;

[iv] where the plaintiff was not aware of any fact which displaced the apparent title of the person ; and

[v] where the real legal representative had not intervened during the pendency of the suit. (Vol 16) 1929 Mad 482 (485) * (Vol 20) 1933 Nag 73 (74) : 29 Nag LR 39.

[See however (Vol 20) 1933 Mad 43 (48) (DB)].

[3] A decree obtained after impleading a person having a *prima facie* claim to be considered will bind the estate. ('91) 14 Mad 454 (457) (DB) * (Vol 12) 1925 Oudh 330 (334) : 28 Oudh Cas 177 (DB).

[4] A decree obtained after impleading a person, who but for some other facts of which the plaintiff is not aware, would be such legal representative, will be binding on the estate. (Vol 28) 1941 Lah 49 (51) * (Vol 15) 1928 Mad 243 (244, 245) * (Vol 17) 1930 Mad 930 (936) : 54 Mad 212 (DB) * (Vol 20) 1933 Lah 380 (381) : 14 Lah 696 (DB).

[5] The true representatives must not have intervened or applied to be made parties pending the suit,

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and the plaintiff must not, during such pendency, have been otherwise made aware that the other person impleaded is not the true representative or giving the decree to be binding upon the estate. (Vol 18) 1931 Cal 782 (784, 785) (DB).

[6] Application to substitute a wrong person as the heir of the deceased cannot save the suit from abatement where the plaintiff by enquiry could have known the true representative. (Vol 24) 1937 Pat 612 (613) (DB).

[7] Court can substitute the name of the true legal representative on record on it being apprised of his existence. ('83) 12 Cal L Rep 45 (46) (DB) * (Vol 2) 1915 Lah 144 (144) (DB).

11. Joint Hindu family and legal representative.—[1] Before the other members of the joint family of a deceased defendant can be impleaded as legal representatives, it must be shown *prima facie* that the deceased had an estate which survived to the other members. (Vol 17) 1930 Mad 575 (576)

[2] Defendant in suit dying during pendency of suit leaving father, brothers, widow and daughter—His father brought on record in his place and not his widow—Representation is defective. (Vol 26) 1939 All 636 (636) (DB).

[3] Hindu joint family of father and sons—Sons and not the widow are the legal representatives—Widow does not become representative under Hindu Women's Rights to Property Act. (Vol 32) 1945 Oudh 196 (197) : 20 Luck 305 (DB).

12. Legal representatives already on record in another capacity.—[1] Where the legal representatives of a deceased defendant are already on record though in another capacity, abate by reason of the absence of an application under this rule. (Vol 13) 1926 Lah 607 (608) : 7 Lah 999 (DB) (Dissenting from (Vol 13) 1926 Lah 37) * (Vol 16) 1929 Mad 152 (152) : 51 Mad 347 * (Vol 31) 1944 Oudh 139 (143) : 19 Luck 515 (DB) * (Vol 7) 1920 Sind 82 (83) (DB) * (Vol 16) 1929 Sind 225 (226) : 24 Sind LR 167 (DB) * (Vol 19) 1932 Lah 426 (427) : 14 Lah 78 (DB) * (Vol 23) 1936 Pat 548 (550) : 15 Pat 326 (DB) [(Vol 15) 1928 Pat 250 : 7 Pat 285 distinguished.] * (Vol 26) 1939 Oudh 155 (155) : 14 Luck 453 (DB).

[But see (Vol 25) 1938 Bom 6 (8) : ILR (1938) Bom 61. (Note—This case has been declared to be not good law in the later decision of the same Court in (Vol 27) 1940 Bom 259 : ILR (1940) Bom 487, a case relating to the death of a plaintiff.)]

[2] It is enough if the plaintiff, at some time or other during the hearing of the suit, states the fact and gets it noted on the record. (Vol 16) 1929 Mad 152 (152) : 51 Mad 347 (DB) * (Vol 17) 1930 Mad 573 (581) (DB) * (Vol 25) 1939 Oudh 259 (259).

[3] Where, however, only some of the legal representatives are on the record but not all, an application is necessary under this rule and that in its absence the suit will abate. (Vol 12) 1925 Pat 123 (124) : 8 Pat 853 * (Vol 15) 1928 Pat 250 (252, 253) : 7 Pat 285 (DB) * (Vol 20) 1933 Lah 356 (359) : 14 Lah 543 (DB).

[See however (Vol 17) 1930 Mad 69 (71, 72) (DB).

[4] A substitution of legal representatives in the suit will not be sufficient for the purpose of the counter in which there must be an independent amendment of the record by substituting the legal representatives. (Vol 27) 1940 Bom 117 (118) : ILR (1940) Bom 10.

13. Succession Act and legal representative.—[1] Where the deceased is governed by the Succession Act, his legal representatives are his executors or

administrators and not his heirs. ('94) 18 Bom 337 (340, 342) (DB) (Inferred.)

[2] Even though no representation is taken but for the estate, the plaintiff cannot, add defendant's heirs as legal representatives. (Vol 12) 1935 Rang 186 (187) : 3 Rang 46.

[3] The plaintiff can only move the Court to have an administrator appointed. (Vol 29) 1942 Cal 571 (575) : ILR (1942) 2 Cal 363 (DB) * ('94) 18 Bom 337 (342) (DB) * (Vol 12) 1925 Rang 186 (187) : 3 Rang 46.

[4] A suit or appeal filed against the executor will abate if upon his death, an application for bringing on record the residuary legatee is not made within the period of limitation. ('35) 62 Cal 993 (1006) (DB).

14. Pro forma defendant or respondent.—[1] The rule does not apply in the case of death of a defendant or respondent who had no interest in the litigation. (Vol 20) 1933 Lah 406 (407) * (Vol 13) 1926 Cal 512 (513) (DB) * (Vol 1) 1914 Mad 708 (709) : 38 Mad 1064 (DB) * (Vol 13) 1926 Lah 189 (189) * (Vol 25) 1938 Lah 541 (543) (DB).

[2] Failure to implead the legal representatives of a deceased *pro forma* defendant or respondent will not cause abatement of suit or appeal. ('01) 28 All 22 (24) (DB) * (Vol 10) 1923 All 211 (213) : 45 All 286 (DB) (Note—This case is overruled in (Vol 15) 1928 All 345 : 50 All 792 (FB) on another point) * (Vol 11) 1924 Cal 998 (1001) * (Vol 10) 1923 Lah 350 (351) (DB) * (Vol 14) 1927 Lah 779 (779) (DB).

[3] The death of a person who was not a proper or necessary party to the suit or appeal will not cause abatement. (Vol 20) 1933 Lah 406 (407) * (Vol 17) 1930 Lah 477 (478) (DB) * (Vol 20) 1933 All 291 (291).

15. What pleas may be taken by a legal representative.—[1] A legal representative cannot set up a new or individual right. (Vol 14) 1927 Nag 162 (163) * (Vol 22) 1935 Mad 52 (54).

[2] A legal representative cannot set up a plea open to him personally. (Vol 27) 1940 All 99 (100) : ILR (1940) All 153 (FB) [(Vol 17) 1930 All 48 held wrongly decided on facts] * (Vol 12) 1925 Mad 59 (59) (DB).

[3] A legal representative can take up any plea which may be appropriate to his character as legal representative. (Vol 17) 1930 All 348 (349) (DB) * (Vol 30) 1943 Pat 433 (441) (DB) * (Vol 31) 1944 Lah 473 (477).

[4] The legal representative can rely on any one of the alternative defences of the deceased. (Vol 29) 1942 Cal 180 (201) (DB) * ('13) 15 Bom LR 209 (214) (DB).

[5] Even where the alternative defence was not specifically raised by the deceased defendant, his legal representative can rely on it. (Vol 3) 1916 Mad 1139 (1139) (DB).

[6] A new and inconsistent plea cannot be set up. (Vol 8) 1921 Cal 343 (344) (DB).

[7] A plea contrary to the one taken up by the deceased cannot be set up by the legal representative. (Vol 11) 1924 Mad 245 (246) (DB) * (Vol 30) 1943 Cal 613 (624) : ILR (1944) 1 Cal 139 (DB). (A new and inconsistent plea with the one stated by the deceased in the plaint cannot be raised by the legal representative in Appeal.)

16. Effect of decree against legal representative of deceased defendant.—[1] Person against whom decree was obtained, a limited owner—Question whether decree binds reversioners depends upon whether the suit affects the whole inheritance or only a personal cause of action of the limited owner. ('81) 7 Cal 357 (366) (DB).

[2] Where the cause of action is personal to the

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limited owner the decree is not binding on the reversioners. ('99) 26 Cal 285 (299, 300) (DB).

[3] When the decree has been fairly and properly obtained against the representative in his representative capacity it is binding on the reversioners. ('98) 20 All 341 (343, 344) (DB) * ('96) 23 Cal 636 (638) (DB) * ('09) 9 Cal L Jour 346 (353) (DB).

[4] Decree obtained against wrong legal representative will not bind the true representative, even though the plaintiff acted under a *bona fide* mistake and was not aware of his existence: (Vol 14) 1927 Bom 63 (66, 67) : 50 Bom 802 (DB).

[5] Where the legal representative stands by and allows a stranger to enter into possession of the property, a decree obtained *bona fide* against the latter will be binding on the former. ('78) 3 Cal L Rep 157 (158) (DB).

[6] Decree passed holding a person as the proper legal representative will bind the estate though subsequently he is found to be the proper representative if the Court has decided that a person is the proper legal representative and passes a decree against him it is binding on the estate even though it may subsequently turn out that he is not the proper legal representative. ('01) 25 Bom 337 (347) : 27 Ind App 216 (PC).

17. "The suit shall abate as against the deceased defendant."—[1] Suit abates on failure to apply to implead representative of a sole defendant. (Vol 9) 1922 Cal 408 (409) : 49 Cal 524 * (Vol 11) 1924 Lah 316 (317, 318) * (Vol 23) 1936 Pat 110 (110) (DB) (Vol 21) 1934 All 1027 (DB) Followed.)

[2] Failure to implead the representative of one of several defendants—Suit in the first instance abates only as against him. (Vol 28) 1941 Oudh 495 (496) + (Vol 27) 1940 PC 215 (218) : ILR (1940) Kar PC 410 : ILR (1941) Bom 8 : 67 Ind App 406 (PC).

[3] A partial abatement may under certain circumstances result in the whole suit or appeal failing. ('02) 26 Bom 203 (206) (DB).

[4] The abatement takes place automatically and no separate order therefor is necessary. (Vol 13) 1926 All 217 (220) : 48 All 334 (FB) (Vol 9) 1922 All 209 : 44 All 459 overruled. * (Vol 13) 1926 Lah 234 (235) : 7 Lah 78 (DB) * (Vol 24) 1937 Bom 401 (406) : ILR (1937) Bom 602 (DB) * (Vol 24) 1937 Nag 88 (89) + (Vol 21) 1934 Lah 442 (443) : 15 Lah 879 (DB).

[5] Where a suit abates it is "dead or at an end". (Vol 15) 1928 Cal 234 (235) (DB).

[6] A decree passed in an abated suit is a nullity so far as the legal representative is concerned. (Vol 8) 1921 Lah 219 (219, 220) (DB) * (Vol 13) 1926 Cal 1053 (1054) (DB) + (Vol 12) 1925 Lah 37 (38) (DB).

18. Decree against a dead person.—[1] A decree passed against a dead person without impleading his legal representatives is a nullity. ('32) 33 Pun LR 735 (736) (DB) * (Vol 5) 1918 All 226 (227) : 40 All 423 (DB) + (Vol 10) 1923 All 211 (213) : 45 All 286 (DB) * ('02) 26 Bom 317 (319) (DB) * ('09) 11 Bom L R 1070 (1073) (DB) * ('11) 11 Ind Cas 782 (782) (Low Bur) * (Vol 4) 1917 Low Bur 132 (133) * ('13) 17 Cal L Jour 634 (636) (DB) * (Vol 3) 1916 Mad 656 (656) : 38 Mad 682 * (Vol 11) 1924 Mad 713 (713, 714) (DB) * (Vol 7) 1920 Oudh 57 (58) * ('12) 5 Sind LR 260 (263) * (Vol 12) 1925 Lah 494 (494) : 6 Lah 313 (DB) * (Vol 25) 1938 Mad 115 (117) * (Vol 27) 1940 Pat 243 (244) (DB) * (Vol 16) 1929 Cal 527 (527) (DB).

[See, however (Vol 10) 1923 Cal 676 (677) (DB)].

[But see (Vol 15) 1928 Lah 784 (786) (DB)].

[2] The objection that the decree is a nullity as one passed against a dead person cannot be raised by a

person who was heard and against whom a decree was passed on merits. (Vol 17) 1930 Mad 719 (720) (DB) * (Vol 12) 1925 Pat 434 (434) : 4 Pat 187 (DB).

[3] Suit against several defendants one of whom is dead—Plaint is not invalid—Court can implead the representatives under O. 1, R. 10. (Vol 21) 1934 All 25 (26, 27) (DB) * (Vol 24) 1937 Lah 794 (795) (DB).

[4] Some of several defendants dead when decree was passed—Others may object to the execution on the ground that the decree is a nullity. (Vol 11) 1924 Pat 339 (340) (DB). (32 All 801 followed.)

[5] A final decree passed against A as the legal representative of B could not be treated as a nullity by the executing Court merely because B had died before the preliminary decree itself and his legal representative had been impleaded at the time of the preliminary decree. (Vol 10) 1923 All 141 (144) : 45 All 198 (DB).

19. Where suit or appeal abates against deceased defendant or respondent only.—[1] An abatement under this rule will in the first instance be only so far as the deceased defendant or respondent is concerned. ('12) 1912 Pun LR No. 231 page 731 (732) (DB) [(14) 1 Oudh L Jour 581] (Vol 7) 1920 Cal 264 (266) (DB).

[2] If, on account of partial abatement, it becomes impossible to proceed with the suit or appeal, the entire suit or appeal will fail. (Vol 30) 1933 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) : (Vol 25) 1938 Nag 42 (43) : ILR (1938) Nag 370 (DB) * (Vol 22) 1935 Pat 241 (242) * (Vol 23) 1936 Sind 169 (171) : 30 Sind LR 242. [(Vol 12) 1925 Sind 2 followed.]

[3] If the suit or appeal can proceed to a final adjudication in the absence of the legal representative the partial abatement will not affect the rest of the suit or appeal. (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 28) 1941 Pesh 41 (42) (1-B) * (Vol 27) 1940 PC 215 (218) : ILR (1940) Kar PC 410 : 67 Ind App 406 : ILR (1941) Bom 8 (PC) * (Vol 27) 1940 Pat 243 (244).

[4] A final adjudication is possible in cases where the interest of the deceased defendant or respondent can be separated from those of the others and a decree can be given against the latter without affecting the rights of the legal representatives of the former. (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 30) 1943 Oudh 11 (13, 14) (DB) * (Vol 29) 1942 Oudh 155 (158, 159) : 17 Luck 327 * (Vol 15) 1928 All 172 (175, 176, 177) : 50 All 559 (FB) * (Vol 12) 1925 Nag 299 (301) : 21 Nag LR 38 * (Vol 23) 1936 Nag 292 (293) : ILR (1937) Nag 423 * (Vol 25) 1938 Lah 35 (38) : ILR (1937) Lah 746 (DB) * (Vol 22) 1935 Bom 287 (290) * (Vol 22) 1935 Lah 853 (854) : 16 Lah 747 (DB).

[5] In the following cases abatement as regards the deceased was held not to affect the rest of the suit or appeal:

[a] Where the suit is for the recovery of a specific sum of money from the deceased defendant and for a specific sum from each of the other defendant. (Vol 28) 1941 Pesh 41 (42) (DB) + (Vol 11) 1924 Rang 127 (128) : 1 Rang 618 (DB) * (Vol 18) 1931 Pat 164 (168) * 10 Pat 341 (DB).

[b] Where the suit relates to distinct plots of land in the hands of the several defendants including the deceased defendant. (Vol 13) 1926 Cal 193 (203) (DB) * (Vol 13) 1926 Cal 252 (254) (DB) * (Vol 13) 1926 Lah 264 (266) : 7 Lah 376 (DB).

[c] Where the suit relates to specified shares. (Vol 13) 1926 All 128 (129) : 48 All 81 (DB) * (Vol 18) 1931 Lah 486 (487) : 12 Lah 318 (DB) * (Vol 23) 1936 Pat 548 (550) : 15 Pat 326 (DB) * (Vol 25) 1938 Lah 35 (38) : ILR (1938) Lah 746 (DB).

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[d] Where the suit relates to shares which are ascertained or ascertainable. (Vol 15) 1928 Lah 572 (575, 576) : 10 Lah 7 (FB).

[e] Where the liability sought to be enforced against the defendants is joint and several. ('06) 33 Cal 580 (582) (DB).

[f] Suit against co-promisors. (Vol 9) 1922 Lah 182 (183) (DB) * (Vol 12) 1925 Pat 434 (434, 435) : 4 Pat 187 (DB).

[g] Suit against principal and surety. ('08) 25 All 206 (208) (DB).

[h] Suit against joint wrong-doers or tort-feasors (Vol 11) 1924 Lah 348 (349) : 5 Lah 54 * (Vol 21) 1934 Lah 941 (942) * (Vol 8) 1921 Pat 350 (350, 351) (DB) * (Vol 15) 1928 All 555 (555).

[i] Suit for ejectment against co-trespassers. ('11) 21 Mad L Jour 574 (576) (DB) * (Vol 21) 1934 All 716 (717) (DB).

[j] Suit for rent against fixed rate tenants. ('12) 34 All 604 (606) (DB).

[k] Suit against joint-holders of a holding. (Vol 12) 1925 Pat 480 (481) : 4 Pat 53 (DB) * (Vol 13) 1926 Pat 504 (505) : 5 Pat 238 (DB) * ('26) 94 Ind Cas 30 (31) (Cal) (DB).

[l] Suit by annuitants under walk for removal mutawalli—One annuitants during second appeal by mutawalli—Failure to implead his representative does not cause abatement of whole appeal. (Vol 32) 1945 Cal 328 (329) (DB).

[6] Test to determine whether there is partial or total abatement is to see whether separate suits are maintainable against each of the several defendants. (Vol 11) 1924 Nag 123 (123) * (Vol 20) 1933 Sind 384 (385) (DB) * (Vol 14) 1927 Lah 851 (852).

20 When suit or appeal abates against all, as a whole—[1] Where the absence of the legal representatives from the record renders it impossible to proceed with the suit or appeal as against the rest, the suit or appeal will fail *in toto*. (Vol 27) 1940 Oudh 865 (867) : 15 Luck 748 (DB) * (Vol 18) 1931 Nag 184 (186) : 27 Nag LR 220 * (Vol 13) 1926 Cal 893 (894, 895) : 53 Cal 753 (DB) * ('04) 31 Cal 487 (494) : 31 Ind App 71 (PC).

[2] Impossibility to proceed with the suit may arise for the following reasons :

[a] Suit or appeal becoming imperfectly constituted for want of essential or necessary parties (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 29) 1941 Oudh 219 (223) : 16 Luck 515 (FB) * (Vol 15) 1928 Lah 572 (575, 576, 582) : 10 Lah 7 (FB) * (Vol 13) 1926 All 234 (235) : 48 All 251 (DB) * (Vol 17) 1930 All 762 (764, 767) (DB) * (Vol 7) 1920 Cal 264, 267 (DB) * ('12) 1912 Mad WN 825 (825) (DB) * (Vol 19) 1932 Mad 212 (213) * (Vol 18) 1931 Pat 17 (18) : 9 Pat 693 (DB) * (Vol 10) 1928 Rang 258 (259, 260) : 1 Rang 189 * (Vol 22) 1935 Pat 241 (242) (DB).

[b] The possibility of having two inconsistent or contradictory decrees in the same suit. (Vol 31) 1944 Pat 38 (39) 22 Pat 289 (DB) * (Vol 30) 1943 Nag 13 (16) : ILR (1943) Nag 17 (DB) * (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 28) 1941 Oudh 219 (222) : 16 Luck 515 (FB) * (Vol 31) 1944 Mad 139 (143) : ILR (1943) Mad 595 (DB). (But it is not the only test.) * (Vol 13) 1926 All 128 (129, 130) : 48 All 81 (DB) * (Vol 7) 1920 Cal 264 (267) (DB) * (Vol 19) 1932 Lah 281 (286) : 13 Lah 70 (DB) * (Vol 19) 1932 Lah 624 (626) : 14 Lah 284 (DB) * (Vol 18) 1931 Nag 184 (186) : 27 Nag LR 220 * (Vol 26) 1939 All 698 (699) : ILR (1939) All 921 (DB) * (Vol 24) 1937 Pat 612 (614) (DB).

[c] Effective execution of decree that may be given becoming impossible by reason of the outstanding right of the legal representative of the deceased. (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 16) 1929 PC 58 (60) : 56 Ind App 80 : 51 All 267 (PC).

[3] The non-impleading of the legal representatives of a deceased defendant will result in total failure of the suit or appeal in the following cases :

[a] Where the interest of the defendants in the suit are joint and indivisible. (Vol 28) 1941 Oudh 219 (222, 223) : 16 Luck 515 (FB) * ('30) 28 All L Jour 999 (1002) (DB) * (Vol 10) 1923 Cal 289 (290) (DB) * (Vol 14) 1927 Lah 87 (88) * (Vol 21) 1934 Lah 429 (430) (DB) * (Vol 22) 1935 Pat 430 (430) * (Vol 31) 1944 Pat 38 (40) : 22 Pat 289 (DB).

[b] Suit relating to the interests in a pre-emption suit. (Vol 13) 1926 All 152 (152, 153) (DB) * ('10) 32 All 301 (305) (DB) * (Vol 32) 1945 Lah 184 (185, 186) (FB) (Vol 17) 1930 Lah 33 overruled)

[c] Where a decree appealed from is joint and indivisible. (Vol 31) 1944 Pat 38 (40) : 22 Pat 289 (DB) * (Vol 33) 1946 Pat 132 (133) (DB) * (Vol 20) 1933 Lah 356 (359) : 14 Lah 543 (DB) * (Vol 21) 1934 Pesh 14 (15) * (Vol 14) 1927 All 331 (332) * ('32) 1932 All L Jour 219 (220) (DB) * (Vol 7) 1920 Cal 782 (783) (DB) * (Vol 10) 1923 Cal 294 (294) (DB) * (Vol 12) 1925 Lah 494 (494) : 6 Lah 313 (DB) * (Vol 4) 1917 Mad 398 (399) (DB) * (Vol 19) 1932 Mad 212 (213) * (Vol 16) 1929 Nag 358 (360) * (Vol 23) 1936 Oudh 209 (211) * (Vol 26) 1939 Oudh 241 (243) (DB).

[4] A decree is not joint and indivisible merely because it is on one sheet of paper. (Vol 17) 1930 Lah 651 (653).

[5] The interest awarded in the decree must in substance be joint and indivisible. (Vol 13) 1926 All 234 (235) : 48 All 251 (DB) * (Vol 14) 1927 Lah 851 (852) * (Vol 19) 1932 Cal 134 (135) : 58 Cal 1341.

[6] In a suit the nature of the abatement will depend upon the relief involved. (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 17) 1930 Lah 651 (653) * (Vol 10) 1923 Cal 289 (289) (DB) * (Vol 17) 1930 All 762 (764, 767) (DB).

[7] If the plaintiff sets up a joint and indivisible right and the defendants set up a separate or separable right, the point should be decided before deciding the nature of the abatement. (Vol 10) 1923 Cal 289 (290) (DB).

[8] Nature of abatement in an appeal depends upon the nature of the relief awarded by the decree appealed against. (Vol 30) 1943 Cal 570 (571) : ILR (1943) 1 Cal 144 (DB) * (Vol 17) 1930 Lah 651 (653) * (Vol 20) 1933 Lah 356 (359) : 14 Lah 543 (DB).

[9] If the decree awarded joint possession the abatement will affect the whole appeal even though the plaintiff had asked for separate possession in the plaint. (Vol 10) 1923 Cal 294 (294) (DB) * (Vol 24) 1934 Pesh 14 (15).

[10] Plaintiff entitled to both joint and several relief asking for joint relief only—One of the defendants-respondents dying pending appeal against dismissal—Failure to bring his representatives causes abatement. ('26) 92 Ind Cas 35 (36) (Lah) * ('21) 62 Ind Cas 714 (715) (DB) (Cal) * ('26) 94 Ind Cas 253 (253) (Cal) (DB).

21. Inherent power to add legal representative after abatement—[1] Even after a suit or appeal has abated, the Court has inherent power to add the legal representatives in proper cases. ('11) 35 Bom 393 (395) (DB).

[2] The proper procedure for adding the representatives would be to declare the suit or appeal ~~abated~~ and then to set the abatement aside for valid reasons.

Determination of question 5. Where a question arises as to whether any person is or is not as to legal representative. the legal representative of a deceased plaintiff or a deceased defendant such question shall be determined by the Court.

[1882-S. 367; 1877-S. 367; 1859-S. 103 See S. 52.]

PROVINCIAL AMENDMENT

Madras

Add the following as a proviso :

"Provided that an appellate Court before determining it, may direct any lower Court to take evidence here on and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question."

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and add the legal representatives. (Vol 9) 1922 Bom 449 (449) : 47 Bom 92 (DB).

[3] Unless very strong grounds are made for the addition of the representatives after the abatement has taken place the Court will not do so. ('05) 28 Mad 359 (360) (DB).

22. Appellate Court and abatement—[1] The Court in which the suit or appeal was pending when the death took place can only appoint the legal representatives. (Vol 16) 1929 All 319 (320) (DB) * (Vol 6) 1919 Cal 242 (242) (DB).

[2] Where a decision on the merits in spite of an abatement is given the Appellate or Second Appellate Court, may set aside the decision and declare the abatement. (Vol 16) 1929 Lah 256 (256).

[3] The Court may remand the matter for disposal according to law where a decision is given in spite of the fact that abatement has taken place. ('12) 1912 Mad W N 825 (825) (DB) * (Vol 12) 1925 Bom 290 (291) (DB).

23. Award of costs.—[1] Legal representatives cannot ask for costs where a suit is declared to have abated for failure to implead the representatives. (1912) 22 Mad L Jour 439 (440).

24. Re-hearing of suit or appeal.—[1] An application to implead the legal representatives and to reopen and rehear the suit or appeal can be entertained where decree is passed against a deceased defendant. (Vol 14) 1927 Oudh 221 (221) : 2 Luck 592 (DB).

25. Revision—[1] Deceased plaintiff's representatives held not necessary parties in application for setting aside *ex parte* decree—No revision lies (Vol 13) 1926 Pat 29 (30) (DB) * (Vol 22) 1935 Pat 121 (121) (DB).

26. Appeal—[1] Order of abatement falling strictly within the rule is not appealable, the only remedy being provided under O. 9. But where the propriety of the dismissal of the suit on the ground of abatement itself is questioned an appeal will lie. (Vol 4) 1917 Mad 285 (286) (DB) * (Vol 22) 1935 Pat 121 (121) (DB) (No revision lies.) * (Vol 18) 1931 Pat 553 (553) : 10 Pat 471 (DB).

[See however (Vol 27) 1940 Sind 137 (138) (DB). (Although an order under R. 4 may amount to a decree and therefore be appealable, yet R. 9 provides a concurrent remedy of which the party aggrieved may avail himself).]

[2] Where on abatement of a suit so far as the deceased is concerned, the Court dismissed the whole suit an appeal would lie. (Vol 25) 1938 Cal 639 (640).

[3] No appeal lies from an order bringing in certain persons as legal representatives of a deceased defendant. (Vol 12) 1925 All 431 (432) : 47 All 741 (DB).

[4] An order bringing in legal representatives of a deceased defendant is not appealable under the ~~Section~~ Patent of Allahabad and Nagpur High Court.

(Vol 24) 1937 All 192 (194) : ILR (1937) All 881 (DB) * (Vol 26) 1939 Nag 39 (40) : ILR (1940) Nag 324 (DB).

ORDER 22 RULE 5—Synopsis.

1. Scope.
2. "Shall be determined."
3. By the Court.
4. Objection as to the representative character.
5. Effect of order under this rule.
6. Suit to establish title as legal representative.
7. Appeal.

1. **Scope.**—[1] Where a dispute as to who is the legal representative arises it is the duty of the Court under this rule to decide it. Question must be decided in suit itself and cannot be postponed to execution proceedings. (Vol. 30) 1943 Nag 233 (235-236) : ILR (1943) Nag 352 * (Vol 5) 1918 Bom 175 (176) : 42 Bom 535 (DB) * (Vol 5) 1918 Bom 100 (101) : 43 Bom 168 (DB). (Even though it might have primarily passed an order bringing some person on record as legal representative) * (Vol 6) 1919 Mad 971 (971) (DB) * (Vol 8) 1921 Nag 23 (25) : 17 Nag LR 45 * (Vol 26) 1939 Pat 117 (118).

[2] The decision of the dispute as to who is the legal representative should be limited for the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property. ('03) 27 Bom 162 (169).

[3] The rule does not apply to execution proceedings as O. 22, Rr. 3 and 4 on which R 5 is dependent do not apply to execution proceedings. (Vol 29) 1942 Bom 309 (310) : ILR (1942) Bom 822 * (Vol 20) 1933 Bom 396 (397) : 57 Bom 631 (DB).

2. **"Shall be determined."**—[1] The rule makes it obligatory on the Court to come to a conclusion as to who is the legal representative according to the rights of the parties. (Vol 12) 1925 Mad 456 (457) * (1912) 16 Ind Cas 798 (799) (Mad) * (Vol 21) 1934 Oudh 337 (340) (DB).

[2] R. 5 is mandatory—Death of defendant before trial—Court substituting in place of deceased defendant his son and widow leaving question which of them was legal representatives of deceased for decision at time of trial—Procedure is illegal. (Vol 32) 1945 Oudh 289 (294) : 20 Luck 488 (DB).

[3] For the purpose of determining as to who is the legal representative in Court must hold an enquiry in which evidence may be adduced. (Vol 6) 1919 Mad 510 (512) : 42 Mad 76 (DB) * (Vol 12) 1925 Mad 456 (457) (DB). (Failure to take evidence will justify interference in revision) * (Vol 24) 1937 Pat 530 (531).

[4] Legal Representative, already on record—No steps taken to have him declared as such—Decision in case is not vitiated. (Vol 9) 1922 All 223 (226) : 44 All 407.

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action

No abatement by reason of death after hearing.

survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

[R. S. C., O. 17, R. 1, last portion.]

Objects and Reasons.

"The provision as to ante-dating the judgment has been struck out and in its stead we suggest a provision to the effect that the judgment shall have the same force and effect as if it had been pronounced before the death took place. In our opinion this is all that is required."—S. C. R.

O. 22 R. 5 (contd.)

3. By the Court.—[1] Under O. 22, R. 5, the Court to which a petition is presented for the bringing on record of the legal representatives should decide the question itself and an Appellate Court cannot call on the trial Court, to submit a finding though it can direct the latter to take evidence and submit it. (Vol 5) 1918 Mad 1103 (1107) (DB) * (Vol 9) 1922 Pat 197 (197) (DB).

4. Objection as to the representative character.—[1] Objection as to the representative character of a person appointed as legal representative must be taken at the earliest opportunity. (Vol 5) 1918 P C 156 (159) : 42 Mad 581 : 46 Ind App 64 (P C) * (Vol 20) 1933 Cal 325 (328) : 60 Cal 87 (DB) * (1903) 26 Mad 224 (228).

[2] When legal representative is appointed without notice to other side, in latter can at the hearing raise objection to the representative character of the person so appointed. (Vol 10) 1923 Mad 367 (367).

[3] The procedure under this rule must be followed not only when two or more persons claim in opposition to each other but also when the representative character of a person who alone claims is denied by the other side. (1895) 18 Mad 496 (497) * (1894) 17 Mad 209 (212).

5. Effect of order under this rule.—[1] An order under this rule will enable the person to represent the estate in the suit and will make an adjudication therein binding on the estate. (Vol 29) 1942 All 824 (826) : ILR (1942) All 448. (That deceased was Mohamedan does not effect position) * (Vol 29) 1942 All 358 (361) : ILR (1942) All 671 * (Vol 9) 1922 : Mad 457 (477) : 46 Mad 190 (FB). (Vol 10) 1923 Rang 114 (116) 4 Upp Bur Rule 150.

[2] An order under this rule is final to the extent and in the sense mentioned above. (Vol 27) 1940 Pat 516 (536) (DB). (Ex parte order is as much binding on parties as contested one) * (Vol 15) 1928 All 532 (533) : 50 All 857 (DB) * (Vol 26) 1939 Nag 147 (148, 149) : ILR (1939) Nag 165 (DB).

[3] The admission of a person as legal representative for purpose of prosecuting suit is not conclusive of his legal position if it is the subject-matter of the main issues in the suit. (Vol 10) 1923 Nag 209 (209) * ('06) 23 All 109 (111).

[4] Decision under R. 5 has not effect of conferring any right to heirship or to property. (Vol 28) 1941 Lah 142 (143).

6. Suit to establish title as legal representative.—[1] Decision under R. 5 does not operate as *res judicata* (Vol 28) 1941 Lah 142 (143) * (Vol 26) 1939 Lah 580 (581) * (Vol 24) 1937 Oudh 220 (222) : 13 Luck 20 (FB) (Vol 20) 1933 Oudh 207 : 8 Luck 477 Overruled). [But see (Vol 13) 1926 All 489 (489) : 48 All 422 (DB) (Re-adjudication of question under R. 5 is barred by *res judicata*).

7. Appeal.—[1] No appeal lies from an order under O. 22, R. 5 either as a decree or as an appealable order. (Vol 18) 1931 Lah 235 (236) * (Vol 2) 1915 All 158 (158) : 37 All 272 * (Vol 13) 1926 Lah 181 (181) * (Vol 5) 1918 Mad 1055 (1055) * (Vol 13) 1926 Mad 586 (591) : 49 Mad 450 (FB) * (Vol 3) 1916 Nag 89 (90) : 13 Nag LR 32 * (Vol 13) 1926 Oudh 158 (159).

ORDER 22 RULE 6—Synopsis.

1. Applicability and scope.

2. Death after the conclusion of the hearing

1. Applicability and scope.—[1] This rule embodies an exception to the principle that a Court cannot make a decree whether against or in favour of a deceased person. (Vol 26) 1939 Pat 534 (535) (DB) * (1911) 5 Sind LR 260 (263) * (Vol 16) 1929 Mad 802 (803) : 52 Mad 933 (DB).

[2] Rule is based on the principle that a judgment pronounced at any time after the conclusion of the hearing shall be construed to be operative as if it had been delivered on the day on which the hearing was closed. (Vol 20) 1933 All 111 (111, 112) * (1895) 19 Bom 807 (809) (DB) * (Vol 3) 1916 Lah 133 (133) : 1915 Pun Re No. 106 * (1903) 26 Mad 101 (102) (DB) * (Vol 4) 1917 Nag 99 (101) : 14 Nag LR 71.

[3] Mortgage suit—Arguments concluded—On date of delivery of judgment defendant mortgagor dying—Preliminary decree passed next day—Decree is good against defendant. (Vol 27) 1940 Bom 818 (819) : ILR (1940) Bom 689.

[4] This rule applies to execution proceedings. (Vol 29) 1942 Mad 608 (609).

[5] Defendant dying after hearing but representative brought on record before decree—Legal representative under a legal disability and no guardian or next friend appointed to act for him—Decree is a nullity as against him—Rule cannot be invoked to validate it. (Vol 11) 1924 All 892 (893) : 46 All 744.

[6] An award made after the death of a party, who lived at the time of arguments before arbitrator, is valid. (1910) 14 Cal WN 759 (764).

[7] It is immaterial whether death is or is not brought to notice of Court. (Vol 5) 1918 Upp Bur 9 (10) : 3 Upp Bur Rul 46.

2. Death after the conclusion of the hearing.

—[1] The completion of hearing contemplated by this rule is such a hearing as is provided for by O. 18, and includes hearing of arguments. (Vol 4) 1917 Nag 99 (101) : 14 Nag LR 71. (1909) 11 Bom LR 1070 (1073) * (Vol 6) 1919 Mad 685 (689). (Arguments partly heard).

[2] Hearing of case cannot be said to be concluded where anything remains to be done or furnished by either party as a basis for the consideration which is to end in judgment. (Vol 4) 1917 Nag 99 (101) : 14 Nag LR 71.

[3] An appellant dying on day fixed for hearing of appeal but before the hearing—Held, Legal representatives not bound by decree—Appeal must be re-heard,

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

[1882-S. 369.]

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain, for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

[1882-S. 370; 1877 S. 370; 1859 S. 106.]

O. 22 R. 6 (contd.)

(Vol 7) 1920 Oudh 57 (58) * (1920) 2 Lah LJ 144 (145).

[But see (1909) 33 Mad 167 (169) (DB). (Nothing on record to show fact and time of death.)]

[4] Execution of decree can be objected to on the ground that the judgment-debtor was dead at the time of passing final decree in a mortgage suit, though he was alive at the time of the preliminary decree. (Vol 6) 1919 Pat 430 (432); 4 Pat L Jour 240 (FB).

[But see (Vol 14) 1927 Oudh 561 (561)].

ORDER 22, RULE 8—Synopsis.

1. Scope and applicability.
2. Applicability of the rule to appeals.
3. Suit instituted after adjudication.
4. Insolvency must be existing.
5. Security for costs.
6. Appeal.
7. Limitation.

1. **Scope and applicability.**—[1] This rule applies where the plaintiff in a pending suit becomes insolvent. (Vol 21) 1934 All 1011 (1012) (DB) * (Insolvency before suit—Rule does not apply) * (Vol 24) 1937 Mad 915 (917).

[2] When a plaintiff becomes insolvent the official Receiver alone and not the insolvent can continue the suit. (1928) 109 Ind Cas 589 (589) (Mad).

[3] Insolvency of plaintiff pending suit—Court should not straightaway dismiss suit—Notice to Official Receiver is necessary. (Vol 7) 1920 Mad 736 (737) * (Vol 14) 1927 Cal 76 (77, 78); 53 Cal 844.

[4] Where the receiver declines to continue the suit or appeal or to give security the suit or appeal will abate even without an application for dismissal by the other side. (Vol 28) 1941 Bom 293 (293); ILR (1941) Bom 603.

[5] Guardian adjudicated insolvent is not debarred from acting as guardian. (Vol 17) 1930 Lah 205 (205).

[6] Where a plaintiff after instituting a suit in forma

pauperis is adjudicated an insolvent the receiver in insolvency can continue the suit in the same way as the insolvent. (Vol 5) 1918 All 177 (177).

[7] On plaintiff's adjudication as insolvent the Court should fix a time within which Assignee may decline to continue suit or give security for costs. On the expiration of that period the defendant may apply for dismissal of suit and then the Court may dismiss the suit. (1892) 16 Bom 404 (406).

2. Applicability of the rule to appeals.—

[1] The provisions of the rule apply to appeals. (Vol 28) 1941 Bom 293 (293); ILR (1941) Bom 603 * (Vol 20) 1933 All 388 (389); 55 All 509 (DB) * (Vol 15) 1928 Lah 596 (597); 10 Lah 208.

3. **Suit instituted after adjudication.**—[1] Adjudicated insolvent cannot sue to recover debts vested in receiver nor can receiver continue such suit under O. 22, R. 8. (Vol 1) 1914 Mad 395 (395).

[2] Plaintiff adjudicated pending suit—He cannot appeal against decree in suit. (Vol 13) 1926 Mad 1214 (1214).

[But see (Vol 16) 1929 Bom 202 (204) * (Vol 8) 1921 Mad 402 (402)].

4. **Insolvency must be existing.**—[1] The rule does not apply unless an adjudication has actually taken place. (Vol 16) 1929 Bom 202 (204) * (1900) 27 Cal 217 (219).

5. **Security for costs.**—[1] Order for furnishing security must be passed at the time of receiver electing to continue the suit and not afterwards. (Vol 14) 1927 Mad 511 (511, 512).

[2] Receiver must give security only for costs incurred upto time of electing to continue suit and for subsequent costs for which he is personally liable. (Vol 13) 1926 Bom 533 (534).

6. **Appeal.**—[1] An order under this rule is not appealable. (Vol 23) 1936 Lah 83 (84, 85).

7. **Limitation.**—[1] There is no limitation for the receiver to appear and apply on the adjudication of the plaintiff for being allowed to continue the suit. (Vol 9) 1922 All 361 (362); 43 All 621.

Effect of abatement
or dismissal.

9. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the ^a Indian Limitation Act, 1877, shall apply to applications under sub rule (2).

[1882—Ss 371, 372A; 1877—S. 371]

^a See now the Indian Limitation Act, 1908 [9 [IX] of 1908], ss 4 and 5.

ORDER 22 RULE 9

Synopsis

1. Scope and applicability.
2. "No fresh suit shall be brought on the same cause of action"
3. Setting aside abatement.
4. Who may apply under this rule.
5. Sufficient cause.
6. Formal order of abatement if necessary before setting aside abatement.
7. Substitution without setting aside abatement
8. Remand.
9. Appeal.
10. Letters patent appeal.
11. Revision.

1. Scope and applicability.—[1] Rule must be strictly construed. (Vol. 18) 1931 Lah 79 (80)=12 Lah 275 (DB).

[2] R 9 applies where no application to bring legal representative is made within time and not where abatement is ordered for other reasons (Vol. 7) 1920 Lah 8(9)=1 Lah 493 (DB).

[3] R 9(2) does not apply where abatement is due to cause of action not surviving—Such abatement order is decreed. (Vol. 3) 1916 Mad 1068 (1069) (DB). * (Vol. 12) 1925 Lah 208 (208)

[4] Income-tax Act (1922), S 66 (2)—Assessee dying pending reference—Proceedings do not abate—Heirs were allowed to be heard. (Vol. 17) 1930 Pat 81 (82, 80, 90): 9 Pat 240 (SB).

2. "No fresh suit shall be brought on the same cause of action".—[1] Facts constituting the infringement of right, and not those constituting the right itself, are 'cause of action' (1910) 5 Ind Cas 325 (329) (All).

[2] Abatement—No fresh suit can be brought on the same cause of action nor can plaintiff resist defendant's claim to enforce right under suit. (Vol. 20) 1933 Lah 752 (753) (DB) * (Vol. 24) 1937 Mad 101 (103).

(Suit to recover possession by benamidar for owner—Benamidar dying pending suit—No legal representative brought on record—Fresh suit by owner—Abatement of previous suit is bar to fresh suit on the same cause of action.) * (Vol. 15) 1928 Nag 220 (221).

(Fresh suit cannot be brought on the ground that in the former suit the Court acted under some other provision of law ignoring the abatement.)

[3] Rule does not bar fresh suit brought on dissimilar causes of action. (Vol. 20) 1933 Lah 109 (110)=14 Lah 380 (DB).

[4] Suit by alleged donor for cancellation of gift—Donor dying and suit abating.—Next suit by his legatee for possession against the alleged donees is not barred. (Vol. 16) 1929 All 806 (806, 307) (DB)

[5] Cause of action for ejectment of tenant is different from cause of action for recovery of rent—Abatement of suit for ejectment of tenant in arrears of rent for some years—Subsequent suit for recovery of rent for some years is not barred. (Vol. 24) 1937 Oudh 248 (248, 249)=13 Luck 199.

[6] Abatement of suit.—Bar of fresh suit applies when plaintiff in previous suit is same in subsequent suit. (Vol. 33) 1946 All 254 (256) (DB).

[7] Suit by reversioner to set aside alienation abated.—Fresh suit by another reversioner for same relief is not barred. (Vol. 28) 1941 Lah 169 (171) (DB). * (Vol. 18) 1931 Lah 299 followed * (Vol. 26) 1939 Lah 580 (581)

[See however (Vol. 28) 1941 Cal 847 (849, 851.) = ILR (1941) 1 Cal 137. Reversioners are legal representatives of widow plaintiff—Fresh suit by purchasers of reversioners' interest held barred—(Vol. 18) 1931 Lah 79= 12 Lah 275 (DB) dissented from].

[8] Death of plaintiff during pendency—Application for substitution by legal representative dismissed on objection by defendant that he was not entitled to represent deceased plaintiff—Suit by legal representative—Defendant is stopped from contending that O.22, R. 9 applied—(Vol. 6) 1919 Mad 572 (573) (DB).

[9] The dismissal of a suit for failure to deposit the costs of service of summons on the legal representatives will not bar a fresh suit. (1883) 9 Cal 163 (166) (DB).

[10] The abatement of a suit under this rule has not the same effect as *res judicata* and does not extinguish the right. (1904) 6 Bom L.R. 638 (639) (DB). (Suit abating—Plaintiff continuing in possession—He can plead possession as defence in suit against him). * (Vol. 30) 1943 All 99 (101).

[11] An order of abatement is a judgment and should be followed up by a decree and is appealable as such. If the legal representative of the deceased pff. does not seek to set aside the abate-

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ment, the order of abatement is conclusive of the deft's. rights to the property. (Vol. 7) 1920 Mad 550 (581) (DB) * (Vol. 20) 1933 Lah 752 (753) (DB)

3. Setting aside abatement.—[1] The remedy provided by Sub R. (3) applies where the suit has abated under Rule 3 or Rule 4. (Vol. 4) 1917 PC 156 (160, 161) = 45 Cal 94 = 44 Ind App. 218 = 1917 Pun Re No. 104. (PC).

[2] Order under R. 4 may be appealable—Still R. 9 provides concurrent remedy in respect of that order (Vol. 27) 1940 Sind 137 (138) (DB).

[3] Application meant to be under R. 4 cannot be treated as under R. 9 (2) as the two rules contemplate two separate proceedings. (Vol. 27) 1940 Pesh 39 (40) (DB).

[4] Abatement of appeal—If by some oversight the abatement is set aside formally without notice to the respondents, their objections, if any, must be heard when the appeal comes on for hearing. (Vol. 15) 1928 Mad 1148 (1149) (DB). * (Vol. 13) 1926 Lah 422 (422) (DB).

[See however (Vol. 3) 1916 Mad 180 (181) (DB). [Order setting aside abatement of appeal can be made without notice—It cannot be challenged before another Bench—even though the order be ex parte as the order does not require the issue of a notice—Proper remedy is review].

4. Who may apply under this rule.—[1] Application by legal representative, for substitution made within time and rejected—Legal representative cannot subsequently apply under this rule. (Vol. 5) 1921 Nag 23 (24) = 17 Nag L R 45.

[2] Where there are more plaintiffs or appellants than one, each one of them can make an application. (Vol. 13) 1926 Pat 276 (276) (DB).

[3] Where the heir of a deceased plaintiff or appellant neglects to be brought on record, the person obtaining letters of administration after abatement is entitled to apply for setting aside the abatement on showing cause to explain delay. (Vol. 29) 1942 Rang 15 (17) = 1941 Rang L R 371 (DB).

5. Sufficient cause.—[1] An applicant for setting aside an abatement must show that he had sufficient cause for not taking timely steps to continue the suits. (Vol. 3) 1916 Cal 285 (285, 286) (DB). * (Vol. 9) 1922 Cal 335 (337) = 49 Cal 62 (DB). (Vol. 20) 1933 Lah 356 (358) = 14 Lah 543 (DB).

(No reason for delay offered—Delay cannot be condoned). * (Vol. 20) 1933 Lah 556 (557) (DB). * (Vol. 13) 1926 Lah 234 (235) = 7 Lah 73 (DB). * (Vol. 6) 1919 Lah 425 (426) (DB). (Appellant being grossly negligent abatement was not set aside.)

(Illiteracy and distant residence of appellant are not sufficient grounds) * (Vol. 10) 1923 Lah 230 (232) (DB).

[2] Though, as a matter of practice, the applicant should state in the application that he was prevented by some sufficient cause from continuing the suit, it is not legally necessary to do so. All that is needed is that he should satisfy the Court that there was a sufficient cause. (Vol. 15) 1928 Lah 746 (747).

[3] The question as to what is sufficient cause depends upon the facts and circumstances of each case. The test to be adopted in determining it is

to see whether the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise or whether the negligence was culpable or the applicant had acted mala fide or irreparable injury would result to the other side by the granting of the application. In the former case the application must be granted in the latter, it must be dismissed. (Vol. 16) 1928 Mad 404 (406). * (Vol. 25) 1933 Bom 408 (409, 410) = ILR (1933) Bom 704 (DB).

(Death of opponent in Native State or foreign place—Difficulties in tracing legal representatives—Reasonable delay should be condoned. * (Vol. 20) 1933 Lah 765 (766)

(Death of sole appellant—Delay in filing application and affidavit on behalf of minor heirs of appellant—Time was extended and abatement set aside.) * (1926) 91 Ind Cas 560 (561) (Oudh).

The plaintiff serving at a place some 100 miles from the residence of the defendant; also there was no presiding judge in the Court for many months to take up the case—on these grounds abatement was set aside). * (Vol. 26) 1939 Pat 623 (624, 625) (DB).

(Conduct of the appeal left to a law agent, not residing in the village and not in touch with the village where respondent lived—the fact of his death came to his knowledge, several months afterwards—This was sufficient cause for setting aside abatement). * (Vol. 14) 1927 Pat 410 (410) (DB)

(Petition for setting aside abatement giving sufficient reasons for appellant's ignorance of respondent's death after service of notice. No particular reason why the fact of death should come to his knowledge before the time alleged order of abatement should be set aside). * (Vol. 20) 1933 Sindh 36 (37) = 26 Sind LR 105 (DB)

(Plaintiff Hindu alert in making inquiries—Defendants Mahomedans living at several places—Delay was excused and abatement was set aside).

[4] The legal representative of a deceased party may be added after time, if it appears that the Court had made an order allowing the parties on record to represent all the persons interested under O. I. R. 8 C. P. Code. (Vol. 6) 1919 Lah 147 (148) = 1919 Pun Re. No. 20 (DB).

[5] Where owing to the mistake of Court below in not entering the names of the legal representatives of a deceased deft. who had been added as such, the plff. filed an appeal with the name of the deft. on record though deceased, and the mistake was discovered nine months later. Held, that O. 22, C. P. C. does not apply to these circumstances. If they did apply the mistake being a bona fide one there would be sufficient ground for extending the period of limitation. (Vol. 7) 1920 Lah 508 (509).

[6] Plaintiff, appointed executor under will of deceased defendant, not applying under R. 4 through doubt and want of probate—Application to set aside abatement filed late, alleging delay due to hostile attitude of the testator's son—the application held to be barred and delay not sufficiently accounted for (Vol. 2) 1915 Mad 132 (133).

[7] Application for permission, to revive an appeal by the legal representatives of a deceased appellant, should be allowed, where a surviving appellant was prosecuting the appeal, and they were under the

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impression that it was not necessary for them to take any steps in the appeal before. (1909) 36 Cal 418 (421) (DB).

[8] Applicant, a Government servant, sending necessary papers to vakil 10 days before last day of limitation—Papers coming to vakil's knowledge only after rising of Court on last day of limitation. It not striking vakil to present them at Judge's private house—Circumstances were held to justify setting aside abatement. (Vol 10) 1323 All 44 (47) = 45 All 66 (DB).

[9] Number of parties very large—Death of some of them—Appeal pending long and no negligence in application for substitution of legal representatives—Delay excused. (Vol 23) 1936 Lah 710 (711)

[10] Mere ignorance of law is not sufficient cause for failure to apply within time. (Vol 7) 1920 Lah 174 (174) (DB) * (Vol 20) 1933 Lah 356 (358) = 14 Lah 543 (DB).

(Ignorance that an application is necessary) * (1984) 147 Ind Cas 1187 (1188) (Lah) (DB). * (Vol 8) 1916 Lah 366 (367) = 1916 Pun Re No. 3 (DB)

(Ignorance of death must also be proved * (Vol 2) 1915 Lah 334 (336) (A careless mistake of law held to be no sufficient cause) * (12) 1912 Pun LR No. 204 Pages 653 (654). (DB)

[See however (Vol 15) 1928 Mad 404 (405). Suit, by minor through next friend, his mother, abating for bringing not legal representatives of a deceased defendant on record—Ignorance of law pleaded as excuse—Delay was excused and abatement set aside].

[11] Ignorance of law of a native state or foreign place (where deceased was domiciled) according to the law of which the legal representatives have to be brought on record may be sufficient cause (Vol 25) 1938 Bom. 408 (410) = ILR (1938) Bom 704.

[12] Minor - Ignorance of the change in the law is "sufficient" cause. (Vol 10) 1923 Bom 40 (40) (DB). * (Vol 10) 1923 Lah. 475 (475) (DB). (Wrong view of change in law is sufficient cause.

[13] Ordinarily a mere plea of ignorance of death of opposite party is not sufficient ground for setting aside an abatement. But there may be special circumstances which make the ignorance sufficient Cause. (35) 1935 Oudh W N 371 (372) (DB). * (Vol 12) 1934 Lah 1934 (934) (DB).

Plaintiff and defendant living 15 miles apart and related by marriage - Plaintiff dying after decision of suit - Defendants-appellants not bringing legal representative and abatement of appeal - Abatement cannot be set aside on ground of want of knowledge of plaintiff's death on part of defendant in these circumstances. (Vol. 9) 1922 Lah 61 (61) (DB). * (Vol. 10) 1923 Mad. 503 (504)

Justifiable ignorance of death is sufficient cause * (Vol. 28) 1941 Oudh 16 (17) = 15 Luck 580 (DB). * (40) 1940 Oudh W N 219 (222). * (Vol. 12) 1925 Oudh 806 (307).

Special circumstances which entitle the parties concerned to special indulgence must be proved * (Vol. 5) 1913 Oudh 804 (305) = 21 Oudh Cas 68. * (Vol. 12) 1925 Pat 123 (124) = 3 Pat 853.

Application made within time from date of knowledge of death—Delay excused. * (Vol. 11) 1924. Pat 126 (127) (DB).

Ignorance of death for a long time is not sufficient cause. (Vol. 11) 1924 Pat 607 (607) (DB).

Mere ignorance of the death for several months of the respondent is not sufficient ground. * (Vol. 4) 1917 Lah 10 (11) = 1916 Pun Re. No. 118 (DB).

[14] Ignorance of death of respondent in absence of negligence is sufficient cause to excuse delay in seeking to set aside abatement. (Vol. 25) 1938 Mad 218 (218, 219) = ILR (1938) Mad 275 (DB). (Vol. 19) 1932 All 459 (460) = 54. All 280 (DB). * (Vol. 24) 1937 Bom 401 (407) = ILR (1937) Bom 602 (DB).

Delay due to ignorance of appellant's agent who having regard to the numerous respondents, could not keep a more efficient watch on them, held to be excusable for a sufficient reason. The question as to the ignorance being due to carelessness or want of diligence is not adverted to. * (Vol. 22) 1935 Lah 478 (478) (DB). * (Vol. 20) 1933 Lah 916 (920) (DB). Application to bring on record legal representative filed four days beyond limitation, applicant not knowing date of deceased's death—Time was extended. (Vol. 6) 1919 Lah 319 (320, 321) (DB). (Vol. 2) 1915 Lah 395 (399) (DB) Application to set aside abatement—Applicant adopting culpable means for trying to conceal his neglect in finding out respondent's death—Application must be rejected.

[See (Vol. 25) 1938 Pat 125 (126) = 17 Pat 84 (DB). Appellant getting notice served on respondent—He is not thereafter bound to enquire from day to day whether he is dead or alive.]

[15] Mere statement of ignorance of death of principal respondent is not sufficient to set aside order of abatement of appeal particularly when they resided at no great distance and it was appellant's duty to keep informed (Vol. 1) 1914 Oudh 411 (411). (Vol. 2) 1915 Lah 382 (383) (DB). * (Vol. 13) 1926 Lah 137 (138) (DB).

[See (Vol. 11) 1924 Lah 461 (DB). Distant residence of parties is not sufficient cause].

[16] Ignorance of pardanashin lady's death in a different district is excusable where appellant is not guilty of laches—Appellant need not always be enquiring to see if respondent is dead. (Vol. 12) 1925 Pat, 162 (164) (DB). * (Vol. 11) 1924 Pat 319 (320) * (1934) 147 Ind. Cas 1187 (1188) (Lah) (DB). The mere fact that the applicant was a pardanashin lady will not excuse delay in applying to set aside abatement if her mukhtiar is an educated man. Vendor and two of his transferees respondents dying during pendency of appeal—Heir of the vendor, a minor and his guardian a pardanashin lady, living in Aligarh district, while the vendor died at Delhi—Want of knowledge of death held to be a sufficient excuse for delay of 9 days in application for setting aside abatement. (Vol. 21) 1934 Lah 998 (998) (DB).

[17] Where means of communication were scarce there is sufficient cause for justifying setting aside abatement under O. 22 R. 9. (Vol. 20) 1933 Lah 224 (225).

[18] If residence of deceased was not fixed there is sufficient cause. (Vol. 11) 1924 Lah 429 (429) = 5 Lah 70 (DB).

[19] Negligence of pleader is no ground for condoning delay though plaintiff was minor and next friend was a pardanashin lady. (Vol. 24) 1937 Nag 97 (98) = ILR (1937) Nag 507.

O. 22 R. 9 (*contd.*)

[See (Vol. 8) 1921 Mad 650 (651) (DB). Plead-er's mistake may be sufficient cause.]

[20] Appellant's legal representatives not brought on record—Agent's collusion with respondent held sufficient cause under R. 9 to set aside order of abatement. (Vol. 6) 1919 Cal 156 (157) (DB)

[21] Quarrel among legal representatives is no sufficient cause to excuse delay in applying to be brought on record as legal representative under O. 22 R. 9. (Vol. 8) 1916 Mad 869 (871) (DB)

[22] The fact that the legal representatives were minors who would not have obtained execution without obtaining a succession certificate is sufficient reason to excuse the delay. (Vol. 11) 1924 Oudh 83 (84)—26 Oudh Cas 244.

[23] The negligence or forgetfulness of the appellant's agent specially appointed to look after the appeal and to receive notices and information from the Vakil, is not a sufficient cause within O. 22 R. 9. (1910) 12 Cal L Jour 615 (617) (DB).

6. Formal order of abatement if necessary before setting aside abatement.—[1] In order to work abatement of a suit or appeal it is not necessary for the court to pass any formal order—Abatement can be set aside even though no such formal order has been passed (Vol. 13) 1926 All 217 (220)—48 All 834 (FB). [Overruling (Vol. 9) 1922 All 209 (210)—44 All 459.] (Vol. 17) 1930 All 379 (380)* (Vol. 24) 1937 Bom 401 (406)=ILR (1937) Bom 602 (DB). *(Vol. 26) 1939 Lah 572 (577)=ILR (1940) Lah 199 (DB). [Application under O. 22 R. 9. made before declaration that suit has abated is not incompetent]

[2] One of the defendants in a suit died and the legal representatives were not brought on record in time—The court passed an order that the suit abated as against him and also decided at the same time that this partial abatement resulted in total abatement of suit—Held that though that portion of the order which decided that the suit had abated *in toto* may be a decree, the order declaring the partial abatement was one which could be set aside on an application under O. 22, R. 9 (Vol. 14) 1927 Lah 865 (865)

7. Substitution without setting aside abatement.—[1] An application for substitution of legal representatives is not competent unless the order of abatement has been set aside. (Vol. 10) 1923 Pat 417 (418)—2 Pat 168 (DB). * (Vol. 23) 1936 Pat 266 (266) (DB).

[2] Even when a representative is on record application to set aside an order of abatement must be made. (Vol. 8) 1916 Cal 690 (691) (DB).

[3] Death of a defendant after the preliminary decree—Abatement caused by such death not properly set aside—The heirs of such deceased mentioned in the application for final decree—Final decree is invalid against the heirs when they do not appear and contest the decree—Heirs cannot impeach such decrees in execution proceedings (Vol. 14) 1927 Bom 156 (157) (DB).

[4] An application for substitution may, in substance, be treated as an application to set aside the abatement. (Vol. 7) 1920 All 284 (285)=42 All 540. * (Vol. 24) 1937 Lah 455 (456, 457) (DB). *(Vol. 11) 1924 Lah 424 (424).

[5] Suit for possession before 1908—Decree, as contemplated by O 20, R. 12, in 1918—Death of defendant in 1920—Application for substitution more than six months later—Application not stating time of death, nor particulars entitling extension of time—Held that mesne profits were to be ascertained in suit and not in execution proceedings—That application for substitution could not be treated as one for setting aside abatement. (Vol. 17) 1930 Cal 422 (424)—57 Cal 148 (DB).

8. Remand.—[1] Appellate Court finding that there was an abatement in lower court—It should remand the case for disposal and not set aside the abatement. (Vol. 12) 1925 Bom 290 (291) (DB).

[2] Wrong persons substituted as legal representatives in appeal within time—Case remanded for fresh decision—Order of remand not nullity—Application to bring true representatives on record made after remand—Final decree not passed—Application should be granted. (Vol. 15) 1928 Pat 197 (198) (DB).

9. Appeal.—[1] Order setting aside abatement is not appealable and cannot be questioned in an appeal from the decree. (Vol. 12) 1925 Cal 473 (474) (DB). * (Vol. 13) 1926 Cal 444 (445) (DB) Order setting aside abatement without considering the limitation for making application for setting aside is bad (Vol. 11) 1924 Cal 638 (634)—51 Cal 690 (DB). Substitution of heirs allowed, after period of limitation, without objection cannot be set aside by the appellate court. * (Vol. 11) 1924 Mad 713 (714) (DB).

[2] Appeal lies from order refusing to set aside abatement of appeal. (Vol. 28) 1941 Mad 51 (52). * (Vol. 21) 1934 Lah 315 (315) * (Vol. 26) 1939 Pat 623 (624) (DB). * (Vol. 25) 1938 Pat 125 (126)=17 Pat 84 (DB).

[But see (Vol. 16) 1929 Cal 532 (533) (DB).]

[3] Order of abatement—Delay in making application to set it aside—Court can condone delay—Discretion so exercised is open to scrutiny by Appellate Court only if it is exercised in perverse or unjudicial manner—Order otherwise proper is not illegal merely because application to bring legal representative on record is submitted beyond time. (Vol. 22) 1935 Lah 712 (713) (DB).

10. Letters Patent appeal.—[1] Order setting aside abatement is not appealable—Such order does not amount to judgment under Cl. 15, Letters Patent, but is merely one of procedure (Per Beaumont C. J.) (Vol. 25) 1938 Bom 408 (409)=ILR (1938) Bom 704 (DB).

[But see (Vol. 9) 1922 Cal 335 (337)=49 Cal 62 (DB).]

11. Revision.—[1] Cause found sufficient—Setting aside abatement is discretionary—No revision lies (Vol. 20) 1933 Pat 27 (28) *(Vol. 20) 1933 Nag 85 (86, 87)=29 Nag LR 118 No revision lies if discretion exercised by trial Court be within its jurisdiction.

[2] Though technically an order seems to come under Rule 9 and though the order is not appealable still where the Court has no jurisdiction to pass an order under R. 9 the order will be set aside in revision. (Vol. 11) 1924 Mad 718 (715).

Procedure in case of assignment before final order in suit.

10. (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

[1882—S. 372; 1877—S. 372 See S 146.]

ORDER 22, RULE 10

Synopsis

1. Scope and applicability of the rule.
2. Other cases of assignment, creation or devolution of interest pending suit.
3. Assignment of interest.
4. "Interest."
5. "Attachment of a decree."
6. Appeal from interlocutory order.
7. Transfer of decree.
8. Creation of interest.
9. Devolution of interest.
10. Insolvency of defendant.
11. "During the pendency of a suit."
12. Application under this rule, when to be made.
13. Execution proceedings.
14. Laches.
15. No new suit.
16. "By leave of the Court."
17. Effect of adding new parties.
18. Appeal.
19. Letters Patent Appeal.
20. Limitation.

1. Scope and applicability of the rule.—

[1] The rule is an enabling one and is based on the principle that the trial of a suit cannot be arrested merely by reason of a devolution of the interest of a party. (Vol. 29) 1942 Rang 13 (14) - 1941 Rang L R 366. * (Vol. 33) 1946 Lah 33 (35) (DB) * ('05) 28 Mad 157 (160) (DB).

[2] If the person acquiring interest does not choose to continue it, he will be bound by the decree passed in the suit. (Vol. 29) 1942 Rang 13 (14): 1941 Rang L R 366 * (Vol. 22) 1935 Pat 488 (489): 15 Pat 64 (DB) * (Vol. 28) 1941 Oudh 495 (496) * (Vol. 2) 1915 Cal 103 (105) (DB) * (Vol. 25) 1938 Cal 481 (485) (DB) * (Vol. 23) 1936 Pat 420 (422): 15 Pat 607 * (Vol. 24) 1937 Mad 915 (917) (DB) * (Vol. 26) 1939 PC 170 (173): I L R (1939) Bom 503: I L R (1939) Kar 295: 66 Ind App 210. (PC)

[3] The rule applies to appeals in cases where the devolution takes place pending appeal. ('96) 18 All 285 (287). * (Vol. 21) 1934 All 442 (444) (DB) * (1900) 22 All 281 (282, 283) (DB)

[4] The rule also applies to second appeals. (Vol. 25) 1938 Mad 757 (758)

[5] The rule applies equally to cases of devolution of the interest of the plaintiff or of the defendant and to the case of appellants as well as to that of respondents. (Vol. 2) 1915 Cal 771 (772) (DB) * ('96) 18 All 285 (287). * (Vol. 31) 1944 Mad 165 (166) * (Vol. 33) 1946 Lah 203 (204)

[6] The assignment, creation or devolution of interest must be by a party to the suit and not a stranger. (Vol. 3) 1916 Mad 523 (524): 39 Mad 488 (DB). (A widow of the deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit). * (Vol. 12) 1925 Mad 487 (488) - (Vol. 12) 1925 Mad 1166 (1166) (Assignee from heir of plaintiff who was not brought on record cannot apply. (Vol. 23) 1936 Pat 123 (125): 15 Pat 82 (DB) (Do)

(See also (Vol. 23) 1936 Lah. 83 (84))

[7] The rule is a residuary one governing cases which are not provided for by the previous rules of the order. (Vol. 30) 1943 Oudh 24 (25) (DB) * (Vol. 23) 1936 Lah. 652 (656): I. L. R. (1937) Lah 525 (DB) * (Vol. 28) 1941 Oudh 495 (496) (Vol. 10) 1923 Mad 237 (237): 45 Mad 872 (DB) (Overruled in (Vol. 15) 1928 Mad 914: 51 Mad. 701 (FB) on another point.) * (Vol. 12) 1925 Mad 1166 (1167) * (Vol. 14) 1927 All 272 (272): 49 All 310 (DB) * (Vol. 21) 1934 Lah. 190 (190) (DB).

[But see (Vol. 11) 1924 Cal. 90 (91) (DB).]

[8] Two devolutions—one by the death of a party and the other by a transfer of his interest, prior to his death transferee has the right to be impleaded under this rule. (Vol. 12) 1925 Cal. 467 (468) (DB) * (Vol. 31) 1944 Lah. 397 (398) (DB). (Court of wards taking over property of defendant can be impleaded).

[9] The successor-in-interest of the party and not the opposite party can apply under this rule (Vol. 28) 1941 Oudh 495 (496).

2. Other cases of assignment, creation or devolution of interest pending suit.—[1] The words "other cases," etc., mean cases other than those specifically provided for in the preceding rules.

('05) 9 Cal W N 171 (173). * (Vol. 23) 1936 Lah 83 (84)

[But see (Vol. 32) 1945 Oudh. 60 (61). (The rule does not apply to cases of devolution by death)]

[2] As to illustration of "other cases of assignment, creation or devolution" see the following cases;

(Vol. 8) 1921 Mad 599 (603): 44 Mad 919 (FB) (Transfer *inter vivos* (Vol. 14) 1927 Lah 501 (504) (DB) (Do) * (Vol. 17) 1930 Pat 145 (146): 8 Pat 900 (Mortgagee party releasing property to mortgagor) * (Vol. 13) 1926 All 285 (286) (Suit against widow for debt of husband-posthumous son can be brought on record) * (Vol. 13) 1926 All 585 (586) (Railway, a party taken over by Government—Government made a party) * (Vol. 13) 1926 Nag 303 (303) (No "assignment" in case of company going into liquidation).

O. 22 R. 10 (*contd.*)

[3] The "interest" referred to is the interest of a person who was a party to the suit, and it is the transfer of the interest of such a person to the applicant that entitles him to continue the suit under this rule. (Vol. 9) 1922 P C 304 (307) : 1 Pat 581 : 49 Ind App 220 (PC) (Reversing) (Vol. 3) 1916 Pat 118 : 1 Pat L Jour (96) * (Vol. 23) 1936 Lah 652 (656) : LLR (1937) Lah 525 (DB).

[4] A person who has a merely contingent interest cannot come in under this rule. (Vol. 27) 1940 Mad 918 (319) (DB) (Vol. 24) 1937 Mad 200 (207).

[5] The creditors of an insolvent cannot file an appeal which the Official Receiver has failed to file. (Vol. 28) 1941 Mad 577 (578).

3. Assignment of Interest.—[1] It is not necessary that the transfer of an interest under this rule should be direct. (Vol. 1) 1914 Cal 60 (63) (DB) * (Vol. 9) 1922 Oudh 289 (290) : 25 Oudh Cas 319 (DB) * (Vol. 33) 1946 Nag 164 (165) = I L R (1946) Nag 43.

[2] Assignment, pending suit, of the benefit which the plaintiff may obtain under the decree—Assignee cannot be brought on record under this rule. (Vol. 26) 1941 Mad 389 (390) (DB). * (Vol. 11) 1924 P C 162 : 48 Mad 230 : 52 Ind App 1 (PC) (followed).

4. Interest.—[1] A right to maintain a suit is "interest". (Vol. 15) 1928 Mad 246 (246) (DB)

[2] A right to recover mesne profits given by a decree is "interest" (Vol. 26) 1941 Oudh 263 (266) (DB).

[3] The interest must be an interest in the subject matter of the suit. (08) 81 Mad 464 (466) (DB). * (1904) 30 Cal 951 followed * (Vol. 24) 1937 Mad 200 (207) (Vol. 23) 1936 Sind 166 (168) : 30 Sind L. R. 170 (DB).

[4] The interest must be one which is vitally affected by the suit. (Vol. 5) 1918 Pat 606 (606) (DB).

[5] The word "interest" includes also a portion of the interest. (Vol. 28) 1941 Mad 245 (245, 246) (DB). * (Vol. 6) 1919 Mad 755 : 41 Mad 510 held not overruled by (Vol. 9) 1922 P C 304 = 1 Pat 531 = 49 Ind App 220 (PC) * (Vol. 8) 1921 Mad 599 (600, 603, 605) : 44 Mad 919 (FB).

[But see (Vol. 21) 1934 Mad 485 (488, 489)].

[A] Where after a decree for money against a company it has assigned all its properties with liabilities, the assignee cannot be proceeded against as no property in suit has been assigned to him (08) 30 Cal 961 (964) (D. B)

[E] In a suit on mere money claim the insolvency of defendant creates no assignment of interest within the meaning of this rule. (95) 22 Cal 259 (265).

[C] Suit by widow for partition of widow's estate—The widow dying, no devolution of interest in the suit on the adopted son. (Vol. 12) 1925 Nag 423 (426) (DB).

5. "Attachment of a Decree."—[1] Attachment of a decree not pending an appeal is not an interest. (Vol. 23) 1936 All 857 (858) (DB).

[2] The benefit indicated in sub-r. (2) is the right to oppose or support the pending appeal. * (Vol. 25) 1938 Mad 757 (758).

6. Appeal from Interlocutory Order.—[1]

Suit pending—Appeal filed from an interlocutory order—Court of first instance still has jurisdiction to implead parties under this rule. (Vol. 10) 1928 Bom 303 (303) (DB)

7. Transfer of Decree.—[1] This rule does not apply to the transfer of a decree. (Vol. 25) 1938 Cal 169 (171) : I L R (1937) 2 Cal 207.

[See however (Vol. 27) 1940 Pat 259 (261) (DB).]

8. Creation of Interest.—[1] A person who has attached property is not entitled to be impleaded in a mortgage suit regarding the attached properties. (Vol. 13) 1926 Nag 67 (68) (DB).

[2] An adoption does not create an interest within the meaning of this rule. (Vol. 15) 1918 Nag 1 (6) : 15 Nag L R 24 (DB).

[3] This rule applies to a person acquiring the rights of a mortgagee on the principle of subrogation. (Vol. 26) 1939 Nag 215 (216) (DB).

[4] The accrual of exclusive title under a partition decree amounts to the "creation" of an interest in the property. (Vol. 27) 1940 Mad 876 (878).

9. Devolution of Interest.—[1] Suit by or against a person in representative character—devolution of the representative interest—Rule 10, and not R. 3 or R. 4, applies whether such devolution is by virtue of the death of the person or for any other cause. (Vol. 19) 1932 Cal 783 (784) (DB). (Vol. 9) 1922 Mad 402 [403] : 45 Mad 703 (DB). (Vol. 20) 1933 Cal 829 (832) : 60 Cal 794 (DB).

[2] Where a new trustee is appointed in the place of a trustee, the estate "devolves" on the former. (Vol. 13) 1926 Mad 540 (541) (where former trustee dies or retires) * (Vol. 15) 1928 Cal 651 (652) (DB) (Former trustee removed) * (Vol. 11) 1924 Mad 615 (615). Fact that original trustee was wrongly appointed is immaterial.

[3] The following are illustrations of devolution of interest :

[a] One of four uralans of a Malabar devaswam sued for redemption of a kanom. The other uralans had been made party defendants. One of the latter three died pending suit. It was held it was a case of devolution under this rule. (Vol. 17) 1930 Mad 881 (883) : 53 Mad 790 (DB).

[b] The manager of an undivided Mitakshara family files a suit as manager of the family and dies pending suit. The succeeding manager can come in under this rule. (96) 23 Cal 912 (913).

[c] When the Court of Wards assumes the management of the estate of a party to a suit during the pendency of the suit, there is a devolution of interest. (Vol. 22) 1935 Oudh 486 (487) (DB).

[See (Vol. 25) 1938 PC 49 (52) : 65 Ind App 57 : 17 Pat 1 : 32 Sind L R 290 (PC). (In this case the Privy Council observed that it was arguable whether Rule 10 will apply to such case but did not express any definite opinion on the point.)]

[d] Joint family Karta dying—Coparceners should be impleaded. (Vol. 32) 1945 Oudh 60 (61).

[4] In cases of devolution other than by death if the person on whom the estate devolves does not bring himself on record, the decree passed in the suit will be binding on him. (Vol. 8) 1921 Cal 422 (423) (DB). (Vol. 15) 1928 Mad 246 (246) (DB).

[5] Where the cause of action is purely a personal one there can be no devolution of interest.

O. 22 R. 10 (*contd.*)

(Vol. 21) 1934 Pesh 89 (30) (DB). * ('12) 40 Cal 323 (323) (DB).

[See (Vol. 27) 1940 Cal 383 (385) (DB).]

[6] An adoption creates no devolution of interest within the meaning of this rule. (Vol. 5) 1918 Nag 1 (6) : 15 Nag L R 24 (DB).

10. **Insolvency of defendant.**—[1] Whether, on the adjudication of a defendant pending suit, the receiver in insolvency can come in under this rule will depend upon the "interest" involved in the suit. ('02) 25 Mad 406 (413, 421, 423) (DB).

[2] Where the suit is in personam, such as for instance a mere money suit, no interest devolves on the receiver or assignee. ('95) 22 Cal 259 (266) * (Vol. 1) 1914 Sind 114 (114) : 8 Sind L R 325 * (Vol. 20) 1933 Nag 6 (2) : 28 Nag L R 340. * ('02) 25 Mad 406 (421) (DB) (Vol. 22) 1935 Rang 439 (445).

[3] Where the suit relates to the "estate," such as a suit to enforce a mortgage, the receiver or assignee should be impleaded. (Vol. 14) 1927 PC 108 (103) : 54 Cal 595 : 54 Ind App 190 (PC).

[4] If in above cases the receiver or assignee refuses to defend the suit the insolvent cannot on that ground defend it. (Vol. 2) 1915 Bom 298 (299) : 39 Bom 568.

[5] If the suit can go on without the insolvent defendant, the receiver need not be made a party (Vol. 17) 1930 Cal 383 (390) (DB).

[6] Adjudication of an insolvent during the pendency of a suit for maintenance against him—Decree passed declaring maintenance charge on the property. The insolvent can file an appeal against the decree. (Vol. 24) 1937 Mad 915 (917) (DB).

11. **"During the pendency of a suit."** [1] The rule does not apply if the assignment of interest takes place before the suit is instituted. (Vol. 15) 1928 All 120 (123) (DB). * ('10) 12 Cal. Jour 545 (547) (DB) * (Vol. 11) 1924 Mad 648 (649) (DB). * (Vol. 24) 1937 Sind 47 (48) (DB).

[2] The rule applies to cases of assignment of interest, after the preliminary and before final decree. ['01] 23 All 331 (334, 335, 338) (DB). (Vol. 11) 1924 Cal. 188 (189) (DB) * (Vol. 24) 1937 Lah. 616 (616) (DB). (Vol. 29) 1942 Pat 340 (340, 341) (DB) (Death after preliminary decree—O 22 R. 3 and 4 do not apply). (Vol. 27) 1940 Pat (259 261) (DB) (Do) (Vol. 16) 1929 Nag 142 (144) (FB) (Do)

[3] Assignment of the rights of the plaintiff after a final decree in a mortgage suit although before sale under the decree is not an assignment during the "pendency of the suit." [Vol. 25] 1938 Cal 169 (170) : I. L. R. (1937) 2 Cal 207.

[4] Addition of a party to the suit after decree cannot be made under this rule. (Vol. 6) 1919 Mad 755 (756) : 41 Mad 510 (DB) : (Vol. 1) 1914 P. C. 129 (131) : 42 Cal. 72 : 41 Ind App 251 (PC). (It is doubtful whether this rule applies after final decree) (Vol. 24) 1937 Cal. 336 (337).

[5] The rule does not to apply to cases of assignment of interest between the date of the decree and the date of the filing of the appeal. (Vol. 29) 1942 Rang 13 (14) : 1941 Rang L. R. 366 * (Vol. 29) 1942 Rang 15 (17) : 1941 Rang L. R. 371 (DB) * (Vol. 22) 1935 Lah. 119 (120).

[6] The assignee of interest can be joined in the

appeal under S. 146 (Vol. 4) 1917 Oudh 176 (174) : 20 Oudh Cas 31 (DB). (Under S. 146) (Vol. 38) 1946 Lah 33 (34). [But see (Vol. 22) 1935 Lah. 119 (120) (DB)]

12. **Application under this rule, when to be made :**

[1] An application under the rule can be made at any time when the suit is pending (Vol. 17), 1930 Cal 267 (269) (DB). * (Vol. 2) 1915 All 88 (88) 37 All 226 (DB) ('07) 30 Cal. 609 [611]. (Vol. 3) 1916 Pat 10 (11) (DB)

[2] An application under this rule cannot be made after the final decree. (Vol. 6) 1919 Mad 755 (756) : 41 Mad 510 (DB) (Vol. 13) 1926 Bom 406 (406) (DB) (Vol. 18) 1931 Cal. 51 (51) : 57 Cal 1143 (Vol. 5) 1918 Mad 409 (410) (DB) (Vol. 13) 1926 Mad 244 (245) (DB).

[3] The fact that the assignee made no application when the suit was pending will not deprive him from filing an appeal as a person claiming under the party within the meaning of s. 146. (Vol. 28) 1941 Mad 245 (245, 246) (DB) * (Vol. 6) 1919 Mad 755 (756) : 41 Mad 510 (DB).

[4] Assignment pending the suit in the trial Court will not enable the assignee to apply to continue an appeal or second appeal. (Vol. 28) 1941 Oudh 495 (495, 496) * (Vol. 27) 1940 Mad 876 (877, 878) (Vol. 27) 1940 Pat 177 (179). (Vol. 21) 1934 All 442 (444) (DB).

[But see (Vol. 25) 1938 Mad 757 (758) * (Vol. 11) 1924 Cal 90 (91) (DB) (Vol. 31) 1944 Nag 137 (139, 140) = I L R (1944) Nag 520.]

[5] Plaintiff alleging transfer of her interest to two of the defendants and praying for striking off of her name—Court ordering parties to continue without entering into merits of plaintiff's application—Court also finding that there was such transfer of interest—The defendants can join in plaintiff's appeal against decree though there was no formal order substituting them as plaintiffs. (Vol. 32) 1945 Bom 69 (73).

13. **Execution proceedings.** [1] The following views have been expressed as to whether the rule applies to execution proceedings:—[1] The rule does not apply to execution proceedings ('88) 10 All 97 (106) (DB). * (Vol. 19) 1932 Cal 423 (425) (DB) (Applicability of rule to execution proceedings doubted).

[2] The rule applies to execution proceedings. (Vol. 29) 1942 Bom 82 (84) : I. L. R. (1941) Bom 629 (DB). (Vol. 8) 1921 Mad 599 (601, 603) : 44 Mad 919 (FB) [Explained away in (Vol. 14) 1927 Mad 824 (824) which held that it does not apply] ('11) 39 Cal 220 (DB).

[3] A person on whom the interest of a party has devolved during execution proceedings can be added as a party under this rule or in the exercise of inherent power. (Vol. 27) 1940 Pat 615 (515, 616) (DB) (1897) 24 Cal 62 (FB) relied on : (Vol. 9) 1922 P. C. 304 : 1 Pat 581 : 49 Ind App 220 (PC) explained. (1892) 19 Cal 683 : 19 Ind App 166 (PC) referred].

[See however (Vol. 8) 1921 Pat 180 (181) (DB).]

14. **Laches.**—[1] Delay or laches is a ground for refusing permission under this rule. (Vol. 11) 1924 Cal 188 (189) (DB). * (Vol. 20) 1933 Cal 696 (699) : 60 Cal 940 (DB). * (Vol. 12) 1925 Lah 574 (575). * (Vol. 5) 1918 Pat 606 (606) (DB).

15. **No new suit.**—[1] No final decree has been passed. The assignee can carry on the suit, and

Application of Order
to appeals

11. In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

[1882—S. 582]

PROVINCIAL AMENDMENTS.

CALCUTTA

Add the following :

"Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased, under O. 41 R 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party."

[25.7.1928.]

O- 22 R. 10 (*contd.*)

cannot file a new suit for the same relief. ('79) 5 Cal 726 (731) (DB).

[2] Assignee added in a pending suit—suit merely continues as against him and does not become a new suit. ('01) 23 All 331 (335) (DF).

16 By leave of the Court.—[1] The granting of the leave is discretionary with the Court. (Vol. 29) 1942 Bom 82 (84) : I L R (1941) Bom 629 (DB) * (Vol. 27) 1940 Cal 383 (385) (DB) * (Vol. 21) 1934 Mad 387 (342) : 57 Mad 892 (DB) * (Vol. 15) 1928 Mad 607 (608) (DB) * (Vol. 11) 1924 Cal 188 (189, 190) (DR) (Vol. 2^o) 1936 Pat 420 (422) : 15 Pat 607 (DR) (Vol. 22) 1935 Mad 423 (428) * (Vol. 31) 1944 Nag 187 (139) = I L R (1944) Nag 520.

[2] Unnecessary delay on the part of the applicant is a good ground for refusing leave. (Vol. 23) 1936 Lah 652 (657) : I L R (1937) Lah 525 (DB).

[3] The assignee has the option of either getting impleaded or keeping quiet. (Vol. 31) 1944 Nag 137 (141) : I L R 1944 Nag 520 (No unnecessary delay—leave should not be refused. * (Vol. 29) 1942 Rang 13 (14) : 1941 Rang L R 366 * (Vol. 17) 1930 All 380 (381) (DB).

[4] The leave should not be given without notice to the party concerned. ('13) 17 Cal W N 862 (868) (DB).

[5] Leave should not be refused merely because the assignment is challenged. (Vol. 2) 1915 Cal 771 (773) (DR) * (Vol. 6) 1919 Cal 323 (323, 324) (DB) (Vol. 12) 1925 Oudh 143 (143) (Vol. 13) 1926 Cal 173 (174) (Court should decide validity of assignment : (Vol. 21) 1934 Mad 337 (342, 344) : 57 Mad 892 (DB) (Do) (Vol. 31) 1944 Nag 137 (140) 141) = I L R (1944) Nag 520.

[6] Where in addition to the assignment being disputed, there was long delay in making the application, leave was refused. (Vol. 12) 1925 Lah 574 (575).

17. Effect of adding new parties.—[1] An assignee is entitled to continue the further proceedings from that date but is bound by all orders passed up to that date (Vol. 7) 1920 Mad 391 (396) : 43 Mad 87 (SB).

[2] The rule does not require deletion of transferor's name as absolutely necessary on the transferee being allowed to prosecute. ('44) 1944 All L. Jour. 351 (351)

[3] After the assignee is impleaded, the assignor, though on record, will be concluded by all legal and *bona fide* proceedings taken by or against the assignee.

(Vol. 14) 1927 P. C. 57 (59, 60) : 51 Bom 442 : 54 Ind App 111 (PC).

[4] Person allowed to continue an appeal under

this rule—appeal dismissed with costs—he is liable for the full costs of the respondent in the appeal and not merely for the costs incurred from the date of his application. (Vol. 20) 1933 Mad 411 (413) : 56 Mad 469 (DB). (Also see S. 35 Note 26)

[5] In cases of institutions represented at different stages by different representatives, the Court has a discretion to allow amendments and new pleas in order to avoid multiplicity of suits. (Vol. 9) 1922 Mad 402 [403] : 45 Mad 703 (DB).

[6] Suit by inamdar against tenants for recovery of assessment—Decree for plaintiff—Subsequently third party purchasing the land—The vendee intervened in appeal and also filed second appeal—Both dismissed, merely confirming first Court's decree—No liability on the vendee—Decree cannot be executed against him. (Vol. 19) 1932 Bom 462 (464).

18. Appeal.—[1] O. 43 R. 1 [1] gives a right of appeal from an order granting, or refusing leave under this section. (Vol. 18) 1931 Cal 594 (595) (DB) (Vol. 20) 1933 Oudh 207 (209) : 8 Luck 477 (DB) (Overruled in (Vol. 24) 1937 Oudh 220 : 13 Luck 20 (FB) on another point.) * (Vol. 22) 1935 Oudh 486 (487) (DB). * (Vol. 33) 1946 Lah 263 (264). (Vol. 2^o) 1937 Lah 615 (616) (DB).

[See also (Vol. 24) 1937 Mad 200 (206). (Where an application under O. I. R. 10 is treated by the Court as having been made also under O. 22 R. 10 an appeal lies against an order passed on the application. * (Vol. 14) 1927 Cal 844 (844) : 54 Cal 716 (DB) (Appeal is the only remedy) * (Vol. 14) 1927 Nag 307 (308) (Do).

[2] Where an order purports to be passed under this rule an appeal will lie, even though, on the facts, the order is improper. (Vol. 8) 1921 Mad 599 (600, 607) : 44 Mad 919 (FB).

[3] Where the order is not one under this rule at all, no appeal will lie. * (Vol. 4) 1917 Cal 560 (560) (DB). * (Vol. 4) 1917 Cal 627 (628) (DB) * (Vol. 11) 1924 Mad 648 (649) (DB) * (Vol. 23) 1936 Lah 83 (84) (DB).

[4] No second appeal lies from an order under this rule. (Vol. 29) 1942 Bom 82 (84) : I. L. R (1941) Bom 629 (DB) * (Vol. 22) 1935 Mad 423 (423).

19. Letters Patent Appeal.—An order refusing the application of an assignee of the plaintiff is a "judgment" within the meaning of clause 15 of Letters Patent. ('01) 24 Mad 252 (254) (DB)

20. Limitation.—[1] There is no limitation for the application under this rule. ('03) 30 Cal 609 (612) (DR). (Vol. 11) 1924 Cal 90 (91) (DB) * (Vol. 8) 1921 Nag 32 (33, 34) : 17 Nag L. R. 81. * (Vol. 14) 1927 Oudh 156 (158) : 2 Luck 464 (DB) * (Vol. 31) 1944 Nag 137 (141) : I. L. R. (1944) Nag 520 * (Vol. 22) 1935 Lah 316 (317).

RULE 11A MADRAS

After Rule 11, add the following as Rule 11A :

"R. 11A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi-judicial* act within the meaning of S. 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal."

[Dis. No. 1601 of 1914.]

Application of order
to proceedings.

12. Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order. [See S. 52.]

ORDER 22 RULE 11**Synopsis.**

1. Scope.
2. Abatement of appeals in personal actions.
3. Appeal by several defendants on grounds common to all.
4. Appellate court's power to declare abatement of suit.
5. Appeal in suit for wakf property.
6. Death during pendency of appeal to Privy Council.

1. **Scope.**—[1] The effect of this rule is to make the provisions of the previous rules applicable, as far as may be, to appeals. (Vol. 30) 1943 Oudh 11 (12):18 Luck 567 (Rule 4). * (Vol. 21) 1934 All 1029 (1030) (DB). : Right to sue should be taken to mean right to appeal. * (Vol. 21) 1934 All 1011 (1012) (DB). (Rule 8 (1)) * (Vol. 28) 941 Bom (293) : ILR (1941) Bom 604. (Rule 8). * (Vol. 14) 1927 Bom 156 (157) (DB) (Rule 3). * (1909) 36 Cal 418 (421.) (Rule 9) * (Vol. 13) 1926 Lah 329 (330). * (Vol. 26) 1939 Pat 623 (624) (Rule 9).

[2] Death of one of the respondents during appeal—Representatives not brought on record. Appellant not aware of death—Appeal abates as against the deceased. (Vol. 14) 1927 All 331 (332). * (Vol. 1) 1914 Mad 708 (703) : 88 Mad 1064.

[3] Two independent appeals against same decree one by plaintiff and other by defendant—During pendency of appeal plaintiff dying—His legal representatives impleaded in his appeal, but not in defendant's appeal—Latter appeal will abate. (Vol. 18) 1931 Mad 277 (277).

[4] Party already impleaded in appeal and in memorandum of objection—Two separate applications are not necessary to bring his legal representatives on record—Bringing on record of appeal is sufficient for cross objections also. (Vol. 21) 1934 Mad 448 (452) (DB).

[5] Devolution of interest after decree in suit and before filing of appeal—This rule and consequently previous rules do not apply. (Vol. 29) 1942 Rang 13 (15) : 1941 Rang LR 366.

[6] R. 11 does not apply to application under Punjab Alienation of Land Act, S. 21-A. (Vol. 17) 1930 Lah 775 (775) : 11 Lah 706 (DB).

[7] After abatement of an appeal, trial court has no jurisdiction to go on with proceedings taken in pursuance of an order of appellate court which was intended to operate only during pendency of appeal. (Vol. 23) 1936 Lah 618 (619).

[8] The rule has no application to appeals pending in courts which have no jurisdiction to entertain them. (Vol. 22) 1935 All 92 (92, 93).

2. **Abatement of appeals in personal actions.**—[1] As a general rule the right to appeal in a personal action does not survive on the death of either party. (Vol. 20) 1933 Cal 61 (63) (DB).

[2] Suit for damages for malicious prosecution dismissed—Pending appeal, appellant dying—Appeal abates. (Vol. 5) 1918 Mad 1100 (1102) (DB). * (1911) 34 Mad 76.

[3] Suit for damages for defamation decreed—Appeal by defendant—Death of defendant will not cause abatement of appeal. (1902) 26 Bom 597 (608).

[4] Decree for damages for slander set aside in appeal—Pending second appeal defendant dying—Appeal does not abate. (Vol. 4) 1917 Upp Bur 14 (15) : 2 Upp Bur Rul 105.

3. **Appeal by several defendants on grounds common to all.**—(1) Lower court's decision jointly affecting all defendants appellants—Death of one—Legal representatives not brought on record—Entire appeal can proceed as a whole the reason being that there is abatement only in so far as deceased is concerned. (Vol. 28) 1941 Pesh 36 (37) * (1911) 10 Ind Cas 27 (28) (All). * (Vol. 3) 1916 Lah 401 (402) (DB).

4. **Appellate court's power to declare abatement of suit.**—(1) When the sole plaintiff respondent dies in appeal and the defendant appellant claims to be his legal representative, it is not the suit but the appeal that abates. (Vol. 6) 1919 All 355 (356) : 41 All 283.

5. **Appeal in suit for wakf property.**—[1] Suit by certain persons as followers of a shrine for declaration that certain property was wakf property decreed—Appeal—One of plaintiffs respondents dying—Appeal does not abate. (Vol. 8) 1921 Lah 390 (391).

6. **Death during pendency of appeal to Privy Council.**—[1] O. 22 has no application to appeals before Privy Council. Consequently on the death of a party in appeal pending before Privy Council no question of impleading legal representatives or limitation arises. (1903) 4 Ind Cas 454 (456) (Cal). * (Vol. 7) 1920 Pat 89 (91, 92) : 5 Pat L Jour 314. (Death of one of respondents pending appeal before Privy Council—Legal representatives not brought on record—Decree of Privy Council is not nullity). * (Vol. 7) 1920 Pat 672 (673). (Where one of appellants to His Majesty-in-Council died before passing of Privy Council decree, and no substitution was made, Privy Council decree cannot be held void by the Courts in India)

ORDER 22, RULE 12.**Synopsis**

1. Execution proceedings.
2. Allahabad amendment.

PROVINCIAL AMENDMENTS

ALLAHABAD

At the end of the rule, *add* the words :

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

OUDH

Same as that of Allahabad.

ORDER XXIII

WITHDRAWAL AND ADJUSTMENT OF SUITS

Withdrawal of suit
or abandonment of
part of claim.

1. (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

O. 22 R 12 (*contd.*)

1. **Execution proceedings.**—[1] O. 22 R. 12 lays down that the provisions relating to abatement contained in Rules 3, 4 and 8 do not apply to execution proceedings. (Vol. 17) 1980 Cal 614 (615) : 57 Cal 1137. * (Vol. 12) 1925 PC 117 (117) : 4 Pat 507 : 52 Ind App 188 (PC). (Proceedings for ascertainment of mesne profits are proceedings in execution. * (Vol. 22) 1935 All 27 (2f). * (Vol. 18) 1931 Bom 425 (427). * (Vol. 18) 1926 Cal 957 (958). * (1909) 10 Cal L Jour 396 (399) (DB). * (Vol. 19) 1932 Mad 73 (82) : 55 Mad 352 (FB). * (Vol. 25) 1938 Nag 528 (528) : ILR (1940) Nag 198. * (Vol. 16) 1929 Pat 200 (200). (Pending execution proceeding does not abate by the death of any of the joint-decree holders).

[See (Vol. 15) 1928 All 299 (300) : 50 All 621 (R. 1 applies to execution proceedings—Names can be substituted while execution is still pending)]

[2] The rule cannot be interpreted to mean that no substitution can be made in execution proceedings. (Vol. 19) 1932 Mad 73 (76) : 55 Mad 352 (FB). * (Vol. 7) 1920 All 171 (172) : 42 All 570.

[3] On the death of a decree-holder pending an execution proceeding his legal representative can get himself substituted and carry on the proceedings. (Vol. 18) 1931 Bom 423 (423) (DB). * (Vol. 29) 1942 Cal 390 (393). * (Vol. 19) 1932 Mad 73 (82) : 55 Mad 352 (FE) (Vol. 14) 1927 Mad 184 : 50 Mad 1 Overruled. * (Vol. 22) 1935 Pat 117 (118) : 13 Pat 777.

[But see (Vol. 14) 1927 All 165 (167) : 39 All 509 (FB). (Decree-holder dying pending execution—Legal representatives must make fresh application for execution.)]

[4] On death of judgment-debtor, pending application for execution does not abate. (Vol. 23) 1936 Bom 456 (457). * (Vol. 17) 1930 Sind 16 (17).

[5] Where a judgment-debtor dies during the pendency of an application for execution a fresh application for execution is not necessary for proceeding against the legal representatives of the deceased. (Vol. 18) 1931 Mad 303 (308) (DB).

[But see (Vol. 12) 1925 Oudh 448 (448) : 28 Oudh Gas 330. (Death of judgment-debtor during execution—Applying for substitution is not the proper procedure.)]

[6] Death of decree-holder pending execution—There is no fixed time within which application by legal representative for substitution should be made. (Vol. 12) 1925 All 66 (67).

[7] R. 12 does not apply to appeals against orders made in execution proceedings. (Vol. 19)

1932 Mad 574 (575, 576) : 55 Mad 1006. * (Vol. 6) 1919 Cal 1053 (1053). (Appeal relating to execution of joint decree—one decree-holder respondent dying—His legal representatives not brought on record within time—Appeal cannot proceed against surviving respondents alone) * (Vol. 23) 1936 Lah 1022 (1024) : ILR (1937) Lah 80. * (Vol. 10) 1923 Lah 560 (563). * (Vol. 21) 1934 Mad 664 (664) (DB). * (Vol. 15) 1928 Mad 772 (773) : 51 Mad 858. * (Vol. 25) 1938 Nag 502 (503) : ILR (1939) Nag 119. * Dissenting from (Vol. 12) 1925 Nag 239. * (Vol. 28) 1941 Oudh 16 (17) : 15 Luck 580. * (Vol. 21) 1934 Oudh 337 (340). * (Vol. 25) 1938 Sind 239 (240) : ILR (1939) Kar 156.

[But see * (Vol. 16) 1929 Pat 565 (568) : 9 Pat. 372 (FB).]

2. **Allahabad Amendment.**—[1] The amendment of this rule by the Allahabad High Court is not retrospective. (Vol. 22) 1935 All 180 (181).

ORDER 23 RULE. 1

Synopsis

1. Scope and object.
2. Applicability to certain proceedings.
3. "At any time after the institution of a suit".
4. Power of appellate Court to allow withdrawal of suit.
5. Withdrawal of application for entering up satisfaction of decree.
6. Withdrawal of application for withdrawal of suit.
7. Withdrawal of suit on behalf of minor.
8. Withdrawal of suit by some of several plaintiffs.
9. Withdrawal of representative suits.
10. Withdrawal of suit by vakil.
11. Withdrawal of suit by benamidar.
12. "As against all or any of the defendants".
13. Effect of permission.
14. Withdrawal from suit pending arbitration.
15. Withdrawing after suit has abated against some of the defendants.
16. "Formal defect".
17. "Other sufficient grounds".
18. "May grant permission".
19. Form of permission.
20. Dismissal of suit with liberty to bring a fresh suit.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.

[1882—S. 373; 1877—S. 373; 1859—S. 97. See S. 11, O. 2 R. 2]

O. 23 R. 1 (*contd.*)

21. Liberty to withdraw two suits in order to bring a consolidated suit.

22. "On such terms as it thinks fit".

23. Fresh suit must be between the same parties.

24. Same subject-matter.

25. Additional relief in fresh suit.

26. Effect of withdrawal without permission.

27. Erroneous order granting permission.

28. Effect of reversal of order granting permission.

29. Power of Court of Small Causes to allow withdrawal.

30. Appeal.

31. Letters Patent Appeal.

32. Revision.

1. Scope and object.—[1] Plaintiff withdrawing suit without the permission of the Court cannot bring fresh suit on same cause of action. (Vol. 28) 1941 Nag 180 (180) * (Vol. 26) 1939 Rang 878 (880) : 1939 Rang L R 749.

[2] Plaintiff is liable for costs if he withdraws without permission. (Vol. 30) 1943 Cal 427 (428) : I L R (1943) Cal 205 (DB).

[3] The rule does not apply to alternative claims on the same cause of action. (Vol. 13) 1926 Bom 189 (192).

[4] Plaintiff can withdraw part of his claim for the purpose of bringing the suit within the court-fee paid without permission under this rule. (Vol. 33) 1946 Mad 126 (127).

[5] No permission to withdraw a suit can be granted where the deficiency in court-fee has not been paid. (Vol. 21) 1934 All 989 (990).

[6] A suit does not cease to exist on an application by the plaintiff for its withdrawal. It continues till an order is made by the Court on the application. (Vol. 21) 1934 All 4 (8) : 55 All 825 (DB). * (Vol. 19) 1932 Mad 31 (32).

[7] Court can consider and decide objections to the withdrawal of the suit before passing orders on the application to withdraw. (Vol. 21) 1934 Mad 337 (343) : 55 Mad 892 (DB).

[8] Death of one of several co-plaintiffs—His sons sought to be added as legal representatives but on their refusal to be joined as co-plaintiffs, joined as pro forma defendants—There is no "withdrawal of suit" by the legal representatives. (Vol. 26) 1939 Pat 225 (228) (DB).

[9] Where the Court dismisses a suit as against certain defendants on the ground of misjoinder

of parties and causes of action, there is no 'withdrawal' or 'abandonment' by the plaintiff. (Vol. 22) 1935 Mad 696 (697).

[10] Where an application for final decree is withdrawn, it does not preclude a second application for the same purpose. (Vol. 15) 1928 Mad 1165 (1166) (DB).

[11] Where a defendant withdraws a plea of set-off, he will not be debarred from raising the same plea in a subsequent suit against him by way of defence. (Vol. 24) 1937 Oudh 394 (395) : 13 Luck 323.

[12] Where the defendant in a suit makes a counter-claim to the suit, but the plaintiff withdraws his suit with liberty to file a fresh suit, the counter-claim can be continued as a plaint and can be proceeded with on merits. (Vol. 21) 1934 Rang 160 (161).

[13] Redemption suits come within the scope of bar enacted in this rule. (Vol. 32) 1945 Mad 225 (228) (DB).

2. Applicability to certain proceedings—*Appeals*—[1] This rule applies to appeals as well as second appeals. ('08) 1908 Pun W R No. 119 Page 403 * ('01) 23 All 130 (132, 133) (DB). * ('67) 3 Mad H. C. R. 368 (369) (DB). * ('83) 7 Bom 287 (289) (DB). (Second appeal.)]

[See however (Vol. 25) 1938 Bom 442 (443) = I L R (1939) Bom 66 (DB)]

[2] The effect of the withdrawal, without liberty of an appeal, is to make the decree of the lower Court *res judicata* and the only executable decree in the case. ('09) 5 Nag L R 88 (93) * (1892) 16 Bom 243 (248) (DB). * (Vol. 15) 1928 All 679 (679) : 50 All 698 (DB).

[3] Appellant is entitled as of right to withdraw his appeal, if the respondent has not acquired any interest thereunder, but, if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without permission. ('25) 1938 Bom 442 (443) : I L R (1939) Bom 66 (DB).

Suits in Rent Courts—(4) The rule does not apply to suits under the Bengal Tenancy Act. (1908) 35 Cal 990 (995) (DB). * ('64) 1864 Suth W. R. 47 (48) (FB). (See however Ss. 87 (2) and 147 of the Bengal Tenancy Act, VIII of 1885).

[5] The withdrawal without permission of an application or a suit under the Bengal Tenancy

O. 23 R. 1 (*contd.*)

Act, does not bar a fresh suit in the Civil Court in respect of its subject-matter. (1911) 9 Ind Cas 4 (Cal) (Suit) * (1913) 40 Cal 428 (431, 432) (DB) (Application)]

[But see (Vol. 10) 1923 Cal 634 (626) : 50 Cal 626 (DB).]

[6] The rule applies to suits under the North-West Provinces Rent Act, XII of 1881. (1883) 5 All 406 (413) (FB).

Probate proceedings.—[7] The rule does not apply to applications for probate. (Vol. 4) 1917 Pat 41 (42) : 2 Pat L Jour 535 (DB). * (Vol. 19) 1932 Lah 290 (291).

Insolvency proceedings.—[8] The rule read with S. 141 applies to proceedings in insolvency. (1895) 17 All 156 (161) (DB).

Execution proceedings.—[9] A decree-holder cannot, of his own volition, withdraw from execution proceedings where a third party has acquired an interest or right in the property which is the subject-matter of the execution proceedings. (Vol. 25) 1938 Cal 615 (618) (DB).

3. "At any time after the institution of a suit".—[1] A plaintiff can withdraw his suit of his own accord and the order of the Court is not necessary for the purpose. ('08) 32 Bom 345 (347) (DB). * (Vol. 21) 1934 Mad 485 (492).

[2] A withdrawal may be made before the judgment is passed in the case. (Vol. 2) 1916 Mad 575 (577) * ('69) 2 Beng L R (SN) xi (DB) * ('75) Pun Re No. 65 page 168 (167) (DB) * ('29) 116 Ind Cas 823 (824) (DB) (Mad) * ('11) 35 Bom 261 (263).

[8] A plaintiff cannot withdraw his suit so as to deprive the defendant of any rights that may have accrued to him as in the following cases:—

[a] Partition suit—Defendant becoming entitled under S. 3 of the Partition Act to purchase the plaintiff's share at a valuation to be fixed by the Court. (Vol. 5) 1918 All 356 (357) (DB).

[b] A preliminary decree having been passed in a partition suit. (Vol. 21) 1934 Mad 485 (492). * (Vol. 7) 1920 Mad 546 (546).

[c] Suit for accounts when preliminary decree has been passed. (Vol. 29) 1942 Lah 81 (83) = I L R (1943) Lih 151 (DB) * (Vol. 13) 1926 All 582 (583) (DB) * (Vol. 1) 1914 Mad 869 (370) (DB).

[See however (Vol. 26) 1939 All 174 (175) (DB)].

[4] Plaintiff cannot abandon the suit and at the same time ask for a decision on the merits of the case. ('09) 5 Nag L R 121 (122).

[5] Plaintiff withdrawing suit is liable to pay such costs as the Court orders him to pay. (Vol. 9) 1916 Mad 575 (577). * (Vol. 12) 1925 Oudh 699 (699) (DB).

[6] Payment of costs cannot be made a condition precedent to plaintiff's withdrawing his suit. ('95) 17 All 156 (161) (DB).

[7] Where the plaintiff enters into a compromise with the defendant but does not communicate the terms of the compromise to the Court, he should be held to have withdrawn his suit. ('01) 23 All 219 (220) (DB). * ('92) 1892 All W.N. 53 (53) (DB).

[8] When a suit is dismissed at the request of the parties on a petition of compromise being filed, the dismissal operates as a withdrawal. (Vol. 4) 1917 Nag 1 (').

[1] The Court can permit the withdrawal of a suit only while the suit is pending before it. ('86) 163 Ind Cas 367 (369) (Cal).

4. Power of Appellate Court to allow withdrawal of suit.—[1] A Court of appeal has power, in a proper case, to grant permission to withdraw a suit with liberty to file a fresh suit. (Vol. 27) 1940 All 205 (206) (DB) * (Vol. 11) 1924 All 260 (260). * (Vol. 8) 1921 Bom 278 (280) : 45 Bom 206 (DB) (Dissenting from a contrary view expressed in 35 Bom. 261). * (Vol. 12) 1923 Cal 711 (712) (DB). * (Vol. 7) 1920 Bom 107 (107) : 44 Bom 598 (DB). * (Vol. 5) 1918 Mad 1287 (1291) : 40 Mad 259 (FB). (Overruling (Vol. 2) 1915 Mad 339) * Bourke A O C 99. * ('07) 1903 Pun Re No. 21, p. 45 (J1) (DB). * (Vol. 17) 1926 Nag 443 (445) * (70) 14 Suth W R (OC) 17 (21) * (Vol. 25) 1935 Mad 445 (446). * ('37) 166 Ind Cas 290 (290) (Lih) * (DP).

[See (Vol. 2) 1915 PC 24 (27) : 42 Cal 897 : 42 Ind App 79 (PC).]

[2] Permission to withdraw suit with liberty to bring fresh suit not asked in trial court nor in lower Appellate Court still case is fully argued—Permission should not be granted. (Vol. 21) 1934 All 214 (215) (DB).

[See also (Vol. 29) 1942 Pat 148 (150) (DB) * (Vol. 13) 1926 All 548 (549) * (Vol. 5) 1918 Nag 148 (149).]

[3] The Appellate Court has no power to allow a suit to be withdrawn before the appeal has been admitted. ('11) 35 Bom 261 (263) (DB).

[4] Where a suit is dismissed and the appeal from the decree of dismissal is also dismissed, the Appellate Court cannot, as part of the same order, allow the suit to be withdrawn with liberty to sue again. (Vol. 28) 1941 Lih 15 (16) * (Vol. 1) 1917 Cal 409 ('10) DL) * (Vol. 25) 1939 Lah 52 (53, 54) (DB).

[5] Where the trial Court had decreed the suit and the Appellate Court allowed the appeal and set aside the decree of the trial Court but did not expressly dismiss the suit, it was held that the Appellate Court's order passed at the same time allowing the suit to be withdrawn with liberty to bring a fresh suit was not without jurisdiction. (1935) 39 Cal W N 586 (589).

[6] A plaintiff-appellant is not entitled as a matter of right to withdraw his suit and he will not be permitted to do so if the effect of allowing him to withdraw it would be to deprive the defendant of the benefit of the lower Court's adjudication in his favour. (1918) 20 Ind Cas 17 (18, 17) (DB) (Oudh) * (1905) 29 Bom 13 (14) (DP) * (Vol. 12) 1925 Bom 425 ('27) : 19 Bom 672 (DB) * (Vol. 10) 1923 Oudh 252 (253) * (1923) 61 Ind Cas 831 (832) (Pat) * (Vol. 17) 1930 Pat 410 (411) (DB) * (Vol. 19) 1932 Mad 81 (32).

[7] Plaintiff suing Government and some ryots—Claim to certain channel as private property—Decree passed in plaintiff's favour—Government not appealing but ryots appealing—Plaintiff seeking to withdraw suit against ryots being satisfied with decree against Government—Plaintiff not allowed to do so. (Vol. 11) 1924 Mad 79 ('79, 80) : 46 Mad 811 (DB).

O. 23 R. 1 (contd).

5. Withdrawal of application for entering up satisfaction of decree:—[1] Where a decree-holder applies to enter up satisfaction of a decree but afterwards wants to withdraw his application, the Court should not allow him to do so but should inquire into the matter under O. 21 R. 2, (Vol. 6) 1919 Mad 198 (199).

6. Withdrawal of application for withdrawal of suit:—[1] A plaintiff applying to withdraw his suit unconditionally has a *locus penitentie* until his petition has been acted upon by the Court, and he can withdraw his petition at any time before an order is made as prayed for in his petition, (Vol. 10) 1928 Mad 246 (247) * (12) 15 Ind Cas 852 (853) (DB) (Mad) * (1910) 12 Cal L Jour 437 (435) (DB) * (74) 6 N W P H C R 66 (65) (DB).

[But see (67) 2 Agra 168 (159) (DB)].

[2] Suit withdrawn against some defendants and decreed *Ex parte* against others—*Ex parte* decree set aside—Withdrawal of suit cannot be cancelled—But plaintiff may be given permission to file fresh suit, (Vol. 27) 1940 Mad 765 (766).

7. Withdrawal of suit on behalf of minor:—[1] Courts should not allow a suit instituted on behalf of a minor to be withdrawn without being satisfied that the withdrawal is for the minor's benefit, (Vol. 21) 1984 Oudh 257 (257) (DB)

[2] Where the next friend of a minor fraudulently withdraws a suit on behalf of the minor, the latter can sue again in respect of the same subject-matter (Vol. C) 1919 Lah 395 (396) : 1919 Pun Re No. 59 (DB) * (84) 10 Cal 357 (367) (DB) * (02) 29 Cal 785 (787) (DB)

[3] The Court should not allow the unconditional withdrawal of a suit on behalf of a minor, by the minor's next friend, without liberty being reserved to bring a fresh suit, (04) 27 Mad 377 (379, 380).

[See however (84) 10 Cal 357 (364, 365) (DB) (Withdrawal of a suit by the next friend of a minor has the same effect as the withdrawal by a person of full age.)]

8. Withdrawal of suit by some of several plaintiffs:—[1] Where there are several plaintiffs in a suit the suit cannot be withdrawn without the consent of all the plaintiffs, (Vol. 30) 1943 Cal 427 (431) : I L R (1943) 1 Cal 205 (DB) * (Vol. 28) 1941 Nag 180 (180) * (20) 55 Ind Cas 926 (927) (DB) (U P BR) * (Vol. 20) 1933 Mad 824 (825) : 57 Mad 299 (DB) * (Vol. 12) 1925 Cal 637 (640) : 52 Cal 139 (DB) * (19) 52 Ind Cas 183 (184) (D.B.) (U P B R) * (Vol. 9) 1922 Pat 439 (490, 491) : 1 Pat 228 (DB) * (87) 1887 Pun Re No. 93, p. 209 (212, 216) (DB) * (Vol. 16) 1928 Mad 496 (496).

[But see (85) 1885 All W N 189 (190) (DB)].

[2] One of several co-plaintiffs or co-appellants may withdraw from the suit or appeal so far as his own interest is concerned, (Vol. 30) 1943 Cal 427 (428, 430, 431) : I L R (1943) 1 Cal 205 (DB). * (Vol. 14) 1927 Bom 244 (244) (DB) * (06) 1908 Pun W R No. 119.

[3] If the withdrawing plaintiff wishes to sue again he must get the leave of the Court, and the

Court cannot grant such leave without the consent of the other plaintiffs, (Vol. 30) 1943 Cal 427 (428, 429) : I L R (1943) 1 Cal 205 (DB)

[4] Where the right of action is a joint one vesting in several persons, the Court can transpose the withdrawing plaintiff as a defendant, so that the suit may not fail for defect of parties, (Vol. 30) 1943 Cal 427 (431, 432, 433) : I L R (1943) 1 Cal 205 (DB)

[5] The withdrawal of unnecessary plaintiffs from a suit does not cause the dismissal of the suit, (21) 60 Ind Cas 592 (592) (U P D R).

9. Withdrawal of representative suits:—[1] Where the plaintiff sues in a representative character it is not open to him to put an end to the litigation by withdrawing from the suit. He may, no doubt, go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation, (Vol. 21) 1934 All 47 (55 All 825 (DB) * (Vol. 22) 1935 P C 135 (136, 137) : 62 Ind App 257 : 57 All 678 (P C)).

10. Withdrawal of suit by vakil:—[1] Power to withdraw must be specifically given, (Vol. 7) 1920 Mad 232 (232)

[See however (Vol. 25) 1938 All 450 (451)].

[2] A vakalatnama which authorises vakil to choose arbitrators, prefer objections to the award, file solenama, and do all necessary acts in connexion with the suit will include also an authority to withdraw a suit, (1912) 16 Cal W. N. 932 (933) (DB)

11. Withdrawal of suit by benamidar:—[1] Where a benamidar, in breach of trust, fails to carry on the suit and withdraws it, the real owner will be entitled to have the order of withdrawal vacated and to continue the suit, (Vol. 25) 1938 Cal 874 (879) (D. B.)

12. "As against all or any of the defendants":—[1] Plaintiff withdrawing suit against some of several defendants—Liberty of suing again not reserved—Subsequent suit against those defendants barred, (10) 8 Ind Cas 860 (860) (DB) (Mad) * (Vol. 31) 1944 Bom 264 (265)

[2] Suit by plaintiff against four persons as trustees—They were later removed and eight others appointed instead—Plaintiff got them substituted—Court found that four old trustees were personally liable to the plaintiff and not as trustees and the new trustees were not liable at all—Held, plaintiff could not sue the former four persons whose names had been struck off at his instance, (Vol. 26) 1939 PC 110 (112) : 1939 Rang L. R. 358 : 66 Ind App 198 (P.C.) * (Vol. 27) 1940 Oudh 43 (44).

13. Effect of permission:—[1] Permission to withdraw with liberty to bring a fresh suit removes the bar of *res judicata*, (94) 14 Mad 78 (80) (DB) * (Vol. 12) 1925 P C (58) : 52 Ind App 100 : 27 Oudh Cas 334 : 47 All 158 (P C) * See (Vol. 12) 1925 Cal 845 (851) : 52 Cal 894 (F B), Iper Suhrawardy, J.]

[2] Permission to withdraw suit with liberty does not imply the recognition of maintainability of the second suit, (Vol. 9) 1922 Mad 447 (450) : 45 Mad 90 (DB)

[3] Where a suit instituted with the leave of the Court under cl. 12 of the Letters Patent is withdrawn with liberty to bring a fresh suit, and an application is again made under cl. 12 of the Letters Patent for leave to institute the fresh suit,

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Court can deal with the application and grant or refuse leave as it deems proper ('01) 24 Mad 293 (295) (DB).

[4] A suit against a number of defendants was dismissed and the plaintiff appealed from the decree dismissing his suit. Pending the appeal, one of the defendants died and as no application for bringing on record his legal representatives was made within the period of limitation, the appeal abated as against him. The suit was then withdrawn with leave to bring a fresh suit. It was held that the legal representatives of the deceased defendant who had acquired a valuable right under the decree of the trial Court could not be affected by this order to which they were not parties. (Vol. 22) 1935 All 853 (854).

14. Withdrawal from suit pending arbitration:

[1]—Reference to arbitration by order of Court—Suit cannot be withdrawn with liberty to bring a fresh suit either before or after award. ('87) 9 All 168 (172) (DB) * (Vol. 3) 1916 Oudh 141 (141). * ('03) 7 Cal W N 186 (187, 188) (DB) * (Vol. 25) 1938 All 56 (56, 57) : ILR (1938) All 146.

[2] Reference to arbitration by order of Court invalid and award consequently void—Second suit is not incompetent. (Vol. 12) 1925 Mad 621 (624).

[3] Application withdrawn without leave of Court to file fresh application—Only fresh application to file the award is barred, not suit to enforce the award. (Vol. 29) 1942 Bom 57 (59) : ILR (1942) Bom 94 (DB).

15. Withdrawing after suit has abated against some of the defendants.—[1] Order permitting withdrawal of suit with liberty to bring a fresh suit after the suit has abated. Order is without jurisdiction. ('86) 40 Cal W N 1019 (1022).

[2] Suit against a defendant abating by reason of his legal representatives not having been brought on record within limitation—Plaintiff withdrawing with permission to bring a fresh suit—Fresh suit can only be brought against defendants who were actually on record at time of permission and not against legal representatives of the deceased defendant. (Vol. 1) 1914 Mad 170 (170) : 38 Mad 643 (DB) * (Vol. 22) 1935 All 853 (854).

16. "Formal defect"—[1] The expression "formal defect" connotes defects of various kinds not affecting the merits of the case. (Vol. 30) 1943 All 67 (68) : I L R (1942) All 942 * (Vol. 27) 1940 Bom 121 (125) : I L R (1940) Bom 299 (FB) * (Vol. 11) 1924 Rang 249 (259) : 2 Rang 66.

[2] A defect which goes to the root of the plaintiff's claim is not a formal defect. (Vol. 12) 1925 Mad 617 (618).

[3] The "formal defect" need not necessarily be in the pleadings. (Vol. 18) 1931 Cal 268 (269) (DB).

[4] The Court must be satisfied that the suit must fail by reason of some formal defect. Mere objections by the defendant are not enough. (Vol. 28) 1941 Lah 18 (19) * (Vol. 12) 1925 Oudh 140 (141) * (Vol. 18) 1931 Cal 386 (336) * (1925) 64 Ind Cas 82 (82) (D B) (Cal) * (Vol. 11) 1924 Rang 249 (255) : 2 Rang 66.

[But see (Vol. 5) 1918 Pat 185 (486) : 3 Pat L Jour 630 (DB)].

[5] Order allowing withdrawal on the ground of lacuna in the case of plaintiff must contain the facts to enable a Court to know the lacuna and

the reasons for holding that a case has been made out under the rule. (Vol. 31) 1944 All 224 (224).

[6] The following are some examples of "formal defects"—

[a] Omission to obtain permission of the insolvency Court for filing the suit. (Vol. 12) 1925 Rang 105 (107) : 2 Rang 648.

[b] Misjoinder of parties or causes of action (Vol. 5) 1918 All 425 (426) : 40 All 7 (D B).

[c] Erroneous valuation of suit. ('07) 29 All 471 (476) (D B).

[d] Institution of suit in a Court which has no jurisdiction. (Vol. 30) 1943 Oudh 36 (37) (D B) * (Vol. 6) 1919 Mad 1071 (1075) (D B).

[7] The following are instances of defects which are not formal:—

[a] Suit bar of limitation. (Vol. 5) 1918 Sind 6 (8) : 13 Sind L R 1.

[b] Non-joinder of parties. (Vol. 30) 1943 All 67 (68) : I L R (1942) All 942. * (Vol. 28) 1941 Oudh 417 (420) * (Vol. 3) 1916 Mad 674 (674) * (Vol. 21) 1934 Cal 50 (60) (D B).

[c] Non-joinder of causes of action. (Vol. 1) 1914 All 457 (458) * ('22) 36 Ind Cas 285 (286) (Lah)

[d] Suit for a declaration of a public right of pathway without taking steps under s. 91 or O.I.R.8 or proving special damage. (Vol. 12) 1925 Cal 711 (713) (D B)

[e] Failure to put alternative case or omission to implead other parties or failure to produce documents at proper time are material. (Vol. 28) 1941 Oudh 417 (420).

17. "Other sufficient grounds"—[1] A suit cannot be allowed to be withdrawn with liberty of suing again apart from the provisions of the rule. (Vol. 4) 1917 Cal 830 (830) (D B) * (Vol. 7) 1920 Pat 63 (64) (D B) *Note*.—This case is overruled. * (Vol. 9) 1922 Pat 44 : 1 Pat 90 (F B) on another point * (Vol. 22) 1935 Pat 438 (438).

[2] The Court before granting leave under this rule must satisfy itself that the conditions specified therein exist. (1911) 10 Ind Cas 566 (557) (DB) (All) * (Vol. 5) 1918 Nag 93 (94) * (Vol. 5) 1918 Pat 452 (453) (D.B.) : ('27) 1927 Mad WN. 851 (851, 852) : (Vol. 25) 1938 Lah 582 (583).

[3] Failure of the plaintiff to prove his case is no ground for allowing him to withdraw his suit with liberty of suing again for the same subject-matter. (Vol. 30) 1943 Nag 307 (312) : (Vol. 26) 1941 Oudh 417 (420) * (Vol. 27) 1940 Bom 121 (126) : ILR (1940) Bom 299 (FB). (Dissenting from 33 Bom 722). * (Vol. 1) 1914 P C 249 (252) (PC).

[4] Defect in suit shutting out fair trial on merits—Error made in good faith by the plaintiff—Sufficient ground for allowing withdrawal exists. (Vol. 28) 1941 Nag 258 (260) * (Vol. 4) 1917 Nag 121 (122)

[5] Defect must not be due to the plaintiff's own fault. (Vol. 18) 1931 Cal 107 (108) (D B.) * (Vol. 22) 1935 Oudh 495 (435).

[6] Defect curable by amendment of pleadings—Withdrawal cannot be allowed (Vol. 5) 1918 Oudh 163 (163) : 21 Oudh Cas 66 * ('27) 1927 Mad WN 851 (851, 852).

[7] After judgment, the Court cannot allow the suit to be withdrawn with permission to bring a fresh suit on the same cause of action. (Vol. 18)

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1931 Cal 336 (336). * (Vol. 16) 1929 Cal 88 (89) : 55 Cal 1067 * ('11) 35 Bom 261 (263) (DB)

[8] The expression "other sufficient grounds" should be construed *ejusdem generis* with "formal defect". (Vol. 13) 1926 Bom 315 (316) : 50 Bom 192 (DB) * (Vol. 15) 1928 Mad 1085 (1086) * (Vol. 13) 1926 Mad 863 (863) * (Vol. 25) 1938 Lah 582 (583) * (Vol. 25) 1938 Lah 294 (294) * (Vol. 16) 1929 All 683 (685) * (Vol. 15) 1928 Oudh 482 (484) : 3 Luck 403 (D.B.). * (Vol. 12) 1925 Oudh 291 (293) * (Vol. 4) 1917 Cal 409 (410) (DB) : (Vol. 3) 1916 Cal 255 (256). 44 Cal 367 (DB) * (Vol. 5) 1918 Pat 261 (262) (DB). (Vol. 22) 1935 Pat 438 (438) * (1909) 5 Nag. L.R. 88 (92). [See however : (Vol. 18) 1931 Cal 263 (269) * (Vol. 21) 1934 All 214 (215) * (Vol. 22) 1935 Bom 28 (29) * (Vol. 6) 1919 Mad 1071 (1073, 1074) * (Vol. 25) 1938 Rang 389 (390).]

[9] The grounds must be, though not *ejusdem generis* with the grounds mentioned in cl. (a), analogous to them. (Vol. 28) 1941 Mad 46 (47) * (Vol. 27) 1940 Bom 121 (125) : I.L.R. (1940) Bom 299 (F. B.).

[10] The following have been held to be "sufficient grounds".

(a) The omission to file a power-of-attorney. (Vol. 13) 1926 All 294 (294, 295).

(b) Evidence being not available, for no fault of the plaintiff. (Vol. 18) 1931 Cal 268 (269) (DB).

(c) Two suits brought—Both sought to be withdrawn to be consolidated into one—Apprehension that second suit would be barred under O. 2, R. 2 (Vol. 11) 1924 Rang 249 (255) : 2 Rang 66.

(d) Plaintiff misled by the absence of a specific denial in the written statement. (Vol. 1) 1914 Cal 842 (843) (DB).

(e) Material document rejected as not properly stamped. (1870) 13 Moo Ind App 160 (170) (P.C.).

(f) The defendant absent and the plaintiff finds that even if a decree is passed, it cannot be executed. ('91) 15 Bom 160 (164) [But see (92-96) 1892-1896 Upp Bur Rul 261].

[11] In the following cases it was held that there were "Not sufficient grounds" :—

(a) Parties ready for trial and withdrawal prejudicing defendant. (Vol. 12) 1925 Mad 617 (618) * (Vol. 9) 1922 Nag. 84 (85) : 18 Nag. L.R. 30 * (Vol. 15) 1918 All 356 (357) (DB) * ('09) 38 Bom 727.

(b) Plaintiffs not ready to go on with the case. (Vol. 12) 1925 Mad. 1268 (1269).

(c) Plaintiff deliberately and grossly undervaluing suit and paying insufficient court-fee.

(d) Notices on the heirs of a deceased defendant could not be served. (Vol. 9) 1922 Bom 449 (449) : 47 Bom 92 (DB)

(e) Some important items left from plaint owing to mistake of writer. (Vol. 4) 1917 Cal 36 (37) (DB).

(f) Plaintiff deliberately and grossly undervaluing suit and paying insufficient court-fee. (Vol. 30) 1943 Nag. 307 (311) I. L. R. (1944) Nag. 51. * (Vol. 6) 1919 Mad 1071 (1074) : 41 Mad 701 (DB)

(g) Plaintiff's cause of action vanished—But, out of excess of caution to meet possible claim by defendant, requesting Court for permission to bring fresh suit—Held, no right to bring fresh

suit. (Vol. 28) 1941 Nag. 258 (260).

[12] Plaintiff applying for permission to withdraw suit—Defendant not objecting if costs were paid—Court has jurisdiction to permit withdrawal with liberty to bring fresh suit. (Vol. 25) 1938 All 450 (451).

18. "May grant permission".—[1] Granting permission under this rule is within the discretion of the Court.. (Vol. 30) 1943 Nag 307 (312) : I. L. R. (1944) Nag. 51.

[2] The court can pass an order under the rule without an application by the plaintiff. (Vol. 14) 1927 Nag 302 (303) : 10 Nag L R 142 * (Vol. 25) 1938 Mad 865 (876) (DB). [See however ('37) 1937 Oudh W. N. 1146 (1149)]

[3] Notice to the defendant should be given before leave to withdraw with liberty to file a fresh suit, is granted by the Court. (Vol. 4) 1917 Cal 633 (633) : 44 Cal 454 (D. B.) * (Vol. 17) 1930 Nag 151 (151, 152) * (Vol. 31) 1944 Sind 192 (194) : I L R (1944) Kar 169 (DB).

[4] The permission under the rule extends only to one suit. (Vol. 12) 1925 Bom 272 (272) (DB).

[5] Where the second suit is found to contain some formal defects, leave to withdraw with liberty to institute fresh suit may be given in respect of it. (Vol. 28) 1941 Lah 192 (195) : I L R (1941) Lah 381 (D. B.)

[6] A direction in the decree permitting the plaintiff to bring a separate suit in regard to a portion of the claim is enough. No specific order is necessary. (Vol. 25) 1938 Mad 865 (876) (DB)

[See however ('37) 1937 Oudh W.N. 1146 (1149)]

[7] The power of permitting under this rule a fresh suit on the same cause of action should be exercised very sparingly. (Vol. 28) 1941 Mad 46 (47).

[8] Where the requisite evidence is not produced, leave should not be granted. (Vol. 31) 1944 Nag 183 (184).

19. Form of permission.—[1] The permission to file a fresh suit need not be express but may be implied from the circumstances under which the order was passed. (Vol. 11) 1924 Nag 285 (286) * (Vol. 21) 1934 All 292 (293) * (Vol. 13) 1926 Pat 259 (260) : 5 Pat 23 (D. B.) * (Vol. 14) 1927 Oudh 360 (360) (DB) * (Vol. 14) 1927 Rang 237 (238) * (Vol. 5) 1918 Mad 126 (127) (S.B.) * ('96) 9 O. P. L. R. 3 (4). * (Vol. 7) 1920 Lah 494 (496) (DB).

[But see (Vol. 4) 1917 Lah 33 (34) : 1916 Pun Re. No. 97.]

[2] The Court cannot refuse liberty to file a fresh suit and at the same time dismiss the suit. ('26) 95 Ind Cal 199 (200) (Cal) * ('32) 135 Ind Cas 160 (160) (All).

[3] The Court cannot allow withdrawal of suit and at the same time refuse liberty to bring a fresh suit. (Vol. 12) 1925 All 272 (272) * (Vol. 5) 1928 Cal 273 (273) * (Vol. 8) 1921 Pat 360 (360) * ('08) 32 Bom 345 (344) (DB). * (1909) 3 Ind Cas 206 (206) (Mad) * (Vol. 4) 1920 Pat 587 (587, 588) * (Vol. 19) 1932 Mad 155 (155).

[4] An order granting permission to sue in respect of a portion of the claim only is bad. ('08) 5 Bom L. R. 223 (224) (DB).

[5] Directing a new plaint to be filed is not a legal order : to be passed on an application under

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R. 1 Sub-r. (2) ('87) 9 All 191 (200) 18 Ind App 134 (PC)

[6] The dismissal of a suit in the form "in which it is brought" does not amount to a permission to sue again. ('87) 9 All 155 (157) (D. B.).

[7] Where the Court passes an order granting permission to withdraw the suit with liberty to bring a fresh suit and adds that "the suit stands dismissed", a fresh suit is not barred by *res. judicata*. (Vol. 28) 1941 Lah 192 (194): 1 L R (1941) Lah 381 (DB).

[8] An application for withdrawal of a suit under rule 1 is a petition chargeable with court-fees under the Court-fees Act. ('84) 8 Mad 15 (17) (F. B.).

20 Dismissal of suit with liberty to bring a fresh suit.—[1] A Court cannot dismiss a suit with liberty to the plaintiff to bring a fresh suit on the same cause of action. (Vol. 28) 1941 Rang 118 (118): 1941 Rang L R 14. (Vol. 12) 1925 PC 55 (58): 52 Ind App 100: 27 Oudh Cas 334: 47 All 158 (PC) * ('89) 11 All 187 (188) (FB).

[2] The suit can be dismissed and permission granted to bring a fresh suit if the suit is premature. (Vol. 13) 1926 Mad 594 (597).

21. Liberty to withdraw two suits in order to bring a consolidated suit.—(1) Liberty to withdraw two suits in order to consolidate them into one may be granted (Vol. 11) 1924 Rang 249 (255): 2 Rang 66

22. "On such terms as it thinks fit".—

(1) Plaintiff should ordinarily be allowed to withdraw his suit by allowing costs to defendant. (Vol. 10) 1928 Bom 206 (206): 47 Bom 559 (D. B.) * (Vol. 19) 1932 Mad 714 (715). * (Vol. 13) 1926 All 738 (733): 43 All 696.

[2] Order making payment of costs a condition precedent to withdrawal with liberty to bring fresh suit should fix the time for payment and direct that suit will stand dismissed on failure: * (Vol. 5) 1918 Pat 171 (171, 172) * (Vol. 22) 1935 Nag 56 (56, 57) * (Vol. 16) 1929 All 692 (695) * (Vol. 1) 1914 Cal 207 (208) (DB).

[3] There is conflict of opinion as to whether a second suit is barred on failure to pay costs where no direction is given. They are as follows:—

(a) Whether the direction as to date for payment is given or not and whether such payment is made or not the suit will not fail. (Vol. 30) 1943 Cal 560 (563): 1 L R. (1944) 1 Cal 286 (D. B.) * (Vol. 25) 1938 Cal 13 (15): 1 L R. (1938) 1 Cal 273 (D. B.) * (Vol. 14) 1927 Lah 159 (160) * (Vol. 14) 1927 Lah 169 (160) * (Vol. 28) 1941 Lah 192 (194): 1 L R. (1941) Lah 381 (D. B.) * (Vol. 13) 1926 Pat 407 (410): 5 Pat 306 (D. B.) * (Vol. 13) 1926 Pat 472 (473).

[See however (Vol. 26) 1937 Lah 148 (148)].

[But see (Vol. 5) 1918 C 1 749 (750) (D. B.) * (Vol. 21) 1934 Cal 433, 435 (D. B.) * (Vol. 12) 1925 Pat 308 (310)]

(b) (1) Where a date has been fixed, failure to pay cannot be remedied by a subsequent deposit, and such deposit will in no way comply with the order for withdrawal and where no such date has been fixed the suit will not fail by reason of non-payment. (Vol. 20) 1933 All 810 (812): 56 All 10 (D. B.)

[But see (Vol. 16) 1929 All 692 (695).]

(c) Non payment of costs is a mere irregularity which can be cured by payment at any time before hearing of suit. (Vol. 16) 1929 Nag 135 (136): 25 Nag L. R. 171 * (Vol. 22) 1935 Nag 56 (56): 31 Nag L. R. 266. (for the purpose of limitation, suit is deemed to have been instituted on the date of payment of costs).

(d) Costs should be paid where date has been fixed before expiry of such time and where no such date is fixed, before the institution of second suit; failure will bar the second suit. (Vol. 18) 1931 Bom 257 (258, 259): 55 Bom 206 (D. B.) * (Vol. 11) 1924 Mad 877 (878, 879) * (1910) 33 Mad 265 (251) (Vol. 26) 1939 Rang 378 (380, 381).

[But see (Vol. 5) 1918 Mad 78 (80) (D. B.)]

[4] Plaintiff desiring to modify or annul the conditions of withdrawal should ask for that, before order permitting withdrawal is passed. Nor can he revive the suit on the ground of non-acceptance of condition after the order is passed. (Vol. 28) 1941 Bom 290 (292): 1 L R. (1941) Bom 570.

[5] Court can extend the time for payment of cost where it is impossible for the plaintiff to pay them within time fixed. ('06) 29 Mad 370 (371) (D B) * (Vol. 13) 1926 Pat 409 (411): 5 Pat 306 (D B) * ('12) 15 Ind Cas 157 (160) (D B) (Cal).

[6] The Court which permits withdrawal of suit with leave to institute fresh suit cannot prescribe a period within which to institute such suit so as to curtail the period which the law allows him. (Vol. 14) 1920 Bom 29 (29): 44 Bom 939 (D B).

23. Fresh suit must be between the same parties.—[1] The bar under this rule applies only if the parties in both suits are the same. (Vol. 15) 1928 All 689 (694, 695) (D B) (Vol. 4) 1917 Pat 543 (544) (D B) * (Vol. 14) 1927 Bom 87 (88) (D B) * (Vol. 2) 1942 Sind 130 (131): 1 L R (1942) Kar 56 (DB).

[2] Where the second suit is against a different defendant it is not barred under this rule. (Vol. 26) 1942 Bom 57 (58): 1 L R (1942) Bom 94 (D B)

[3] The withdrawal without the leave of the Court, of a suit by a Hindu reversioner, challenging an improper alienation by a Hindu widow, is no bar to another suit by another presumptive reversioner for the same purpose. (Vol. 5) 1918 Mad 425 (496) (D B).

[4] By "fresh suit" the rule does not contemplate a freshly filed suit against all the parties to the suit. It is quite sufficient if the suit is instituted against a particular party after leave has been obtained under O. 23, R. 1. (Vol. 32) 1945 Bom 74 (75).

24. Same subject-matter.—[1] The term "subject matter" is synonymous with "cause of action". (Vol. 21) 1934 Cal 433 (3, 436) (D P) * (Vol. 4) 1917 Bom 10 (10): 42 Bom 155 (D P) * ('0) 15 Mad L Jour 462 (465, 466) (H P) * (Vol. 20) 1933 Mad 3 (3): 56 Mad 163 (164) * (Vol. 1) 1932 Lah 198 (198, 140). * (Vol. 1) 1944 Sind 192 (194): 1 L R (1944) Kar 160 (D P) * (Vol. 11) 1924 Oudh 180 (181) * (Vol. 26) 1939 All 584 (586).

[2] A suit on a different cause of action is not barred under this rule. (Vol. 27) 1942 Sind 130 (131): 1 L R (1942) Kar 56 (DB) * (Vol. 4) 1917 Mad 512 (517)

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39 Mad 987 (F B) (Overruling 21 Mad 35)* (Vol 21) 1934 Lah 721 (728) : 16 Lah 27 (DB) * (Vol 20) 1938 Lah 943 (944) : 15 Lah 1 (D B).

[3] When the cause of action is different, a suit is not barred even though the suit may relate to the same property. (Vol 11) 1924 Oudh 180 (181) * (Vol 21) 1934 Cal 433 (436) (DB) * (Vol 20) 1933 Lah 943 (944) : 15 Lah 1 (DB).

[4] A suit based on the same cause of action as the first one is barred, where no permission to institute such fresh suit was obtained. (Vol 17) 1930 Lah 755 (756) (DB) * (Vol 26) 1939 All 584 (586).

[5] In the following cases it was held that withdrawal without leave barred a second suit, as the cause of action was the same:—

[a] A suit for declaration of title to a war bond is a bar to a suit for the recovery of the bond. (Vol 11) 1924 Rang 127 (131) : 1 Rang 618 (DB).

[b] A suit for recovery of plots A and B withdrawn with reference to plot B—Second suit for recovery of plot B is barred (Vol 5) 1918 Cal 23 (26)

[6] In the following cases the second suit was held not barred :

[a] Suit for ejectment on the basis of trespass—Second suit for ejectment after quit notice of the same defendant on the basis of tenancy. (Vol 4) 1917 Bom 10 (10) : 42 Bom 155 (DB) * (Vol 7) 1920 Cal 666 (667) (DB) * (Vol 20) 1933 Mad 3 (3) : 56 Mad 163 (DB).

[b] Suit by reversioner to declare alienations by widow not binding—Second suit for possession of the property after her death. (Vol 4) 1917 Mad 512 (517) : 39 Mad 987 (F B) (Overruling (Vol 2) 1915 Mad 1190). * (Vol 20) 1933 Lah 943 (944) : 15 Lah 1 (DB) * ('06) 9 Oudh Cas 164 (166).

[But see ('10) 8 Ind Cas 1066 (1067) (DB) (Mad)].

[c] First suit for partition—Withdrawal without permission does not bar second suit for partition of the property. (Vol 11) 1924 All 905 (906). 46 All 820 (DB) * (Vol 22) 1935 Mad 909 (912) * (Vol 12) 1925 Mad 112 (114) * (Vol 81) 1944 Sind 192 (194) : 1 L R (1944) Kar 169 (DB).

[7] The withdrawal of a suit instituted by partners not registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action after they get themselves registered as a firm. (Vol 23) 1936 Mad 697 (698).

25. Additional relief in fresh suit.—[1] As withdrawal without leave operates as a dismissal of the suit, O. 2, R. 2 will bar a suit in respect of any portion of the claim omitted in the suit so withdrawn ('05) 2 Cal L Jour 480 (484) (DB).

[2] Where the withdrawal is with the Court's permission to bring a fresh suit. O. 2 R. 2 is no bar to the inclusion in the second suit of any portion of the plaintiff's claim or of any relief which the plaintiff might have included but did not include in his first suit. (Vol 4) 1917 Lah 414 (416, 417) : 1917 Pun Re No. 65 (DB) * (Vol 12) 1925 Rang 118 (119) * ('95) 17 All 53 (55) (DB).

[3] In the second suit filed with leave of Court, it is not necessary to allege in the subsequent suit the same title as in the first. ('85) 9 Bom 346 (352).

26. Effect of withdrawal without permission.—[1] Unconditional withdrawal of suit in view of reference to arbitration of the dispute will bar subsequent suit in respect of the matter

even though the arbitration has failed (Vol 2) 1915 All 32 (33) * ('97 - 01) 2 Upp Bur Rul (286)

[But see ('97 - 01) 2 Upp Bur Rul 284].

[2] Though the plaintiff at the time of withdrawal reserves to himself the liberty of bringing a fresh suit, the bar under the rule will operate. (Vol 15) 1928 Rang 273 (274) : 6 Rang 494.

[3] The defendant's consent to the withdrawal of the suit will not remove the bar under the rule (Vol 2) 1915 All 32 (33) * (Vol 22) 1935 Cal 157 (158) * (Vol 25) 1938 Rang 210 (211).

[4] Where the second suit has been already filed at the time of the withdrawal of the first suit, the withdrawal does not bar the trial of the second suit. (Vol 17) 1930 Lah 599 (600) (DB) * (Vol 13) 1926 Mad 490 (491).

[5] The rule merely bars a remedy but does not extinguish the right. (Vol 15) 1928 Lah 710 (712). * (Vol 26) 1939 P C 110 (112) : 1939 Rang L R 358 : 66 Ind App 198 (PC).

[6] Where a creditor sues both the principal debtor and the surety in the same suit and later on withdraws the suit as against the former, though he cannot file a fresh suit against the principal debtor, he can continue the suit as against the surety. (Vol 26) 1939 P C 110 (114) : 1939 Rang L R 358 : 66 Ind App 198 (P C) (Reversing (Vol. 24) 1937 Rang 302).

[7] The bar under this rule is not based upon the principle of *res judicata* but operates as it is expressly contained in sub-rule (3) (Vol 26) 1939 Lah 414 (415) * (Vol 24) 1937 Mad 718 (719) (DB) * (Vol 26) 1939 All 584 (585).

[8] The prohibition does not apply to withdrawal of defences without permission. (Vol 24) 1937 Oudh 894 (895) : 13 Luck 323.

[9] The costs are in the discretion of the Court and the parties may be made to bear their own costs in proper cases. (Vol 26) 1939 Lah 414 (415).

27. Erroneous order granting permission.—

[1] An order granting permission under this rule cannot be questioned by the Court trying subsequent suit to see whether the order was properly made. (Vol 8) 1921 Cal 34 (38). 48 Cal 138 (F B) * ('12) 14 Ind Cas 175 (176) (All) * (Vol 5) 1918 Mad 1093 (1095) (DB) * (Vol 9) 1922 Pat 44 (46) : 1 Pat 90 (F B) * (Vol 22) 1935 Cal 739 (740) (DB) * (Vol 31) 1944 Nag 307 (305) : ILR (1944) Nag 412 * (Vol 7) 1920 Mad 1026 (1032) (DB) * (Vol 7) 1920 Lah 494 (496) (DB).

[2] Order allowing withdrawal at the instance of some of the plaintiffs without the consent of other is one without jurisdiction and does not amount to a withdrawal (Vol) 1922 Pat 489 (490, 491) : 1 Pat 228 (DB).

28. Effect of reversal of order granting permission.—[1] Where subsequent to the institution of the second suit, order permitting such suit is reversed in revision, the suit should be declared null and void and the previous suit should be continued from the stage where withdrawal was permitted. (Vol 5) 1918 Pat 452 (454). 3 Pat L Jour 460 (DB).

29. Power of Court of Small Causes to allow withdrawal.—[1] Presidency Small Cause Court after dismissal of suit granting new trial—It can grant permission to withdraw suit. (1902) 29 Cal. 239 (241) (DB).

[2] Decree in favour of plaintiff contingent on opinion of High Court—Withdrawal should not

2. In any fresh suit instituted on permission granted under the last Limitation law not preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. affected by first suit

[1882—S. 374 ; 1877, S. 374 ; 1859, S. 97.]

O. 23 R. 1 (contd.)

be permitted after opinion has been expressed against the plaintiff. Judgment in favour of defendant should be pronounced. ('96) 24 Cal 129 (132, 133).

30. Appeal.—[1] Order allowing withdrawal of suit with liberty to bring fresh suit is not appealable, under S. 104 or O. 43 R. 1. (Vol 17) 1930 All 863 (864) (DB) * (Vol 13) 1926 Oudh 185 (185) * (Vol 9) 1922 Lah 267 (268) (DB) * (Vol 15) 1928 Mad 416 (418, 419) : 51 Mad 664 (DB) * (Vol 6) 1919 Oudh 116 (116) * ('91) 18 Cal 322 (323) (DB) * (1900) 27 Cal 362 (363) (DB) * (Vol 26) 1939 Lah 472 (472)

[But see ('86) 8 All 82 (84) (DB) : ('04) 29 Bom 18 (18) (DB).]

[2] An appeal does lie from an order as to costs under this rule (Vol 14) 1927 Nag 399 (400) * ('98) 21 Mad 421 (422) (DB) * (Vol 26) 1939 Lah 472 (472)

[3] Where the Court refuses to permit a suit to be withdrawn, its order is not open to attack under S. 105 in the appeal from the decree in the suit. (Vol 4) 1917 All 134 (135, 136) (DB). * (Vol 12) 1925 Cal 711 (713) (DB).

[4] Where a Court, while dismissing a suit, reserves a right to institute a fresh suit, an appeal lies from the former part of the decree. (Vol 4) 1917 All 134 (135, 136) (DB).

[5] Order of lower appellate Court setting aside permission to withdraw and dismissing suit is appealable to the High Court. (1900) 27 Cal 362 (363) (DB).

[See however (Vol 22) 1935 Oudh 486 (488) (DB)]

[6] Withdrawal by one of the plaintiffs—Dismissal of whole suit on the ground that other plaintiff derived title from plaintiff withdrawing—Appeal lies against order of dismissal. (Vol 28) 1941 Nag 180 (181).

31. Letters Patent Appeal.—[1] Order of single Judge of a High Court allowing withdrawal of suit with leave to sue afresh is appealable (Vol 8) 1921 Bom 267 (268) : 45 Bom 377 (DB).

32. Revision.—[1] An order allowing the withdrawal of a suit with liberty to sue afresh is a decision within the meaning of S. 115. (Vol 9) 1922 Nag 84 (86) : 18 Nag L R 30 * (Vol 4) 1917 Nag 121 (122) * (Vol 9) 1922 Cal 58 (59) * (Vol 5) 1918 Pat 372 (373) : 2 Pat L Jour 682 (DB)

[But see (Vol 2) 1915 Cal 100 (100) : 41 Cal 632 (DB).]

[2] If an order is made on grounds not covered by O 23 R 1, it is open to revision (Vol 28) 1941 Nag 258 (260) * (Vol 28) 1941 Oudh 417 (420) * (Vol 27) 1940 Bom 121 (126) : I L R (1940) Bom 299 (FB) * (Vol 13) 1926 Mad 863 (864) * (Vol 12) 1925 Mad 617 (618) * (Vol 22) 1935 Oudh 495 (495) * (Vol 8) 1921 Cal 34 (37) : 48 Cal 138 (FB)

* (Vol 4) 1917 Nag 121 (122) * (1884) 6 All 211 (213) * (Vol 13) 1926 All 294 (295) * (Vol 22) 1935 Pat 251 (252) * (Vol 8) 1921 Pat 42 (43) (DB) * (Vol 17) 1930 Lah 175 (176) * (Vol 13) 1926 Lah 294 (295).

[3] An order permitting a partition suit to be withdrawn after the preliminary decree in the suit has been passed is open to revision. (Vol 22) 1935 Madras 445 (446).

[4] Failure to exercise judicial discretion by Court or to apply its mind at all to the question is a material irregularity in passing the order which will make it open to revision. (Vol 21) 1934 All 137 (139) * (Vol 22) 1935 All 740 (742) : 53 All 245 * (Vol 21) 1934 Cal 59 (60) (DB) * (Vol 13) 1931 Cal 336 (336) * (Vol 12) 1925 Oudh 140 (141) * (Vol 22) 1935 Pat 438 (438).

[5] The lower Court orders a suit to be withdrawn with leave to sue afresh, without giving any reasons. It acts with material irregularity and its order is liable to be set aside in revision. (Vol 28) 1941 Lah 18 (19) * (Vol 28) 1941 Mad 46 (47). * (Vol 15) 1928 All 98 (98) : 50 All 199 (DB) * (Vol 16) 1929 All 683 (684) (DB). * (Vol 3) 1946 Mad 674 (674) * (Vol 18) 1931 Cal 336 (336) * (Vol 13) 1931 Cal 107 (108) (DB) * (Vol 5) 1918 Nag 93 (94) * (Vol 5) 1918 Pat 372 (373) (DB). * (Vol 31) 1944 Sind 192 (194) : I L R (1944) Kar 169 (DB).

[But see (1902) 29 Cal 239 (241) (DB)]

[6] Where the order is not one passed with material irregularity the High Court will not interfere in revision on the ground that it would have passed a different order under the circumstances (Vol 28) 1941 Mad 46 (47) * (Vol 13) 1931 Cal 268 (269) (DB) * (Vol 17) 1930 Cal 424 (426) (DB) * (Vol 5) 1918 All 418 (419) : 40 All 612 (DB). * (Vol 22) 1935 All 284 (284) (DB) * (Vol 22) 1935 Bom 28 (30) : 59 Bom 114 * (Vol 20) 1933 Oudh 255 (256) * (Vol 25) 1938 Bom 442 (443) : I L R (1939) Bom 66 (DB) * (Vol 19) 1932 Lah 360 (361) : 13 Lah 537.

[7] An order for withdrawal made *ex parte* or made without any enquiry as to the circumstances justifying such withdrawal is liable to be set aside in revision (Vol 4) 1917 Cal 633 (633, 634) : 44 Cal 454 (DB) * (Vol 5) 1918 Pat 452 (454) : 3 Pat L Jour 460 (DB) * (Vol 5) 1918 Pat 261 (262) : 3 Pat L Jour 651 (DB)

[8] Where the defendant consented to the withdrawal upon payment of costs the order allowing withdrawal is not one passed without the court applying its mind and is not open to revision. (Vol 25) 1938 All 450 (451)

[9] An order refusing permission to withdraw a suit with liberty to bring another suit is interlocutory in nature and is not open to revision. (Vol 17) 1930 Lah 589 (589).

[10] Failure to give notice of application to the other side is a ground for revision:—see Notes on "May grant permission."

3. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

[1882—S. 375; 1877—S. 375; 1859—S. 98. See S. 96 (3) and O. 20.]

Objects and Reasons

"The Committee have considered it expedient to alter the language of section 375 [of 1882 Code] so as to recognise the power of a Court to enquire into and to record a disputed compromise."—S. O. R

Provincial Amendments

LAHORE

Add the following provisos to the rule :

"Provided that the hearing of a suit shall proceed and no adjournment shall be granted in it for the purposes of deciding whether there has been any adjustment or satisfaction, unless the Court for reasons to be recorded in writing thinks fit to grant such adjournment, and provided further that the judgment in the suit shall not be announced until the question of adjustment or satisfaction has been decided :

Provided further that when an application is made by all the parties to the suit either in writing or in open Court through their counsel that they wish to compromise the suit, the Court may fix a date on which the parties or their counsel should appear and the compromise be recorded, but shall proceed to hear those witnesses in the suit who are already in attendance, unless for any other reason to be recorded in writing, it considers it impossible or undesirable to do so. If upon the date fixed no compromise has been recorded, no further adjournment shall be granted for this purpose, unless the Court, for reasons to be recorded in writing, considers it highly probable that the suit will be compromised on or before the date to which the Court proposes to adjourn the hearing."

OUDDH

Add the following proviso :

"Provided that no agreement, compromise or satisfaction shall be recorded in a suit instituted under S. 92, Code of Civil Procedure, unless previous notice of the same has been given to the Legal Remembrancer to Government, and the Court, after hearing him, if he desires to be heard, decides to accept it."

ORDER 23, RULE 2—Note 1

[1] Under the present rule, a plaintiff withdrawing a suit under O. 23 R 1 with liberty to sue again and instituting a fresh suit is not entitled to deduct from the period of limitation applicable to his second suit the time taken up by the withdrawn suit (Vol 21) 1984 All 688 (691) (FB) * (Vol 25) 1988 Bom 281 (282) : I L R (1988) Bom 927 * (1918) 20 Ind Cas 205 (206) (Cal) (DB).

[2] S. 14, Limitation Act, does not apply where a suit is withdrawn by a plaintiff. (Vol 30) 1943 Mad 80 (81) (DB) (Court has no power to give permission to bring fresh suit without prejudice to the plaintiff on question of limitation as such an order would in effect repeal the statutory provisions of this rule) * (1905) 29 Bom 219 (225) * (Vol 26) 1939 Cal 625 (626) : I L R (1939) 2 Cal 316 (DB) * (Vol 27) 1940 Sind 125 (127) : I L R (1940) Kar 225 (DB)

[3] The rule applies only where a period is fixed by the law of limitation. Hence where under the order of the Revenue Court a plaintiff was required to institute a suit in a Civil Court within three months and the plaintiff after filing it in a Civil Court within that period, withdrew it and then re-instituted it beyond three months but within the ordinary period of limitation, the suit is within time. (Vol. 1) 1914 All 400 (401)

ORDER 23, RULE 3.

Synopsis.

1. Scope of the rule.
2. Applicability to Revenue Courts.

3. Applicability to mortgage suits.
4. Applicability to divorce suits.
5. Applicability to Insolvency proceedings.
6. "Where it is proved to the satisfaction of the Court."
7. "Has been adjusted."
8. "By any lawful agreement or compromise."
9. Submission to award, if a valid adjustment.
10. Agreement to take oath.
11. Compromise of probate proceedings.
12. Compromise pending arbitration.
13. Compromise of guardianship proceedings.
14. Pre-decree agreements in bar of execution.
15. "Shall order such agreement, compromise or satisfaction to be recorded."
16. "Shall pass a decree in accordance therewith so far as it relates to the suit."
17. Where compromise includes matters not relating to the suit.
18. Parties to the compromise.
19. Compromise by Hindu widow.
20. Compromise by pleader.
21. Effect of consent decree and admissibility in evidence.
22. Registration, if necessary.
23. Stamp.
24. Execution of consent decree.
25. Mode and effect of setting aside compromise decrees.
26. Compromise of appeal.
27. Revision.
28. Construction of compromise decrees.
29. Compromise of suit relating to public trust.

O. 23 R. 3 (contd.)

1. **Scope of the rule.**—(1) Court should investigate any dispute regarding the legality of the compromise or agreement sought to be recorded and should pass a decree in terms thereof, so far as such compromise relates to the suit. (Vol 22) 1935 All 137 (138); 57 All 426 (DB) * (Vol 21) 1934 Mad 337 (340); 57 Mad 892 (DB) * (Vol 21) 1934 Pat 582 (582, 583) * (Vol 24) 1937 Pat 11 (12); 15 Pat 379 (DB).

[2] "Compromise" means an adjustment of claims in dispute by mutual concessions, and also mutual promise to refer the ending of their controversy to arbitrators. (Vol 14) 1927 Bom 565 (567, 573); 51 Bom 908 (FB) * (Vol 18) 1931 Oudh 127 (127); 6 Luck 591 (DB) * (Vol 26) 1939 Nag 166 (187). I L R (1939) Nag 250 (FB).

2. **Applicability to Revenue Courts.**—(1) The rule applies to revenue as well as civil proceedings. (Vol 5) 1918 Oudh 412 (417); 21 Oudh Cas 346 (DB).

[2] The rule does not apply to proceedings for the appointment of common manager under S. 93 of the Bengal Tenancy Act. ('06) 4 Cal L Jour 564 (565) (DB).

[3] The rule does not apply to a rent suit under the Bengal Tenancy Act, though a compromise in such suits can be recorded by the Court under S 147A of that Act which is identical in terms with this rule. (Vol 7) 1920 Pat 602 (604); 4 Pat L Jour 687 (DB).

[4] The rule does not apply to proceedings under some other special Acts.

[See S. 196 of the Orissa Tenancy Act II of 1913] and S. 199 of the Madras Estates Land Act (I of 1908).

3. **Applicability to mortgage suits.**—(1) The rule applies also to suits on mortgages so that it is open to the Courts to decree such suits on terms settled between the parties. (Vol 8) 1921 Pat 320 (321) (DB) * (Vol 24) 1937 All 108 (112) (DB).

[2] This rule cannot be extended by analogy to proceedings under S. 83 of the Transfer of Property Act, ('90) 18 Mad 816 (818) (DB).

4. **Applicability to divorce suits.**—(1) Decree nisi passed in suit for dissolution of marriage—Court can on consent of parties omit to make the decree absolute. ('88) 10 All 559 (562, 563) (SB).

5. **Applicability to Insolvency proceedings.**—(1) The rule does not apply to insolvency proceedings. (Vol 32) 1945 Oudh 319 (320).

6. **"Where it is proved to the satisfaction of the Court."**—(1) The Court has jurisdiction, in the case of a dispute between the parties as to the compromise to enquire into, and decide, whether there has been a lawful compromise in terms of which the suit should be decreed. (Vol 14) 1927 PC 204 (PC).

[But see (Vol 21) 1934 Cal 693 (644) (DB)].

[2] Enquiry about the fact and lawfulness of a compromise of a suit in the suit itself contemplated under this rule is a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms.

(Vol 20) 1933 Pat 306 (403); 12 Pat 359 (DB).

[3] The question whether a particular party has agreed or has not agreed to the compromise and whether he has signed it is a question of fact ('42) ILR (1942) Kar (PC) 143 Sup (147).

[4] The onus of establishing that a suit has been adjusted in a lawful manner is on the person who alleges the same. (Vol 24) 1937 Pat 11 (12); 15 Pat 379 (DB).

[5] The Court can decide the matter by taking evidence in the usual way or upon affidavits. ('02), 5 Oudh Cas 49 (53) (DB) * ('96) 20 Bom 304 (308) * (Vol 23) 1936 Mad 347 (350).

[6] The general rule, that evidence should be recorded before a decision is made and not after should also be followed in cases in which the Court records compromise arrived at between the parties. (Vol 23) 1936 Sind 59 (61); 29 Sind LR 437 (DB).

[7] The agreement compromising the suit may be written or oral. (1905) 13 Cal WN 1023 () * (1905-06) 3 Low Bur Rul 243 (243).

[8] The agreement may be proved by oral evidence. (Vol 3) 1916 Mad 849 (850) (DB).

[See also (Vol 26) 1939 Rang 149 (150) (DB).]

[9] The compromise need not be presented by the parties themselves. (Vol 4) 1917 Lah 232 (233); 1917 Pun Re No. 78 (DB).

[10] A compromise otherwise unobjectionable is not vitiated by the want of signature of a party. (Vol 1) 1914 Lah 130 (131) (DB).

7. **"Has been adjusted":**—(1) For the rule to apply, there must be a completed agreement between the parties. (Vol 28) 1941 Oudh 529 (543) * (Vol 11) 1924 PC 200 (201) (PC).

[2] The agreement must amount to an adjustment, in whole or in part, of the suit. (Vol 28) 1941 Oudh 529 (544) * (1900) 2 Bom LR 118 (119) (DB) * (Vol 17) 1930 Sind 217 (217) (DE) * (Vol 10) 1928 Pat 293 (294) (DB) * (Vol 26) 1933 Rang 300 (303); 1939 Rang LR 280 (FB).

[3] Failure to make a further agreement to give effect to a previous agreement for compromise does not affect it. ('42) I L R (1942) Kar (PC) 143 Sup (148, 152).

[4] The following cases will show when a suit can be said to be adjusted and when not:

[a] Case adjourned on the ground that parties contemplated compromising the matter out of Court. There is no adjustment of the suit within this rule. (Vol 18) 1931 Cal 205 (206) (DB).

[b] Agreement to disposal of the suit one way or other on the existence of a fact or not amounts to adjustment. (Vol 16) 1929 Mad 416 (417) * (Vol 4) 1917 Cal 327 (328) (DB) * (Vol 27) 1940 All 190 (192); I L R (1940) All 185 (DB) * (Vol 23) 1936 Mad 856 (857).

[But see 14 All 141 (144) (DB).]

[c] Agreement between parties to abide by the final decision to be made in another proceeding amounts to an adjustment when that decision is actually passed (Vol 6) 1919 Mad 546 (547) (DB). (Distinguishing). (Vol 1) 1914 Mad 449; 37 Mad 408).

[But see (Vol 22) 1935 Rang 482 (482). (Vol 12) 1925 All-271 : 47 All 456 followed)].

O. 23 R. 3 (*contd.*)

[d] Agreement that dispute is to be settled in accordance with the statement of a third person is an adjustment. (Vol 20) 1933 All 861 (880, 889) : 56 All 39 (SB) * (Vol 14) 1927 Lah 9 (100) * (Vol 24) 1937 All 701 (702, 704) (DB) * (Vol 25) 1938 All 353 (354) (In this case the same principle was held applicable to an agreement of the defendant to be bound by a statement of the plaintiff and (Vol 20) 1933 All 861 : 56 All 39 (SB) was relied on).

[e] An agreement to refer disputes to an arbitrator and abide by his terms is not an adjustment, till the terms are stated and accepted. (Vol 17) 1930 All 162 (163) : 52 All 235 (DB) * (Vol 14) 1927 All 614 (615) : 50 All 51 (DB) * (1912) 6 Sind L R 166 (167) (DB) * (Vol 1) 1914 Sind 139 (139) : 8 Sind L R 91 (DB).

[f] Compromise which either party has the option of repudiating afterwards is not an adjustment of the suit. (Vol 1) 1914 Lah 306 (307) : 1914 Pun Re No. 24.

[g] An agreement to abide by the decision of the Court whether right or wrong amounts to a compromise. (Vol 12) 1925 All 558 (558) : 47 All 921 (DB) * (Vol 16) 1929 Oudh 451 (452) : 5 Luck 391 (DB) * (Vol 15) 1928 All 497 (498) (DB).

[h] An agreement for making the decision of Court depend on contingencies beyond the control of parties is not an adjustment. (Vol 14) 1927 Oudh 222 (223) (DB) * (Vol 11) 1924 Oudh 367 (368) : 27 Oudh Cas 157 * (Vol 15) 1928 Cal 108 (110) (DB).

[See also (Vol 11) 1924 All 911 (912)].

[But see (Vol 12) 1925 All 271 (272) : 47 All 56 (DB).]

[i] Where the contingency on which the Court's decision depends is within the power of the parties themselves, an agreement to abide by the decision of the Court will be an adjustment. (1907) 17 Mad L Jour 37 (38) (DB).

[j] The abandonment of an issue does not amount to a compromise. ('99) 22 Mad 538 (546) (DB).

[k] Arbitration pending appeal—One arbitrator not signing award and award not filed in time—Award is no award and is not an adjustment. (Vol 30) 1943 Pat 433 (435)

[5] A suit may be compromised even after a preliminary decree, provided the final decree has not been passed. (Vol 23) 1936 Oudh 320 (320, 321) : 12 Luck 260 (DB).

[6] There can be a 'satisfaction' (under this rule) of the plaintiff's claim between the preliminary and final decrees in a suit. (Vol 22) 1935 Pat 385 (395) : 14 Pat 488 (DB).

8. "By any lawful agreement or compromise"—

[1] As only lawful agreements or compromises are recordable under this rule the Court is bound to enquire whether the compromise sought to be recorded is a lawful one or not. (Vol 13) 1926 Nag 194 (195) * (Vol 21) 1934 Pat 582 (582, 583) * ('11) 14 Cal L Jour 337 (342) (DB) * (Vol 11) 1924 Cal 159 (159) (DB) * (1912) 35 Mad 75 (81) (DB) * (Vol 6) 1919 Pat 146 (155) : 4 Pat L Jour 580 (DB) * (1911) 35 Bom 190 (195) (DB) * (Vol 22) 1935 Bom 54 (64) (DB).

[2] The Court can record that portion of the compromise which is lawful, where the compromise contains a part which is unlawful but separable ('10) 7 All L Jour 778 (781, 782) (DB) * (Vol 15) 1928 Pat 435 (496).

[3] When investigating the fact and lawfulness of a compromise, it is irrelevant to examine the strength or weakness of the suit. (Vol 27) 1940 Pat 629 (681) (DB) * (Vol 20) 1933 Pat 306 (339, 340) : 12 Pat 359 (DB).

[4] An agreement or compromise may be lawful within this rule, although it may not be binding on one of the parties. (Vol 15) 1928 All 494 (496) : 50 All 748 (DB) * (Vol 22) 1935 All 187 (138, 139) : 57 All 426 (DB) (Party executing compromise cannot avoid it under O. 23 R. 3 on ground of fraud. (Vol 23) 1936 Mad 347 (350)).

[But see (Vol 14) 1927 Lah 546 (549) (DB)]

[5] The word "lawful" means lawful within the meaning of the Contract Act, that is to say, the rule requires an agreement which is legally enforceable. (Vol 27) 1940 Bom 60 (61) : 1 L R (1940) Bom 13.

[6] It is not necessary that the terms of the compromise should be specifically enforceable under the Specific Relief Act to enable the recording of them. (Vol 20) 1933 Pat 306 (405) : 12 Pat 359 (DB).

[7] The following have been held to be agreements which are unlawful within the meaning of this rule :

[a] Agreements prohibited by law. (Vol 6) 1919 Mad 429 (431) (DB) * (Vol 7) 1920 Nag 35 (37) * (Vol 7) 1920 Pat 159 (160) * ('10) 11 Cal L Jour 346 (351, 352) (DB).

[b] Agreements which are opposed to public policy. (Vol 2) 1915 Mad 561 (568) : 38 Mad 850 (DB) * ('03) 26 Mad 31 (33) (DB). (Alienation of religious office.) * (Vol 17) 1930 Mad 629 (630) . 53 Mad 893 (DB) (Agreement relating to public trust, detrimental to its interest) * (Vol 9) 1922 Mad 429 (432) (DB) (do) * (1928) 9 Pat L T 214 (214) (do) * (1904) 8 Cal W N 404 (405, 406) (DB) (do).

[But see (Vol 7) 1920 Mad 508 (509) (DB). (*Bona fide* compromise by trustee of public trust is lawful—It is not for Court to enquire whether it is in fact beneficial to trust or not.) * ('08) 31 Mad 236 (250) : 35 Ind App 176 (PC) (Agreements amounting to breach of trust). * (Vol 7) 1920 Mad 508 (509) (DB).]

[c] Agreements which involve injury to a third party. (Vol 6) 1919 Pat 146 (155) : 4 Pat L Jour 580 (DB). (Vol 6) 1919 Pat 325 (328) * ('0) 32 Cal 561 (566) (DB). * (Vol 10) 1923 Oudh 252 (253) . (Vol 11) 1924 Cal 159 ('60) (DB) * (1936) 38 Pun. L R 283 (283, 284) * (1935) 61 Cal L Jour 88 (90) (Agreement injuring rights of minor not a party to suit) (Vol 27) 1940 Pat 406 (409) (DB). (The compromise of a doubtful right is a sufficient foundation of an agreement.)

[8] The following compromises were held to be not unlawful.—

[a] Compromise containing an agreement for the withdrawal of a prosecution for a compoundable offence. (Vol 17) 1930 Lah 860 (861).

[But see ('83) 1883 All W N 145 (145) (DB).]

O. 23 R. 3 (*contd.*)

[b] Allowing a relief which is barred by limitation (Vol 13) 1926 Oudh 311 (313) (DB) (Compromise preventing consideration of legal bar to claim is not unlawful.)

[See however (Vol 27) 1940 Oudh 107 (110); 15 Luck 308 (DB)]

[c] Compromise as a result of which parties do not get the shares to which they would be legally entitled. (Vol 7) 1920 Cal 269 (269) (DB).

[d] Compromise containing a penal provision (Vol 13) 1926 All 278 (280) (DB) (*Obiter*).

[e] Compromise in which one party transfers his right to another is not bad on the ground of *lis pendens* (Vol 23) 1935 Bom 54 (64) (DB).

[f] Compromise reconciling husband and wife, containing provision for separate maintenance in case of disagreement is not against public policy. (Vol 32) 1945 Mad 36 (38).

[9] A promise to do a thing can be a good consideration for the adjustment of a suit and it need not have been carried out before the adjustment can be recorded. (Vol 24) 1937 Pat 89 (89) (DB).

[10] The rule contemplates an adjustment by act of parties and not an adjustment which has a statutory operation. (Vol 24) 1937 Cal 381 (382) (DB).

9. Submission to award, if a valid adjustment.—(1) An award made during the pendency of the suit concerning the matters or some of the matters in the suit may constitute an adjustment by lawful agreement or compromise within this rule. (Vol 29) 1942 All 145 (147) (FB) * (Vol 32) 1945 Mad 294 (295) (DB).

[2] Where both the parties accept the award of the arbitrators, the award becomes a compromise and can be recorded under this rule. (Vol 17) 1930 Lah 860 (861) * (Vol 18) 1926 Mad 1211 (1211, 1212) (DB) * (Vol 26) 1939 Rang 800 (801): 1939 Rang L R 280 (FB)

[3] The court acting under this rule could enquire into any alleged misconduct of the arbitrator. (Vol 10) 1923 Bom 401 (401) (DB).

[4] Party not objecting to the recording of a submission and award as a compromise would be estopped from questioning the Court's power to do so. (Vol 16) 1929 Bom 1 (6): 53 Bom 75 (DB).

[5] A mere agreement to refer to arbitration is not a compromise within this rule. ('03) 30 Cal 218 (228, 229) (SB) * (Vol 12) 1925 P C 70 (73) (PC).

[6] An award under an invalid reference cannot be accepted as a compromise or adjustment. (1909) 33 Bom 69 (76) * (Vol 8) 1921 Mad 709 (709) (DB) * (Vol 18) 1931 Bom 843 (846): 55 Bom 503 (DB) compare (Vol 13) 1926 Mad 366 (366).

10. Agreement to take oath.—(1) An agreement to be bound by the oath of the opposite party does not amount to an adjustment of the suit. ('99) 22 Mad 234 (237) (DB) * (1880) 2 Mad 356 (360) (DB) * (Vol 9) 1922 All 160 (161): 44 All 117 (DB) * (Vol 5) 1918 Lah 126 (126): 1918 Pun Re No. 83 (DB) * (Vol 33) 1946 Lah 78 (79, 80) (Vol. 20) 1933 All 956 (957).

[See however (Vol. 25) 1933 All 353 (354) * (Vol. 20) 1933 All 881: 56 All 89 (SB) Followed.]

[2] Party agreeing to be bound by oath of the opposite party can resile from it before oath is actually taken (Vol. 22) 1935 All 276 (277).

[3] Where the opposite party refuses to take the oath, the suit should not be decreed but decided on merits. (Vol. 33) 1946 Lah 78 (79, 80).

11. Compromise of probate proceedings.—(1) Probate cannot be granted on the basis of a compromise between applicant for probate of will and caveator aiming at exclusion of proof of will, as it is opposed to public policy. (Vol. 3) 1916 Pat 82 (83): 1 Pat L Jour 377 (DB) * ('04) 31 Cal 357 (362, 363) (DB) * (1903) 12 Cal L Jour 91 (96) (DB) * (Vol. 4) 1917 Pat 41 (42): 2 Pat L Jour 535 (DB).

[2] A caveator who has entered into a compromise with applicant for probate to exclude proof of will, can resile from it and require due proof of the will. (Vol. 3) 1916 Pat 82 (83): 1 Pat L Jour 377 (DB).

[3] An executor who withdraws his application for probate in pursuance of a compromise can file another application for it. (Vol. 4) 1917 Pat 41 (42): 2 Pat L Jour 535 (DB).

12. Compromise pending arbitration.—[1] Cases given under this note were decided prior to the Arbitration Act, 1940. They are still good law even now.

[2] Compromise entered into pending arbitration proceedings without the intervention of the Court is valid. 1910 Pun W R No. 38 p. 94 (99, 100).

[3] Pending arbitration on reference by Court, parties cannot compromise. (Vol. 11) 1924 Cal 722 (724): 51 Cal 432 (DB) * ('04) 1 All L Jour 29 (32).

[But see (Vol. 14) 1927 Lah 156 (157).]

[4] Arbitration is not superseded by the expiry of time fixed for making the award. (Vol. 11) 1924 Cal 722 (724): 51 Cal 432 (DB).

[But see (Vol. 10) 1923 Mad 576 (577) (DB).]

[5] Agreement not to dispute an award is a lawful adjustment of the suit within this rule. (Vol. 2) 1915 Cal 101 (102).

[6] Compromise *pendente lite* differs from adjustment of award—Award if completely adjusted, bars execution of decree based on it. (Vol. 23) 1936 Lah 319 (320) (DB).

13. Compromise of guardianship proceedings.—[1] A guardian appointed by the court cannot be removed by a compromise. (Vol. 5) 1918 Sind 32 (33): 12 Sind L R 14 (DB).

14. Pre-decree agreements in bar of execution.—(1) Pre-decree agreements to treat the decree as not executable wholly or partly cannot be given effect to by the executing Court. (Vol. 7) 1920 Mad 124 (124): 43 Mad 725 (DB) * (Vol. 15) 1923 Cal 527 (530) (DB).

[2] Agreement not to execute the decree in whole or in part, entered into after the decree is passed, is valid and binding. (Vol. 2) 1915 Nag 128 (129): 11 Nag L R 110.

15. "Shall order such agreement, compromise or satisfaction to be recorded."—[1] Recording a compromise is not a mere matter of form but is one of substance and an order directing the recording is appealable under O. 43 R. 1. (Vol. 10) 1923

O. 23 R. 3 (*contd.*)

P C 178 (183) (PC) * (Vol. 22) 1935 Pat 433 (444) : 14 Pat 356 (DB)

[But see (Vol. 16) 1929 Sind 12 (12) (DB)]

[2] Omission to record the compromise deprives the court of its jurisdiction to pass a decree in accordance with the compromise. (Vol. 14) 1927 Pat 354 (360) : 6 Pat 108 (DB)

[But see (Vol. 22) 1935 All 738 (739).]

[3] The rules makes it obligatory on the Court to record a compromise duly entered into by the parties to a suit. (Vol. 10) 1923 P C 98 (101) PC * (Vol. 17) 1930 P C 158 (162) : 57 Ind App 133 : 57 Cal 1311 (PC) * (Vol. 22) 1935 P C 119 (120) : 14 Pat 545 : 62 Ind App 196 (PC) * (Vol. 26) 1939 Nag 233 (238) : ILR (1939) Nag 607 (FB) * (Vol. 32) 1945 All 136 (139) : I.L.R. 1945 All 197 (DB).

[4] Court cannot refuse to record the compromise merely because it considers it too favourable to one side. (196) 22 Bom 238 (240) (DB) * (Vol. 17) 1930 Mad 629 (630) : 5 Mad 398 (DB) * (Vol. 23) 1936 Mad 347 (350).

[5] Court cannot refuse to record the compromise for the reason that the working of it would give trouble. (1910) 7 All L Jour 778 (181) (DB) * (Vol. 20) 1933 Pat 306 (405) : 12 Pat 359 (DB).

[6] Till judgment is delivered in open court, the Court has jurisdiction to record a compromise. (Vol. 8) 1921 Mad 690 (690, 691) (DB) * (1908) 1908 Pun W R No. 67.

[See however (Vol. 10) 1923 Cal 319 (319) (DB).]

[7] Where an *ex parte* decree is set aside by suit on the ground of fraud any compromise entered into before the decree should be recorded. (Vol. 6) 1919 Cal 993 (994) (DB).

[8] Where a plaintiff, in pursuance of a compromise, merely asks for a withdrawal of suit, the Court is not bound to record the compromise (Vol. 3) 1916 Cal 80 (81) (DB) * (Vol. 4) 1917 Nag 1 (4).

[9] Compromise out of Court—Decree passed not in terms of compromise—Terms of agreement cannot be enforced. (Vol. 8) 1921 Lah 248 (249) : 1 Lah 445 (DB) * (Vol. 11) 1924 Nag 325 (327).

[10] Unless Court's order embodies the whole compromise, it is not enforceable (Vol. 16) 1929 Lah 291 (292) : 10 Lah 685 (DB).

[11] The order need not set out the compromise verbatim but the terms of the compromise should be indicated with sufficient clearness. (Vol. 27) 1940 P C 70 (74) : 67 Ind App 179 : I L R (1940) Lah 330 : I L R (1940) Kar P C 149 (PC).

[12] Incidental noting of the fact of agreement made out of Court, in an order of adjournment. It does not amount to a record of the compromise. (Vol. 3) 1916 Mad 849 (849) (DB).

[13] Where the claim is beyond the jurisdiction of the Court, it cannot pass a compromise decree. (Vol. 8) 1921 Mad 696 (699) (DB).

16. "Shall pass a decree in accordance therewith so far as it relates to the suit."—[1] A decree on a compromise can be passed only so far as it relates to the suit. (Vol. 22) 1935 P C 119 (122) : 14 Pat 545 : 62 Ind App 196 (PC).

[2] The question whether a term of the com-

promise relates to the suit should be decided on the facts of each case. (Vol. 30) 1943 Sind 11 (13) : I L R (1942) Kar 326 (DB) * (1908) 35 Cal. 887 (841) (DB) * (Vol. 2) 1915 Mad 210 (215) : 38 Mad 959 (DE) * (Vol. 19) 1934 Bom 47 (48 to 51) (DF) * (Vol. 27) 1940 Oudh 27 (20) (DF) * (Vol. 24) 1937 Pat 232 (233) (DB) * (Vol. 24) 1937 Sind 190 (192) : 31 Sind L R 153 (DB).

[3] The relief granted in a compromise decree need not be confined to the relief prayed for in the plaint (Vol. 30) 1943 Sind 11 (13) : I L R (1942) Kar 326 (DB).

[4] All terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject matter of the suit or not, become related to the suit, and can be embodied in the decree (Vol. 31) 1944 Oudh 12 (13) (DB) * (Vol. 30) 1943 Sind 11 (16) : I L R (1942) Kar 326 (DB) * (Vol. 23) 1941 Rang 316 (319) : 1941 Rang L R 774 (DB) * (Vol. 27) 1940 Rang 91 (92) : 1940 Rang L R 237 * (Vol. 8) 1921 Cal 202 (207) : 48 Cal 1059 * (Vol. 21) 1934 Lah 623 (625) * (Vol. 5) 1918 Pat 507 (512) : 3 Pat L Jour 275 (SB) * (Vol. 19) 1932 Bom 466 (467) (DB) * (Vol. 2) 1915 Mad 210 (215) : 38 Mad 959 (DB) * (Vol. 2) 1915 Mad 683 (684) (DB) * (Vol. 19) 1932 Bom 47 (51) (DE) * (Vol. 25) 1938 Oudh 103 (105) (DB) * (Vol. 24) 1937 Pat 232 (233) (DB)

[But see (195) 5 Mad L Jour 115 (147) (DB) * (Vol. 27) 1940 Oudh 27 (20) (DB)]

[5] In the following cases the compromise was held to "relate to the suit" within the meaning of this rule:—

[a] Compromise of suit for money decree—Charge on the defendant's immovable property for payment of amount agreed on may be created. (Vol. 17) 1930 Nag 17 (18) * (Vol. 16) 1929 Nag 164 (167, 168) : 25 Nag L R 110 * (Vol. 12) 1925 Mad 1101 (1103, 1104) (DB) * (1907) 30 Mad 478 (480, 481) (DB) * (1908) 35 Cal 587 (842) (DB) * (Vol. 12) 1925 Bom 503 (510) (DB)

[b] Compromise of a suit for declaration may include term as to the payment of a sum of money by one of the parties to the others. (Vol. 15) 1928 Nag 173 (174, 175) : 24 Nag L R 55 (DB). (Note—Overruled in (Vol. 26) 1939 Nag 186 : I L R (1939) Nag 250 (FR) on another point.) * (Vol. 20) 1933 Pat 176 (178) (DB).

[c] A suit by a co-tenant who has paid the entire rent for contribution may be compromised by providing that the defendant should give his share of the land in favour of the plaintiff. (Vol. 7) 1920 Cal 194 (195) (DB).

[d] Suit for recovery of certain property—Compromise providing that the defendant should redeem a certain house under mortgage and deliver it to the plaintiff is one relating to the suit. (1909) 2 Ind Cas 430 (430) (DB) (Mad).

[e] Lessor and lessee's suit against third person asserting lessor's title to certain lands—Compromise providing for the recognition of title by defendant in return for his receiving half share of rent payable thereon was held to relate to the suit. (1910) 33 Mad 102 (105, 106) (DB)

[f] Where the litigation concerns the ownership and possession of leased land, a compromise relating to the manner in which the land was to be owned and enjoyed relates to the suit. (Vol. 30)

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1943 Sind 11 (1f). I L R (1942) Kar 326 (DB).

[g] Suit by A against his landlord for possession of leased land—B impleaded as party—Real contest being between B and landlord—Compromise of suit—A abandoning suit and B agreeing to pay rent to landlord—Compromise is one relating to suit. ('09) 9 Cal L Jour 16 (18) (DB).

[h] Suit for account—Agreement by plaintiff to take only her share of income of certain villages in consideration of her giving up her rights to an account is one relating to suit. (Vol. 24) 1937 Pat 232 (234) (DE).

[6] The following are instances in which the compromise was held *not* to "relate to the suit".

[a] A consent decree in a partition suit between brothers cannot deal with the rights in their mother's share after her death. (Vol. 8) 1921 Cal 202 (207): 48 Cal 1059.

[b] Suit for a certain sum of money with interest calculated at a certain rate—Defendant compromising to pay smaller sum and on failure to pay the sum with interest at a higher rate—Stipulation to pay higher rate of interest does not relate to suit. (Vol. 5) 1918 Pat 635 (636): 2 Pat L Jour. 673 (DB).

[c] Suit for damages for crops misappropriated—Compromise settling amount of damages and also providing that defendant should hold the land as a tenant—Agreement as to tenancy is outside the scope of the suit. ('07) 5 Cal L Jour 15 (17) (DB).

[7] The decree need not be pasted *simultaneously* with the order recording the compromise and the Court can postpone the passing of the decree in a proper case. (Vol. 28) 1941 Rang 316 (318): 1941 Rang L R 774 (DB) * (Vol. 17) 1930 Pat 315 (399, 400): 9 Pat 314 (DB) * (Vol. 23) 1936 Pat 401 (401): 15 Pat 456 (DB).

[8] Court is not bound to pass a decree in the exact form which the parties propose. (Vol. 16) 1922 Bom 350 (352) (DB)

[9] The decree is not vitiated because it does not recite *verbatim* the compromise. (Vol. 16) 1929 Lah 527 (528)

[10] A court acting under this rule cannot make a *declaratory* decree (Vol. 16) 1929 Bom 350 (352) (DB).

[11] Where the compromise does not provide for a personal remedy, the decree also cannot grant it. (Vol. 18). 1926 Nag 20 (21).

[12] A third party cannot intervene and oppose the passing of a decree on the compromise between the original parties to the suit. (Vol. 13) 1926 Mad 341 (341, 342) * (Vol. 19) 1932 All 478 (479, 480) (DB).

17. Where compromise includes matters not relating to the suit.—(1) A compromise which includes matters extraneous to the suit is not unlawful. (Vol. 4) 1917 Lah 282 (284): 1917 Pun Re No. 78 (DB).

[2] A compromise containing extraneous matters not relating to suit cannot be rejected in its entirety. (Vol. 4) 1917 Lah 282 (284): 1917 Pun Re No. 78 (DB).

[3] The proper course is to record the whole compromise in the decree restricting the operative

part of decree to the terms which relate to the suit. (Vol. 28) 1941 Nag 197 (198) * (Vol. 6) 1919 PC 79 (81): 46 Ind App 240: 47 Cal 485 (PC) * (Vol. 20) 1933 All 649 (651): 55 All 775 (PB) * (Vol. 5) 1918 Pat 507 (512): 3 Pat L Jour. 255 (38) * (Vol. 31) 1944 Bom 46 (49, 50). * (Vol. 27) 1940 Oudh 27 (32) (DB).

[4] Those terms which are not incorporated in the operative part of the decree, may be enforced by means of a separate suit. (Vol. 6) 1919 Mad 305 (310) (DB) * (Vol. 19) 1932 Bom 466 (467) (DB) * (Vol. 26) 1939 All 454 (456): I L R 1939 All 435 (DB).

[5] Compromise containing extraneous matters—Condition that it must take effect as a whole—Suit must not be dismissed. ('99) 22 Mad 214 (216) (DB).

[6] Where a compromise containing extraneous matters, is agreed upon to be given effect to as a whole, the parties should be allowed to suitably amend the plaint to enable the whole compromise to be passed into a decree. ('87) 9 All 229 (230) (DB).

[7] Will disposing of properties situate at two different places—Suit questioning Will and for declaration of title to the properties situate at one of the places brought at that place—Compromise and decree based upon that determining rights of parties in respect of both properties—*Helé* though plaint should have been amended to include both properties, failure to do so did not make decree one without jurisdiction. (Vol. 27) 1940 PC 70 (74): I L R (1940) Kar P C 149: I L R. (1940) Lah 330: 67 Ind App 179 (PC).

[8] Where the extraneous matter is so intimately connected with the subject-matter of the suit that it cannot be split up the words 'so far as it relates to the suit' are wide enough to embrace that matter also. (Vol. 31) 1944 Bom 239 (242) (DB).

18. Parties to the compromise.—(1) A compromise to which some of the parties to a suit alone are parties is not necessarily invalid. (Vol. 14) 1927 PC 57 (59): 51 Bom 442: 54 Ind App 111 (PC).

[2] The Court has a discretion to reject a compromise to which some of the parties in suit alone are parties in good cause shown by the others (Vol. 13) 1926 Cal 193 (198) (DB).

[3] A partial compromise which would be prejudicial to the interests of the parties not joining it, cannot be recognized. (Vol. 10) 1923 Oudh 252 (253, 254). * ('05) 32 Cal 561 (566) (DB).

[4] Where the interests of the several parties to a suit are *inseparable*, some of them alone cannot compromise the matter. (Vol. 6) 1919 Cal 727 (728) (DB). * (Vol. 12) 1925 Lah 280 (280). * (Vol. 14) 1927 Oudh 222 (223) (DB). (Vol. 15) 1928 Mad 594 (596) (Suit for partition—Some of the parties alone cannot compromise) * (Vol. 2) 1915 Cal 473 (474) (DB). (Do.)

[5] A compromise between some parties alone neither binds the others nor can be enforced by such others. (Vol. 2) 1915 Cal 473 (474) (DB) * (Vol. 6) 1919 Cal 1043 (1043, 1044) (DB). * (Vol. 23) 1936 All 1 (2) (DB).

[But see ('01) 5 Cal W N 386 (380, 391) (DB). * ('13) 19 Ind Cas 915 (916) (DB) (Cal). * (Vol. 11) 1924 Cal 814 (815) (DB).]

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[6] Where certain defendants were *ex parte* and the Court passed an *ex parte* decree against them in the terms of the compromise entered into between the other defendants and the plaintiff, the decree is not a nullity as against the *ex parte* defendants. (Vol. 22) 1925 Oudh 358 (361, 362) : 11 Luck 187 (FB).

[7] A party is not bound by an unauthorized compromise entered into by his agent. (Vol. 1) 1914 Lah 112 (113) : 1914 Pun Re. No. 96 (DB) * (Vol. 8) 1916 Cal 479 (482) (DB).

[8] A person who is a party in a representative capacity can bind the persons represented by a *bona fide* compromise. (1900) 28 Mad 239 (249, 250) (SB) * (Vol. 2) 1915 PC 33 (35, 37) : 39 Mad 115 (PC). (Trustee compromising—Act not reasonable and proper in the circumstances—Act not binding.)

[9] Persons not parties to the suit parties to the compromise—Terms affecting parties to suit not separable from those affecting non-parties—Court cannot pass decree under this rule. (Vol. 11) 1924 Cal 722 (723, 724) : 51 Cal 432 (DB).

[10] A purchaser *pendente lite* is bound by compromise decree. (10) 13 Oudh Cas 98 (102) (DB) * ('10) 6 Ind Cas 168 (169) (All). (DB).

[See however ('91) 18 Cal 188 (195, 196) (DB) (Affirmed by Privy Council in 22 Cal 909 : 22 Ind App 129 (PC)).]

[11] Consent of a person who has parted with his interest in the suit is not necessary for a compromise of the suit. (Vol. 21) 1934 Lah 34 (35) (DB).

19. **Compromise by Hindu Widow.**—[1] *Bona fide* compromise by a Hindu widow representing her husband's estate binds the reversioners. (Vol. 9) 1922 PC 356 (358) : 49 Ind App 342 : 1 Pat 741 (PC).

20. **Compromise by pleader.**—[1] Where there had been some misunderstanding between the party and the pleader as to the terms the Court will not give effect to the compromise. (Vol. 22) 1935 Rang 150 (150) : 13 Rang 319 (DB).

[2] Where the client does not object to the compromise it is valid. (Vol. 19) 1932 Cal 231 (239) : 59 Cal 31 (DB).

[3] Where the pleader is authorised to file a compromise he does not get authority to make one or sign it. (Vol. 21) 1934 Oudh 417 (417).

21. **Effect of consent decree and admissibility in evidence.**—[1] A compromise decree though it does not operate as *res judicata* will create an estoppel between the parties and bind them. (Vol. 28) 1941 All 18 (23) : ILR (1940) All 691 (DB).

[2] The estoppel will only arise if the matter has been actually dealt with by the compromise decree expressly or by necessary implication. (Vol. 23) 1941 Lah 116 (117). * ('12) 35 Mad 75 (80) (DB).

[3] A compromise decree is admissible in evidence in a later suit between the same parties, for the same purposes for which an ordinary decree would be admissible. ('09) 9 Cal L Jour 16 (18) (DB).

[4] Between the parties collusive compromise

decree is binding—But third party is not bound. (Vol. 28) 1941 Bom 77 (79, 81) : ILR (1941) Bom 160 (DB).

[5] A breach of the terms of a compromise decree does not restore the parties to the rights they had prior to the decree. ('11) 33 All 743 (751) : 38 Ind App 151 : 14 Oudh Cas 289 (PC).

[6] A compromise decree is subject to all the incidents of the agreement on which it is based. (Vol. 17) 1930 Lah 937 (941). * (Vol. 2) 1915 Cal 464 (467) (DB) * ('01) 24 Mad 265 (270) (DB).

[7] A compromise decree is a contract with the command of a Judge superadded to it. (Vol. 11) 1924 Pat 231 (232) : 2 Pat 749 (DB). * (Vol. 20) 1933 Pat 806 (402) : 12 Pat 359 (DB).

[8] A compromise decree is of no greater validity than the contract on which it is based. (Vol. 4) 1917 Mad 578 (580) : 40 Mad 177 (DB). * (Vol. 24) 1937 Nag 413 (414).

[9] A compromise decree can be set aside on any of the grounds, on which a contract may be set aside. (Vol. 28) 1941 Bom 77 (79, 81) : ILR (1941) Bom 160 (DB) * (Vol. 26) 1939 Lah 439 (451) : ILR (1939) Lah 433 (DB) * (Vol. 24) 1937 Nag 413 (414).

[10] Compromise decree containing provisions which are penal under S. 74 or for forfeiture—Court can grant relief against forfeiture. ('07) 31 Bom 15 (22) (FB). (Overruling 10 Bom 435.) * (1860) 8 Moo Ind App 239 (261) (PC) * (Vol. 24) 1937 Nag 413 (414)

[But see ('80) 7 Cal L Rep 82 (84) (DB)].

[11] A decree on a compromise with a minor is a nullity. (Vol. 14) 1927 Pat 271 (279, 280) : 6 Pat 388.

22. **Registration, if necessary.**—[1] Before the amendment of the section 17 (2) (VI) of the Registration Act in 1929, a compromise decree was held exempt from registration. (Vol. 21) 1940 P C 70 (74) : I L R (1940) Kar P C 149 : I L R (1940) Lah 330 : 67 Ind App 179 (PC) * (Vol. 6) 1919 P C 79 (81) : 47 Cal 485 : 46 Ind App 240 (P C) (Registration not necessary even in cases of extraneous matters in the compromise recorded. * (Vol. 32) 1945 Bom 143 (145, 147) (DB) (Do).

[2] Under the amended section 17 (2) of Registration Act compromise decree need not be registered. ('10) 33 Mad 102 (107) (DB). (Registration is not necessary). * (Vol. 20) 1933 Pat 457 (460).

[But see (Vol. 19) 1932 Pat 97 (100) : 11 Pat 98].

[3] Any part of a compromise compulsorily registrable, not incorporated in a decree, is not exempt from registration. ('09) 31 All 13 (17) (F B) * ('99) 22 Mad 503 (514) : 26 Ind App 101 (PC).

[4] A petition to the Court, which merely recites the compromise and prays for recording the compromise, does not come within the provisions of the Registration Act regarding compulsory registration of documents. ('06) 1 Cal L Jour 888 (406) (DB). (Per Mookerjee, J.) * (Vol. 20) 1933 Pat 306 (421, 422) : 12 Pat 359 (DB) * (Vol. 2) 1915 All 332 (333) : 38 All 75 (DB) * (Vol. 2) 1915 Lah 240 (240) (DB) * (Vol. 4) 1917 Lah 282 (284) : 1917 Pun Re No. 78 (DB) * (Vol. 5) 1918 Oudh 412 (417) : 21 Oudh Cas 346 (DB). * (Vol. 4) 1917 Nag 1 (1). * ('08) 12 Cal W. N. 59 (60) (DB) * (Vol. 7) 1920 Sind 101 (103) : 14 Sind L R 245 (DB).

[5] The application is not compulsorily registrable even though the compromise includes terms

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affecting matters extraneous to the suit. (Vol 5) 1918 Pat 507 (517, 519, 520): 3 Pat L Jour 255 (3B) * (Vol 4) 1917 Pat 9 (10): 1 Pat L Jour 208.

[But see ('03) 30 Cal 783 (787) (DB) * ('02) 25 Mad 553 (555) (DB)]

[6] Where the compromise does not transfer or declare any rights in immovable property but merely provides for the temporary management of the property, registration is not necessary. (Vol 13) 1926 Bom 24 (25) (DB).

[7] Even where a compromise is compulsorily registrable when it has been acted upon, parties cannot resile from it. (Vol 1) 1914 P C 27 (29): 42 Cal 801: 42 Ind App 1 (PC)

[8] The question of registration becomes material only where the matter of adjustment of suit by compromise is in dispute and the writing has to be used in evidence. (Vol 26) 1939 Nag 233 (235): I L R (1939) Nag 607 (FB).

23. Stamp.—[1] A *solanamah* on stamped paper is not necessary for a compromise decree. ('15) 29 Ind Cas 511 (512) (U P B R) * ('08) 12 Cal W N 59 (60) (DB).

24. Execution of consent decree.—[1] A consent decree is executable in the same manner as an ordinary decree. (Vol 9) 1922 Oudh 150 (152): 25 Oudh Cas 53. * (Vol 8) 1921 Cal 227 (229) (DB) * (Vol 21) 1934 Cal 735 (736) (DB).

[2] A consent decree providing for the execution of a document by one of the parties may be enforced under O. 21 R. 34. (Vol 8) 1921 Cal 227 (228, 229) (DB) * (Vol 8) 1926 Cal 975 (976) (DB).

[3] Where the decree is *incapable of execution* a separate suit is necessary to enforce the right created by the decree. ('95) 23 Cal 818 (816) (DB) * ('95) 22 Cal 859 (863, 864) (DB).

[4] Compromise decree concerned not with plaintiff's present but future rights on uncertain future happenings—Decree must be regarded as declaratory and incapable of execution. (Vol 30) 1943 Sind 11 (14, 16): I L R (1942) Kar 326 (DB).

[5] Decree declaring amount due and providing that amount would be paid in manner provided in compromise which formed part of decree—Decree held capable of execution and not merely declaratory (Vol 29) 1942 Oudh 1 (3, 4): 17 Luck 249 (DB).

[6] A decree can be executed only in respect of the terms included in the operative part thereof. (Vol 5) 1918 Mad 1331 (1332) (DB). * (Vol 9) 1916 Mad 550 (550) (DB) * (Vol 11) 1924 Cal 49 (51) (DB).

[7] Where the decree gives effect to an unlawful compromise the executing Court is entitled to go behind the decree and is bound to refuse to execute the decree. ('10) 5 Ind Cas 236 (238, 239) (DB) (Cal) * (Vol 11) 1924 Nag 84 (85): 20 Nag L R 1 * (Vol 17) 1930 Mad 805 (814): 53 Mad 805 (DR) * ('09) 26 Mad 31 (33) (DB).

[But see (Vol 20) 1933 Bom 298 (301) (DB).

[8] Where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit the executing Court cannot refuse to execute the decree. (Vol 2) 1915 Mad 683 (684) (DB): (Vol 2) 1915 Mad 210 (215): 33 Mad 959 (DB) * (Vol 20) 1933 All 649 (652): 55 All 775 (FB) * (Vol 21) 1934 Lah 623 (625).

* (Vol 21) 1934 Pat 203 (203): 13 Pat 17 (DB) * (Vol 14) 1927 Oudh 33 (33): 29 Oudh Cas 276 (DB) * (Vol 11) 1924 Oudh 230 (231) (DB). (A decision of the Judicial Commissioner's Court of Oudh.)

[But see ('12) 39 Cal 663 (667) (DB) * ('21) 62 Ind Cas 653 (354, 655) (Cal) (DB) * (Vol 6) 1919 Lh 400 ('03): 1919 Pun Re No. 31 * (Vol 19) 1932 Bom 463 (457) (DB)]

[9] Where the decree contains any provision in the nature of a penalty an executing Court can relieve against any forfeiture incurred. (Vol 30) 1943 Pesh 33 (35). * (Vol 30) 1943 Sind 247 (250): I L R (1943) Kar 245 * (Vol 20) 1933 All 252 (255) 55 All 334 (FB) (Overruling (Vol 11): 1924 All 687: 46 All 571.) * (1901) 28 Cal 557 (56): 28 Ind App 89 (PC).

[10] In respect of the terms of a consent decree which do not relate to the suit, a separate suit can be brought on the *contract*. ('07) 31 Cal 456 (463) (DB) * (Vol 12) 1925 Cal 286 (288).

[But see ('87) 9 All 229 (231) (DB) * (Vol 27) 1940 Cal 82 (83) (DB)]

[11] Where any terms of a compromise are *not embodied* in the operative part of a decree, a separate suit will lie in respect of it. (Vol 6) 1919 Mad 305 (310) (DB) * (Vol 26) 1938 All 454 (456): I L R (1939) All 435 (DB) * (Vol 25) 1938 Rang 145 (147)

[12] Where a consent decree orders the sale of any property, it can be executed by selling the property without the formality of an attachment. (Vol 8) 1921 Pat 320 (321) (DB).

[13] A consent decree in a mortgage suit can be executed without any final decree being passed. (Vol 13) 1926 Oudh 383 (386): 29 Oudh Cas 26 (DB) * (Vol 12) 1925 Bom 509 (510) (DB) * (Vol 8) 1921 Pat 320 (321) (DB).

[But see ('11) 8 All L Jour 418 (428) (SB)]

[14] Consent decree creating charge on property—Proceeds in sale of such property found insufficient to discharge decretal amount—Decree-holder can proceed against other properties without obtaining a separate personal decree. (Vol 23) 1941 Bom 90 (71, 92): I L R (1941) Bom 297 (FB). (Vol 7) 1920 Bom 95 and (Vol 23) 1941 Bom 71 I L R (1941) Bom 136 Overruled—Analogy of mortgage decree is not applicable).

[15] An executing Court cannot go into the question whether the agreement on which the decree is based is valid and binding on the parties (Vol 30) 1943 Nag 325 (327) * (Vol 31) 1944 Bom 46 (50) * (Vol 31) 1944 Oudh 12 (13) (DB).

[16] Suit based upon a compromise decree is not one for breach of contract. (1904) 26 All 299 (300): 31 Ind App 116 (P C).

25. Mode and effect of setting aside compromise decrees.—[1] Appeal lies against an order recording a compromise. (Vol 31) 1944 Bom 46 (50) * (Vol 31) 1944 Bom 239 (241): I L R (1944) Bom 405. (Though decree is passed the order is still appealable).

[2] A consent decree can be set aside (a) by suit and (b) by review. (Vol. 19) 1932 Bom 615 (615, 616): 56 Bom 231 * ('84) 10 Cal 612 (614) (DB) * ('99) 23 Bom 620 (625): 1 Bom L R 82 (DB) * ('71) 6 Beng L R 648 (651) (PC). (Review application lies.)

[But see (Vol. 20) 1933 Sind 29 (31): 26 Sind L R 395.]

Proceedings in execution of decrees not affected.

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

[1932—S. 375 A].

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[3] A suit lies to set aside the consent decree on any or the grounds on which the contract can be set aside such as a fraud, mistake, etc. (Vol. 30) 1943 Lah 263 (271) (F.B.). (Vol. 14) 1927 Pat 233 : 6 Pat 254 and (Vol. 7) 1920 Cal 424 not followed. * (Vol. 16) 1929 Cal 470 (472) : 57 Cal 154 (DB) * (Vol. 13) 1926 Mad 1146 (1146) * ('01) 10 Cal L Jour. 420 (436) (DB) * (Vol. 22) 1935 All 137 (133) : 57 All 426 (DB). * (Vol. 21) 1934 Oudh 417 (417, 418) * (Vol. 21) 1934 Pat 229 (231) : 13 Pat 165 (DB) * (Vol. 20) 1933 Sind 53 (55) (DB) * (Vol. 10) 1923 Pat 483 (486) : 2 Pat 731 (DB) * (Vol. 13) 1925 All 266 (267) (DB) * (Vol. 24) 1937 Nag 413 (414) * (Vol. 26) 1939 Bom 490 (491) : 41 Bom L R 994 (996) * (Vol. 23) 1941 Bom 77 (79, 81, 82) : 1 L. R. (1941) Bom 160 (DB).

[But see ('11) 35 Mad 75 (30) (DB)].

[4] In appropriate cases an application under O. 9 R. 13 is a proper remedy to set aside the compromise decree. ('06) 3 Cal L Jour. 153 (156) (DB) * (Vol. 7) 1920 Lah 408 (403) : 1 Lah 344 (DB) * (Vol. 14) 1927 Lah 602 (603, 604) : 9 Lah 248 (DB) * (Vol. 5) 1918 Cal 322 (323) (DB).

[But see (Vol. 3) 1916 Cal 50 (50) (DB) * (Vol. 2) 1915 Cal 821 (821) (DB)].

[5] A consent decree cannot be set aside by rule on motion on the ground of fraud. (Vol. 19) 1932 Bom 615 (616) : 56 Bom 231 * ('11) 13 Bom L R 332 (339) * ('98) 25 Cal 649 (652).

[6] A consent decree cannot be set aside by an application under S. 151 on the ground of fraud. (Vol. 30) 1943 Pat 13 (14) (DB) * (Vol. 9) 1922 Mad 446 (446) (DB). * (Vol. 20) 1933 Sind 29 (31, 32) : 26 Sind L R 335. * (Vol. 26) 1939 Bom 490 (491) : 41 Bom L R 994 (996).

[But see (Vol. 13) 1926 Oudh 315 (315) : 1 Luck 841 (DB). * (Vol. 22) 1935 Cal 231 (233) : 62 Cal 223.]

[7] An interlocutory consent order can be set aside by application in the same suit. (Vol. 17) 1930 Bom 362 (364) : 55 Bom 372 * (Vol. 19) 1932 Bom 615 (616) : 56 Bom 231.

[8] Parties cannot rescind a consent decree by mutual agreement. ('11) 35 Mad 75 (81) : 9 Ind Cas 375 (379) (DB).

[9] A consent decree cannot be varied by consent of parties. (Vol. 24) 1937 Cal 222 (224).

[See however (Vol. 25) 1938 Oudh 103 (105) (DB)].

[10] Where, by a mistake, the Court passes a decree which purports to be in accordance with the terms of the compromise between the parties, but is not actually so it has got power under S. 151 to correct its mistake and amend the decree. (Vol. 16) 1929 Lah 400 (402). (Vol. 21) 1934 Rang 108 (109) (DB).

[11] Where the question is whether there was consent at all the Court can investigate it on an application under S. 151 and set aside the compromise decree when it finds that there was no consent. (Vol. 30) 1943 Pat 13 (14) (DB).

[12] When a compromise decree is set aside, the suit can be proceeded with from the stage when the compromise was effected. ('76) 2 Cal

184 (196) : 3 Ind App 291 (PC) * (Vol. 11) 1924 Pat 758 (758) (DB).

[But see ('85) 10 Bom 338 (340) (DB)].

[13] Ignorance of real facts, when it was within the party's power to know them is no ground for setting aside a compromise decree. (1837) 2 Mo. Ind App 181 (247) (PC)

[14] Mistake or ignorance of law is no ground for setting aside a compromise decree. ('82) 8 Cal 138 (141) (DB) * (Vol. 23) 1936 Sind 99 (105) : 29 Sind L R 455 (DB).

[15] Defendant's absence at the time when the compromise was recorded by the Court is no ground for setting aside the decree. (Vol. 23) 1936 Mad 347 (350).

26. **Compromise of appeal.**—[1] An appellate Court can pass a compromise decree if the appeal is compromised. ('02) 5 Oudh Cas 49 (53) (DB) * (Vol. 12) 1925 Lah 145 (146) (DB)

27. **Revision.**—[1] Where the Court requires evidence to be given of an illegal compromise, though it has no such power under this rule its order is not open to revision. ('12) 16 Ind Cas 3 (4) (DB) (Cal).

[2] No revision will lie against a decree on a compromise on the ground that the Court omitted to order the recording of the compromise. (Vol. 22) 1935 All 733 (733).

28. **Construction of compromise decrees.**—[1] For construing a compromise decree reference should be had to pleadings and agreement and natural meaning should be attached to the words. (Vol. 29) 1942 P C 37 (38, 31) : 1 L R. (1942) Kar PC 88 (PC). * (Vol. 27) 1940 Lah 46 (47) * (Vol. 27) 1940 Cal 347 (349) * (Vol. 20) 1933 P C 167 (168) 169 : 56 Mad 737 : 60 Ind App 266 (PC) * (Vol. 13), 1926 P C 110 (111) (PC) * (Vol. 23) 1936 P C 309 (310, 311) : 63 Ind App 429 : 1 L R. (1937) Mad 94 (PC). * (Vol. 25) 1938 P C 250 (252) : 32 Sind L. R. 913 (PC).

29. **Compromise of suit relating to public trust.**—[1] Though the Court has jurisdiction to pass a compromise the Court must refuse to pass a decree on the basis of a collusive agreement which is detrimental to the trust. (1943) 9 Cut L Tim 85 (89, 90.)

ORDER 23, RULE 4—Note 1

[1] Provisions as to withdrawal do not apply to execution proceedings. Therefore an application for execution of a decree cannot be withdrawn with liberty to make a fresh application (Vol. 1) 1914 All 134 (135) : 36 All 172.

[2] O. 23 R. 3 does not apply to execution proceedings and the Court has no power to pass a consent order in such proceedings. (Vol. 11) 1924 Lah 342 (343)

[3] Adjustment before a decree—Cognizance cannot be taken by an executing Court—Separate suit to restrain the decree-holder from executing the decree must be filed. (Vol. 15) 1928 Cal 527 (530) (DB).

[4] O. 23 R. 4 does not affect the rule of estoppel. Where an execution application is allowed to be dismissed on the basis of a compromise which

ORDER XXIV.

PAYMENT INTO COURT

Deposit by defendant
of amount in satisfac-
tion of claim.
claim.

1. The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the

[1882—S. 376; 1877—S. 376; R. S. C., O. 22 R. 1.]

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

[1882—S. 377; 1877—S. 377; R. S. C., O. 22 R. 4.]

Interest on deposit
not allowed to plain-
tiff after notice.

3. No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or

falls short thereof.

[1882—S. 378; 1877—S. 378.]

4. (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

[1882—S. 379; 1877—S. 379. Cf. R. S. C., O. 22 R. 6.]

O. 23 R. 4 (contd.)

provides for a fresh application if the compromise was not carried out and the compromise is broken, the defendant is estopped from contending that as O. 23 R. 3 does not apply to execution applications the decree-holder cannot file a fresh application for execution on the basis of the compromise. (1912) 18 Ind Cas 81 (81, 82) (Mad).

[5] Application to set aside sale under O. 21 R. 9 is not a proceeding in execution and hence O. 23, R. 3 applies to such application. (Vol. 8) 1921 Pat 107 (108); 6 Pat L Jour 253 (DB).

ORDER 24, RULE 1—Note 1

[1] O. 24 R. 1 does not apply to payments made in pursuance of the order of the court under the provisions of O. 9 R. 13 setting aside *ex parte*

decree. (Vol. 18) 1926 Mad 1069 (1071).

[2] Unconditional deposit is contemplated (Vol. 14) 1927 Cal 72 (73) (DB) * (Vol. 24) 1937 Lah 738 (736) (DB)

[3] The treasury becomes, for purposes of payment under the rules of Madras High Court, dated 21st June 1882, part of the establishment of the Court and payment therein will be payment into Court. (1884) 7 Mad 211 (212).

[4] Money, sought to be attached before judgment, paid by debtor into Court—Attachment irregular—Such payment should be considered as a deposit under R. 1. (Vol. 14) 1927 Rang 278 (278); 5 Rang 753.

[5] The word "debt" applies to secured as well as unsecured debts. (Vol. 22) 1935 Oudh 93 (95); 10 Luck 850.

ORDER XXV.

SECURITY FOR COSTS

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does possess any sufficient immovable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford Residence out of reasonable probability that he will not be forthcoming whenever British India. he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

O. 24 R. 1 (contd.)

[6] Suit for injunction for obstruction of light and air is not a suit to recover a debt or damages within the meaning of this rule. (1897) 21 Bom 502 (508, 509).

[7] Principles laid down in O. 24 apply to case of innocent infringement of designs where offender offers to pay profits made by infringement. (Vol. 26) 1939 Bom 198 (202).

ORDER 24, RULE 2—Note 1

[1] Deposit made by defendant on challenge of plaintiff and in his presence—Separate notice is not necessary—Plaintiff is not entitled to interest between date of deposit and date when he gets formal notice. (Vol. 22) 1935 Mad 342 (344) (DB).

[2] The court has a discretion to refuse to allow the money to be paid out, but that discretion is to be exercised reasonably. (Money sued for due on a promissory note—Refusal in absence of special circumstances is unreasonable.) (1899) 26 Cal 766 (769).

ORDER 24, RULE 3—Note 1

[1] Deposit of amount found due by Court stops running of interest where defendant is given notice. (1910) 11 Cal L Jour 226 (235) (DB) (Increase in the amount due found in the Appellate Court does not entitle defendant to interest so far as deposited amount is concerned) * (Vol. 22) 1935 Oudh 93 (95): 10 Luck 350 (DB) * (Vol. 5) 1918 Mad 88 (90, 91) (DB).

[2] Mortgagee wrongly refusing to withdraw deposit—Redemption suit—Mortgagor is entitled to interest from service of summons. (Vol. 5) 1918 Mad 88 (90, 91) (DB)

[3] Where conditional deposit is made and the decree-holder is under the necessity, if he desires to withdraw the amount, of furnishing security, interest does not run even after the date of deposit. (Vol. 24) 1937 Lah 733 (736) * (Vol. 28) 1936 Lah 76 (78) (DB). (Defendant depositing money in Court but stipulating impossible conditions cannot escape payment of interest from date of deposit)

[4] Tender, before suit, refused by creditor—To stop running of interest such tender must be followed by payment into court when creditor sues for money. (Vol. 19) 1932 Mad 109 (110): 55 Mad 458 * (Vol. 15) 1928 Cal 874 (875) (DB).

[5] O. 24, Rr. 1, 2 and 3 do not apply to proceedings in execution. (Vol. 14) 1927 Cal 72 (73) (DB).

[6] Benefit of rule extended by analogy to execution. (Vol. 5) 1918 All 234 (234, 235): 40 All 125 (DB). (Where the amount deposited in Court in execution might have been immediately on deposit paid out to the decree-holder in part discharge of his claim, the judgment-debtors were relieved from paying any interest on that amount.)

[See also (Vol. 6) 1919 Mad 445 (445): 42 Mad 576 (When the amount of a decree is paid into Court under O. 21, R. 1 interest on the same ceases to run from the date when the decree-holder receives notice thereof)]

ORDER 24, RULE 4—Note 1

[1] The Court has discretion in awarding costs. (1911) 2 Mad WN 568 (568) (DB).

[2] The Court must distinctly find as to which of the parties is most to blame for the litigation, before making an order as to costs. (1912) 1 Mad WN 38 (39).

[3] Where the suit is not one to recover debt or damages within the meaning of R. 1, the Court has discretion to apportion costs under S. 35. (1897) 21 Bom 502 (509).

ORDER 25, RULE 1

Synopsis

1. Object and applicability.
2. Residence outside British India.
3. "The Court may.....order".
4. Where plaintiff is woman—Sub-rule (3)
5. "Suit for the payment of money"—Sub-rule (3).
6. Appeal and revision.
7. Liability of person standing surety.

1. Object and applicability.—[1] The object of the rule is to provide for the protection of the defendants in certain cases where, in the event of success, they may have a difficulty in realising their costs. (1894) 21 Cal 832 (836) * (1936) 63 Cal 897 (899).

[2] Rule does not apply to a reference under S. 12 of the Bombay Revenue Jurisdiction Act as there is no suit before the Court. (Vol. 8) 1921 Bom 468 (468).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India.

[1382—Ss 380, 382; See S. 145.]

Objects and Reasons

Sub-rule (3) corresponds with the second paragraph of section 380 of the 1882 Code. After the words 'within British India' that paragraph contained the words 'independent of the property in suit.'

"The Committee have deleted the last words of this sub-rule, because the nature of the suit excludes the possibility of the property in suit being immovable." S. O. R.

PROVINCIAL AMENDMENTS

Allahabad

After the words "property in suit", add "or that the plaintiff is being financed by a person not a party to the suit."

Madras

The following shall be inserted as sub-rule (4) :

"(') In all cases in which an element of competency or maintenance is proved, the Court may on the application of the defendant, demand security for the estimated amount of the defendant's costs, or such proportion thereof, as from time to time during the progress of the suit, the Court may think, just." [R. O. C. No. 8019 of 1926]

Nagpur

In Rule 1 (1) insert the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" and "the Court may." [29-6-1943]

Oudh

Add the following as sub-rules (4) and (5) :

"(') Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

() If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court, to give security for the payment of all costs likely to be incurred by any other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit."

O. 25 R. I. (contd.)

2. Residence outside British India.—[1] The word "residence" means a residence under such circumstances as would afford reasonable probability that the plaintiff would be forthcoming when the suit was decided. (1878-79) 3 Bom 227 (229).

[2] Mere temporary residence at the time of suit is not residence within this rule (1878-1879) 3 Bom 227 (221) * (Vol. 9) 1922 Bom 299 (300); 46 Bom. 589 (Temporary residence in British India for the purpose of Court proceedings,) * (1890) 14 Bom 541 (552).

[3] Person coming from Native State and staying in British India for period of four years prior to suit resides in British India. (Vol. 17) 1930 Bom 220 (221).

3. 'The Court may.....order'.—

[1] Power given by rule is discretionary. (Vol. 26) 1939 Cal 154 (154); ILR (1938) 1 Cal 688 * (1905) 7 Bom LR 495 (497) * (1936) 63 Cal 897 (899) (The discretion of Court in ordering

security for costs is unqualified and unfettered.) * (1890) 17 Cal 610 (613).

[2] Power should not be exercised unless order for security is necessary for protection of defendant. (Vol. 26) 1939 Cal 154 (154); ILR (1938) 1 Cal 688.

[3] The principle on which the Court acts in making orders for security of costs, is to see if the suit is *prima facie bona-fide* and whether the defence is likely to succeed. (1904) 6 Bom LR 1072 (1072).

[4] Court cannot make an order under this rule before the written statement is filed. (1913) 18 Ind Cas 217 (218) (Cal).

[5] Poverty of plaintiff is no ground for making order under this rule. (Vol. 1) 1914 Cal 38 (39, 40) (DB) (1885) 7 All 542 (546) * (1887) 14 Cal 533 (536, 537).

[6] Suit by undischarged insolvent—Cause of action accruing after adjudication—Security for

O. 25 R. 1 (*contd*)

costs cannot be demanded. (Vol. 6) 1919 Cal 719 (720) : 46 Cal 156.

[7] Father, undischarged insolvent, and daughter having no property of her own, suing for breach of promise to marry—Security for costs ordered, insolvent being nominal plaintiff. (1903) 27 Bom 100 (103).

[8] Except in special cases, neither a minor plaintiff nor his next friend ought to be required to give security for costs. (1890) 23 Bom 100 (102) (DB) * (Vol 21) 1934 All 458 (458) : 56 All 653.

[9] A suit on behalf of minor should not be stopped merely on the ground that the next friend is unable to give security for costs. The other parties are sufficiently protected by the power they have in a proper case of moving the court either to stay the suit as not being for the benefit of the minor or, if there is a just cause other than the poverty of the next friend, to have him removed. (1911) 35 Bom 339 (341) * (Vol 21) 1934 All 458 (458) : 56 All 653.

[10] A plaintiff suing in *forma pauperis* may be called on to give security for costs, but very special grounds must be shown to support such an application. (1881) 3 Mad 66 (67) (DB) * (Vol 15) 1928 Lah 960 (960) * (Vol. 22) 1935 Mad 230 (231) (If pauper is mere creature in hands of persons able to find security, order to furnish security can be passed) * (Vol. 10) 1923 Rang 244 (245) (Suit in *forma pauperis*—Plaintiff being assisted by rich relative is no ground for order for security).

[But see (1912) 36 Bom 415 (417) (An order to give security for costs in an ordinary suit must cease to operate as regards antecedent costs, if leave to continue the suit as pauper is given, provided it is given before the time limited for giving security has expired). (1908) 7 Cal L Jour 312 (313, 314) (DB). (Rule does not apply to pauper plaintiff.) (Vol 4) 1917 Low Bur 163 (164) : 8 Low Bur Rul 387 (DP). (Woman allowed to sue as pauper is not liable to furnish security for costs.)]

[11] Apart from the provisions of this rule, Court has inherent power to require security for costs in proper cases. (1876-77) 2 Cal 233 (259) : 4 Ind App 23 (PC). (Plaintiff not real litigant, but mere puppet in hands of others—Order for security may be made) * (Vol. 1) 1914 Cal 38 (30) (DB) * (Vol 19) 1932 Sind 33 (34) : 26 Sind LR 21.

[See also (Vol. 25) 1938 Bom 510 (512) : ILR (1938) Bom 743. (Application under Sec. 115, Civil P. C. or under S. 75, Provincial Insolvency Act—Applicant not residing in British India nor having any immovable property in British India—Application presented by opposite party praying for order for security for costs—High Court is competent under S. 151 to pass order of the nature provided for in O. 25, Rule 1.)]

[But see (Vol. 28) 1941 All 219 (221) : ILR (1941) All 418.] * (Vol. 11) 1924 Cal 251 (252, 254, 256) : 50 Cal 853 (DB) * (Vol. 30) 1943 Mad 657 (657)]

4. Where plaintiff is woman—Sub-rule (3).

[1] Court would be most averse to making orders against women for depositing security for defendant's costs when such an order would embarrass them in the conduct of their cases. (1908) 32 Bom 602 (606) (DB).

[2] Suit by woman ripe for hearing—Discretion

under R 1 should not be exercised as it would practically defeat suit—But Court might impose on plaintiff any terms it thinks fit except demand of security. (1911) 35 Bom 421 (42-).

[3] Court will not order a female plaintiff to give security unless grounds are made out tending to show that the defence is true (1913) 18 Ind Cas 217 (218) (Cal)

[4] Suit by male minor and mother—Suit cannot be called as a suit in which the plaintiff is woman. (Vol. 24) 1937 Cal 53 (53) : 63 Cal 803.

5. "Suit for the payment of money"—Sub-rule (3).—[1] In considering whether suit is for payment of money, Court must look at the substance. (1830) 17 Cal 610 (613).

[2] Suits which are not exclusively for money but which will result in a decree for money on the relief sought come within the purview of sub-rule (3) (1908) 32 Bom 602 (603, 611) (DB)

[3] A suit to recover moneys and certain specified articles or the value thereof is a suit for payment of money. (1890) 17 Cal 610 (613) * (1912) 16 Cal WN 763 (7-5) (DB).

[4] Suit for administration of estate consisting largely of immovable property is not suit for payment of money. (Vol. 12) 1925 Rang 300 (300) : 3 Rang 211 * (Vol. 1905) 7 Bom LR 495 (496, 497).

[5] Widow's suit for dissolution of partnership, accounts and *stridhan* consisting of immovable property is not a suit for payment of money. (Vol. 10) 1923 Cal 316 (3) (317).

6. Appeal and revision.—[1] Appeal lies from an order for security of costs passed on the Original Side of Madras High Court as the order is a "Judgment" within the meaning of S. 15 of Letters Patent. (1903) 26 Mad 502 (502) (DB) * (1908) 32 Bom 602 (603, 610) (DB).

[2] Applying O. 25, R. 1 to a suit which is not for payment of money is an illegal exercise of jurisdiction and such an order is revisable. (Vol. 12) 1925 Rang 300 (300) : 3 Rang 211.

[3] Application for furnishing security—Application not disposed of at once on merits—There is irregularity in exercise of jurisdiction and order is open to revision (Vol. 22) 1935 Mad 230 (332).

[4] Pauper suit allowed—Security for costs demanded—No exceptional circumstances disclosed for demanding security—Order to furnish security is a material irregularity. (Vol. 15) 1928 Lah 960 (960).

[5] Order demanding security from woman plaintiff in suit for property for costs of defendant made under S. 151, Civil P. C. on ground that plaintiff had been put forward by other persons interested in suit is without jurisdiction—Revision lies. (Vol. 28) 1941 All 219 (221) : ILR (1941) All 418.

7. Liability of person standing surety.—Where

A was surety for costs for B, a lady, who had instituted a suit for dower debt and failed and the surety bond laid down that if the lady failed to obey the order of the Court the property of the surety would be liable and also he himself in case the property proved insufficient and there was no provision for the principal debtor being proceeded against as a condition precedent to proceeding against the surety. *Held* that a failure on the part of the decree-holder to execute the decree

2. (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant

[1882—S. 381 ; 1877—Ss. 380, 381 ; 1859—S. 35.]

PROVINCIAL AMENDMENTS.

Bombay

The following shall be added as sub-rule (4) :

"(4) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule." [21-12-1927]

Rule 3—Nagpur

After Rule 2, add the following new Rule 3:

"R. 3. (1) Where any more plaintiff has, for the purpose of being financed in the suit, transferred Power to implead and or agreed to transfer any share or interest in the property in suit to a person demand security from a who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion third person financing or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of rule 2 shall apply *mutatis mutandis* to such application." [29-6-1948]

ORDER XXIV

COMMISSION

COMMISSIONS TO EXAMINE WITNESSES

1. Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Cases in which Court may issue commission to examine witness.

[1882—S. 383 ; 1877—Ss. 383, 385 ; 1859—S. 175. See Ss. 75 to 78, 132 and 133.]

O. 25 R. 1 (contd.).

against B does not amount to a release of surety's liability. (Vol. 13) 1926 All 657 (658).

Order 25, Rule 2—Note 1.

[1] Rule refers to suit as a whole—Suit by male minor and mother—On default in furnishing security, suit cannot be dismissed against mother only. (Vol. 24) 1937 Cal 58 (57): 63 Cal 809.

[2] Dismissal of suit for failure to furnish security for costs as ordered, is no bar to a fresh suit on the same cause of action. (1902) 26 Bom 637 (640).

[3] Court from which an appeal is preferred has the right to extend the time for furnishing security for costs. (1884) 10 Cal 557 (561): 11 Ind App 7 (PC).

ORDER 26, RULE 1

Synopsis

1. Scope and applicability of rule.
2. "May in any suit issue".
3. "Who is exempted under this Code".
4. "Who is from sickness or infirmity unable to attend".
5. Procedure where evidence is taken on commission.
6. Arbitration.
7. Appeal.
8. Revision.

O. 26 R. 1 (*contd.*)

1. **Scope and applicability of rule.**—[1] The grounds upon which a commission can be issued are specified in this rule and in Rr. 4 and 5: they ought not to be relaxed or nullified because the witness is a man of rank or is a man of social status. (Vol. 4) 1917 Bom 155 (157): 2 Bom 136 (DB) * ('05) 31 Mad 60 (51) (DB). * ('05) 25 Mad 28 (35, 36) (DB) personal appearance in court derogatory to the person)

[2] The Court can issue a commission even after remand. (Vol. 12) 1925 Lah 39 (41): 5 Lah 252 (DB).

[3] The successor of a Judge has power to cancel the issue of a commission made by his predecessor. (Vol. 17) 1930 Rang 815 (816) (DB).

[4] The provisions relating to the issue of a commission do not apply to execution proceedings. (Vol. 27) 1940 Mad 569 (570) (DB).

2. **"May in any suit issue"**.—[1] The general trend of opinion is that the issue of a commission is a matter of judicial discretion. ('93) 23 Bom 626 (627), * (Vol. 17) 1930 Nag 27 (28). * (Vol. 33) 1944 Mad 331 (332) * (Vol. 10) 1923 Mad 321 (332): 46 Mad 574 dissented from; ('11) 21 Mad LJ 889 (890) (DB) explained.

[2] An application will not be granted unless the application is made *bonafide*, the issue in respect of which the evidence is required is one which the Court ought to try, the witness to be examined would give evidence material to the issue, and there are some good reasons why the witness cannot be examined in court. ('19) 19 Ind Cas 643 (344) (11)

[3] Where the examination on commission may result in manifest injustice to any party, or where it is not calculated to permit of the evidence being tested fairly, or when the application is made to avoid cross examination before the court the Court is not bound to issue a commission. ('05) 23 Mad 28 (35, 36) (DB).

[4] Examination on commission being invariably disadvantageous to the opposite party, the court should very jealously enquire into the reason of commission. ('73) 20 Suth W R 253 (155) (DB) * ('97) 26 Cal 657 (552) * (Vol. 14) 1927 Mad 524 (525).

[5] Regard must always be had to the possibility of the witness not being a credible witness in which case the opportunity of noting his demeanour and of hearing the exact and precise answers given by him would be lost. ('99) 23 Bom 626 (628). * (Vol. 20) 1933 Mad 44 (55) (DB) * (Vol. 11) 1924 Cal 971 (372, 374) * (Vol. 10) 1923 PC 73 (76) (PC)

[6] The fact that the case of the party asking for commission is improbable is no ground for refusing commission. (Vol. 17) 1930 Sind 33 (36) (DB).

[7] That the judge thinks that evidence will serve no useful end is no ground for refusing commission. ('71) 15 Suth W R 447 (148) (DB) * ('11) 12 Ind Cas 74 (75) (Mad). (DB).

[8] Lapse of one year since the filing of suit is not a ground for refusing commission for examination of plaintiff when the issues have still to be stated. (Vol. 21) 1934 All 37 (38) (DB)

[9] Notice ought to be given to the opposite party before ordering commission. (1863) 3 Suth W R 147 (150) (DB)

[10] The Court can order the issue of commission on condition of the applicant depositing in Court security for the costs of the opposite party in regard to the commission. (Vol. 24) 1936 Pat 33 (34)

3. **"Who is exempted under this code"**.—[1] Pardanashin ladies can claim the privilege of being examined on commission as provided by S 132 (Vol. 27) 1942 Cal 147 (147): ILR (1941) Cal 155 * (Vol. 35) 1923 Cal 814 (515) (DB). * (Vol. 12) 1925 Mad 905 (906) * (Vol. 20) 1933 All 551 (553): 55 All 666 (DB)

[2] The following are not good grounds for refusing commission for the examination of a pardanashin lady:—

[a] That an allegation of immorality is made against her ('01) 5 Cal W N CCXXXII (CCXXXII) (DB).

[b] That she had appeared on a former occasion in public ('93) 26 Cal 650 (652) (DB) * ('99) 26 Cal 651 n.

[c] That she had appeared previously in court (Vol. 5) 1918 Cal 748 (744): 45 Cal 697 (DB).

[d] That she is an old lady who had entirely abandoned purdha (Vol. 5) 1918 Cal 111 (112): 45 Cal 492)

[8] Custom of not appearing in public not made out—Commission should not be issued. (Vol. 14) 1927 Mad 524 (525).

[4] Custom alleged, regarding appearance in public, of a varving and uncertain character—No commission to be issued. ('90) 14 Bom 584 (586).

[5] A pardanashin lady cannot decline to be examined on commission at any place other than that of her choice. (Vol. 8) 1921 Cal 229 (231): 48 Cal 413.

[See however (Vol. 24) 1937 Pat 21 (22).]

[6] A religious preceptor is not entitled to be examined on commission on the ground of his social status. (Vol. 4) 1917 Bom 155 (157): 42 Bom 136 (DB).

4. **"Who is from sickness or infirmity unable to attend"**.—[1] In the case of persons who owing to illness, are unable to attend the Court, a commission ought not to be refused. (Vol. 10) 1923 Mad 321 (322): 46 Mad 574.

[2] If sickness or infirmity is alleged, the court must consider the character and gravity of the sickness. (Vol. 11) 1924 Cal 971 (373) * ('86) 163 Ind Cas 444 ('50) (Cal).

[3] Infancy is no ground for issuing commission: 2 Hyde 153.

5. **Procedure where evidence is taken on commission**.—[1] Where the cross-examination by opposite party is unnecessarily prolonged or amounts to an abuse of process, the Court can fix a time limit and order the cross-examination to be finished. ('03) 30 Cal 625 (627). * (Vol. 11) 1924 Pat 284 (295) (DB).

[2] The commissioner has no power to disallow questions and give rulings as to points about admissibility of evidence. (Vol. 8) 1916 PC 266 (251) (PC).

[3] Commission for examination by written interrogatories—Opportunity to cross-examine orally must be given to the opposite party—Ordering such party to file cross interrogatories is withi

2. An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

[1882—S. 384; 1877—S. 384; 1859—S. 175.]

3. A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

[1882—S. 385; 1877—S. 385; 1859—S. 175.]

Persons for whose examination commission may issue. 4. (1) Any Court may in any suit issue a commission for the examination of:—

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) any person in the service of Crown who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

O. 26 R. 1 (contd.).

out jurisdiction. (Vol. 21) 1934 Pat 60 (60), (Unless the opposite party consents to do so)

[4] Commission for examination by interrogatories—Party is entitled to a copy of cross-interrogatories filed by the opposite party (Vol. 4) 1917 Sind 85 (35); 10 Sind L R 210.

6. Arbitration.—[1] The Court has no power either under S. 75 or under this rule to issue a commission for examination in the case of private arbitration. The consent of parties cannot confer such power nor can the court issue a commission in such a case under its inherent powers. (Vol. 9) 1922 Bom 444 (146, 448); 47 Bom 250.

7. Appeal.—[1] An order under this rule is not appealable under O 43 R. 1 or S. 104. Nor is an order directing the issue of a commission a "judgment" within the meaning of O 1. 15 of the Letters Patent. (1909) 11 Bom L R 241 (247) (DB)

[2] Neither the High Court nor the Privy Council will interfere in appeal with an order made in the proper exercise of the discretion. ('98) 25 Cal 807 (815); 25 Ind App 117 (PC). * (Vol. 19) 1932 Cal. 236 (238, 239); 59 Cal 40 (DB).

8. Revision.—[1] An order under this rule cannot be interfered with in revision unless there has been a wanton abuse of the process of the Court. (Vol. 14) 1927 Sind 264 (265); 22 Sind L R 129 * ('38) 1933 Mad W N 648 (649). * (Vol. 15) 1928 Cal 421 (423); 55 Cal 748 (DB). * (Vol. 8) 1921 Low Bur 6 (8); 11 Low Bur 65 (DB). * ('36) 163 Ind Cas 449 (450) (Cal).

[2] An order under this rule does not amount to a "case decided" within the meaning of S. 115 and hence is not revisable. (Vol. 21) 1934 All 87 (39) (DB). * (Vol. 33) 1946 Sind 30 (31, 32); 15LR (1945) Kar 351 (DB) (Powers under S. 151 held should not be involved). * (Vol. 24) 1937 Lah 28 (29).

[But see (Vol. 25) 1938 Mad 646 (648).

ORDER 26, RULE 2

1. "Either of its own motion or on the application".—[1] Issue of commission is a matter of discretion with the court after considering the circumstances of the case. (Vol. 33) 1946 Mad 331 (332).

[2] A commission may be issued for the examination of a witness either *suo motu* or on the application of a party. (Vol. 18) 1926 Sind 34 (35).

[3] The application is to be supported by affidavit or otherwise; but the affidavit need not necessarily be made by the witness or by the party himself. (Vol. 14) 1927 Ran 174 (175).

ORDER 26, RULE 3.

Synopsis.

1. Scope.
2. Deputy Collector, if can delegate an officer of his court to take evidence on commission.

1. Scope.—[1] Failure to issue the commission does not invalidate the examination actually held by the commissioner pursuant to the order of the court; the omission is only an irregularity which, if not objected to before examination will be deemed to have been waived. (Vol. 8) 1921 Cal 852 (854) (DB).

2. Deputy Collector, if can delegate an officer of his court to take evidence on commission.—[1] A Deputy Collector is competent to depute an officer of his Court to examine a witness on commission provided the place of examination is within his jurisdiction. ('68) 10 Suth W R 236 (237) (DB).

ORDER 26, RULE 4.

Synopsis.

1. Scope and applicability of the rule.
2. "May issue".
3. Plaintiff asking his evidence to be taken on commission.
4. Defendant asking his evidence to be taken on commission.
5. Appeal.
6. Revision.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

[1882—S. 336 ; 1877—Ss. 383, 384, 385, 386 ; 1859—Ss. 175, 176. See S. 76.]

a. Substituted by A. O., for "any civil or military officer of the Government"

Provincial Amendment

NAGPUR

Add the following as clause (i) of sub-rule (1) —

"(d) any person who by reason of anything connected with the war cannot conveniently be spared." [28-6 1943.]

5. Where any Court to which application is made for the issue of a commission or request to examine witness not within British India. Commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

[1882—S. 387 ; 1877, S. 387 ; 1859, Ss. 177, 178. See S. 77.]

O. 26 R. 4 (contd.)

1. **Scope and applicability of the rule.**—[1] The power of the Court is not more restricted under this rule than under R. 1. (Vol. 16) 1929 Mad 192 (193)

[2] A party is entitled to the issue of a commission if the witness is residing outside the jurisdiction of the Court. (Vol. 27) 1940 Pat 437 (438) (DB) * (Vol. 13) 1926 Mad 345 (346).

[See however ('67) 7 Suth W R 349 (352). (Commission issued to a Magistrate to examine a prisoner—Magistrate is not bound to do so.)]

[But see (Vol. 29) 1942 Oudh 344 (345) (DB)].

[3] It is not for the Court to decide whether the party will be benefited or not (Vol. 10) 1923 Mad 321 (322) 46 Mad 574. * (1911) 21 Mad L Jour 889 (390) (DB)

[4] Where a commission is issued to a Court it should be addressed to the Court of first instance within the limits of whose jurisdiction the witness resides. ('72) 17 Suth W R (H O) Rules and Orders (Civil Circular Order No 7) page 3 (3).

[5] This rule does not apply to execution proceedings. (Vol. 26) 1939 Mad 578 (579)

2. **"May issue".** [1] The issue of a commission is not a matter of statutory right but is in the discretion of the Court. (Vol. 16) 1929 All 449 (451) : 51 All 341. * (Vol. 14) 1927 Rang 175 (175). * (Vol. 33) 1946 Mad 331 (332) * (Vol. 10) 1923 Mad 321 : 46 Mad 574 dissented from and, (1911) 21 Mad LJ 889 (890) (DB). Explained. * ('99) 23 Bom 626 (629).

[2] Court must exercise jurisdiction judicially (Vol. 14) 1927 Rang 174 (175)

3 **Plaintiff asking his evidence to be taken on commission.**—[1] The evidence of plaintiff in a case ought not to be taken on commission except for very strong reasons. (Vol. 7) 1920 Low Bur 63 (64). * (Vol. 22) 1935 Pat 220 (221, 222) * (Vol. 13) 1926 Pat 277 (278).

4. **Defendant asking his evidence to be taken on commission.**—[1] It would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself. (1894) 1 Ch D 38 (42) : 63 LJ Ch 191 : 70 LT 22 : 42 WR (Eng) 188. * ('12) 16 Ind Cas 750 (751) (DB) (Cal) * (Vol. 21) 1934 Mad 339 (400) : 57 Mad 705. * (Vol. 9) 1922 Cal 42 (43, 44) (DB). * (Vol. 11) 1924 Lah 475 (476)

[2] A defendant residing abroad should ordinarily be permitted to be examined on commission. (Vol. 24) 1937 Mad 24 (26).

5 **Appeal.**—[1] An order under this rule directing or refusing to issue a commission is only an interlocutory order and not a "judgment" within clause 15 of the Letters Patent and is not appealable ('10) 35 Mad 1 (8) (FB). * (Vol. 21) 1934 Bom 168 (169) (DB). * (Vol. 7) 1920 Cal 394 (395) (DB) * (Vol. 13) 1926 Rang 64 (64) : 3 Rang 605 (DB)

[2] An order under this rule is not an appealable order and the Appellate Court will not interfere with the order in the regular appeal from the decree in the suit, unless the discretion is shown to have been improperly exercised which has prejudiced the party aggrieved. (Vol. 9) 1922 Cal 42(44) (DB). * ('12) 16 Ind Cas 750 (751, 752) (DB). (Cal)

6 **Revision.**—[1] Order under this rule—Absence, of grounds mentioned therein—Revision lies. ('08) 31 Mad 60 (61) (DB). (Can interfere under S. 15-Charter Act, apart from S. 622).

[2] Where the Court has acted with material irregularity, e.g., in refusing to issue a commission to a defendant residing outside its jurisdiction—Revision lies. (Vol. 27) 1940 Pat 437 (438). * (Vol. 21) 1934 Mid 399 (401) : 57 Mad 705. * (Vol. 10) 1923 Mad 321 (322) : 46 Mad 574. * ('02) 5 Oudh Cas 151 (152) (DB)

[But see (Vol. 29) 1942 Oudh 344 (345) (DB)].

[3] Where the refusal to issue a commission would be tantamount to a denial of justice or would result in manifest injury, the High Court can interfere in revision. (Vol. 12) 1925 Cal 1113 (1119) (DB)

[4] An order under this rule refusing to issue a commission is an interlocutory order and is not a case decided within the meaning of section 115. (Vol. 21) 1934 All 37 (39) (DB). * (Vol. 29) 1942 Oudh 344 (345) (DB).

ORDER 26, RULE 5.

Synopsis.

1. Evidence of witnesses not residing within British India.
2. Plaintiff in foreign territory asking for a commission to examine himself.
3. Revision.

Court to examine witness pursuant to commission. 6. Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

[1882—S. 388. See S. 77.]

7. Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

[1832—S. 389; 1277—Ss. 389, 390; 1353—S. 179.]

8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

O. 26 R. 5 (contd.).

1. Evidence of witnesses not residing within British India.—[1] This rule deals with the issue of a commission for the examination of persons residing outside British India. ('08) 30 Cal 934 (936) (DB). (Witness in French territory.) *('61) 10 Suth W R 385 (386) (DB), (1894) 61 L J Q B 101 (105, 106).

[See also (Vol. 20) 1933 Mad 866 (867)].

[2] Bangalore is not within British India. (Vol. 25) 1938 Mad 646 (647).

[3] Evidence of persons residing outside British India. Necessary application made for issue of commission for examination of such person. Commission should be issued as a matter of course. (Vol. 25) 1938 Mad 646 (647).

[See also (Vol. 24) 1937 Lah 73 (74) (DB)].

[4] Commission issued for taking evidence in England. Bill of costs with respect to such commission is to be taxed by the Taxing Master in India. Same principle to be adopted as in England. ('91) 15 Bom 203 (211, 214, 215).

2. Plaintiff in foreign territory asking for a commission to examine himself.—[1] The Court will be very reluctant to accede to the request of the plaintiff for the issue of a commission to examine himself abroad except upon very strong grounds (Vol. 12) 1925 Pat 125 (126)=3 Pat 86 (DB).

3. Revision.—[1] Interlocutory orders passed in the exercise of discretion under this rule cannot be revised by the High Court. ('80) 9 Mad 256 (257).

(But see (Vol. 25) 1938 Mad 646 (647)).

ORDER 26, RULE 7.

Synopsis

1. Return of commission.
2. "Duly executed."
3. Commissioner can note demeanour of witness.
4. "Shall form part of the record."

1. Return of commission.—[1] The return should show that the evidence recorded in the language ordinarily used in the proceedings before the Court, duly read over and signed by the witness ('70) 14 Suth. W. R. 269 (271) (DB).

[2] The time for the execution of the commission

may be enlarged on the application of party. ('70) 14 Suth W R (OC) 17 (18) (DB).

2. "Duly executed."—[1] Party to suit dying before completion of examination of a witness on commission. Fact of death brought to the notice of the Commissioner. Proceedings after death being illegal, commission not regarded as duly executed. (Vol. 16) 1929 Pat 101 (101).

3. Commissioner can note demeanour of witness.—[1] Commissioner can note his observation as to the demeanour of the witness (Vol. 5) 1918 Cal 863 (379) (SB).

4. "Shall form part of the record."—[1] Evidence on commission subject to Rule 8, shall form part of the record and a party is entitled to refer to it though not tendered in evidence. ('08) 35 Cal 23 (32) (DB). * (Vol. 18) 1926 Sind 31 (35). * ('99) 26 Cal 591 (592).

ORDER 26 RULE 8.

Synopsis.

1. Evidence on commission, when may be read as evidence in the suit.
2. Object in regard to admissibility of evidence.
3. Admissibility of documents.

1. Evidence on commission, when may be read as evidence in the suit.—[1] The practice on the original sides of the High Courts of Bombay and Calcutta is that evidence, taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence by the party on whose behalf it was taken. (Vol. 23) 1922 Bom 266 (267); 1 L R (1942) Bom 680. * ('03) 30 Cal 999 (1001). * ('05) 9 Cal W N 734 (735).

[2] The practice of the metropolitan courts in Calcutta and Patna is to treat evidence on commission as evidence in suit, though not formally tendered. ('0) 26 Cal 566 (567) (DB). * (Vol. 20) 1933 Cal 412 (414) (DB). * (Vol. 23) 1926 Pat 6 (6) (DB).

[3] Evidence taken on commission cannot, without the consent of the party against whom it is offered, be read as evidence in the suit unless circumstances in clause (1) exist at the time of reading evidence or unless the Court dispenses with the proof of such circumstances. (Vol. 14) 1927 Cal 43 (44) (DB). * (Vol. 10) 1923 PC 73 (76) (PC). * (Vol. 24) 1937 Cal 163 (166). 63 Cal 914 (DB).

[4] Evidence on commission can be read at the

- (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a [person in the service of the Crown] who cannot, in the opinion of the Court, attend without detriment to the public service, or
- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

[1932—S. 330; 1977—S. 330; 1933—S. 173.]

a. Substituted by for "Civil or Military Officer of the Government."

COMMISSIONS FOR LOCAL INVESTIGATIONS

9. In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make investigation and to report thereon to the Court:

Provided that, where the [Provincial Government] has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

a. Substituted by A. O. for "Local Government."

Provincial Amendment

CALCUTTA : Omit Proviso.

[7-6-1933.]

O. 26 R. 8 (contd.).

instance of either party to the suit. (Vol. 29) 1942 Bom 266 (263); ILR (1942) Bom 680. *(Vol. 13) 1926 Sind 34 (35).

[5] Evidence taken on commission in the absence of the opposite party is no sufficient ground for refusing to admit it in evidence. ('68) 10 Suth WR 236 (237) (DB).

[6] Commission issued to examine a particular witness. Another witness also examined in spite of other side objecting—Evidence of such person can be ignored. (Vol. 7) 1920 Cal 718 (720); 47 Cal 583 (583).

[7] The mere fact that witness resides beyond the territorial jurisdiction of the Court is not sufficient to hold that he is beyond the jurisdiction of the Court. (Vol. 24) 1937 Cal 163 (165); 63 Cal 914 (DB).

2. Objection to admissibility of evidence.—[1] Objection to the admissibility of evidence taken on commission should be raised in the trial Court itself. (Vol. 16) 1929 Cal 531 (532) (DB).

[2] Pardanashin lady while being examined on commission tutored by somebody—Court may exclude evidence but cannot insist on personal attendance of the lady. (Vol. 20) 1933 All 551 (554); 55 All 666 (DB).

3. Admissibility of documents.—[1] Document produced before the Commissioner—No objection taken as to its admissibility—Objection cannot be taken afterwards at the time of the trial of the suit. ('80) 6 Cal L Rep. 10 (111, 112).

[2] Hundi exhibited before commissioner—He giving identifying mark—Admissibility in evidence not considered—No objection raised—Issue of admissibility pending before Court—Hundi held not admitted in evidence within S. 36, Stamp Act (Vol. 22) 1935 Mad 888 (890).

[8] Party objecting to admissibility of documents is not precluded from urging other grounds of objection than those taken before the Commissioner at the time of trial. ('83) 8 Cal 939 (940, 941) (DB).

ORDER 26, RULE 9.

Synopsis.

1. Scope of the rule.
2. "Such person as it thinks fit."
3. Appeal from order directing local investigation.
4. Revision.

1. Scope of the rule.—[1] The object of local investigation is to obtain evidence which from its peculiar nature can only be had on the spot and to elucidate any point which is left doubtful on the evidence taken before the Court. ('70) 2 N W P HCR 136 (137) (DB) * (Vol. 16) 1929 Cal 774 (774) (DB) * ('03) 18 Mad 350 (351, 352) (DB) * ('68) 1868 Pun Re No. 11 Page 42 (43) (DB) * ('66) 6 Suth W R 324 (325) (DB).

[See (Vol. 20) 1933 Cal 475 (476). (Question as to whether certain structures are old or new—Commission must be issued under O. 39 R 7 and not under this rule.)

[2] Cases of boundary disputes and disputes about the identity of lands—Court may order a local investigation under this rule. ('03) 5 Low Bur Rul 1 * ('72) 17 Suth W R 472 (474) (DB).

[3] The Court has a discretion to order local investigation or not. ('66) 5 Suth W R 248 (248) (DB) * (1865) 3 Suth W R Act X, 153 (154) (FB). (Court not bound to order *suo motu*). * ('86) 12 Cal 45 (47) (DB). (Do.) * (Vol. 25) 1938 Nag 530 (532).

[4] An application under this rule should be made at the hearing of the suit. Bourke O C 243.

10. (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

O. 26 R. 9 (contd.)

[5] Application under the rule cannot be made after the case is closed (Vol 6) 1919 Oudh 126 (126) * ('61) 6 Srth W R Act X, 11 (11) (DB). * (Vol 22) 1935 Pat 56 (57, 58) (DB).

[6] The presiding officer or officers in enquiries under the undermentioned Acts have been empowered to issue commissions for local investigation in accordance with this rule. (The Chota Nagpur Tenancy Act (VI of 1908), S. 265 (3); The Bengal Tenancy Act (VIII of 1885), S. 31 (b) and S. 158 (2); The Orissa Tenancy Act (II of 1913), S. 36 (b) and S. 210) -

[7] An Appellate Court has the power to issue a commission for a local investigation under this rule read with section 107. (Vol 19) 1932 All 270 (271).

[8] Commission under this rule should not be issued behind the back of one of the parties concerned (Vol 25) 1938 Nag 530 (532).

2. "Such person as it thinks fit".—[1] Under the General Rules of the Allahabad High Court commissions other than commissions for the examination of witnesses or of accounts, should not be issued to persons other than Civil Court amins except when such a course is impracticable. Where a person other than a Civil Court amin is employed, the Court should record reasons. (Vol 16) 1929 All 446 (447).

[2] The rule does not contemplate the issue of a commission to more than one person—More than one person appointed—Provisions should be made for meeting any difference in opinion that may arise between them. ('91) 1 C P L R 160 (161)

3. Appeal from order directing local investigation.—[1] An order under this rule is not appealable under O. 43 R.1. Nor is it a "judgment" within clause 15 of the Letters Patent. (Vol 12) 1925 Rang 200 (291); 3 Rang 298 (DB) * ('67) 7 Srth W R 425 (425).

[2] The discretion exercised by the Court under this rule cannot be interfered with in appeal or second appeal. (Vol 19) 1932 All 270 (271) * ('94) 21 Cal 504 (512, 513); 21 Ind App 39 (PC). * ('12) 13 Ind Cas 194 (197) (Cal). * (Vol 26) 1939 Pat 270 (272).

[3] Irregularity not causing prejudice to defendant—Decree cannot be varied in second appeal. (Vol 25) 1938 Nag 530 (58 '5).

4. Revision.—[1] Where the order directing a local investigation would be a calamitous waste of

time and money and would be determining the rights of parties on an improper basis, the High Court would interfere in revision. (Vol 11) 1924 Pat 761 (764)

[2] Order directing a Commissioner to ascertain the mesne profits—Applicant having remedy by way of appeal from the final decree—High Court refused to interfere. (Vol 10) 1923 Mad 43 (43).

ORDER 26, RULE 10.

Synopsis

1. Scope of the rule.
2. Functions and powers of the Commissioner.
3. Admissibility of report of Commissioner.
4. Examination of the Commissioner.
5. Objections to Commissioner's report.
6. Commissioner's report, how far binding on the Court.
7. Further evidence after the Commissioner's report.
8. Sub-rule (3).
9. Interference with the report.

1 Scope of the rule.—[1] Sub-rule (2) is "intended to afford protection to the Commissioner on grounds of public policy so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination." (Vol. 2) 1915 Cal 280 (282) (DB).

[2] This rule applies to suits under the Tenancy Acts. [See ('90) 17 Cal 277 (280) (DB) * (Vol. 4) 1917 All 70 (70); 39 All 694 (DB). (Agra Tenancy Act)]

2. Functions and powers of Commissioner [1] The Court cannot delegate to the Commissioner the trial of any material issue which it is itself bound to try. (Vol. 19) 1932 All 264 (267) (DB). (Commissioner not to be asked to decide about occupation of a woman after hearing her singing nor can he take the help of assessors) * (Vol. 17) 1930 Cal 764 (765) (DB). (Issue whether disputed land is an accretion—Not to be delegated to commissioner) * (Vol. 15) 1928 Bom 145 (147) (Question whether one of the parties is personally engaged in agricultural labour cannot be referred to the Commissioner). * (Vol. 12) 1925 Pat 576 (576) (DB). (In a mortgage suit where the defendant pleads that the debt has been discharged out of the usufruct of the property the Court cannot refer to the commissioner the question whether the plaintiff has been in possession.) *

O. 26 R. 10 (*contd.*)

(Vol. 9) 1922 Lah 47 (48, 49) : 3 Lah 209 (DB). * ('93) 16 Mad 350 (351, 352) (DB) = (Vol. 17) 1930 Pat 557 (558) (DB). * ('12) 15 Cal L Jour 17 (22) (DB). * (Vol. 13) 1926 Lah 145 (146) (DB). * (Vol. 22) 1935 Mad 888 (900). * (Vol. 16) 1929 Bom 478 (479) (DB). (Cannot enquire as to the heirs and properties of the deceased in an administration suit.)

[2] The Court can depu'te a Commissioner to inspect a disputed land, to prepare a map or to obtain information with regard to physical features of the property inspected. ('74) 21 Suth W R 231 n (231n) (DB). * ('72) 17 Suth W R 282 (283) (DB).

[3] Commissioner should not examine witnesses, unless the nature of evidence is such that it ought to be taken only on the spot. ('68) 9 Suth W R 83 (86) (DB). * ('72) 17 Suth W R 282 (283) (DB).

[4] The Commissioner may examine witnesses where the parties agree and accept the same. (Vol. 8) 1921 Cal 363 (367) (DB). * ('69) 2 Beng L R App 3 (4) (DB).

[5] Statements regarding a right of way, made by village officers to a Commissioner appointed to prepare a map are not evidence. (1900) 24 Bom 43 (45) (DB).

[6] Any evidence taken by the Commissioner contrary to instructions cannot be looked into. ('75) 24 Suth W R 203 (209).

[7] Commissioner appointed to ascertain amount of mense profits entering into question of possession of land, recording evidence and arriving at a finding—*Held* that the procedure was *ultra vires*. (Vol. 15) 1928 Pat 278 (278, 279) (DB). * ('71) 16 Suth W R 294 (294) (DB). * ('62) 1862 Suth W R 39 (39) (FB). (The report is of no value regarding past possession).

[8] Information given by witnesses and not reduced to writing is not legal evidence (Vol. 12) 1920 Mad 145 (147) 47 Mad 800 (DB).

[9] A Commissioner is bound to record the state of things as actually existing and not draw upon his own imagination or make surmises. ('70) 14 Suth W R 269 (270) (DB).

[10] Notice should be given to parties of the time when local investigation will be held. ('69) 12 Suth W R 139 (140) (DB).

[See also (Vol. 21) 1934 Mad 548 (549)].

3. **Admissibility of report of Commissioner.**—[1] The report of the Commissioner together with the evidence, if any, recorded by him is legal evidence in the suit. ('74) 22 Suth W R 350 (350) (DB). * ('88) 1 C P L R 160 (161). * ('90) 17 Cal 281 (284) (DB). (Report cannot be rejected because am'n's remuneration is not paid). * (Vol. 4) 1917 All 70 (70) : 39 All 694 (DB). (Report of a Commissioner appointed by an Assistant Collector to ascertain collections under Section 164 of the Agra Tenancy Act is admissible in evidence.) * (Vol. 21) 1934 Mad 548 (548) * ('36) 163 Ind Cas 36 (37) (Mad).

[2] Evidence alone without the report of the Commissioner cannot be received as evidence in the suit. (1871) 6 Beng L R (App) 70 (72) (DB).

[3] The Court is not justified in refusing to consider the report unless the local investigation is incomplete or inconclusive. (Vol. 13) 1926 Cal

290 (293) (DB). * ('36) 163 Ind Cas 36 (37) (Mad). * (Vol. 27) 1940 P C 3 (6) : 1 L R (1940) Kar (PC), 15 (PC). (Interference with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated. 13 Moo Ind App 607 (PC) relied on).

[4] The report, however, is not *per se* evidence in any other suit unless its accuracy is proved in the ordinary way. ('82) 12 Cal L Rep 50 (52) (DB). * (Vol. 15) 1928 Cal 63 (64) (DB). * (Vol. 23) 1936 Oudh 192 (192). (The report does not fall within Section 35 of the Evidence Act). * (Vol. 21) 1934 Lah 890 (892) : 16 Lah 377 (DB) (Do.).

4. **Examination of the Commissioner.**—[1] The parties are entitled to take objection to the report of the Commissioner and substantiate the same by examining the Commissioner or other witnesses. (Vol. 4) 1917 Lah 57 (58). * (Vol. 16) 1929 Lah 782 (783) (DB).

[2] There must be some real ground for examining the commissioner. (Vol. 6) 1919 Cal 946 (947) (DB).

[3] If the report is attached on grounds which require explanation, it is necessary that the Commissioner should also be examined. (Vol. 7) 1920 Cal 863 (864) (DB). * (Vol. 2) 1915 Cal 280 (282) (DB).

[4] It is against established practice to find fault with his report behind his back and to reject it *in toto*. (Vol. 4) 1917 Pat 278 (279).

5. **Objections to Commissioner's report.**—[1] The Court must fix a date to enable the parties to file objections, if any, to the report of the Commissioner. ('74) 21 Suth W R 2 (3) (DB). (Court should also give notice to parties of the date so fixed).

[2] The Court is bound to enquire into such objections when filed. ('69) 11 Suth W R 95 (95) (DB). * ('67) 8 Suth W R 172 (173) (DB).

[3] Where the parties agree to, or accept the report, no date for filing objections need be fixed. ('13) 6 Sind L R 256 (260) (DB). * ('69) 11 Suth W R 155 (155) (DB).

[4] A party refusing to appear before the Commissioner has been held not entitled to object to the report. (Vol. 7) 1920 Cal 863 (864) (DB). * ('66) 6 Suth W R 130 (130) (DB).

[5] Objections to the report of the Commissioner should be taken in the trial court and cannot be raised for the first time in appeal. ('74) 2 Ind App 34 (37) (PC).

[6] Appellate Court has power to consider whether the report was outside or within the scope of the warrant of commission. (Vol. 16) 1929 Mad 492 (493) (DB).

6. **Commissioner's report, how far binding on the Court.**—[1] The Court has full power to arrive at its own conclusion even at variance with the report of the Commissioner. (Vol. 13) 1926 Pat 462 ('63) (DB). * (Vol. 22) 1935 Cal 23 (29) : 61 Cal 833 (DB). * (Vol. 23) 1935 Pat 569 (570) : 17 Pat 358 (DB).

[2] A Commissioner's report ought not to be made the sole basis and foundation for the judgment in disregard of the other evidence in the case. ('75) 24 Suth W R 338 (338) (DB). * ('74) 21 Suth W R 281 (281) (DB). (Value of the report depends upon the evidence on which it is founded.)

COMMISSIONS TO EXAMINE ACCOUNTS

11. In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

O. 26 R. 10 (contd.)

7. Further evidence after the Commissioner's report.—[1] The Commissioner does not prohibit further evidence. The point has to be decided on general principles according to the facts and circumstances of each case (100) 27 Cal 951 (366) : 27 Ind App 110 (PC)

[2] Party cannot at the last moment adduce fresh evidence after going on with the trial of the case without objection and with the knowledge that the investigation was carelessly done. (12) 16 Ind Cir 39 (40) (Cal) (DB)

8. Sub-rule (3).—[1] The Court has a discretion to order a fresh commission. It can decide the case on the evidence (Vol 6) 1919 Cal 96 (7) * (Vol 4) 1917 Cal 573 (573) (DB). * (Vol. 25) 1938 Pat 569 (570) : 17 Pat 308 (DB)

[2] Sub-rule (3) does not contemplate the issue of a fresh commission covering the same ground. (Vol. 14) 1929 Mad 681 (663) (DB) * (Vol. 20) 1933 All 65 (65). (Vol 16) 1929 All 446 (447) * (Vol 19) 1942 Mad 482 (484) : 55 Mad 656 (DB). * (Vol 18) 1931 Mad 73 (77) : 54 Mad 230 (DB).

[See also (Vol. 22) 1935 All 422 (423)].

[8] Where the Court is so dissatisfied with the whole proceedings of the Commissioner that it thinks it better to discard the whole record and start afresh, it may do so (Vol 16) 1929 Mad 661 (663) (DB). * (Vol 18) 1931 Mad 73 (76) : 54 Mad 230 (DB). * (Vol 9) 1922 Mad 219 (220) : 45 Mad 79 (DB). * (Vol 13) 1926 Pat 159 (160). * (Vol. 16) 1929 Pat 101 (102) * (Vol. 20) 1933 All 65 (65). * (Vol 16) 1929 All 446 (447).

[4] In an execution of a final decree for partition Commissioner appointed on application of one party granting more to that party through mistake. Other party not being aware of execution proceedings subsequently applying for allocation of his share under partition decree. Commissioner appointed on latter's application can rectify previous commissioner's mistake. (Vol. 18) 1931 Cal 170 (170) (DB)

[5] The mere filing of objections to the report is no ground for issuing a fresh commission. (Vol 17) 1930 Mad 236 (235). * (Vol. 9) 1922 Mad 219 (220) : 45 Mad 79 (DB).

[6] When the Court issues a fresh commission it is not bound to wipe out of the record the report of the first Commissioner. (Vol. 24) 1937 Pat 670 (671) (DB).

9. Interference with the report.—[1] The Court ought not to interfere with the result of a long and careful local investigation except upon clearly defined and sufficient grounds. (Vol. 27) 1940 PC 3 (6) : ILR (1940) Kar (PC) 15 (PC)

[2] An Appellate Court should not interfere with the finding of the trial Court based on a careful local investigation except upon very strong grounds. (70) 13 Moo Ind App 607 (617) (PC) * (72) 17 Suth WR 285 (285) (PC).

(See however (01) 5 Cal WN 692 (701)).

[3] Disregard of the report of the Commissioner is not such an error or defect affecting the merits of the case within the meaning of section 100 as to justify interference in second appeal. (34) 21 Cal 504 (511, 512) : 21 Ind App 39 (PC).

[4] An Appellate Court should not, as a result of an inspection of the spot of accident, reverse the decision of the trial Court based on recorded evidence. (07) 31 Bom 381 (392) : 34 Ind App 115 (PC). (Reversing 7 Bom LR 119).

ORDER 26, RULE 11.

Synopsis

1. Commission to examine accounts.
2. "Is necessary."
3. Power of Commissioner to decide questions of law.
4. Disobedience of order made by Commissioner
5. Appeal.

1. Commission to examine accounts.—[1] In a suit for accounts if the accounts are complicated the Court may appoint a commission under this rule. (81) 7 Cal 654 (656, 657) (DB). * (Vol. 13) 1926 Cal 349 (350) (DB). * (72-92) 1872-32 Low Bur Rul 809. * (97) 20 Mad 313 (316) (DB).

[2] Where a case is remanded to the lower Court for taking accounts, it has not jurisdiction to appoint a Commissioner for such purpose. (Vol. 21) 1934 Pat 35 (37) (DB).

2. "Is necessary."—[1] Before an order for the appointment of a Commissioner can be made, the examination or adjustment of accounts must be considered necessary. (Vol 27) 1940 Cal 837 (343) : ILR (1940) 1 Cal 372 (DB). * (Vol. 12) 1925 Cal 1059 (1072) : 52 Cal 766 (DB). * (Vol. 16) 1929 Pat 626 (637) (DB). (Vol. 24) 1937 Nag 136 (136, 137) ILR (1937) Nag 266.

3. Power of Commissioner, to decide questions of law.—[1] The Court cannot delegate its judicial powers to a Commissioner in the matter of taking evidence and determining issues. (Vol. 13) 1926 Lah 145 (146) (DB)

[2] It is for the Court and not the Commissioner to decide as to the truth or falsity of the account books or as to whether a certain contract was or was not authorized. (Vol. 12) 1925 Sind 265 (265) (DB). * (Vol. 11) 1924 Sind 9 (10) : 17 Sind LR 316 (DB).

[See also (Vol. II) 1924 Mad 406 (408, 409)].

[3] The duty of determining in whose possession the account books are cannot be delegated to the Commissioner. (Vol. 23) 1936 Lah 458 (460) (DB).

[See also (Vol. 27) 1940 Cal 337 (343) : ILR (1940) 1 Cal 372 (DB)].

[4] It is not open to the Court to refer to the Commissioner the question as to whether the dealings between the parties constituted in law, a mutual, open and current account between them. (Vol. 25) 1938 Rang 270 (270, 271) (DB).

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied to be evidence. Court may with them, it may direct such further inquiry as it shall direct further enquiry. think fit.

[1882—S. 395 ; 1877—Ss. 394, 395, 400 ; 1859—S 181]

COMMISSIONS TO MAKE PARTITIONS

13. Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

[1882—S. 396 ; 1877—S. 396.]

O. 26 R. 11 (contd.)

[5] It is irregular to appoint a Commissioner to give findings on mixed questions of law and fact, (Vol. 18) 1981 PC 186 (140): 58 Ind App 173: 58 All 190 (PC).

[6] The Commissioner can determine only the extent, or the quantum and not the factum of liability. (Vol. 16) 1929 Cal 418 (422) (DB) * (Vol. 21) 1984 Pat 35 (37, 38) (DB) (But if question of quantum involves question of liability, commissioner can determine both).

[7] A Commissioner has no power of review either, under S 151 or under O. 47, R. 1. (Vol 11) 1924 Bom 231 (232).

[8] A Commissioner appointed by a Judge on the Original Side of the High Court can decide questions of law arising while accounts are taken. (Vol 8) 1916 Bom 181 (182) : 41 Bom 719.

4. Disobedience of order made by Commissioner.

—[1] A Commissioner is an officer of the Court and the Court can issue an attachment to compel a party to obey his order. (1873) 10 Bom H C R (OC) 4 (6).

5. Appeal.—[1] An order under this rule is not a decree and is not appealable nor is the order one appealable under O. 43 R. 1 (Vol. 1) 1914 Bom 36 (38) : 38 Bom 392 (DB).

[But see ('02) 29 Cal 758 (766, 768) (FB). (An order giving directions to the commissioner is a "decree" and is appealable.) * ('04) 31 Cal 722 (724) (FB)].

ORDER 26 RULE 12—Synopsis.

1. Scope of the rule.
2. "Shall be evidence in the suit".
3. Objections to the Commissioner's report.
4. Powers and duties of the Appellate Court

1. Scope of the rule.—[1] The Court must furnish the Commissioner with the requisite proceedings and issue definite instructions as to what he should do. The Commissioner may apply for enlargement of time fixed for the return. ('92) 1892 Bom P J 318 (318) (DB).

[2] The rule contemplates the appointment of only one Commissioner. But the appointment of more than one is only a mere irregularity. ('70) 1870 Pun Re No. 40. Page 103 (105) (DB).

2. "Shall be evidence in the suit."—[1] The report of the Commissioner together with the evidence, taken by him is evidence in the suit, unless the Court directs a further enquiry. ('71) 3 N W P H C R 217 (223) (DB) * ('82) 1882 Pun Re No. 161 Page 485 (486) (DB).

[See ('78) 3 Bom 161 (170).]

[2] The report of the Commissioner has not the effect of a decision. ('01) 5 Cal W N 692 (707) (SB).

[3] The Court is not bound to take any other evidence than that furnished by the report. ('70) 1870 Pun Re No. 40 Page 103 (105) (DB).

[See however (Vol. 19) 1932 All 128 (130) : 53 All 54 (DB).

S. Objections to the Commissioner's report.—

[1] A party can file objections to the report of the Commissioner and can produce evidence in support of objections. (Vol. 16) 1929 Lah 782 (783) (DB) * (Vol. 21) 1984 Pat 35 (38) (DB) * (Vol. 9) 1922 Mad 219 (220) : 45 Mad 79 (DB) * (Vol. 1) 1914 Lah 339 (341) (DB).

[2] Objections should be made by a party within twenty days of the filing of the report by the Commissioner. ('89) 13 Bom 368 (369, 370) * ('97) 24 Cal 437 (439).

[3] Reference to a Commissioner by consent—Those parties cannot go behind the consent so given. ('74) 1 Ind App 346 (362) (PC)

[4] Objections to the report cannot be raised for the first time in appeal. ('74) 2 Ind App 34 (37) (PC).

[But see ('98) 8 Mad L Jour 133 (134) (DB). (Proceeds according to Rule 292 of the Rules of Practice on the Original Side)].

4. Powers and duties of the Appellate Court.—

[1] The Commissioner's report affirmed by the trial Court is not absolutely binding on the Appellate Court. ('70) 6 Mad H C R 36 (37). (1 Mad H C R 1 and 1 Mad H C R 418—dissented from as being bad law).

[2] The appellate Court can scrutinize the report and make such further enquiries into the matter as it may deem proper. ('01) 5 Cal W N 692 (701, 706, 707) (SB) * (Vol. 14) 1927 Lah 736 (737) (DB).

ORDER 26 RULE 13—Synopsis.

1. Scope of the rule.
2. "Such person as it thinks fit".
3. Appeal.

14. (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorised thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

[1882—S 396; 1877—S. 396 (2) and (3).]

PROVINCIAL AMENDMENTS

PATNA

Substitute the following for sub-rules (2) and (3):

"(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub-divided, the area of each sub-plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports shall confirm, vary or set aside the same

O. 26 R. 13 (contd.)

1. Scope of the rule.—[1] Court is not under this rule bound to appoint a Commissioner in every case. ('03) 31 Mad 540 (543) (DB).

[2] The essential difference between an arbitrator and a Commissioner appointed under this rule is that the latter merely submits his report for the approval of the Court, whereas the former has a final authority to settle all matters of difference between the parties. Further, the former is selected by the parties and therefore his decision cannot be questioned except on the limited grounds specified in Sch. II whereas the latter is selected by the Court and the parties are therefore at liberty to challenge his report. (Vol 1) 1914 Oudh 183 (184) (DB). (Vol 14) 1927 Pat 135 (137) (DB) * (Vol 26) 1939 Pat 526 (527) : 18 Pat 193 (DB).

[3] An application for the appointment of a Commissioner is not governed by any rules of limitation. (05) 28 Mad 127 (129) (DB).

[4] Preliminary decree for partition—Subsequent dismissal of suit for default—Order under this rule does not amount to order setting aside such dismissal. (Vol 23) 1936 Lah 875 (876).

[5] Partition suit—Plaintiff's application for appointment of Commissioner to prepare inventory of property—Defendant's objection that plaint was not properly stamped—Court entertaining such objection but passing conditional order for inventory before disposing question of Court-fee—Order held not proper. (Vol 29) 1942 Pat 43 (46) (DB).

2. "Such person as it thinks fit."—[1] The choice of the Commissioner lies with the Court. But a relation of one of the parties or their pleaders should not be appointed except with the consent of the other party. (Vol 4) 1917 All 143 (149) (DB).

3. Appeal.—[1] An order issuing a commission under this rule is not appealable under O. 43 R. 1. Nor is the order one passed in execution within the meaning of S. 47. (Vol 6) 1919 Mad 42 (43) (DB) * (Vol 3) 1916 Mad 809 (810) (DB) * ('07) 17 Mad L Jour 144 (144) (DB) * ('98) 20 All 911 (913, 914) (DB) * ('97) 24 Cal 725 (735, 738) (FB).

ORDER 26 RULE 14—Synopsis.

1. Mode of effecting partition.
2. Revenue-paying immovable property.
3. Joint family dwelling-house.
4. Allotment of shares.
5. Objections to Commissioner's report.
6. Resistance to Commissioner.
7. Issue of a new Commission.
8. Decree.
9. Final decree to be on stamp paper.
10. Preliminary decree in a partition suit—Appeals—See notes under Order 26 Rule 13.

1. Mode of effecting partition.—[1] Commissioner should not propose a number of schemes and ask the Court to choose any one of them;

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree, shall incorporate in the decree the schedule, and the map, if any, mentioned in sub rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily entered in the decree. When the Court sets aside the report or reports it shall either a cause new commission or make such other order as it shall think fit " [4-3 1932.]

O. 26 R. 14 (contd.)

only the shares as ascertained by the decree have to be worked out by him. ('04) 6 Bom LR 556 (587) (DB)

[2] Court may, in the case of a joint Hindu family with the consent of all the coparceners, order that any part of the property should remain joint. ('78) 3 Cal 514 (516) (DB).

[3] Court may award money compensation instead of dividing property.

[a] Where a partition cannot be made without destroying the intrinsic value of the property. ('84) 10 Cal 675 (676) (DB) * ('81) 8 Cal L Rep 259 (260) (Compensation allowed to co-sharer enhancing value of portion.)

[b] Where it would be inconvenient to disturb the exclusive possession of one co-sharer. ('76) 25 Suth W R 335 (342) (DB) * 1907 6 Cal L Jour 8 (8).

[4] The following five accounts must be filled:- (1) Property account. (2) Cash account. (3) Ledger account. (4) Costs adjustment account. (5) Costs pool account. (Vol. 29) 1942 Cal 300 (301): 1 L R (1941) 2 Cal 410.

2. Revenue-paying immovable property.—[1] When a revenue-paying estate has to be partitioned into several revenue-paying estates such partition can be done only by the Collector because the revenue is affected. ('89) 16 Cal 203 (205) (DB). * ('78) 2 Cal L Rep 134 (136).

[2] Where no allotment of separate revenue is asked for, the Civil Court is competent to allot the shares leaving the whole estate liable for the whole revenue. ('97) 24 Cal 725 (734, 745, 745) (FB) (Overruling 23 Cal 679) * ('81) 7 Cal 153 (155) (DB) * ('88) 15 Cal 198 (201)

See also Notes under S. 54.

3. Joint family dwelling-house.—[1] In the case of partition of joint family dwelling-house the Court can actually fix the particular area, rooms or part of the house to be allotted to the respective shares. ('06) 28 All 75 (76) (DB).

[2] Cases under the Partition Act, 1893 ('05) 32 Bom 103 (105) (DB). (Power to sell) * ('01) 24 (Mad) 639 (641) (DB). (Power to sell under Section 2) * (1900) 5 Cal W N 128 (130) (DB). (Power to sell under S. 2—Preliminary decree on report of the commissioner is no bar to proceedings under S. 2) * ('08) 30 All 324 (325) (FB). (Section 4 applies to Mahomedans) * ('99) 23 Bom 77 (79) (DB). (Applicability of S. 4) * ('99) 21 All 409 (411). (Applicability of S. 4).

[3] Cases regarding valuation of suits. ('06) 3 Cal L Jour 257 (259) (DB). (For purposes of S. 110, C. P. C. value of the subject-matter of the suit is the value of the whole estate which it is sought to partition. * ('85) 8 Mad 235 (236) (DB). (Value of whole property determines jurisdiction). * ('90) 12 All 506 (509) (DB). (Value of share determines jurisdiction). * ('84) 8 Bom 31 (34) (DB)

(Do). * ('90) 13 Mad 25 (27) (DB) (Case of co-owners—Specific share claimed determines jurisdiction).

4. Allotment of shares.—[1] The duty of the Commissioner is not to give possession but to allot the shares and prepare a report fixing the shares and distinguishing the same by metes and bounds, if so ordered. ('95) 20 All 311 (313) (DB) * (Vol. 21) 1931 Pat 32 (33) (DB) (He cannot decide shares of the parties, which is the duty of the Court.)

[See also '97) 19 All 194 (195) (DB). (Wall cannot be ordered to be built by amin to separate shares)].

[2] The Court after considering the rights and objections of the different parties should make the final allotment. ('08) 8 Cal L Jour 521 (523) (DB).

[3] A casting of lots can be resorted to by the Courts for equitable distribution of shares. (Vol. 2) 1915 Mad 1171 (1172) (DB).

[4] An order of the Court approving the allotment and division made by a Commissioner is binding on the parties, even though a fresh decree is not passed in accordance with the report. (Vol. 2) 1915 Mad 254 (256) (DB).

5. Objections to Commissioner's report.—[1] Objections to the report can be filed within the period fixed by the Court. (Vol. 6) 1919 All 403 (403) (DB) * ('89) 13 Bom 368 (370). (Practice on the Original Side.)

[2] Objections cannot be raised for the first time in appeal. (Vol. 7) 1920 Low Bur 31 (34) (DB) * ('01) 7 Cal 318 (321).

[3] High Court has power to see whether the Commissioner has exceeded his jurisdiction or acted within the scope of his warrant of commission. (Vol. 16) 1929 Mad 492 (492) (DB).

[4] Evidence can be let in to support the objections. (Vol. 22) 1935 Lah 501 (502) (DB). (Commissioner should be examined first—If there is ground for further inquiry, parties should be allowed to produce evidence).

6. Resistance to Commissioner.—[1] Court is not justified in dismissing the suit when the Commissioner is resisted in executing his warrant of commission—Commissioners are officers of the Court and a process of attachment can be issued by the Court to enforce his order. ('10) 32 All 319 (322) (DB).

7. Issue of a new Commission.—[1] Second commission may be issued on superseding the old report in cases:—[a] Where the report is unsatisfactory. (Vol 13) 1926 Pat 159 (160).

[b] The Commissioner has so misconceived his duties as to render his report useless. (Vol 9) 1922 Mad 219 (220): 45 Mad 79 (DB). (Second Commission cannot be issued on mere objection of party.)

[2] A Second commissioner can rectify mistakes of first Commissioner. (Vol 18) 1931 Cal 170 (170) (DB).

GENERAL PROVISIONS

15. Before issuing any commission under this Order, the Court may order Expenses of commission such sum (if any) as it thinks reasonable for the expenses of to be paid into Court. the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

[1882—S. 397 ; 1877—S. 397 ; 1859—S. 182.]

PROVINCIAL AMENDMENT.

MADRAS

Re-number the existing Rule 15 Rule 15 as (1) and *insert* the following as sub-rule (2) :

"(2) Before executing and returning any commission issued by foreign Courts under the provisions of Section 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under Rule 2 of Order 16."

O. 26 R. 14 (contd.)

[See also Notes on Order 26, Rule 10.]

8. Decree.—[1] The proceedings under the rule are these in the suit and not in execution. ('86) 12 Cal 275 (277) (DB) * ('06) 1906 Pun Re No. 47, page 168 (DB) * ('95) 22 Cal 425 (432) (DB).

[2] Court is bound to pass a final decree after perusing the report. ('98) 1898 All W N 99 (99) * ('05) 1905 Pun Re No. 23 page 99 (DB) (Decree—Effect—Is in favour of each share-holder.)

[3] Court can pass a final decree *suo motu* without an application by the party. ('08) 18 Mad L Jour 43 (34) (DB) * ('10) 8 Mad L Tim 295 (295) (DB).

[4] Though the final decree is appealable, no appeal lies against an order of the Court confirming or varying the report. (Vol 13) 1926 Oudh 195 (196) (DB).

9. Final decree to be on stamp paper.—[1] A final decree for partition being an instrument of partition within the meaning of S. 2, cl. (15), Stamp Act, 1899, must be engrossed on a stamp paper of proper value. ('05) 29 Bom 366 (368) (SB) * ('05) 82 Cal 483 (491) (DB)

[Also see Notes under Order 20, Rule 18.]

10. Preliminary decree in a partition suit. Appeal.—See notes under Order 26, Rule 13.

ORDER 26 RULE 15—Note 1.

[1] The Court may, if it thinks fit, order the party requiring the commission to deposit the necessary expenses therefor. (Vol 14) 1927 Cal 907 (905) (DB) * (Vol 11) 1924 Bom 90 (92) * (Vol 23) 1986 Pat 33 (34).

[See also (Vol 25) 1988 Rang 254 (256) (DB)].

[See however ('80) 5 Cal 866 (867). (In case of pardanashin lady, Court will not direct payment by her).]

[2] The rule does not prevent the Court from imposing any terms as a condition precedent to the issuing of a commission. (Vol 14) 1927 Cal 907 (907) (DB).

[3] Omission on the part of the Court to require the deposit of the expenses—Commissioner is not

prevented from recovering his remuneration from the party at whose instance he was engaged. ('82) 4 Mad 399 ('01) (DB) * (Vol 10) 1923 Cal 436 (437, 438) (DB).

[4] The object of the rule is, that the Commissioner ought not to be driven to a separate suit or execution to get his fees. ('11) 15 Cal W N 221 (223) (DB) * ('96) 63 Cal L Jour 563 (565) (DB).

[5] An order directing the deposit of fees to the Commissioner is not capable of execution. (1900) 10 Mad L Jour 241 (242) (DB) * ('96) 6 Mad L Jour 124 (124, 125) (DB) * ('13) 21 Ind Cas 191 (191) (DB) (Cal) * (Vol 13) 1926 Lah 62 (62).

[But see (Vol 12) 1925 Cal 57 : 52 Cal 269 (SB). * (Vol 21) 1934 Lah 46 (46)].

[6] An order directing one of the parties to pay a certain sum to the Commissioner cannot be made a part of the decree. (Vol 25) 1988 Rang 254 (256) (DB)

[7] Failure to deposit the required fees can afford no ground for rejecting the report or for dismissing the suit. ('90) 17 Cal 281 (284) (DB) * ('81) 3 Mad 259 (259) (DB).

[See ('90) 13 Mad 510 (511) (DB)].

[8] Courts in appointing Commissioners and fixing their remunerations under Order 26 act judicially and not administratively. ('40) 1940 Nag L Jour 93 (94).

[9] The reduction or disallowance of a Commissioner's bill is a matter for the trial Court. ('40) 1940 Nag L Jour 93 (95) * (Vol 6) 1919 Cal 839 (839) (DB) * (Vol 21) 1934 Pat 316 (318).

[10] The Court will not be justified in re-opening or reducing the fees fixed in the presence of the parties and paid into Court. (Vol 7) 1920 Pat 555 (558) * (Vol 20) 1933 Pat 681 (683).

[11] Pleader of standing and experience appointed Commissioner—Commissioner's fees not mentioned—Previous direction by District Judge not to allow more than Rs. 8 per day to Commissioners in ordinary cases.—Held there was no implied contract to work on Rs. 8. (Vol 24) 1937 Pat 614 (614) (DB).

Powers of Commis-
sioners
ment,—

16. Any Commissioner appointed under this Order may, unless otherwise directed by the order of appoint-

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give the evidence in matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

[1882—S. 399.]

17. (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this order whether the Commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

[1882—S. 399; 1877—S. 399.]

18. (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

1882—S. 400; 1877—S. 394, 395, 400; 1880—S. 181.]

PROVINCIAL AMENDMENTS

ALLAHABAD

In clause (1) after the words "agents or pleaders" substitute a comma for the full stop, and add the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings, and issues."

ODDH

In sub-rule (1), after the words "agents or pleaders" substitute a comma for the full stop, and add the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

COMMISSIONS ISSUED AT THE INSTANCE OF FOREIGN TRIBUNALS

Cases in which High Court may issue commission to examine witness.

19. (1) If a High Court is satisfied—

- (a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

ORDER 26 RULE 16—Note 1.

[1] The discretion to examine or not to examine a witness lies with the Commissioner. (Vol 25) 1938 All 215 (216).

ORDER 26 RULE 17—Note 1.

[1] The Commissioner has the powers of Court in regard to the summoning and procuring the

attendance of witnesses. (Vol 10) 1928 Oudh 119 (120): 24 Cr L Jour 781.

[2] It is not open to the Commissioner to examine the witnesses in the absence of the parties without giving them sufficient notice of the time and place of the examination of witnesses. (Vol 25) 1938 All 215 (216, 217).

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the ^b[Central Government], or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the ^b[Central Government], or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding

[a] Rules 19 to 22 and the heading were *inserted* by the Code of Civil Procedure (Amendment) Act 1932 (10 [X] of 1932), Section 3

[b] *Substituted* by A. O. for "Governor-General in Council"

Application for
commission

20. The High Court may issue a commission under rule 19—

(a) upon application by a party to the proceeding before the foreign Court, or

(b) upon an application by a law officer of the ^a[Provincial Government] acting under instructions from the ^a[Provincial Government].

[a]. *Substituted* by A. O. for "Local Government"

21. A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where To whom Commission may be issued. ^a[* * *] the witness resides within the local limits of ^b[the ordinary original civil jurisdiction of the High Court], to any person whom the Court thinks fit to execute the commission.

[a] The words "The High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915 and" were *repealed* by A O

[b] *Substituted, ibid*, for "its ordinary original civil jurisdiction"

22. The provisions of Rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the ^a[Central Government], along with the letter of request for transmission to the foreign Court.

[a] *Substituted* by A O. for "the Governor-General in Council"

PROVINCIAL AMENDMENTS

Rule 23—MADRAS

Add the following as rule 23.

Application of order to
execution proceedings

"R 23, The provisions of this order and of O 26A shall apply, so far as may be, to proceedings in execution of a decree or order"

Rule 26A—MADRAS

Insert the following as Order 26A (new)

"O R D E R XXVIA

R 1. The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court

R 2 The report of the Commissioner shall be evidence in the suit and shall form part of the record.

R 3 Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

[D1s No 1685 of 1914.]

ORDER XXVII

SUITS BY OR AGAINST ^a[THE CROWN] OR PUBLIC
OFFICERS IN THEIR OFFICIAL CAPACITY

1. In any suit by or against ^b[the Crown], the plaint or written statement
Suits by or against shall be signed by such person as ^c[the Crown] may, by general
Crown or special order, appoint in this behalf, and shall be verified by
any person whom ^d[the Crown] may so appoint and who is acquainted with the facts
of the case.

[See Ss. 79 to 82]

[a] *Substituted* by A. O. for "the Government"

[b] *Substituted, ibid* for "the Secretary of State for India in Council"

2. Persons being ex-officio or otherwise authorised to act for ^a[the Crown]
Persons authorised to in respect of any judicial proceeding shall be deemed to be
act for Crown the recognized agents by whom appearances, acts and appli-
cations under this Code may be made or done on behalf of ^c[the Crown]

[1882—S 417; 1877—S. 417; 1859—S. 17, cl (3) See O 3 R 2]

[a] *Substituted* by A O. for "the Government."

3. In suits by or ^a[against the Crown], instead of inserting in the plaint the
Plaints in suits by or name and description and place of residence of the plaintiff or
against Crown defendant, it shall be sufficient to insert ^b[the appropriate name
as provided in S. 79, or, if the suit is against the Secretary of State, the words "the
Secretary of State"].

[1882—S 418; 1877—S 418; 1859—S 36]

[a] *Substituted* by A O. for "against the Secretary of State for India in Council"

[b] *Substituted, ibid*, for the words "the Secretary of State for India in Council."

^a 4 The Crown pleader in any Court shall be the agent of the Crown for
Agent for Crown to the purpose of receiving processes against the Crown issued by
receive process such Court.

[1882—S 419; 1877—S. 419; 1859—Ss. 52, 67]

[a] *Substituted* by A O. for the original rule

5. The Court, in fixing the day for ^a[the Crown] to answer to the plaint, shall
Fixing of day for appear- allow a reasonable time for the necessary communication
ance on behalf of Crown ^b[with the Crown] through the proper channel, and for the
issue of instructions to the ^c[Crown pleader] to appear and answer on behalf of ^d[the
Crown] or the Government, and may extend the time at its discretion

[1882—S 420; 1877—S. 420; 1859—S. 37 See O. 5 R. 6]

[a] *Substituted* by A O. for "the Secretary of State for India in Council"

[b] *Substituted* for "with the Government," *ibid*.

[c] *Substituted* for "Government pleader," *ibid*

[d] *Substituted* for "the said Secretary of State for India in Council," *ibid*.

ORDER 27 RULE 2—Note 1.

[1] Vakalat purporting to be executed by
Collector but signed by personal assistant to
Collector is proper (Vol 15) 1928 Mad 96 (36)

[2] In the Punjab a Collector is competent to
institute suit on behalf of the Secretary of State
without obtaining a power-of-attorney from the
Financial Commissioner ('05) 1905 Pun Re No. 84
page 258 (259)

[3] All Government Pleaders in the Punjab are
authorised to act for Government as their recog-
nized agents. (Vol 15) 1928 Lah 774 (775). 10 Lah
360 (DB)

ORDER 27 RULE 3—Note 1

[1] Under this rule, in the case of a suit by the
Central Government it is enough to name the

plaintiff as the Governor-General in Council. It is
not necessary that the Governor-General in Council
should be consulted before instituting the suit.
(Vol 29) 1942 Pesh 38 (34) (DB).

[2] Where the plaintiff in a suit was named as the
Governor-General in Council through the Post-
master-General it was held that the words
"through the Post-master-General" were mere-
ly surplusage and that the suit was brought in
the name of the correct plaintiff. (Vol 29) 1942
Pesh 38 (34) (DB)

ORDER 27 RULE 4—Note 1

[1] Suit against railway—Absence of Crown
pleader—Service on agent of railway held sufficient.
(Vol 26) 1939 All 277 (278, 279): ILR (1939)
All 392.

PROVINCIAL AMENDMENT

MADRAS

Substitute the following :

"5. The Court in fixing the day for the Crown to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Crown Pleader to appear and answer on behalf of the Crown and may extend the time at its discretion." [2-8-1942.]

6. The Court may also, in any case in which the ^a [Crown pleader] is not accompanied by any person on the part of ^b [the Crown], who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

[1882—S. 421; 1877—S. 421; 1859—S. 67. See O. 10 R. 4.]

[a] *Substituted* by A.O. for "Government pleader."

[b] *Substituted* for "the Secretary of State for India in Council," *ibid.*

7. (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to ^a [the Crown] enable public officer to before answering the plaint, he may apply to the Court make reference to Crown to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

[1882—S. 423; 1877—S. 423; 1859—S. 69. See S. 2, Sub-section (17)]

[a] *Substituted* by A.O. for "the Government."

8. (1) Where ^a [the Crown] undertakes the defence of a suit against a public officer, ^b [the Crown pleader], upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by ^b [the Crown pleader] on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

[1882—Ss. 426, 427; 1877—S. 427; 1859—S. 71. See S. 81.]

[a] *Substituted* by A.O. for "the Government."

[b] *Substituted* for "the Government pleader," *ibid.*

*8A. No such security as is mentioned in rules 5 and 6 of Order XI shall be required from the Crown, or, where the Crown has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

[O. 41 R. 7; 1882—S. 547; 1877—S. 547; 1859—S. 340.]

[a] *Inserted* by A.O.

PROVINCIAL AMENDMENT

RULE 8 B—OUDH

Add the following as Rule 8B—

"8B. In every case, in which any Pleader/Advocate who is authorised to act for the Crown as a party on his own account, or for the Crown Representative, or for the Crown undertaking under the provisions of Rule 8(1) the defence of a suit against or for a public officer who is a party to a suit or appeal in his official capacity, appears he shall, in lieu of a *vakalatnama*, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such a memorandum shall be, as nearly as may be, in the terms of the following form :

TITLE OF THE SUIT OR APPEAL

I, A.B., Pleader/Advocate appear on behalf of the—Secretary of State for India/Central Government/Crown Representative/Provincial Government/Crown (who has undertaken the defence of the suit under the First Schedule, Order XXVII, Rule 8 (1) of Act V of 1908). A Public Officer (state designation) who is a party to the suit or appeal in his official capacity." [28-10-1944.]

ORDER 27 RULE 7—Not 1

[1] A Suit against a public officer should be brought in his personal and not in his official name. (Vol 14) 1927 Bom 521 (523, 525) : 51 Bom 749 (DB)

Definitions of "Crown"
and "Crown pleader."

^a8B. In this Order "Crown" and "Crown pleader" mean respectively—

- (a) in relation to any suit by or against the Secretary of State or the Central Government, or against a public officer in the service of that Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purposes of this Order;
- (b) in relation to any suit by or against the Crown Representative, or against a public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative and such pleader as he may appoint, whether generally or specially, for the purposes of this Order; and
- (c) in relation to any suit by or against a Provincial Government or against a public officer in the service of a Province, the Provincial Government and the Government pleader, or such other pleader as the Provincial Government may appoint, whether generally or specially for the purposes of this Order.

[a] *Inserted by A. O.*

Rule 9—ALLAHABAD

PROVINCIAL AMENDMENTS

Add the following to Order 27, as Rule 9 :

"R. 9. In every case in which the Government pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of Rule 8 (1), the defence of a suit against an officer of the Government, he shall, in lieu of a *vakalatnama*, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :

TITLE OF THE SUIT, ETC.

I, A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) Respondent (or etc.), in the suit :

Or, on behalf of the Government [which, under O 27 R. 8 (1) of Act V of 1908 has undertaken the defence of the suit], respondent or, etc., in the suit."

Note—This local amendment was made before Rule 8 was amended by A. O.

Rules 9 and 10—MADRAS.

The existing Rules 8A and 8B of Order 27 shall be re-numbered as Rules 9 and 10 respectively [2-3-1942.]

ODDH—

Renumber the existing Rule 8B as Rule 8C. [28-10-1944]

A O R D E R XXVII-A.

SUITS INVOLVING A SUBSTANTIAL QUESTION OF LAW AS TO THE INTERPRETATION OF THE GOVERNMENT OF INDIA ACT, 1935, OR ANY ORDER-IN-COUNCIL MADE THEREUNDER.

GENERAL.

[a] *Inserted by the Code of Civil Procedure (Amendment) Act, 1942 (23 [XXIII] of 1942)* [1-10-1942]

1. In any suit in which it appears to the Court that a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder is involved, the Court shall not proceed to determine that question until after notice has been given to the Advocate-General of India if the question of law concerns the Central Government and to the Advocate-General of the Province if the question of law concerns a Provincial Government,

2. The Court may at any stage of the proceedings order that the Central Government or a Provincial Government shall be added as a defendant in any suit involving a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order-in-Council made thereunder if the Advocate-General of India or the Advocate-General of the Province as the case may be, whether upon receipt of notice under rule 1, or otherwise, applies for such addition and the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question of law involved.

3. Where under Rule 2 Government is added as a defendant in a suit, the Advocate-General or the Government shall not be, entitled to, or liable for costs in the Court which ordered the addition unless the Court having regard to all the circumstances of the case for any special reason otherwise orders.

4. In the application of this Order to appeals the word 'defendant' shall be held to include a respondent and the word 'suit' an appeal.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY ^a[OR NAVAL] MEN ^b[OR AIRMEN].

1. (1) Where any officer, ^a[soldier, sailor or airman] actually ^d[serving under the Crown] in ^e[such] capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any person to sue or defend for them.

(2) The authority shall be in writing and shall be signed by the officer, ^f[soldier, sailor or airman] in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer, ^f[soldier, sailor or airman] is serving in military, ^a[naval,] ^b[or air force] staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, ^f[soldier, sailor or airman] by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, [ship] detachment or depot to which the officer, ^f[soldier, sailor or airman] belongs.

[1882—S. 465 ; 1877—S. 465 ; 1859—S. 19]

[a] Inserted by the Amending Act, 1934 (35 [XXXV] of 1934), Section 2 and Schedule.

[b] Inserted by the Repealing and Amending Act, 1927 (10 [X] of 1927), Section 2 and Schedule I.

[c] The words "soldier or airman" were substituted by Section 2 and Schedule I *ibid*, for "or soldier" and the word "sailor" was inserted by Act XXXV of 1934, Section 2 and Schedule.

[d] Substituted by A. O. for "serving the Government"

[e] Substituted by Act XXXV of 1934, Section 2 and Schedule for "a military or air force." The words "or air force" had been inserted by Act 10 of 1927, Section 2 and Schedule I.

[f] The words "soldier or airman" were substituted by the Repealing and Amending Act, X of 1927, for "or soldier" and "or a soldier," and the word "sailor" was inserted by the Amending Act XXXV of 1934.

2. Any person authorised by an officer, ^a[soldier, sailor or airman] to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, ^a[soldier, sailor or airman] could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, ^a[soldier, sailor or airman].

[1882—S. 466; 1877—S. 466; 1859—S. 20.]

[a] The words "soldier or airman" were substituted by the Repealing and Amending Act, 1927 (10 [X] of 1927), Section 2 and Schedule I, "or soldier" and "or a soldier" and the word "sailor" was inserted by the Amending Act, 1934 (35 [XXXV] of 1934), Section 2 and Schedule

3. Process served upon any person authorised by an officer, ^a[soldier, sailor or airman] under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

[1882—S. 467; 1877—S. 467; 1859—S. 20. See O. 3 R. 5.]

[a] The words "soldier or airman" were substituted by the Repealing and Amending Act, 1927 (10 [X] of 1927), Section 2 and Schedule I, for "or soldier" and "or a soldier" and the word "sailor" was inserted by the Amending Act, 1934 (35 [XXXV] of 1934), Section 2 and Schedule

ORDER XXIX

SUITS BY OR AGAINST CORPORATIONS.

1. In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

[1882—S. 435; 1877—S. 435; 1859—S. 26. See O. 6 R. 14.]

PROVINCIAL AMENDMENT

Rule 1 A—MADRAS

Insert the following as Rule 1 A :

"R. 1A. In suits against a local authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance." [Dis. No. 644 of 1911.]

ORDER 29 RULE 1—Synopsis.

1. Suits by or against corporations.
2. Suit by or against unregistered company.
3. Companies authorized to sue and be sued in the name of an officer or secretary.
4. Foreign corporation.
5. "Other principal officer of the corporation."
6. "Who is able to depose to the facts of the case."
7. Subscription and verification of pleadings.

1. Suits by or against corporations.—[1] This rule says nothing about the manner in which the suit is to be framed. (Vol 8) 1921 Pat 485 (485).

[2] There is nothing in this rule or Order to suggest that the cause title of the plaint should also contain the particulars showing the names and description or place of residence of the person who purports to verify or sign the pleadings (Vol 20) 1933 Sind 102 (102) : 26 Sind L R 431

[3] For the purposes of this Order a corporation is a body authorized by law to act as one individual and constituted either by prescription, by the

Letters Patent, or by an Act of the Legislature (Vol 4) 1917 Low Bur. 36 (37).

[See (Vol 30) 1943 Bom 268 (270) (District School Board can be sued as a corporation)]

[4] A corporation by prescription is corporation of such antiquity that the consent of the sovereign may be presumed. ('98) 20 All 167 (169) (DB).

[5] A registered company under the Companies Act is a corporation. ('86) 12 Cal 41 (44) (DB). * ('85) 1885 Pun Re No. 43 page 81 (83) (DB).

[6] A Mutual Insurance Society is not a corporation (Vol 29) 1942 Sind 130 (131). ILR (1942) Kar 56 (DB)

[7] A corporation must sue or be sued in its own corporate name. ('95) 17 All 292 (293) (DB). (Overruled in 18 All 198 (198) on another point) * (Vol 20) 1933 Lah 203 (206) : 14 Lah 330. * (Vol 8) 1916 Cal 818 (819) : 48 Cal 441 (445) (DB). * ('13) 1913 Pun L R No 190 P. 655 (656). (Amendment not allowed as the error was persisted in even after objection.)

[See however (Vol 10) 1923 Pat 558 (560) (DB)]

[8] In the case of registered companies, the suit must be in the form given in Appendix A, first

O. 29 R. 1 (contd.).

schedule Form No. 2 and described as "the A. B. Company, Limited, having its registered office at" or as "A. B. a public officer of the C D Company" (Vol 8) 1921 Pat 485 (485). * (Vol 10) 1923 Bom 452 (453) : 47 Bom 785 (DB).

[9] A description given as "A. B., agent of C. D. Company" is not in conformity with the rule. (Vol 12) 1925 Cal 716 (718) : 52 Cal 783 (DB).

[10] Relief really sought against the company, error merely one of misdescription. Suit, though nominally against the agent, may be treated as in substance one against the company. (Vol 13) 1926 Pat 40 (42) : 5 Pat 128 (DB). * (Vol 11) 1924 Oudh 809 (810).

[See also (Vol 26) 1939 Cal 178 (179) (DB). (Where the plaintiff, in a suit against a municipality, sues the chairman only instead of the municipal commissioners as required by the local Municipal Act, it is merely a technical flaw.)]

[11] The rule does not authorize the persons mentioned therein to institute suits on behalf of the corporation. (Vol 28) 1941 Pesh 76 (77) (A Secretary of a municipality holding a general power of attorney can defend actions without a special authorisation in this behalf and can engage a counsel for this purpose.) * (Vol 22) 1935 Lah 845 (846) : 17 Lah 35 (DB).

[12] This rule is only an enabling provision and does not prohibit a suit in the form of O. 1 R. 8. (Vol 29) 1942 Sind 130 (131) : ILR (1942) Kar 56 (DB).

[13] Manager of company authorized by the articles of association to file suits with the previous sanction of the executive board—A suit instituted by him without such sanction is unauthorized—Fact that the act of the manager is ratified after the period of limitation by a resolution of the board of directors is of no avail. (Vol 23) 1936 Lah 321 (322) (DB).

2. Suit by or against unregistered company.—

[1] A suit by or against an unregistered company or unincorporated body of persons must be brought in the names of, or, against, all the members of the company or body. (Vol 12) 1925 All 937 (938) : 47 All 342 (DB). * (Vol 20) 1933 Lah 93 (93) * (Vol 20) 1933 Lah 456 (457) (DB). * (Vol 14) 1927 All 783 (783) (DB). * (Vol 22) 1935 All 872 (873). * ('91) 14 Mad 362 (362, 363) (DB). * ('86) 12 Cal 41 (41) (DB). * (Vol 4) 1917 Low Bur 36 (37) * (Vol 16) 1929 Cal 445 (447) (DB).

[2] A suit brought in the names of some only of the members of a society will be dismissed. ('98). 20 All 167 (170). * ('94) 16 All 420 (422) (DB).

[3] Where it appears that the plaintiff did not know of what persons the company in question was composed, he may sue the company in the name under which it was carrying on the business, provided he has stated in the plaint that he was unable to give a better description of the defendant. ('67) 8 Suth W R 45 (46) (DB).

[But see ('99) 21 All 346 (347) (DB).]

3. Companies authorized to sue and be sued in the name of an officer or secretary.—[1] The Indian Companies Act is one of the Act of the Legislature which authorises a company to sue or be sued in the name of an officer thereof. ('86) 12 Cal 41 (44) (DB).

[2] Under Act VII of 1890 a company such as the Comptoir National de Compte de Paris may be sued in the name of its chief manager. ('10) 12 Bom L R 730 (730) (DB). •

[3] Gift to the members of an unincorporated society by a deed—Society subsequently registered—Registered society can enforce the gift without a formal deed of transfer from the unincorporated society. ('97) 1897 Pum Re No. 41, page 182 (188, 187) (DB).

4. Foreign corporation.—[1] It is not necessary that a corporation duly created according to the Law of a State should be registered under the Indian Companies Act before it can sue or be sued in its corporate name in the Courts in India. (1903) 30 Cal 108 (106) (DB) * ('12) 1912 Pun Re No 8.

5. "Other principal officer of the corporation."—[1] The official liquidator of a registered company in liquidation is competent to sue on behalf of the company. ('96) 18 All 196 (201, 202, 208) (FB). * (Vol 5) 1918 Mad 362 (364) : 41 Mad 624 (DB).

[2] Branch of a company conducted by a manager holding a power of attorney under the seal of the company—Such manager in his absence delegating, in pursuance of such power, all his authority to an accountant—Such substituted power omitting words giving power to sue—Such substitute is a principal officer of that corporation and can sign and verify a plaint by the company. ('94) 21 Cal 60 (65) : 20 Ind App 189 (PC).

[See also (Vol 12) 1925 Lah 888 (889) * (Vol 24) 1937 Lah 751 (752) * (Vol 24) 1937 Nag 379 (380) : ILR (1937) Nag 682. * (Vol 23) 1936 Bom 418 (420) : ILR (1937) Bom 45.]

[3] The signing of the plaint by the principal officer of the corporation is not invalid merely because he happens to be an un mukhtar of the corporation. (Vol 1) 1914 Cal 782 (782) (DB).

[4] Plaint signed and verified by an officer other than those specified in the rule. The Court may, in its discretion, allow the plaint to be amended by filing a properly signed and verified copy of the plaint. (Vol 14) 1927 Sind 263 (263) (DB) (Reversed on another point by (Vol 18) 1931 Sind 178 : 26 Sind L R 58.)

6. "Who is able to depose to the facts of the case".—[1] The principal officer of the corporation need not verify the plaint from actual personal knowledge; he may verify upon his information and belief. ('05) 9 Cal W N 608 (609, 610) (DB).

[2] Under Calcutta High Court rules fitness of the person verifying the pleading on behalf of the corporation has to be proved by an affidavit at the time of presenting the pleading. (Vol 14) 1927 Cal 780 (780, 781).

[3] Bombay High Court has held that it is not necessary in a suit by a corporation that the plaintiffs should state in the body of the plaint or by an affidavit that the person verifying was a principal officer of the plaintiffs able to depose to the facts of the case. (Vol 23) 1936 Bom 415 (421) : I L R (1937) Bom 85.

[4] An insufficiency of verification is no ground in appeal, for dismissing the proceedings held in the

Service on
corporation.

2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served
 - (a) on the secretary, or on any director, or other principal officer of the corporation, or
 - (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

[1882—S. 436 ; 1877—S. 436 ; 1859—S. 63. See O. 5]

Objects and Reasons.

"The Committee have enlarged the language of the Code, so as to allow of service by post on corporations having a registered office, and by those means the rule is brought into line with the provisions of the Indian Companies Act. Companies authorised to sue and be sued in the name of an officer or of a trustee must be very few, if, indeed, any, exist, and they do not appear to the Committee to call for special treatment"—S.O.R.

3. The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

[1882—S. 436 ; 1877—S. 436 ; 1859—S. 63]

ORDER XXX.

"The Committee have adopted with the necessary alterations the English procedure in relation to suits against firms. This new procedure has been in force for some time in the Presidency towns of Calcutta and Bombay and has worked satisfactorily. It is hoped that its general application will be found useful by the mercantile community for the rules remove technical obstacles which under the present procedure may seriously impede this class of litigation, as where a partner has died."—S.O.R.]

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. (1) Any two or more persons claiming or being liable as partners and

O. 29 R. 2 (contd.)

first Court, in the absence of any prejudice caused to any person by such defect. (1900) 5 Cal W N 91 (96) (DB).

7. Subscription and verification of pleadings.—[1] A plaint, on behalf of the corporation, may, under this rule, be signed and verified either by the secretary, or by a director of the corporation, or by other principal officer of the corporation. ('86) 12 Cal 41 (44) (DB) * (Vol 20) 1933 Sind 102 (102) ; 26 Sind LR 431 * ('66) 6 Suth W R Civ. Ref. 21 (26). * ('87) 9 All 188 (191) (DB).

[See however ('86) 1886 Pun Re No. 58, p. 121 (125) (DB).

[2] A registrar of a Joint Stock Company is not a proper person to represent the company (Vol. 16) 1929 Nag 185 (190) (DB).

[3] An agent holding a power of attorney is entitled to sign and verify the plaint on behalf of a corporation under the provisions of O. 6 R. 14. (Vol 17) 1930 Bom 566 (567) (DB). (21 Cal 60 (65) held not an authority for the view that O. 6 R. 14 does not apply to cases governed by O. 29 R. 1.) * (Vol 26) 1939 Bom 347 (340) ; ILR (1939) Bom 295. * (Vol 12) 1925 Lah 338 (330) * (1931) 32 Pun LR 605 (655). * (Vol 18) 1931 Sind 178 (179) ; 26 Sind LR 58 (DB) (Reversing (Vol 14) 1927 Sind 263)

[See also (Vol 23) 1936 Bom 418 (420) ; ILR (1937) Bom 85]

[4] It should be shown by a statement in the plaint or in the written statement or by an affidavit that the person purporting to verify is a principal officer of the corporation and is able to depose to the facts of the case. ('95) 22 Cal 268 (269). (22) 1935 Cal 770 (771).

[5] Defence raising question of competency of director to sign and verify the plaint. Defendants are entitled to cross-examine him as to expose all the facts bearing on that question. (Vol 18) 1931 Rang 54 (55) (DB).

ORDER 29 RULE 2—Note 1.

[1] The mode of service provided by this rule can be availed of only in cases where there is no mode of service provided by any other statute. (Vol 15) 1928 Sind 111 (113, 114) (DB). * ('10) 12 Bom LR 730 (735) (DB).

[2] Foreign companies—Place where the corporation carries on business means the principal place of business in British India. (Vol 15) 1928 Sind 111 (113) (DB).

[3] A Railway Company must be deemed to dwell at its principal office. (1837) 1 Hydr. 217 (217).

[4] The mode of service prescribed by the rule can be availed of only after the suit has been properly framed and the person on whom the service is effected must be person entitled to receive the notice in respect of the company. (Vol 3) 1916 Cal 818 (819) ; 43 Cal 441 (DB).

[5] Corporation sued as defendant.—Plaint should be accompanied by an application under this rule duly stamped, stating in what manner and on whom the plaintiff wishes the summons to be served. (Vol 20) 1933 Sind 102 (103) ; 26 Sind LR 431.

ORDER 30 RULE 1—Synopsis.

1. Scope of the rule.
2. "Any two or more persons."
3. "Firm", meaning of.

Suing of partners in carrying on business in British India may sue or be sued in the name of firm. name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

[R. S. C., O 38A, R. 1. See the Indian Partnership Act, 1932, S 69.]

PROVINCIAL AMENDMENTS

LAHORE

Add the following Explanation :

"Explanation.—This rule applies to a joint Hindu family trading partnership."

N.-W.F.P.

Same as that of Lahore.

[12-5-1909.]

SIND

Same as that of Lahore.

O. 30 R. 1 (contd.).

4. Minor
5. "Carrying on business in British India."
6. "May sue or be sued in the name of the firm"
7. Firm as "agriculturist."
8. Suit by firm on promissory note.
9. "At the time of the accruing of the cause of action."
10. Suit against firm—Reference to arbitration.
11. Suit in name of firm—Compromise.
12. Statement of names and addresses.
13. Subscription and verification.
14. Death of partner before suit.
15. Suit against individual partners.

1. Scope of the rule.—[1] This order has been newly introduced into the present Code and provides, as it were, an exception to the provisions of S: 45, Contract Act, in that it allows two or more partners alone to sue, provided the suit is brought in the name of the firm. (Vol 14) 1927 Lah 115 (116) : 8 Lah 1 (DB). * (Vol 4) 1917 Pat 246 (246) (DB).

[See (Vol 6) 1919 Mad 957 (959) 41 Mad 923 (DB).

[2] When a suit is brought against a firm, it is precisely as though it were brought in the name of all the partners. (Vol 14) 1927 Lah 115 (116) : 8 Lah 1 (DB). * (Vol 13) 1926 Sind 75 (76) (DB) * (Vol 20) 1933 All 523 (524) : 55 All 719 (DB) * (Vol 14) 1927 Bom 255 (256) * (Vol 9) 1922 Cal 408 (407) 49 Cal 524. * (Vol 23) 1936 Pat 194 (196) (DB).

[See (Vol 29) 1942 All 441 (442) : ILR (1943) All 1. (Notice issued to M not in his name but in name of firm of which he was partner—Notice must be taken as issued to M.)]

[3] The effect of using the name of the firm is simply to bring all the partners before the Court

and the procedure indicated in this rule is adopted only as a convenient method for denoting the persons who constitute the firm at the time of the accrual of the cause of action. (Vol 14) 1927 Lah 115 (116) : 8 Lah 1 (DB). * (Vol 13) 1926 Sind 75 (76) (DB).

[See also (Vol 25) 1938 All 69 (71) : ILR (1938) All 100 (DB). (The policy underlying O.30 is no more than to afford facilities in the joinder of parties who may be numerous.)

[4] A decree against a firm in the name of the firm has the same effect as a decree against all the partners. (Vol 13) 1926 Sind 75 (76) (DB). * (Vol 27) 1940 All 81 (82) * (Vol 32) 1945 Cal 303 (303).

[See also (Vol 19) 1932 Bom 375 (378) (Same rule holds good in the case of an award.)]

[5] Order merely provides a new procedure and does not affect the plaintiff's right of bringing a suit against a firm by impleading all or any of the members as defendants thereto. (Vol 27) 1940 Sind 19 (22) * (Vol 17) 1930 Pat 289 (240) : 9 Pat 717 (DB). * (Vol 29) 1942 Pat 204 (208) : 20 Pat 811. * (Vol 27) 1940 Lah 256 (261) : I L R (1941) Lah 39 (DB)

[6] The members of a firm can sue jointly in their individual names. (Vol 27) 1940 Lah 425 (427) (Order 30, Rule 1, is enabling provision—Joint Hindu family firm can sue in its name or jointly in name of all members or in name of manager as Karta.) * (Vol 27) 1940 Lah 256 (261) : I L R (1941) Lah 39 (DB) (Order 30, Rule 1, G.P. Code, is only an enabling provision.)

[7] It is not correct to sue persons as partners in the name of the firm by a partner or manager. The proper title for defendant in such suit is : A a firm, B, C, D, partners in the said firm. (Vol 12) 1925 Bom 494 (495) (DB) * (Vol 18) 1931 Sind 121 (122) 25 Sind L R 104 (DB). * (Vol 11) 1924 Bom 155 (156) (DB). * (Vol 23) 1936 Rang 209 (209) (DB). * (Vol 23) 1936 Cal 353 (355) (DB).

O. 30 R. 1 (contd.)

[8] Plaintiff describing plaintiff as "firm X through B, the proprietor of the said firm"—Plaint signed by B—B cannot be deemed to be suing in firm's name but in his own name. (Vol 23) 1936 Pat 140 (141) (DB) (What is contemplated by O. 30 R. 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals)

[9] An undivided Hindu family carrying on business is not entitled to sue as a firm under this Order. (Vol 29) 1942 Cal 613 (615): ILR (1942) 1 Cal 161. * (Vol 27) 1940 Bom 164 (166): I L R (1940) Bom 153 (DB). * (Vol 21) 1934 Cal 810 (812): 61 Cal 975. * (Vol 25) 1938 Lah 563 (564). (Such a firm must sue and be sued in the name of its members.) * (Vol 23) 1936 Nag 292 (292): I L R (1937) Nag 423. * (Vol 25) 1938 Pat 270 (270) (DB).

[See also (Vol 20) 1933 Bom 304 (305) (DB). * (Vol 22) 1935 All 280 (281) * (Vol 31) 1944 Cal 138 (140): I L R (1944) 2 Cal 181 (DB)].

[10] Hindu joint family trading concern can be sued in firm or assumed name—Suit must however, be in respect of matters connected with business, carried in an assumed name. (Vol 31) 1944 Cal 138 (141): ILR (1944) 2 Cal 181 (DB)

[11] The rule applies to a joint Hindu family trading in the Punjab by reason of the Explanation added to the rule by the Lahore High Court. (Vol 30) 1943 Cal 172 (176): ILR (1942) 1 Cal 562. * (Vol 27) 1940 Lah 425 (427). * (Vol 27) 1940 Lah 256 (260): ILR (1941) Lah 39 (DB)

[12] The provisions of this Order assume that the firm is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association. (Vol 21) 1934 Lah 882 (883): 16 Lah 574 (DB) (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law.)

2. "Any two or more persons."—(1) One single person carrying on business in the name of a firm cannot sue in the name of the firm. (Vol 27) 1940 Oudh 443 (445): 16 Luck 357 * (Vol 1) 1914 All 474 (474). * (Vol 21) 1934 Lah 157 (157) * (Vol 17) 1930 Bom 216 (216) * (Vol 19) 1932 Bom 516 (518) (DB). * (Vol 23) 1936 Pat 140 (141) (DB). * (36) 38 Bom L R 529 (380) (DB) (He can however be sued in a firm name.) * (Vol 22) 1935 Rang 240 (243) (DB).

[2] Family firm entering into partnership with strangers—Two members of family firm retiring as insolvents—One member only being minor admitted to benefits—Only one effective member remaining—Suit by such member in firm for dissolution of partnership held not maintainable. (Vol 32) 1945 P C 71 (78, 74): ILR (1945) Kar (PC) 134 (PC).

[3] One of several partners carrying on business in the name of a firm cannot sue in his own name on a cause of action which has arisen in favour of the firm. (Vol 29) 1942 Oudh 335 (337) (DB). * (Vol 12) 1925 Sind 181 (182): 17 Sind L R 324 (DB). * (1910) 7 Mad L Tim 432 (432) (DB).

[4] Only one of several partners can institute a suit in the name of the firm and this rule does not bar him from doing so (Vol 23) 1936 Cal 353 (355) (DB).

3. "Firm," meaning of.—[1] A "firm" is a short, collective name for the individual members who constitute the partners. (Vol 11) 1924 Bom 109 (110). * (Vol 20) 1933 All 523 (524): 55 All 719 (DB). * (Vol 19) 1932 Cal 768 (769):

[2] A firm cannot, as such, enter into a contract and be a member of a partnership (Vol 11) 1924 Cal 74 (77): 59 Cal 549. * (Vol 10) 1932 Cal 768 (769) (DB). * (Vol 25) 1938 All 69 (70, 71): I L R (1938) All 100 (DB). * (Vol 23) 1936 Lah 78 (79) (DB).

[3] Although a firm as such cannot enter into a contract of partnership, the individual partners therein can do so. (Vol 25) 1938 All 69 (73): ILR (1938) All 100 (DB).

[4] Even if a firm is dissolved, it continues to exist for all purposes necessary for its winding up, including the recovery of moneys due by it, by suit or otherwise (Vol 24) 1937 Nag 314 (316). ILR (1937) Nag 28.

4. Minor.—[1] Person under age of majority cannot become partner by contract. (Vol 9) 1922 PC 237 (239): 49 Cal 560: 49 Ind App 103 (PC).

[2] All owners of business minors: there is no partnership. Suit against them in name of firm cannot be brought. (Vol 23) 1936 Mad 707 (708, 709): ILR (1937) Mad 28 (DB).

[3] Share of minor of which S. 30, Partnership Act speaks, is no more than a right to participate in the property of the firm after its obligations are satisfied. (Vol 9) 1922 PC 237 (239, 240): 49 Cal 560: 49 Ind App 103 (PC).

[4] Suit under O. 30 against firm—Minor admitted to some kind of benefit—Minor cannot be regarded as party to suit. (Vol 23) 1936 Mad 707 (708, 709): ILR (1937) Mad 28 (DB).

[5] Suit against firm—Dispute referred to arbitration—Minor member of firm—Suit is not within purview of O. 32—No sanction of Court is necessary for reference to arbitration. (Vol 10) 1923 Lah 103 (104) * (Vol 10) 1923 Lah 212 (213). (Suit by one firm against another—Reference to arbitration by representatives.)

5. "Carrying on business in British India."—

[1] An action can only be brought by or against a firm in the firm name in which the persons claiming or being liable as partners are carrying on business in British India. (Vol 15) 1928 Bom 191 (192, 193). * (Vol 21) 1934 Bom 467 (469).

[2] A foreign firm may carry on business in British India in which case this Order will apply to suits by or against it, even though the partners themselves are residing outside British India (Vol 19) 1932 Nag 114 (116): 28 Nag LR 118.

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[4] Suit against foreign firm is validly instituted although partners of firm are not on record—Names of partners subsequently added—S. 22, Limitation Act does not apply. (Vol 22) 1935 Sind 225 (227) (DB).

[See also (Vol 25) 1938 Lah 718 (718) (DB)].

[5] The words "carrying on business" must be understood in their ordinary sense and not as

Suing of partners in carrying on business in British India may sue or be sued in the name of firm.

name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

[R. S. C., O. 46A, R. 1. See the Indian Partnership Act, 1932, S. 69]

PROVINCIAL AMENDMENTS

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Add the following Explanation :

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[7] It is not correct to sue persons as partners in the name of the firm by a partner or manager. The proper title for defendant in such suit is: A a firm, B, C, D, partners in the said firm. (Vol 12) 1925 Bom 404 (495) (DB) * (Vol 13) 1931 Sind 121 (122) : 25 Sind L R 104 (DB). * (Vol 11) 1924 Bom 155 (156) (DB). * (Vol 32) 1935 Rang 209 (209) (DB). * (Vol 23) 1936 Cal 353 (355) (DB).

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[12] The provisions of this Order assume that the firm is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association. (Vol 21) 1934 Lah 882 (883): 16 Lah 574 (DB) (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law.)

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4. Minor.—[1] Person under age of majority cannot become partner by contract. (Vol 9) 1922 PC 237 (239): 49 Cal 560: 49 Ind App 108 (PC).

[2] All owners of business minors: there is no partnership. Suit against them in name of firm cannot be brought. (Vol 23) 1936 Mad 707 (708, 709): ILR (1937) Mad 28 (DB).

[3] Share of minor of which S. 30, Partnership Act speaks, is no more than a right to participate in the property of the firm after its obligations are satisfied. (Vol 9) 1922 PC 237 (239, 240): 49 Cal 560: 49 Ind App 102 (PC).

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[2] A foreign firm may carry on business in British India in which case this Order will apply to suits by or against it, even though the partners themselves are residing outside British India. (Vol 19) 1932 Nag 114 (116): 28 Nag LR 118.

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[4] Suit against foreign firm is validly instituted although partners of firm are not on record—Names of partners subsequently added—S. 22, Limitation Act does not apply. (Vol 22) 1935 Sind 225 (227) (DB).

[See also (Vol 25) 1938 Lah 718 (718) (DB)].

[5] The words "carrying on business" must be understood in their ordinary sense and not as

O. 30 R 1 (contd.)

having any special significance. (1892) 1 Q B 108 (117), *Grant v. Anderson and Co.*

[6] If a firm has an office of its own within jurisdiction at which a partner or a manager is in control carrying on the business, that is sufficient to bring it within the rule. (1894) 1 Q B 784 (788) *Worcester, etc. Co. v. Fairbank.*

[7] Firm only having office within jurisdiction at which business is done by agent—Agent merely having authority to take orders and transmit them to firm. This is not carrying on business. (1892) 1 Q B 108 (117) *Grant v. Anderson and Co.*

[See (1886) 33 Ch D 604 (607, 608) *Vaillie v. Goodwin and Co.*

[8] If the agent has the power to conclude contracts on his own initiative on behalf of the firm, the latter will be taken to be carrying on business through the agent within the jurisdiction. (1899) 1899 AC 413 (38), *La Bourgogne* * (1902) 1 KB 342 (347), *Dunlop etc. Co. v. Actien Gesellschaft, etc*

6. "May sue or be sued in the name of the firm."—[1] Two or more partners suing in firm's name—Other partners need not be named in plaint as plaintiffs or sign it. (Vol 10) 1923 Nag 137 (137) * (Vol 22) 1935 Sind 225 (228) (DB) * (Vol 22) 1935 Pesh 44 (47) (DB). * (Vol 2b) 1938 Lah 823 (824).

[See also (Vol 20) 1933 Sind 102 (102) : 26 Sind L R 431. (Pleadings need not give particulars of the person who signs it)]

[2] A suit brought in the name of the firm cannot, therefore, be dismissed on the ground of non-joinder of other partners; all that the defendant is entitled to is the disclosure of the names of those partners under R. 2. (Vol 3) 1916 Mad 649 (649).

[3] Addition or correction of partner's name is not addition or substitution of new party within S 22 Limitation Act. (Vol 9) 1916 Mad 649 (649) * (Vol 15) 1928 Nag 319 (321) * (Vol 22) 1935 Sind 225 (226, 227) (DB).

[4] New firm by retirement and new entry of a partner—Suit for contracts of old firm cannot be filed by new firm. Old firm cannot be substituted after limitation. (Vol 9) 1922 Sind 13 (14) : 15 Sind L R 152.

[5] Where a firm continues to be known by its old name even after the original partners are dead though occasionally the name of the actual head of the firm is also added to the old name, the omission of the latter's name in a suit by the firm does not amount to any misdescription. (Vol 5) 1918 Lah 319 (319) (DB).

[6] In a suit for libel made against a firm all the partners should join as plaintiffs. (CC) 36 Cal 907 (914).

[7] Firm dissolved—It cannot sue at all—Late partners can sue in individual capacity. (Vol 32) 1945 Oudh 284 (286)

7. Firm as "agriculturist."—[1] A Firm can be an "agriculturist" within the meaning of S. 2 Dekkhan Agriculturists' Relief Act (XVII of 1879) only when, by itself, or by its servants, or by its tenants it earns its livelihood wholly or principally by agriculture carried on within the limits of a

district to which the Act extends. The mere fact that an individual partner or even all the partners of the firm earn their livelihood from an agricultural income does not make the firm an "agriculturist." A plaintiff suing a firm which, by itself, does not earn its livelihood by agriculture must be sued only at the place where it carries on business and not where the individual partners reside. (Vol 16) 1929 Bom 378 (379) : 53 Bom 787. * (Vol 15) 1931 Sind 121 (122) : 25 Sind L R 104 (DB).

8. Suit by firm on promissory note.—[1] Promissory note executed to partner for debt due to firm—Either such partner personally or firm may sue on note. In latter case it is advisable to get instrument endorsed in firm's name. (Vol 16) 1929 Bom 177 (177) : 53 Bom 110 (DB) * (Vol 16) 1928 Cal 148 (160, 161) : 55 Cal 551 (DB).

[2] Where A sues individually to recover a debt due to the firm consisting of partners A and B, the correct procedure, if B will not join A as co-plaintiff, is to make him a defendant. (Vol 12) 1925 Lah 504 (505)

[3] A suit on a promissory note executed in favour of a joint family firm cannot be brought in the name of the firm but must be brought only in the names of the members. (Vol 27) 1940 Bom 164 (167) : ILR (1940) Bom 158 (DB).

9. "At the time of the accruing of the cause of action."—[1] A suit may be brought under this rule in the name of a firm which has been dissolved before the date of the suit, provided the cause of action has arisen before the date of the dissolution. (Vol 27) 1940 Bom 330 (335) : ILR (1940) Bom 562. * (Vol 8) 1921 Cal 722 (725) (DB). * (Vol 9) 1922 Cal 390 (390) : 49 Cal 394. * (29) 1929 All L Jour 73 (76)

10. Suit against firm—Reference to arbitration.

[1] Where a reference is made to arbitration in a suit in which a firm is a party, all the members of the firm who are sought to be bound must join in making the reference; sub-rule (2) of this rule does not empower one partner alone to refer the case to arbitration so as to bind the other partners who have not agreed to, or joined in, the application for reference. (Vol 17) 1924 All 238 (240) : 48 All 239 (DB). * (Vol 19) 1932 Rom 516 (517) (DB)

[2] A proceeding before an arbitrator under the Arbitration Act is not a suit and, therefore, the provisions of O. 30 do not apply thereto. (Vol 16) 1929 Lah 223 (223, 230)

[3] In agreement to refer to arbitration and in reference V described as sole proprietor of firm—Award made in firm name and decree passed in terms of award—Held award was in reality and in substance in favour of V who was, therefore, entitled to execute decree. (Vol 33) 1946 Sind 126 (127) : ILR (1946) Kar 86.

11. Suit in name of firm—Compromise.—[1] Although a suit is instituted in the name of a firm, all the partners are in reality plaintiffs and it cannot be compromised by one of the partners alone. (Vol 20) 1933 Lah 613 (620).

12. Statement of names and addresses.—[1] Where a statement under R. 1, or a declaration under R. 2 is made, the Court cannot direct a cross-examination on such statement or declaration; nor can it direct the trial of an issue as to

2. (1) Where a suit is instituted by partners in the name of their firm, the disclosure of partners' names. plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint :

Provided that all the proceedings shall nevertheless continue in the name of the firm.

[R. S. C., O. 48A, R. 2]

Service. 3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India :

O. 30 R. 1 (contd.).

who were the partners of firm at the time of the accruing of the cause of action. But the statement or declaration, as the case may be, will be treated as embodied in the plaint and will be a necessary part of the cause of action. (1905) 1KB 46 (50, 51) *Abrahams & Co. v. Dunlop Pneumatic Tyre Co.*

13. **Subscription and verification.**—[1] It is quite sufficient, under the provisions of sub-rule (2), that the pleading on behalf of the firm is signed and verified by one of the partners composing the firm. (Vol 1) 1914 All 474 (474) * (Vol 10) 1928 Nag 137 (137) * ('11) 9 Ind Cas 450 (450) (Low Bur.) (DB) * ('74) 12 Beng L R 35 (36) * ('70) 5 Beng L R 89 (90) * (Vol 19) 1982 Nag 137 (138) : 28 Nag L R 116 * (Vol 22) 1935 Rang 209 (210) (DB).

14. **Death of partner before suit.**—[1] A suit may be brought against a firm in the name of the firm, even though one of the partners is dead before the institution of suit. ('29) 1929 All L Jour 73 (76).

[2] Suit against firm in its name—One partner dead before institution of suit—Judgment is enforceable against partnership property—But private estate of deceased partner is not liable unless his legal representatives are actually made parties. (Vol 11) 1924 Bom 109 (111).

15. **Suit against individual partners.**—[1] This rule does not affect, in any way, the operation of S. 43 of the Contract Act. In a suit upon a contract made by a partner on behalf of the partnership, the promisee can compel all or any one of the partners to perform the whole of the promise. (Vol 14) 1927 Lah. 819 (821) : 9 Lah 217 (DB).

[2] Suit against firm—Personal decree against partner cannot be passed unless sued in personal capacity along with firm—In such case plaintiff can withdraw his suit against firm and proceed against partner. (Vol 29) 1942 Sind 93 (95) : ILR (1942) Kar 210 (DB).

ORDER 30 RULE 2—Note 1

[1] Rule 2 applies only to suits instituted by and against partners in the name of the firm. (Vol 14) 1927 Bom 447 (448) : 51 Bom 794 (DB).

[2] Sub-rule (2) does not control the provisions of O. 21 R. 50. (Vol 14) 1927 Bom 447 (448) : 51 Bom 794 (DB).

[3] It is not necessary to join the legal representatives of a deceased partner as parties to the suit. (Vol 16) 1929 Cal 11 (14) (DB) * (Vol 8) 1921 Cal 722 (725) (DB).

[4] An incomplete disclosure or a wrong declaration of the names of the partners is not a fatal defect to the suit. (Vol 17) 1930 Bom 150 (150) : 54 Bom 285 (DB) * (Vol 21) 1934 Cal 253 (255) : 60 Cal 1217 * (Vol 1) 1914 Cal 53 (54) : 41 Cal 581.

[5] Person suing as managing partner of firm—Names of partners asked for—Initials and addresses and respective shares given—Defendant not objecting—Court should stay proceedings until full names are given. (Vol 24) 1937 Rang 137 (138)

[6] Fresh declaration making full disclosure as to names of partners asked for should be made within limitation. (Vol 21) 1934 Cal 253 (255) : 60 Cal 1217.

[7] Suit for dissolution of partnership between individual and a different partnership—Names of partners constituting latter partnership need not be disclosed. (Vol 16) 1929 Sind 7 (9) (DB).

[See also (Vol 23) 1935 Lah 78 (79) (DB)].

ORDER 30 RULE 3—Synopsis

1. Scope.
2. Dissolution of partnership before suit.
3. Service by registered post.

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

[R. S. C., O. 48A R. 3]

O. 30 R. 3. (contd.)

4. "Person having.....partnership business."

5. Successive services.

6. "Principal place at which the partnership business is carried on."

7. "As the Court may direct."

8. Mortgage suit.

1. Scope.—[1] Rule has no application to suits against partners not brought in the name of their firm. (Vol 12) 1925 Cal 1186 (1137) (DB) * (Vol 26) 1939 Pesh 9 (11).

[2] The directions of the Court should be obtained as to the mode of service. (Vol 30) 1943 Sind 188 (190); ILR (1943) Kar 255.

[3] A service effected under clauses (a) or (b) being a good service against the firm, a decree can be passed against it (Vol 29) 1942 Sind 93 (94, 95); ILR (1942) Kar 210 (DB) * (Vol 2) 1915 Cal 238 (240) (DB) * (Vol 19) 1932 Sind 199 (200); 26 Sind L R 228.

[4] Service, otherwise regular, will not be ineffective in the following cases even if:—

(a) All the partners are not individually served. (Vol 12) 1925 Bom 331 (332) * (Vol 13) 1926 Sind 75 (76) * ("71) 7 Beng L R App 58 (58).

(b) All or any of the partners reside outside British India. (Vol 2) 1915 Cal 238 (240) (DB) * (Vol 11) 1924 Bom 366 (367) (DB).

[5] Summons not served in prescribed modes. Service being irregular no decree can be passed against the firm. (Vol 30) 1943 Sind 188 (190); ILR (1943) Kar 255.

(6) Firm properly served under the rule—Member not actually served, cannot be called to have been "individually served as a partner" under O. 21, R. 50. (Vol 14) 1927 Bom 581 (592); 51 Bom 986 (DB).

[7] Suit against corporation—Plaint should be accompanied by an application stating where, in what manner and on whom plaintiff wishes the summons to be served. (Vol 20) 1933 Sind 102 (103); 26 Sind L R 431.

[8] Award against firm—Filing—Notice to individual partners not necessary—Rule has no application. ('35) 62 Cal 833 (836).

2. Dissolution of partnership before suit.—(1) Plaintiff aware of dissolution of partnership before instituting suit—Service effected under clause (a) or (b)—Decree, when passed, cannot be executed even with the leave of the Court, personally against a partner not individually served. (Vol 11) 1924 Bom 366 (367, 368) (DB) * (Vol 12) 1925 Bom 331 (332) * (Vol 23) 1936 Sind 34 (39).

[See also (Vol 23) 1936 Sind 206 (207); 30 Sind L R 296 (DB)].

[2] Plaintiff aware of the death of a partner at time of suit—Held he must, if he wished to make the private estate of the deceased partner liable, implead the legal representatives as parties and obtain a decree against them. (Vol 11) 1924 Bom 109 (111); * (Vol 14) 1927 Bom 581 (584, 593); 51 Bom 986 (DB). * (Vol 16) 1929 Mad 733 (737); 52 Mad 885 (FB).

[3] O. 21 R. 50 (2) applies only to execution against a person as being a partner of the firm and the legal representatives are, in no sense, partners of the firm. Fact that plaintiff had no knowledge of the death of the partner before the suit does not affect the question of the liability of the legal representatives in respect of private estate of deceased partner. Scope of O. 21 (2) cannot be enlarged by reference to the proviso to this rule. (Vol 16) 1929 Mad 733 (737); 52 Mad 885 (FB).

[See also (Vol 18) 1931 All 65 (69); 52 All 964].

[But see (Vol 10) 1923 Bom 66 (67) (DB). (Legal representatives can be proceeded against under O. 21 R. 50 (2) in respect of private estate of deceased partner.) * (Vol 14) 1927 Sind 130 (131); 23 Sind L R 137 (FB). (Vol 12) 1925 Sind 298, set aside. * (Vol 23) 1936 Sind 211 (212); 30 Sind L R 6 (DB)]

[4] Suit against firm—Firm dissolved before date of suit—Held that for the purpose of limitation, the date of institution is the date of the suit and not the date of the service of summons individually upon a partner, subsequently. (Vol 15) 1928 Sind 57 (60); 23 Sind L R 54.

(5) Partnership dissolved before institution of suit—Service of summons individually on all partners, though required by law, does not put a bar to a decree being passed both against firm and individual partners. (Vol 23) 1936 Sind 206 (208); 30 Sind L R 296 (DB).

3. Service by registered post.—(1) Where service by registered post has been ordered, the registered letter should be addressed to a partner or to the manager of the business and not to the firm name at the place where the business is carried on. (Vol 9) 1922 Cal 300 (300, 301); 49 Cal 394.

4 "Person having.....partnership business".—

[1] The person "having at the time of service, the control and management of the partnership business" must be a servant of the firm; a receiver or a manager appointed by the Court is not such a person. (1897) 1 Q B 14 (15, 16). In re *Flowers & Co.*

[See also (Vol 29) 1942 All 441 (442); ILR (1943) All 1.]

5. Successive services.—[1] Service effected on the person in control of the business and five days later, upon a partner—Judgment in default of appearance—Signed on the first service before the eight days had elapsed from service on the partner. Judgment was set aside. (1890) 26 Q B D 543 (544) *Alden v Beekley*.

6. "Principal place at which the partnership business is carried on".—[1] In a suit against a firm, service on an agent at the principal place of business of the firm within jurisdiction is good service on the firm, whether any members of the firm are within jurisdiction or not. (Vol 1) 1914 Mad 556 (562); 37 Mad 163 (DB).

[2] Plaintiff asked to serve summons at place of business of firm on the manager or managing partner—Name of person to be served not specified.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

[R. S. C., O. 48A, R. 4.]

O. 30 R. 3 (contd.).

Plaintiff not competent to effect service by affixure of summons at the residence of the managing partner. (Vol 29) 1926 Sind 208 (209).

[8] Manager at the place of business refusing to accept service.—Copy of summons may be affixed on the premises. ('07) 1 Ind Cas 118 (120) (Cal) (DB).

[4] Service on partner at principal place of business by affixure is valid. (Vol 32) 1945 Cal 454 (456) : 11LR (1944) 2 Cal 57.

7. "As the Court may direct".—[1] Method prescribed in each particular case when followed and service effected accordingly *prima facie* amounts to good service on the firm. (Vol 14) 1927 Cal 758 (759) : 54 Cal 1057.

[See also (Vol 19) 1932 Cal 541 (542) : 59 Cal 496. (But due service on partner, though without Court's directions, is not a defect or irregularity which affects the jurisdiction of the Court).

8. Mortgage Suit.—[1] A mortgage suit by or against a firm is on the same footing as other suits relating to the properties of the firm and service of summons or notice on the manager of the firm is service on all the partners of the firm. ('11) 12 Ind Cas 629 (630) (All) (DB).

ORDER 30 RULE 4—Note 1.

[1] This rule was enacted to set at rest the conflict that existed under the old code in connection with S. 45, Contract Act. (Vol 14) 1927 Bom 581 (585, 586, 591) : 51 Bom 986 (DB) * (Vol 1) 1914 Low Bur 58 (60, 61) : 8 Low Bur Rul 130 (DB) * ('37) 1937 Mad W N 1312 (1312).

[2] The rule will enable a decree to be obtained only against the partnership assets, and cannot be carried further so as to alter the substantive law laid down in S. 45 and fix liability on the private estate of the deceased partner. If the plaintiff wishes to fix such liability, he is bound to make the legal representatives of the deceased partner also parties. (Vol 14) 1927 Bom 581 (587) : 51 Bom 986 (DB) * (Vol 18) 1931 All 65 (69) : 52 All 964 (DB).

[3] This rule applies only when the suit is brought in the name of the firm and does not apply to

a case when the suit is brought by one or more partners in respect of the partnership. ('32) 1932 All J. Jour 219 (220) (DB) * (Vol 14) 1927 Lah 115 (117) : 8 Lah 1 (DB) * (Vol 20) 1933 Lah 856 (359) : 14 Lah 548 (DB) (O. 30 R. 1 is merely permissive. If it is followed, O. 30 R. 4 applies but not otherwise). * (Vol 22) 1935 Pat 121 (122) (DB) : (Suit could not have been brought in this case in the name of firm by reason of its having ceased to exist on the date of suit.) * (Vol 13) 1926 Sind 81 (82, 83) (DB) * (Vol 5) 1918 Cal 160 (160, 161) (DB).

[But see (1913) 17 Cal L. Jour 648 (652) * (Vol 16) 1929 Rang 810 (811) : 7 Rang 558 (DB).]

[4] Sub-rule (2) of this rule is intended to safeguard the rights of the legal representatives in case, for instance, there should be any collusion between debtors to the estate and the surviving partners. Similarly, sub-rule (2) (b) may enable them to claim contribution from the surviving partners under S. 48 of the Contract Act, in the event of there being a partnership liability. (Vol 14) 1927 Bom 581 (586) : 51 Bom 986 (DB).

[5] Where a partner dies during the pendency of the suit, the suit does not abate but can be proceeded with by or against the firm. (Vol 16) 1929 Cal 11 (12) (DB).

[6] Appeal in partnership suit.—One partner dead.—His legal representatives need not be brought on record. (Vol 31) 1944 Bom 350 (351).

[7] Where the sole proprietor dies, the suit will abate, unless the legal representatives are brought on the record within the limitation period. (Vol 14) 1927 Lah 556 (557) (DB) * (Vol 9) 1922 Cal 408 (409) : 40 Cal 524.

[8] A person who sues some of the partners in their individual capacity, cannot be permitted to prove his case against them as partners of the firm. (Vol 2) 1915 Lah 167 (168) : 1915 Pun Re No. 76 (DB).

[9] The rule does not apply to a Joint Hindu family firm. (Vol 23) 1936 Nag 292 (292) : 11LR (1937) Nag 423.

ORDER 30 RULE 5—Note 1.

[1] The object of the notice as to the capacity of the person served is to remove the possibility of

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

[R. S. C., O. 48 A, R.5.]

O. 30 R. 5 (contd.)

dispute as to the character in which a particular person has been served. In the absence of a notice the person must be deemed to have been served as a partner, and if in reality not a partner he should proceed in accordance with R. 8. (Vol 2) 1915 Cal 238 (240) (DB) * (Vol 15) 1928 Lah 528 (529).

[2] The failure to give notice under this rule will expose the plaintiff to the risk of being liable for costs in case the defendant appears under protest under Rule 8. (Vol 13) 1926 Sind 51 (53).

[3] Service on manager.—See Rule 3.

[4] Notices served on the judgment-debtor during the course of arbitration proceedings as a managing partner of the firm will not enable the decree-holder to take execution at once against him without leave of the Court under Order 21 Rule 50, sub-rule (2). (Vol 16) 1929 Lah 223 (229, 230).

[5] Appearance under protest.—See Rule 8.

ORDER 30 RULE 6—Synopsis.

1. Appearance of partners.
2. "All subsequent proceedings shall continue in the name of the firms."
3. Defence in suits against firms.
4. Decree in suits against firms.
5. Revision.

1. Appearance of partners.—[1] No partner can be compelled to appear in person. (Vol 6) 1919 Lah 296 (297); 1918 Pun Re No. 78.

[2] Partner can appear by an agent or a solicitor or a pleader and such appearance will be an individual appearance within the meaning of the rule. (Vol 15) 1928 Lah 528 (529) * (1806) 1 Q B 386 (389).

[3] The appearance of one partner is appearance of the firm, that is, of all the partners of the firm. (Vol 25) 1938 Cal 377 (383); 62 Cal 510 (DB).

[4] The fact that the firm has been represented by the appearance of one partner does not disentitle another partner from putting in his appearance. (Vol 17) 1930 All 701 (702); 52 All 951. * (Vol 20) 1933 All 523 (525); 55 All 719 (DB).

2. "All subsequent proceedings shall continue in the name of the firm."—(1) Where persons are sued as partners in the name of their firm, they should appear individually in their own names, but all subsequent proceedings are nevertheless to continue in the name of the firm. (Vol 12) 1925 Bom 494 (496) (DB) * (Vol 20) 1933 All 523 (524); 55 All 719 (DB) * (Vol 8) 1921 Cal 722 (725) (DB).

3. Defence in suits against firms.—(1) Each partner appearing individually can put in a separate written statement but each written statement is the written statement of the firm.—It is only when a person is sued personally along with the firm

that he may put in a personal defence. (Vol 12) 1925 Bom 494 (496) (DB).

[2] Suit against firm.—Under warrant from one of the partners firm represented by attorney.—Pending suit, firm dissolved and attorney entering into partnership with another attorney and now warrant signed by same partner in favour of the firm of attorneys.—Partner held could act on behalf of dissolved firm and fresh warrant signed by all the partners of dissolved firm held not necessary. (Vol 28) 1911 Cal 679 (681); 1 L R (1941) 2 Cal 193.

[3] Where a person was served as a partner and not individually and he put in a written statement in his own name, but there was nothing individual in the defence, it was held that there was only a technical flaw which could be corrected by the Court. (Vol 16) 1929 Sind 192 (193).

[4] Where several partners individually appear and put in separate written statements and such written statements are inconsistent with one another, the plaintiff is bound to meet all the defences and is bound to show that none of the defences prevents a decree being passed against the firm. (Vol 14) 1927 Cal 753 (759); 54 Cal 1057.

4. Decree in suits against firms.—[1] Decree must be against the firm in the firm name and if one of the partners fails to appear no decree can be passed against him separately for default of appearance. (1882) 8 Q B D 474 (477, 478), *Jackson v. Litchfield*.

[2] Judgment has the effect of a judgment against all the partners as partners. (1853) 1 Q B 566 (570), *In re Frances Handford & Co.*

[3] Whether a particular partner is also personally liable to satisfy the decree can only be decided in execution under O. 21 R. 50. (Vol 11) 1924 Bom 366 (367) (DB).

[4] A judgment entered against a firm may be a ground for a valid cause of action against an individual partner and an action may be brought upon it against him. (1852) 9 Q B D 355 (356) *Clark & Sons v. Gulle*.

[5] Where a decree is passed against a firm under which each member is personally liable to pay the amount decreed, any member of the firm can appeal against the decree against the firm. (Vol 27) 1940 All 81 (82).

[6] In a summary suit under O. 37 against a firm where several partners have been served individually and leave to defend is granted to some and not to others, a decree can be passed against these partners to whom leave is refused and also against the firm. (Vol 27) 1940 Sind 19 (20).

5. Revision.—[1] Where a Court refuses to allow a partner, who has entered appearance but has not filed a separate statement, to take part in the conduct of the case against the firm, it acts illegally in the exercise of its jurisdiction and the order is open to revision. (Vol 20) 1933 All 523 (525); 55 All 719 (DB).

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

[R. S. C., O. 48A, R. 6.]

8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

[R. S. C., O. 48A, R. 7.]

9. This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

[R. S. C. O., 48A, R. 10.]

ORDER 30 RULE 7—Note 1.

[1] A person served as manager is under no obligation to appear in Court unless he is a partner. (Vol 13) 1926 Sind 51 (52).

[2] Rule contemplates only a case where a person is served as a manager and not a case where the person served is deemed to be served as a partner. (Vol 2) 1915 Cal 288 (242) (DB).

ORDER 30 RULE 8—Note 1.

[1] The effect of appearance under protest has nothing to do with the merits of the suit but it nullifies the service altogether as regards the firm (Vol 13) 1926 Bom 585 (587): 50 Bom 665 (DB) * (Vol 14) 1927 Cal 758 (759): 54 Cal 1057.

[2] The plaintiff may disregard the appearance of the person denying that he is a partner and may again effect a service upon a partner or partners or upon the manager of the business as required by Rule 3, or he can contend that the person served was a partner at the time the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance. (Vol 12) 1925 Bom 494 (496) (DB) * (Vol 8) 1921 Bom 48 (49) * (Vol 13) 1926 Bom 585 (587): 50 Bom 665 (DB) * (Vol 19) 1932 Bom 260 (269).

[3] A person served as a partner and appearing under protest is not entitled to have the issue as to his being a partner tried in the suit itself. The proper stage for the decision of the question is in execution under Order 21 Rule 50. (Vol 27) 1940 Bom 390 (391) * (Vol 19) 1932 Bom 269 (269, 270) * (Vol 14) 1927 Cal 758 (759, 760): 54 Cal 1057. * (Vol 19) 1932 Sind 199 (200, 201): 26 Sind L R 228.

[See also (Vol 29) 1942 Sind 99 (100): ILR (1942) Kar 220 (DB). (Partner appearing under protest—Decree against firm—He may dispute his liability in execution proceedings.)]

[See however (Vol 23) 1936 Sind 206 (207): 30 Sind L R 276 (DB)]

[4] Suit on mortgage against firm—Mortgagee claiming that certain persons are not partners—Persons concerned equally denying same—Their names should be struck out. (Vol 24) 1937 Rang 351 (353) (DB).

[5] A party who has been served as a partner under Rule 3, and has entered appearance under protest, is not entitled to file a written statement on his own behalf denying that he is a partner. (Vol 14) 1927 Cal 758 (760): 54 Cal 1057.

[6] A defendant entering appearance under protest is precluded from taking alternative defences, namely, that he is not a partner and that, assuming that he is a partner, the firm is not liable. (Vol 27) 1940 Bom 390 (390) (*Weir & Co. i.e. Mevcar & Co.* (1925) 2 K B 127 followed) * (Vol 19) 1932 Sind 199 (201): 26 Sind L R 228.

[But See (Vol 13) 1926 Sind 154 (154, 156)].

[7] Execution of decree against alleged partner who had entered appearance in suit under protest—Defence by alleged partner in execution that he was not partner and that he being ward under U. P. Court of Wards Act Court could not decree suit unless provisions of that Act were complied with—Defence being personal held it was legitimate defence. (Vol 17) 1930 Cal 53 (54): 56 Cal 704.

[8] Plea of not being partner, and in alternative, that partnership had no authority to borrow—Alternative plea held unsustainable as it challenged decree. (Vol 19) 1932 Bom 334 (335).

ORDER 30 RULE 9—Note 1.

[1] Rule provides exception to general rule that person cannot be both plaintiff and defendant. (Vol 16) 1927 Sind 192 (194) * (Vol 5) 1918 Mad 258 (260, 262) (DB).

[See also (Vol 4) 1917 Lah 410 (410)].

[2] Rule makes this Order applicable to suits between firms and one or more of the partners therein, and to suits between firms having one or more partners in common. (Vol 14) 1927 Mad 1096 (1098).

[3] A suit may also lie by one firm against another when all the members of one firm are members of the other. (Vol 16) 1929 Sind 192 (194).

[4] The rule does not alter the substantive law as it existed before and does not lay down when and under what circumstances suits can be laid

10. Any person carrying on business in a name or style other than his own

Suit against person carrying on business in name other than his own. name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.

[R. S. C. O., 48A, R. 11.]

ORDER XXXI

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS

1. In all suits concerning property vested in a trustee, executor or adminis-

O 30 R. 9 (contd.)

as between partners. It only lays down the possibility of such suits and the *procedure* to be followed therein. (Vol 23) 1936 Bom 246 (250) * (Vol 5) 1918 Mad 167 (168) (DB) * (Vol 23) 1936 Lah 648 (648, 649).

[5] No suit will lie as between partners or between firms having common partners for recovery of moneys due on accounts *without asking for accounts*. (Vol 5) 1918 Mad 167 (168, 169) (DB). * (Vol 16) 1929 Sind 192 (194) * (Vol 5) 1918 Mad 258 (260) (DB).

[6] An action for the balance of a *settled account* will not be barred merely because there are other unsettled accounts between the parties. (Vol 23) 1936 Lah 648 (648, 649).

[7] One of the directors of a company who has been excluded from acting as a director by the other directors can maintain an action in his own name on the ground of individual injury to himself. (Vol 15) 1928 Mad 1215 (1219).

ORDER 30 RULE 10—Synopsis.

1. Scope of the rule.
2. Non-resident foreigner.
3. This rule and O. 21 R. 50.

1. Scope of the rule.—[1] A *single person* cannot constitute a firm, though he is carrying on business in a name or style other than his own. This is made clear by the use of the words "as if it were a firm" and "so far as the nature of the case will permit" in this rule. (Vol 11) 1924 Bom 109 (111).

[2] Such a person cannot, therefore, *sue* in the name of a firm, but must sue in his own name. (Vol 17) 1930 Bom 216 (216). * (Vol 23) 1936 Pat 194 (196) (DB) * (Vol 26) 1939 Sind 172 (173) : ILR (1939) Kar 275 (DB).

[See (Vol 21) 1934 Lah 147 (147)].

[3] Suit filed in name of firm—Plaintiff willing to amend plaint—Amendment should be allowed. (Vol 18) 1931 Cal 770 (771).

[4] Title of plaint mentioning plaintiff as "A owner of shop C"—*Held* there was no misdescription. (Vol 10) 1923 Bom 368 (368) (DB).

[See also (Vol 27) 1940 Oudh 443 (446) : 16 Luck 357.]

[5] Though a single person trading in a firm name cannot *sue* in the name of a firm, he *can be sued* in that name under the provisions of this rule. (Vol 19) 1932 Bom 516 (518) (DB) * (Vol 23) 1936 Pat 194 (196) (DB).

[See also (Vol 21) 1934 Mad 386 (387) : 57 Mad 973 (DB)].

[6] To apply this rule the business must be carried on in British India and must be an *existing* one at the time when the suit is instituted. (Vol 18) 1926 All 161 (163).

[7] Suit against firm in firm's name—One man constituting firm—Defendant dead at date of suit—Any order in suit is nullity. (Vol 11) 1924 Bom 109 (111).

[8] Sole proprietor dead—Suit can be brought only against his legal representative. (Vol 16) 1929 Lah 149 (150).

[9] Sole proprietor dying pending suit—Suit will abate unless his legal representatives are brought on record. (Vol 9) 1922 Cal 408 (409) : 49 Cal 524 * (Vol 17) 1930 Cal 327 (328) : 57 Cal 931 (DB).

[10] Where the sole proprietor of a business dies and the business is then carried on by the guardian of his minor sons on their behalf, this rule does not apply. (Vol 23) 1936 Mad 707 (709) : 1 L R (1937) Mad 28 (DB).

[See however (Vol 23) 1936 Oudh 246 (246) (DB). (In this case it seems to have been assumed that this rule will apply to a case in which the sole proprietor of a business dies and after him the business is carried on by his heirs)].

[11] Hindu Joint family trading concern can be sued in firm or assumed name. (Vol 28) 1911 Pat 596 (599) : 20 Pat 755 (DB) * (Vol 31) 1944 Cal 138 (140) : 1 L R (1944) 2 Cal 131.

[12] If a person is sued not in his own name but in the name which he adopts for the purpose of dealings, this does not mean that another person who also has used that name either independently or by transfer of business before the suit *ipso facto* has made himself liable for the debts incurred by the first person. (Vol 27) 1930 Sind 191 (191).

2. Non-resident foreigner. [1] There is nothing in this rule which says anything about residence either within or without the jurisdiction of the Court, and a Court can exercise jurisdiction over persons who carry on business *within its local limits* though they are resident outside it. ('11) 10 Ind Cas 395 (396) (Cal).

[See also ('03) 26 Mad 544 (552) : 30 Ind App 220 (PC)].

3. This rule and O 21 R. 50.—[1] Combined effect of this rule and R. 50 of O. 21 is to render it necessary for decree-holder who has obtained against person carrying on business in name or style other than his own name, decree in such name or style to obtain leave of Court before executing decree against any person whose position as proprietor to business has not already been established. (Vol 31) 1944 Mad 351 (351) : 1 L R (1945) Mad 138 (DB).

ORDER 31 RULE 1—Note 1.

[1] The rule does not disentitle a trustee from suing in his *individual* capacity. ('11) 9 Ind Cas 132 (133) (DB) (Cal). (The beneficial owner can also sue even though property is vested in trustee.)

[See ('13) 17 Cal L Jour 233 (235) (DB)].

Representation of beneficiaries in suits concerning property vested in trustees, etc

parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

[1882—S 437, 1877—S 437 R S, C, O 16 R 8 See S 52; O 1 R 10; O 2, R 5 and O 7 R 4]

2. Where there are several trustees, executors or administrators, they

Joiner of trustees, executors and administrators

shall all be made parties to a suit against one or more of them.

O 31 R 1 (contd.)

[2] A person who is not a party to a suit can be represented by a trustee, executor or administrator (Vol 4) 1917 Pat 375 (377) 2 Pat L Jour 306 (DB) (Dissenting from 28 Cal 517)

[3] The suit should be concerning property vested in the trustee, executor or administrator (Vol 7) 1920 Low Bur 151 (151, 155) (DB)

[4] The contention in the suit must be between the beneficiaries and a third person ('95) 18 Mid 266 (272) (DB) * ('00) 13 Mid 197 (206) (DB) * ('84) 8 Bom 474 (480) (DB)

[5] The beneficiaries may be unascertained or unascertainable persons (1901) 2 Ch 479 (485), *Cardigan v Curson How*.

[6] The beneficiaries may be a body of persons (1884) 27 Ch D 237 (210), *Fussell v Dowdang*.

[7] The rule does not apply where the contention is between the beneficiaries themselves or between the beneficiary and the trustee, executor or administrator ('02) 4 Bom L R 857 (863) (DB) * (1857) 3 Jour (NS) 686

[8] Beneficiaries are not necessary parties to a suit by or against trustees executors or administrators ('02) 29 Cal 682 (686) (DB) * (Vol 18) 1931 Bom 533 (537) (DB)

[9] Beneficiaries may be added as parties where their interest will not be sufficiently represented by the trustees or will be endangered unless they are made parties ('90) 13 Mid 197 (202, 206) (DB) * ('02) 12 Mid L Jour 355 (359) (DB)

[See ('08) 31 Mid 236 (250) 35 Ind App 176 (PC)].

[10] The beneficiaries may be added as parties where they are absolutely entitled to a major portion of the property and complain of breach of trust on the part of the trustee. (Vol 14) 1927 Bom 49 (51). 51 Bom 16 (DB).

[11] The beneficiaries may be added as parties if their interests are likely to be affected by them not being impleaded in the suit (Vol 19) 1932 Cal 337 (338) 58 Cal 77 (92)

[12] The trustee, executor or administrator may apply for adding the beneficiaries as parties for the purpose of protecting himself ('02) 26 Bom 301 (304) (DB)

[13] Where the *factum* of the trust itself is in dispute, the beneficiaries are not necessary parties ('02) 4 Bom L R 328 (360)

[14] Decree obtained by a trustee — Beneficial owner can sue for recovery of the benefit thereunder (1864) 1364 South W R 190 (191) (DB).

ORDER 31 RULE 2—Synopsis

1 Several trustees, executors or administrators.

2 "Outside British India"

3. Administration decree

1 Several trustees, executors or administrators—[1] The rule applies only to suits against trustees, executors or administrators and in such suits all trustees who have proved the will or all the administrators should be impleaded as parties. (Vol 9) 1922 Mad 405 (405) (DB) * ('11) 2 Mad W N 537 (538) (DB).

[2] All trustees not made parties—No decree can be passed against any of them (Vol 21) 1934 All 1 (3). 55 All 687 (DB).

[See (Vol 31) 1944 Cal 328 (330) (DB) (Money suit—All trustees not made parties but trust estate itself made party—Trust estate held was substantially represented)]

[3] Several trustees one of them an infant—A guardian *ad litem* must be appointed or him and property served to save suit being dismissed for defect of parties ('08) 35 Cal 182 (184) (DB)

[4] The rule applies only to suits and not to applications against trustees or administrators ('95) 19 Bom 88 (85)

[5] Executor who has not proved his testator's will, may be made a party in the following cases:

(a) Executor intermeddling with the estate. (1894) 1894 App Cas 437 (442), *Mohideen v Pichey*.

(b) Executor when he has acted as executor (1864) 4 D & G J & S 274 (283), *Vickers v Bell*

2 "Outside British India"—[1] Defendant insisting that an executor is a necessary party—Onus to show that the latter is living within British India is on defendant ('05) 2 Cal L Jour 484 (18) (DB)

[2] A Court can refuse to add, as defendant, an executor who has absconded (1885) 28 Ch D 414 (416), *Drake v Hartopp*

[3] All trustees except A residing in Bombay—A living in England—Lease by trustees—Application by trustees to set aside award in respect of lease—Held that if lessee were to file suit in respect of subject-matter of dispute against trustees, it was open to lessee not to make A party and as all trustees except A resided within jurisdiction of Court, it could accept award on its file. (Vol 30) 1943 Bom 82 (84)

3. Administration decree—[1] Where general administration is sought, a general personal repre-

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

[1882—S. 438; 1877—S. 438; See S. 52, O. 2 R. 5 and O. 7 R. 4.]

Husband of married executrix not to join. 3. Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

[1882—S. 439]

ORDER XXXII

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND

Minor to sue by next friend. 1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

[1882—S. 440; 1877—S. 440. See S. 147]

PROVINCIAL AMENDMENTS

LAHORE

The following words were added :

"Such person may be ordered to pay any costs in the suit as if he were the plaintiff."

[12-5-1909]

N.-W. F. P.

Same as that of Lahore.

O. 31 R. 2 (contd.)

sentative is necessary (1878) 9 Ch D 294 (296). *Bowdeshwell v. Bowdeshwell*.

[2] Representation by an administrator *ad litem* or by an executor or administrator *de son tort* is insufficient. (1897) 1 Ch 866 (870), *Re Toleman* * (1876) 3 Ch D 198 (205), *Amblar v. Lindsey*.

ORDER 32—(General)—Note 1.

[1] An infant is, in law, regarded as of immature intelligence and discretion. (1896) 22 Cal 270 (274).

[2] Owing to his want of capacity and judgment, a minor is disabled from binding himself, except where it is for his benefit. (1788) 2 Brown's Chancery Reports 377, *Compton v. Collinson*.

[3] The law will, as a general principle, treat all acts of an infant which are for his benefit on the same footing as those of an adult but will not permit him to do anything prejudicial to his own interests. 2 Dyer's Reports 186 (187), *Basset's case*.

[4] A decree obtained in favour of a minor without a next friend in the suit is not a nullity; but no effectual or valid decree can be passed against a minor without a proper guardian *ad litem*. (Vol 25) 1938 Lah 515 (519) (DB).

[5] A minor who is a party to a suit is under the protection of the Court and should watch his interests vigilantly and see that he is represented by a fit and proper person. (Vol 19) 1932 All 293 (300): 54 All 646 (FB).

[6] The Court has special inherent jurisdiction derived from the Crown as *parens patriae* to protect the interests of minors and it will exercise that jurisdiction wherever it finds it necessary in the interest of a minor. (Vol 29) 1942 All 150 (153): ILR (1940) All 144.

[7] This order deals only with procedure and minors and persons of unsound mind cannot claim

through the guardian what right they do not possess under substantive law. (Vol 20) 1912 All 267 (277): ILR (1942) All 518 (DB).

[8] This order applies to proceedings under the Central Provinces Debt Conciliation Act of 1903. (Vol 26) 1939 Nag 277 (278): ILR (1938) Nag 697.

[9] There is conflict of opinion on the question whether this order directly applies to execution proceedings:—

[a] This order does not directly apply to execution proceedings. (Vol 28) 1941 Lah 327 (330) (DB). (Non-appointment of guardian *ad litem*—Minor's interest represented by the other parties—Proceedings not vitiated by non-appointment.) (Vol 27) 1940 Lah 241 (242) (do) * (Vol 14) 1927 Cal 930 (931) (DB) (do) * (Vol 16) 1929 Mad 275 (282, 283) (DB) (do) * (Vol 3) 1916 Cal 608 (604) (DB). (Injury not resulting from non representation in suit—Proceedings are not vitiated.) * ('07) 5 Cal L Jour 434 (439, 440) (do).

[b] Order applies to execution proceedings. (Vol 30) 1943 Nag 231 (232) * (Vol 25) 1941 Rang 108 (104): 1940 Rang L R 772. * ('02) 26 Bom 109 (114) (DB) * (Vol 20) 1933 Mad 456 (457): 56 Mad 430 (FB) * (Vol 8) 1921 Mad 599 (601): 44 Mad 919 (FB) * (Vol 26) 1939 Cal 471 (472, 473): 69 Cal L Jour 288 (292) (DB) * (Vol 24) 1937 Cal 259 (261): ILR (1937) 2 Cal 127 (DB) * (Vol 29) 1942 All 150 (152): ILR (1942) All 144 (Compromise in execution proceedings by guardian requires leave of Court.) * (Vol 7) 1920 Bom 37 (38): 44 Bom 574 (DB) (do) * (Vol 8) 1921 Bom 142 (143): 45 Bom 1128 (DB) (do) * (Vol 11) 1924 Nag 135 (136) (do) * (Vol 8) 1921 Sind 61 (34): 17 Sind L R 211 (DB) (do) * (Vol 7) 1920 Pat 750: (751): 5 Pat L Jour 379 (DB) (do) * (Vol 28) 1936 Pat 506 (507) (DB) (do).

[See (Vol 29) 1942 Bom 59 (60): ILR (1942) Bom 132 (DB)].

ORDER 32 RULE 1—SYNOPSIS.

1. Scope and object of the rule.
2. Minor, who is
3. Suit on behalf of an alleged minor who is not a minor in fact.
4. Question of minority in dispute.
5. Objection in appeal to authority of next friend.
6. Title of suit.
7. Liability of next friend for costs.
8. Effect of decree in suits by minors.
9. Estoppel.
10. Attorney's costs
11. Suits for specific performance by or against minors.
12. Suit for possession against person in possession as guardian of minor plaintiff.

1. Scope and object of the rule.—[1] This rule provides that every suit by a minor plaintiff shall be brought in his name by a next friend. (Vol 29) 1942 All 150 (151, 152): ILR (1942) All 144. * ('72) 4 N W P H C R 125 (128) (DB). * (Vol 11) 1924 Bom 114 (115) (DB). * (Vol 12) 1925 Bom 527 (528) (DB). * (1865) 3 Suth W R Act X, 138 (139) (DB). * ('96) 10 Mad 127 (129) (DB).

[2] The person by taking steps in the suit automatically constitutes himself the next friend of the minor. An order of the Court as in the case of a guardian *ad litem* for a minor defendant is not necessary for that purpose. (Vol 29) 1942 All 150 (152): ILR (1942) All 144.

[3] The minor is the real plaintiff. (Vol 29) 1942 All 150 (151): ILR (1942) All 144. * ('81) 7 Cal 187 (189) (DB). * ('83) 9 Cal 629 (630) (DB).

[See ('81) 3 Mad 3 (4) (DB).]

[4] No true analogy between a next friend or guardian *ad litem* and a *de facto* guardian under Mahomedan Law—*De facto* guardian as such cannot give valid discharge—But a guardian *ad litem* or next friend can. (Vol 27) 1940 Sind 129 (130, 131): ILR (1940) Kar 200 (DB).

[5] In the course of representation the next friend can choose his own solicitor or even change him although he is under an obligation not to make an appointment which would be detrimental to the interests of the minor. ('01) 28 Cal 264 (270) (SB).

[6] A suit by a minor without a next friend should not normally be treated as abortive but an opportunity should be given to constitute the suit in the regular manner. (Vol 15) 1928 Cal 537 (539): 55 Cal 712 (DB).

[7] The rule was intended for the protection and benefit of defendants. ('95) 22 Cal 270 (274).

[8] The manager or the shebait of an idol can sue on behalf of the idol, which is considered to be a perpetual minor in the eye of law. (Vol 18) 1926 Nag 351 (351) * (Vol 16) 1929 All 887 (888).

2. Minor, who is.—See S. 3 of the Indian Majority Act (IX[g] of 1875).

3. Suit on behalf of an alleged minor who is not a minor in fact.—[1] Suit filed through a next friend on the allegation that the plaintiff is a minor. It is subsequently found that the plaintiff was in fact a major on the date of the suit. Mistake in filing suit due to a *bonafide* doubt as

regards the age of the minor—Defect is a formal one not affecting the merits of the case and can be cured by amendment. (Vol 18) 1931 All 507 (519): 54 All 57 (SB).

[See also (Vol 13) 1926 All 673 (674): 48 All 661 (DB).

[2] The defect can be remedied by amending the plaint and by removing the next friend. ('94) 21 Cal 866 (868) (DB). * (Vol 14) 1927 Cal 477 (477, 478) (DB). * (Vol 13) 1926 Lah 82 (82). * (Vol 19) 1932 Lah 322 (323): 13 Lah 188. * (Vol 5) 1918 Mad 916 (917): 40 Mad 743 (DB). * (Vol 28) 1941 Oudh 43 (44): 16 Luck 256. * ('04) 7 Oudh Cas 234 (236). * (Vol 13) 1926 Nag 40 (43).

4. Question of minority in dispute.—[1] Defendant sued as a major pleading that he is a minor. Preliminary issue should be framed for the purpose of deciding the plea of minority. For the trial on this issue a guardian *ad litem* should be appointed for alleged minor. (Vol 16) 1929 Bom 431 (432).

[2] The burden of proving minority is on the party who alleges it. ('02) 26 Bom 109 (116) (DB). * ('75) 23 Suth W R 335 (397) (DB).

[3] As to the quantum of evidence sufficient to prove minority, see the following cases. ('07) 29 All 29 (32): 84 Ind App 1 (PC) (Evidence to be such as to carry reasonable conviction to judge.) * ('86) 18 Cal 189 (193) (DB). (Mother's evidence supported by horoscope—Best evidence) * ('94) 17 Mad 134 (139) (DB) (Do). * ('10) (1910) Pun L R No 213 P. 615 (639) (DB). (Entry in birth register—Relevant evidence.) * ('02) 25 Mad 133 (209) (DB). (Statement by deceased relative—Relevant.) * ('90) 17 Cal 849 (851) (DB). (Certificate of guardianship under Act XL of 1858—Not evidence.) * ('96) 18 All 478 (479) (DO).

5. Objection in appeal to authority of next friend.—[1] Minor plaintiff having right to sue. Objection as to want of or defect in the authority of next friend is not fatal to the suit and cannot be raised for the first time in appeal. ('89) 1889 Pun Re No. 166, page 577 (578) (DB). (Such defect does not affect merits and comes under S. 99 C. P. C.) * ('84) 10 Cal 626 (634): 11 Ind App 26 (PC). * ('96) 23 Cal 374 (386) (DB). * ('85) 11 Mad 309 (315) (FB). * ('09) 31 All 7 (8) (DB). * ('83) 1883 All W N 193 (193) (DB).

Title of suit.—[1] Suit by a minor plaintiff. Title and description of the minor should be "X, a minor by his next friend Y, versus AB, defendant."—Minor defendant—He should be described X, a minor by guardian *ad litem* Y." ('86) 12 Cal 43 (49) (DB).

[2] Defect or misdescription in title is not fatal to the suit ('86) 12 Cal 43 (49) (DB). * ('93) 20 Cal 498 (504): 20 Ind App 25 (PC).

[3] The defect is formal and cannot afford a ground *per se* for interference in appeal. ('87) 14 Cal 159 (163, 164) (FB). * ('72) 17 Suth W R 144 (145) (DB).

[But see ('80) 5 Cal 450 (453) (DB).]

7. Liability of next friend for costs.—[1] The Court has discretion in proper cases to order the next friend to be personally liable for costs. (Vol 14) 1927 Mad 1023 (1024). * (Vol 10) 1928 Nag 43 (45) * ('94) 21 Suth W R 298 (298). (Case under the old Code.) * ('85) 11 Cal 213 (219) * (Vol 26) 1930 Bom 271 (277): ILR (1930) Bom 396 (DB).

2. (1) Where a suit is instituted by or on behalf of a minor without a next

Where suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaintiff taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

[1882—S. 442; 1877—S. 442.]

O. 32 R. 1 (contd.)

[See also (Vol 29) 1942 All 150 (152); ILR (1942) All 144 * (Vol 29) 1942 Oudh 279 (281) (DB). * (Vol 21) 1934 All 458 (458): 56 All 653. * (Vol 28) 1941 Cal 272 (286): ILR (1940) 2 Cal 285. (Suit by next friend of idol dismissed—Next friend personally liable for costs unless Court directs him to be indemnified out of trust estate.)]

[2] Reasonable grounds for filing the suit—Next friend *bonafide* in his conduct—Court will direct costs to come out of minor's estate. See ('86) 10 Bom 248 (252, 254) (DB).

[See also (Vol 21) 1934 Cal 474 (477): 61 Cal 227.]

[3] Decree dismissing a suit by a minor not expressly directing next friend to pay costs. Costs are payable out of the estate of the minor. (Vol 26) 1939 Bom 350 (352).

[See also (Vol 22) 1935 Bom 112 (119): 59 Bom 35.]

[4] Suit by minor dismissed with costs. In execution of decree for costs minor's property attached. Application for refund of the money paid by the minor to raise the attachment on the ground that the decree could not be executed against the minor can be made on behalf of the minor by a new next friend. (Vol 26) 1939 Bom 350 (351).

[5] Save in exceptional cases neither the infant plaintiff nor the next friend ought to be required to give security for costs. ('99) 23 Bom 100 (102) (DB). * (Vol 21) 1934 All 458 (458): 56 All 653.

[6] On the death of a deceased creditor, his minor legal representative demanding debt, debtor is entitled to refuse to pay until his interests are safeguarded by production of a succession certificate or of probate or letters of administration. Where the minor in such a case sues the debtor for the amount the defendant is not liable for the costs of the suit. ('21) 64 Ind Cas 885 (386) (DB) (Lah).

8. Effect of decree in suits by minors.—

[1] Minor properly represented by the next friend—No fraud, collusion, or gross negligence on his part—Decree passed in the suit operates as *res judicata*. ('10) 13 Oudh Cas 158 (159) (DB). * ('08) 11 Oudh Cas 319 (321). * ('71) 16 Suth W R 231 (232) (SB). * ('86) 10 Bom 21 (24) (DB). * (Vol 13) 1926 Lah 289 (290): 7 Lah 129 (DB). * (Vol 12) 1925 Mad 379 (380, 381) (DB). * (Vol 6) 1919 Lah 104 (105) (DB).

9. Estoppel.—[1] Minor representing himself to be of full age, collecting rents, and granting receipt—He is estopped from questioning the transaction by a suit through next friend. ('02) 29 Cal 226 (227) (DB).

[See also (Vol 6) 1919 App Bar 39 (40): 1 S. Upp Bar Bull 75.]

[2] Minor executing registered sale deed representing himself to be a major. He will be estopped from filing a suit through a next friend questioning the validity of those transactions. ('97) 21 Bom 198 (201) (DB).

[3] Person relying upon the plea of estoppel must prove not only that fraud was practised upon him by the minor but that he was deceived into action by such fraud. ('98) 25 Cal 616 (622) * ('99) 26 Cal 381 (388, 394) (SB).

[But see ('97) 24 Cal 265 (270, 271) (SB).]

[4] There can be no estoppel when the truth (of majority) is known to both the parties. ('08) 30 Cal 539 (546): 30 Ind App 114 (PC) * (Vol 7) 1920 Lah 372 (373): 1919 Pun Re No. 162.

10. Attorney's costs.—(1) The costs incurred by the attorney or solicitor of the guardian or next friend of a minor party in properly prosecuting or defending the suit are recoverable from the estate of the minor as "necessaries" under S. 68 of the Contract Act (IX[g] of 1872). ('94) 21 Cal 372 (380) (DB). * ('81) 7 Cal 140 (144). * ('99) 22 Mad 314 (316, 317) (DB).

[2] Suit instituted on behalf of a minor, repudiated by him on his attaining majority pending the suit and the suit dismissed. Solicitor cannot recover his cost from the estate of the quondam minor but can proceed against the next friend personally. ('94) 17 Mad 257 (259) (DB).

[3] The attorney is entitled only to a charge on minor's estate and cannot get a personal decree against the infant. (Vol 4) 1917 Cal 652 (655): 43 Cal 676.

11. Suits for specific performance by or against minors.—[1] As to the maintainability of suits by or against minors for specific performance of contracts entered into by the guardian: see the following cases. ('95) 22 Cal 545 (551) (DB). * ('98) 20 Cal 508 (513) * (1400) 27 Cal 276 (276) (DB). * ('35) 18 Mad 415 (416) (DB). * ('95) 19 Bom 697 (701) (DB). (Suit on bond executed by minor.)

12. Suit for possession against person in possession as guardian of minor plaintiff.—[1] A in possession claiming to be the *de jure* guardian of B, a minor, and C, acting as next friend of B filing a suit against A for possession—Question is one exclusively falling within the purview of the Guardians and Wards Act (VIII of 1900) and no suit is maintainable. (Vol 12) 1925 Nag 328 (329): 21 Nag L R 76.

[See also (Vol 11) 1924 Bom 114 (115) (DB).]

ORDER 32 RULE 2—SYNOPSIS.

1. Scope.
2. Suit by minor without a next friend.
3. Waiver of objection by Defendant.
4. Costs.

Guardian for the suit to be appointed by Court for minor defendant

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree.]

[1882—Ss 443, 456 ; 1877—Ss. 443, 446.]

O 32 R. 2 (contd.)

1 **Scope.**—[1] Court should take note of the minority of the plaintiff if disclosed during the trial even without an application by the defendant and suspend proceedings till a next friend is appointed (Vol 11) 1924 Loh 168 (188) 4 Loh 390 (5B). * (Vol 12) 1925 Rang 325 (326) 3 Rang 239.

[2] When there is a certificated guardian appointed for the minor under the Guardian and Wards Act (VIII of 1890), no third person can file a suit and a suit so filed will be treated as one by the minor filed without a guardian. (29) 115 Ind Cas 456 (456) (All)

[3] The rule applies to suits instituted by persons of unsound mind at the time of institution of suit and not otherwise, (Vol 23) 1936 Lah 7 (8).

2 **Suit by minor without a next friend.**—[1] Rule applies even to cases where the fact of minority is disclosed during enquiry Court should stay proceedings and allow sufficient time to the plaintiff to be represented by next friend unless the plaintiff instituted the suit with knowledge of his inability in order to deceive the Court and evade payment in the event of failure in which case the suit should be taken off the file. ('89) 13 Bom 7 (11, 12) * (42) 1742 Oudh W N 281 (284) * (Vol 11) 1924 Lah 157 (158) * (Vol 10) 1923 Mid 553 (554) (DB) * (04) 7 Oudh Civ 234 (236). * ('08) 11 Oudh Civ 159 (164) (DB) * (Vol 29) 1942 Pesh 73 (73) (DP)

[But see (1886) 13 Cal 189 (190) (DB) (The rule applies only where the fact of minority is apparent on the pleadings.)

[2] Where the plaintiff attains majority by the time of the enquiry as to his minority, there is no necessity for an amendment. (Vol 29) 1942 Pesh 73 (73, 74) (DL) * ('86) 13 Cal 189 (191, 192) (DB) * (Vol 5) 1913 All 71 (71) (DB) * (Vol 10) 1923 Mad 553 (554) (DB)

[3] The Calcutta High Court has held that an

order taking the plaint off the file is appealable. (1886) 13 Cal 189 (191) (DB). * (1884) 10 Cal 102 (106) (DB)

[See (Vol 8) 1921 Cal 776 (778) 47 Cal 721 * (Vol 6) 1918 Cal 55 (55, 56) (DB).]

3 **Waiver of objection by defendant.**—[1] The non-representation of the minor by a next friend is only an irregularity capable of being waived by the defendant and a defendant who elects to proceed with the suit without objection cannot contend for the first time in appeal that the suit was not maintainable owing to the minority of the plaintiff. (Vol 15) 1928 Cal 537 (539): 55 Cal 712 (DB) * ('99) 22 Cal 272 (274) * ('81) 1831 All W N 150 (151) (DB) * ('84) 1834 Bom P J 262 (263) (DB) * ('96) 19 Mad 127 (129) (DB) * (Vol 27) 1940 Nag 99 (102). ILR (1941) Nag 735 1939 Nag L Jour 577 (582)

[But see ('66) 1 Agra 1 (2)]

[2] Next friend appointed on objection by defendant—He cannot in appeal contend that as the suit was instituted without next friend it was not maintainable (Vol 9) 1922 Mad 259 (260) (DB).

4 **Costs.**—(1) On an order directing suit by minor to be taken off the file costs should not be ordered out of the estate of minor but should be recovered from the pleader or any other person who presented the plaint (1889) 13 Bom 234 (236).

ORDER 32 RULE 3—SYNOPSIS.

1. Scope and object of the rule.
2. "Shall appoint a proper person to be guardian for the suit."
- 2 (a) Title of suit against minor.
3. "On being satisfied of the fact of his minority."
4. When defendant pleads minority.
5. Non-representation.

[a] Sub-rule (5) was inserted by the Code of Civil Procedure (Third Amendment) Act 1937 (16 of 1937), Section 2.

Objects and Reasons.

"Rule 3 (4)—This is based on section 443 (of 1882 Code). The Committee think it necessary to ensure that notice should reach one interested in the minor's welfare, and this rule aims at securing this result... .."—S. O. R.

PROVINCIAL AMENDMENTS

ALLAHABAD

Add the following proviso to sub-rule (4)

'Provided that if the minor is under ten years of age no such notice shall be issued to him.'

BOMBAY

The words "to the minor and" in sub-rule (1) shall be *deleted*

[19-1926]

LAHORE

(a) The following sub-rules were *substituted* for sub rules (3) and (4)

"(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons, with their addresses, who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub-rule (2), above

(4) The Court may at any time after institution of the suit call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint"

(n) The following sub-rules (6) and (7) were *added*

O. 32 R. 3 (contd.).

6. Absence of formal order of appointment of guardian—Substantial representation.

7. Illegal procedure in appointing guardian.

8. Decree against major treating him as minor and *vice versa*

9. Such application shall be supported by affidavit—Sub-rule (3)

10. Notice to minor and his guardian.

11. Duties of a guardian—Gross negligence

12. Effect of fraud or gross negligence of guardian

13. Probate proceedings

14. Effect of sub-rule (5).

1 Scope and object of the rule—[1] The object of the rule is to guard minor's interest by proper representation in a suit filed against him (Vol 14) 1927 Bom 613 (615) * (Vol 24) 1937 Cal 658 (659) ILR (1937) 1 Cal 586

[2] The Court should be very careful in deciding that the proposed guardian is a fit and proper person to act as guardian but also that he has no interest, directly or indirectly, adverse to that of minor. ('02) 24 All 883 (886, 893) (FB). * (Vol 7) 1920 Oudh 164 (166) 23 Oudh Cas 396. * (Vol 23) 1936 Rang 237 (238).

[3] A guardian *ad litem* is constituted by an order of the Court but a next friend automatically constitutes himself by taking steps in the suit. (Vol 29) 1942 All 150 (152) ILR (1942) All 144

[4] Rule does not apply to partition proceedings under U P Land Revenue Act (Vol 6) 1919 Oudh 128 (128).

[5] The rule applies to proceedings in Revenue Courts (Vol 18) 1931 All 666 (667) (DB).

[6] Rule does not apply to commutation proceedings under Bengal Tenancy Act. (Vol 14) 1927 Cal 374 (374)

[7] Rule applies to proceedings under S 26 F, Bengal Tenancy Act. (Vol 25) 1938 Cal 736 (737).

[8] Rule applies to proceedings under U. P. Encumbered Estates Act (Vol 26) 1939 All 507 (509) 1LR (1939) All 557

2. "Shall appoint a proper person to be guardian for the suit."—[1] The rule is mandatory and the Court is bound to appoint a proper guardian for a minor defendant. (Vol 7) 1920 Bom 54 (55): 44 Bom 767 (DB) * (Vol 1) 1914 Oudh 107 (108) 16 Oudh Cas 261 * (Vol 4) 1917 All 477 (479) 39 All 8 (DB) * ('69) 5 Mad 111 (C R App 8 (8) * (Vol 22) 1935 Nag 230 (236) 11 Nag LR 403 (DB) * (Vol 25) 1938 Cal 736 (737) * (Vol 25) 1938 Lah 51. (520) (DP) * (Vol 21) 1937 Rang 126 (128) 1937 Rang LR 161 * (Vol 21) 1934 Oudh 475 (461)

[2] The Court is bound to satisfy itself that the proposed guardian is a fit and proper person (07) 29 All 675 (677, 676) (DB) * (Vol 21) 1934 Bom 390 (395)

[3] The Court is bound to appoint a guardian for a minor defendant, even though the managing member of the family of which such minor is a member is a co-defendant (Vol 18) 1931 All 176 (130) 53 All 427 (DB) * (Vol 21) 1931 Oudh 475 (484, 485) (DB). * ('86) 10 Bom 21 (24) (DB)

[4] The institution of a suit against a minor is complete and gives limitation even though further progress of the suit depends upon the appointment of a suitable guardian (Vol 28) 1941 Nag 130 (131) ILR (1942) Nag 322 * (Vol 4) 1917 All 477 (479) 39 All 8 (DB) * (Vol 14) 1927 All 787 (787): 49 All 869 (DB) * (20) 54 Ind Cas 575 (576) (DB) (U P B R)

[5] The Code does not permit the appointment of joint guardians *ad litem* (Vol 23) 1936 Rang 237 (238)

[6] Where a guardian is appointed by Court though the mother also is allowed to represent the minor, an appeal in the suit should be filed only by the guardian. (Vol 31) 1944 Nag 78 (79, 80) ILR (1944) Nag 270

2 (a). Title of suit against minor—[1] In a suit against minor, the minor should himself be

"(6) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that such person proposed is a fit person to be so appointed

(7) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor or, where there is no father or other natural guardian to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule

Provided that the Court may, if it sees fit, issue notice to the minor also."

MADRAS

(i) *Delete* Rule 3 as it stood originally in the enactment of 1908 before its amendment in 1937 and substitute in lieu thereof the new Rule 3 set forth below:

Qualifications to be a next friend or guardian

"3 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff

Appointed or declared guardians to be preferred and to be superseded only for reasons recorded

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be

Guardian to be appointed by Court

(3) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor

(4) An order for the appointment of a guardian for the suit may be obtained upon application in

Appointment to be on application and where necessary after notice to proposed guardian

the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff, shall set forth in the order of their suitability, a list of persons (with their full addresses for service of notice in Form No 11A set forth in Appendix H hereto) who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may, for reasons to be recorded in any particular case, exempt the applicant from furnishing the list referred to above

(5) The application referred to in the above sub-rule, whether made by the plaintiff or on behalf

Contents of affidavit in support of the application for appointment of guardian

of the minor defendant, shall be supported by an affidavit verifying the fact that the proposed guardian has not, or that no one of the proposed guardians has any interest in the matters in controversy in the suit adverse to that of the minor and that the proposed guardian or guardians are fit persons to be so appointed. The affidavit shall further state, according to the circumstances of each case (a) particulars of any existing guardian appointed or declared by competent authority, (b) the name and address of the person, if any, who is the *de facto* guardian of the minor, (c) the names and addresses of persons, if any, who in the event of either the natural or the *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, or by reason of relationship or interest or otherwise suitable persons to act as guardians for the minor for the suit

O 32 R 3 (contd)

made, and described as a defendant, some other person being named as guardian. ("7") 20 South W R 48 (48) (DB)

[2] Minors sued as majors—Written statement filed by their mother as their guardian—Court accepting the same—Failure to amend the plea, title is a mere irregularity. (Vol 20) 113 Pat 104 (110) 12 Pat 117 (DB)

3. "On being satisfied of the fact of his minority"—[1] Medical evidence as to the age of a person renders other evidence rendered in the case as to his age medically probable or improbable (Vol 7) 1920 Oudh 164 (166) 23 Oudh Cas 396

4 When defendant pleads minority.—[1] Defendant sued as major pleading minority—Proper procedure—Preliminary issue to be raised on the question and decided after appointing guardian *ad litem* for the purpose—If allegation found true a guardian in suit to be appointed—If not guardian in enquiry to cease acting (93) 18 Mad 344 (346) (DB) * (Vol 13) 1926 Pat 489 (490)

[2] Minor applying to be impleaded as legal representative of deceased party—Guardian *ad litem* should be appointed in enquiry to decide whether he is an (Vol 11) 1924 Mad 813 (814)

5. Non-representation.—[1] Decree passed against a minor not represented, without jurisdiction and therefore null and void (Vol 29) 1942 Loh 129 (131) (D) * (42) 1942 Oudh WN 118 (120) * (Vol 27) 1940 All 202 (203) * (105) 32 Cal 296 (312, 313) 34 Ind App 23 (PC) * (13) 16 Oudh Cas 247 (251) 35 All 487 40 Ind App 182 (PC)

[But see (Vol 15) 1928 Mad 1057 (1058) * (Vol 16) 1929 Mad 213 (217) 52 Mad 275 (FB) (Per Devadoss, J Obiter)]

[2] To set aside a decree against the minor, it is not necessary to show that the minor has suffered any prejudice by non-representation (Vol 11) 1924 All 892 (893) 46 All 744 (DB)

[8] The minor may ignore or disregard a decree passed against him without representation even

Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party.

(6) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The applications shall be by separate petitions.

(7) No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No. 11 set forth in Appendix H hereto.

(8) Where the application is by the plaintiff, he shall, along with his application and affidavit referred to in sub-rules (1) and (5), above, produce the necessary forms in duplicate, filled in to the extent that is possible at that stage for the issue simultaneously of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-rule (4) above, together with a duly stamped voucher indicating that the fees prescribed for service have been paid. If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the list referred to in sub-rule (4) above, but no fresh application under sub-rule (4) shall be deemed necessary. The applicant shall, within three days of intimation of unwillingness by the first set of proposed guardians, pay the prescribed fee for service and produce the necessary forms duly filled in.

O. 32 R. 3 (contd.)

without having it set aside (Vol 21) 1934 Mad 386 (387) : 57 Mad 973 (DB).

[4] The executing Court cannot go behind the decree and question its validity on the ground that it was one passed against a minor or a person of unsound mind who was not properly represented (Vol 20) 1938 Cal 85 (87) : 60 Cal 191 (Case relating to lunatic.) * (Vol 24) 1937 Mad 509 (510) : ILR (1937) Mad 884 (DB) * (Vol 23) 1936 Mad 618 (618) : 59 Mad 642 (DB) * (Vol 11) 1924 Lah 448 (448) : 5 Lah 54 (DB) * (Vol 18) 1931 Rang 252 (256) : 9 Rang 480 (FB) (Obiter) * ('04) 7 Oudh Cas 199 (200) (DB).

[But see (Vol 25) 1938 Lah 515 (519) (DB) * (Vol 22) 1935 Nag 235 (236) : 31 Nag L R 403 (DB) * (Vol 18) 1926 Mad 429 (429).]

[5] The objection of a minor not represented in the suit to the execution of the decree does not fall under S. 47 of the Code and a suit to set aside the decree and the sale in execution thereof is not barred by section 47. ('09) 31 All 572 (582) : 36 Ind App 168 (PC).

[6] A minor not properly represented in the suit and against whom an *ex parte* decree has been passed cannot apply under O. 9 R. 13 to set aside the *ex parte* decree (Vol 11) 1924 Mad 489 (489) * (Vol 7) 1920 Mad 713 (714) (DB) * (Vol 9) 1922 Nag 249 (250) : 18 Nag L R 138.

[But see (Vol 4) 1917 All 477 (478) : 39 All 8 (DB) * (Vol 20) 1933 All 116 (116) : 55 All 136 (DB) * (Vol 14) 1927 Oudh 173 (174) (DB).

[7] Where an incompetent or disqualified guardian is appointed for a minor party, the position is the same as if no guardian is appointed at all (Vol 18) 1931 Mad 874 (877).

[8] Minor represented in suit by a duly qualified guardian, becomes legally a party to the suit and

the Court acquires jurisdiction to decide his case (Vol 10) 1923 Pat 242 (250) : 2 Pat 335 (DB).

[9] The decree passed against minor properly represented is binding on him and the judgement will operate as *res judicata* against him in subsequent proceedings. ('37) 10 Mad 272 (279) (DB). * (Vol 13) 1926 Pat 528 (529) : 5 Pat 768 (DB). * (Vol 19) Bom 571 (576) * (Vol 13) 1928 All 621 (622) (DB). * (Vol 13) 1926 All 36 (40, 41) : 43 All 44 (DB). * (1900) 24 Bom 547 (552) (DB). * (Vol 14) 1927 Cal 865 (866, 867) (DB). * ('07) 34 Cal 83 (89) (DB). * (Vol 1) 1914 Mad 384 (385) : 37 Mad 535 (DB). * (Vol 5) 1918 Oudh 95 (97). * ('10) 13 Oudh Cas 168 (169).

[10] In cases where in fact the guardian was appointed and in fact the guardian has acted for the minor, the appointment may not be capable of being called in question on the ground of any irregularity. ('42) 1942 Oudh W N 118 (120).

[11] A minor who can establish gross negligence on the part of guardian and resultant prejudice to himself has a substantive right to avoid the decree so passed. (Vol 29) 1942 Mad 384 (384) : 1 L R (1942) Mad 526 (DB) * (Vol 29) 1942 Mad 82 (84) * (Vol 29) 1942 Oudh 34 (37) : 17 Luck-1 (DB) * (Vol 28) 1941 Cal 401 (404, 405) : 1 L R (1941) 1 Cal 477 * (Vol 28) 1941 Oudh 228 (224) (Failure to raise important defence) * (Vol 27) 1940 All 256 (258) : 1 L R (1940) All 344 (DB) * (Vol 27) 1940 Lah 205 (205) * (Vol 27) 1940 Mad 810 (810) (DB) * (Vol 11) 1932 All 293 (301, 306, 308) : 54 All 646 (FB) * (Vol 22) 1935 Pat 24 (28, 29) (DB) * (Vol 23) 1936 Pat 231 (236) : 14 Pat 824 (DB) * (Vol 17) 1930 Sind 186 (187) : 24 Sind L R 420 (DB).

[12] The minor can exercise the right to avoid the decree passed as the result of the negligence of guardian in the following ways :

(9) No person shall, without his consent, be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in Form No. 11A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

No person shall be appointed guardian without his consent.

(10) Where the Court finds no person fit and willing to act as guardian for the suit, the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions for the re-payment or allowance of the costs as justice and the circumstances of the case may require.

Court guardian—when to be appointed—how he is to be placed in funds.

(11) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time order the plaintiff to advance moneys to the guardian for purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

Funds for a guardian other than Court guardian to defend.

(ii) In the new sub-rule (5) added by the Civil Procedure Code (Third Amendment) Act XVI of 1937, to Rule 3 as it originally stood in the enactment of 1908, for the words "sub-rule (1)," substitute the words "sub-rule (3)," and number the new sub-rule as (3) (a). [6-9-1938]

NAGPUR

For Rule 3 substitute the following:

Guardian for the suit to be appointed by Court for minor defendant. "3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.

(2) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree." [29-6-1943.]

UDH

Add the following proviso to sub-rule (4):

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

O. 32 R. 3 (contd.).

[a] Ex parte decree may be set aside under O. 9 R. 13. The negligence of the guardian constituting a "sufficient cause" (Vol 19) 1925 Pat 512 (513, 514) (DB) * (Vol 20) 1933 All 116 (116) : 55 All 136 (DB) * (1886) 12 Cal 69 (75, 76) (DB).

[b] Appeal from the decree (Vol 20) 1933 All 116 (116) : 55 All 136 (DB).

[c] Review of the judgment may be applied for (Vol 20) 1933 All 116 (116) : 55 All 136 (DB) * (Vol 3) 1916 All 324 (325) : 38 All 452 (DB) * ('12) 16 Ind Cas 543 (544, 545) (DB) (Cal).

[See however (Vol 28) 1941 Cal 401 (403, 404) : I L R (1941) 1 Cal 477].

[d] A suit to set aside the decree (Vol 29) 1942 Mad 82 (83) * (Vol 29) 1942 Mad 384 (384) : I L R (1942) Mad 526 (DB) * (Vol 28) 1941 Cal 401 (404, 405) : I L R (1941) 1 Cal 477 * (Vol 28) 1941 Oudh 223 (224) * (Vol 5) 1918 Nag 187 (189, 191) * (Vol 20) 1933 All 116 (116) : 55 All 136 (DB) * (Vol 6) 1919 Lah 185 (185) : 1919 Pun Re No 24 (DB) * (Vol 9) 1922 Mad 273 (273, 274) : 45 Mad 425 (DB) * ('95) 22 Cal 8 (11, 13) (DB) * (Vol 5) 1918 Lah 223 (224) : 1917 Pun Re No 103 (DB) * (Vol 25) 1938 Pat 437 (440) : 17 Pat 236 (DB) * (Vol 23) 1936 Pat 281 (288, 289, 240) : 14 Pat 824 (DB) * (Vol 28) 1938 Rang 237 (239).

[But see (Vol 27) 1940 Bom 33 (34) * (Vol 25) 1937 Bom 66 (69, 70, 73) : I L R (1937) Bom 340 (FB)

* (Vol 25) 1933 Bom 206 impliedly overruled].

[13] A decree against a minor so long as it subsists cannot be treated as void merely on the ground of the gross negligence of the guardian *ad litem* (Vol 29) 1942 Oudh 33 (37) : 17 Luck 1 (LB) ((Vol 27) 1940 All 256 : I L R (1940) All 344 and (Vol 19) 1932 All 208 : 54 All 646 (FB) dissented from).

[See also (Vol 24) 1937 P C I (4) : I L R (1937) Mad 263 (P C) (Person attacking a decree against him on the ground of gross negligence cannot rely on S 44 of Evidence Act).

[But see (Vol 27) 1940 All 256 (258) : I L R (1940) All 344 (DB) * (Vol 19) 1932 All 293 (298) : 54 All 646 (FB) * (Vol 27) 1940 All 416 (420) : I L R (1940) All 580 (DB).

[14] A minor against whom a decree has been passed without the appointment of a proper guardian may apply in the suit itself for an order under R. 5 (2). (Vol 27) 1940 Lah 164 (165) * (Vol 20) 1933 All 116 (116) : 55 All 136 (DB).

[15] Decree set aside on the ground of non-representation or on the ground of gross negligence of the guardian—The Court can, under its inherent powers, revive the first suit, and proceed with it from the stage at which it was declared that the proceedings were illegal as against the minor. (40) 1940 All W R H O 62 (63) (DB) * ('28) 1928 Mad W N 275 (278, 280) (DB)

O. 32 R. 3 (contd.).

(Dissenting from (Vol 11) 1924 Mad 489) * (Vol 4) 1917 All 477 (479) : 39 All 8 (DB) * (Vol 12) 1925 Cal 512 (513) * (Vol 18) 1926 Oudh 32 (33) (DB) * (Vol 24) 1937 Nag 165 (166, 167) : 1 LR (1937) Nag 360 * (Vol 23) 1936 Cal 421 (423) : 63 Cal 1227 (DB)

6 Absence of formal order of appointment of guardian—Substantial representation—[1] The absence of the order of appointment of a guardian is only an irregularity which, in the absence of any prejudice to the minor resulting therefrom, will not be a ground for setting aside the decree where he has been effectively represented ('42) 1942 Oudh W N 118 (120) * ('40) 1940 Nag L Jour 256 (259) * ('03) 30 Cal 1021 (1031) : 30 Ind App 182 (PC) * ('87) 14 Cal 204 (209, 212, 215) (FB) * (Vol 3) 1916 Pat 267 (268) : 1 Pat L Jour 573 (FE) * (Vol 32) 1945 Pat 133 (134) : 23 Pat 640.

[2] A misdescription of the minor in the pleadings is only an irregularity which is not necessarily fatal to the suit. (Vol 27) 1940 All 467 (471) (DB) * ('89) 16 Cal 40 (56) : 15 Ind App 195 (PC) * ('87) 14 Cal 204 (209, 214) (FB)

7. Illegal procedure in appointing guardian—[1] Decree cannot be set aside on the ground of an irregularity in procedure in the appointment of guardian unless it has caused prejudice to the minor. (Vol 29) 1942 Pat 872 (375) * (Vol 7) 1920 Oudh 164 (166, 167) : 23 Oudh Cas 396 * (Vol 21) 1934 Oudh 171 (173) : 9 Luck 586 (DB) * (Vol 13) 1926 All 545 (545) : 49 All 125 (FB) * (Vol 13) 1926 Lah 435 (438) * (Vol 23) 1936 Cal 247 (248).

[2] The absence of, or omission to, file an affidavit as required by sub-rule (3) cannot render the decree void and cannot be a ground for setting aside the decree unless prejudice is proved (Vol 10) 1923 Mad 465 (467) (DB).

[3] The question whether minor was prejudiced depends upon the facts and circumstances of each case and does not necessarily follow from the irregularity in the appointment of a guardian *ad litem* (Vol 3) 1916 All 353 (355, 356) (DB) * (Vol 8) 1921 All 393 (395) : 43 All 104 (DB)

8. Decree against major treating him as minor and vice versa—[1] A major defendant who is described and impleaded as a minor, cannot be treated as a party and is not bound by decree passed in the suit. (Vol 6) 1919 Pat 10 (12) * (Vol 3) 1916 Oudh 257 (260, 261) * ('96) 23 Cal 686 (689) (DB) * (Vol 25) 1938 Rang 468 (472, 473) (DB).

[2] A minor who is treated as a major and impleaded as such cannot be treated as a party to the suit and is not bound by the decree passed in the suit. (Vol 18) 1926 All 387 (387) : 43 All 362 (DB) * ('18) 18 Cal L Jour 18 (21) (DB) * (Vol 3) 1916 Mad 33 (35, 36) : 38 Mad 1076 (DB) * (Vol 12) 1925 Pat 367 (368).

[See however (Vol 16) 1929 All 148 (154) (DB)]

[3] Major defendant who is aware of the defect or takes part in the proceedings without objection will be estopped from questioning the validity of the decree later on ('06) 23 All 416 (417) (DB) * (Vol 11) 1924 All 94 (95) : 45 All 608 (DB) * (Vol 3) 1921 Cal 584 (587, 588) (DB) * ('98) 21 Mad 167 (169) (DB) * (Vol 3) 1918 Mad 545 (547, 548) (DB)

[4] Such application shall be supported by affidavit—Sub-rule (3).—[1] An application for the appointment of a guardian should be supported by an

affidavit stating the fact of minority of the defendant and that the proposed guardian is a fit person to be appointed as guardian. ('02) 4 All 383 (393) (FB) * ('07) 10 Oudh Cas 321 (331) (DB).

[2] The absence of an affidavit is only an irregularity which cannot render the decree invalid.

See sub-r. (3) of R. 3 substituted by the Madras High Court as to the contents of the affidavit in support of a petition under this rule. ('10) 32 All 287 (294) : 37 Ind App 77 : 13 Oudh Cas 123 (PC).

[See however (Vol 9) 1922 Lh 417 (148)]

[3] Guardian *ad litem*.—Application to appoint one not disclosing certain relations—Applicant held not guilty of fraud. (Vol 21) 1935 Mad 1035 (1046).

[10] Notice to the minor and his guardian. [1] Without giving the necessary notices to the persons referred to in the rule a guardian for the minor cannot be appointed (Vol 11) 1927 Bom 613 (615) * (Vol 21) 1934 All 212 (214) (DB) * (Vol 4) 1917 Mal 655 (655) * (Vol 17) 1930 All 604 (610) (DB) * (Vol 5) 1921 Nag 126 (126, 127) * (Vol 1) 1914 Oudh 328 (328) (DO) * (Vol 5) 1918 Pat 211 (213) * (Vol 33) 1946 Sind 93 (95, 96) : 1 LR (1946) Kar 466.

[2] The objects of giving notice to minor are as follows:—

[a] To enable him to come and defend where he is not a minor. (Vol 14) 1927 Bom 613 (615).

[b] To enable him where he is a minor to express his wishes in the matter of choice of the guardian. ('11) 11 Ind Cas 817 (819) : 1912 Pun Re No. 25.

[3] The omission to send the notice required by this rule is, only an irregularity which will not vitiate the proceedings unless it is proved that the minor has been prejudiced thereby in his defence. (Vol 21) 1934 Lah 132 (133) * (Vol 21) 1931 Pat 427 (430) (DB) * (Vol 13) 1926 All 757 (759) : 43 All 828 (DB) * (Vol 2) 1915 All 62 (63, 64) : 37 All 179 (DB) * (Vol 14) 1927 Bom 613 (615) * (Vol 3) 1916 Bom 150 (152, 153) : 40 Bom 541 (DB) * (Vol 11) 1924 Mad 763 (763, 764) * (Vol 5) 1918 Mad 545 (547, 548) (DB) * (Vol 10) 1929 Oudh 481 (482) : 4 Luck 517 * (Vol 10) 1929 Sind 32 (34) (DB). (Notice not necessary in Sind owing to the amendment in 1927) * (Vol 11) 1924 Pat 772 (773) (DB) * ('12) 13 Ind Cas 594 (595) (Cal) * (Vol 24) 1937 Cal 658 (659) : 1 LR (1937) 1 Cal 586 * (Vol 22) 1935 Oudh 287 (288) : 11 Luck 30 (DB).

[But see (Vol 8) 1921 Pat 25 (26) : 6 Pat L Jour 82 (DB).]

[4] Unless there is fraud or collusion on the part of guardian, omission to send notice will not vitiate proceedings. (Vol 15) 1928 All 631 (632) (DB) * (Vol 10) 1923 Lah 575 (577, 578) : 5 Lah 33 (DB) * ('28) 109 Ind Cas 521 (522) (Lah) * (Vol 7) 1910 Oudh 164 (167) : 23 Oudh Cas 396 * (Vol 10) 1923 Mad 465 (467) (DB).

[5] Prejudice is not a matter of assumption or presumption but of positive proof (Vol 11) 1924 Mad 763 (763)

11. Duties of a guardian—Gross negligence.—[1] The guardian *ad litem* is bound to act strictly in the interests of the minor and to raise the best possible defences for him. (Vol 28) 1941 Oudh 223 (224) * ('12) 1912 Pun W. R. No. 127 page 344 (346) (DB) * (Vol 22) 1935 Lah 349 (350) * (Vol 24) 1937 Mad 472 (475) * (Vol 22) 1935 Pat. 140 (141) (DB).

Who may act as next friend or be appointed guardian for the suit

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

O 32 R 3 (contd.)

[2] He must act in good faith i.e., with due care and caution. ('98) 1898 Pua Ra. No. 35, page 124 (127) (DB). * (Vol 28) 1941 All 318 (320)

[3] Every kind of negligence of the guardian will not render the proceedings, otherwise regular and proper liable to be reopened. (Vol 15) 1928 Nag 207 (208) * (Vol 11) 1924 Mad 860 (860) * ('12) 10 All L Jour 149 (152).

[4] The negligence must be such as leads to the loss of the right which might have been successfully asserted if the suit had been defended with due care * (Vol 28) 1941 Cal 401 (405): ILR (1941) 1 Cal 477 * ('07) 6 Cal L Jour 448 (451, 452) (DB). * (Vol 9) 1922 Mad 278 (278, 274): 45 Mad 425 (DB) * (Vol 22) 1935 Pat 24 (29) (DB). * (Vol 24) 1937 All 552 (554, 555) (DB) * (Vol 25) 1938 Lah 218 (219) (DB). * (Vol 25) 1938 Mad 13 (15, 16)

[5] The negligence must be such as would imply that the person guilty of it neglected to do what was plainly his duty to do, or did something which he ought not to have done, or omitted to do something which any man of ordinary prudence would have done. (Vol 28) 1941 Lah 327 (329) (DB) * (Vol 12) 1925 Mad 258 (259) * (Vol 6) 1919 Lah 413 (414) (DB). * (Vol 22) 1935 Mad 81 (86).

[6] Omission on the part of guardian to appear at trial would not amount to gross negligence if there was no good ground of defence available to be put forward on behalf of the minor. (Vol 28) 1941 Lah 47 (49) * (Vol 9) 1922 Mad 278 (273, 274): 45 Mad 425 (DB) * (Vol 22) 1935 Oudh 183 (189): 10 Luck 298 (DB) * (Vol 20) 1933 Pat 473 (478) (DB) * (Vol 12) 1925 Mad 204 (205) * (Vol 12) 1925 All 214 (215) (DB). * (Vol 12) 1915 All 159 (159, 160) (DB). * ('07) 9 Bom LR 1099 (1101) (DB) * (Vol 12) 1928 Cal 844 (848): 55 Cal 1241 (DB). * (Vol 12) 1925 Lah 116 (116) * (Vol 5) 1918 Oudh 95 (77) * (Vol 16) 1929 Pat 360 (362, 363): 8 Pat 558 (DB). * (Vol 19) 1932 Cal 888 (889): 59 Cal 1108 (1109).

[7] It is not the duty of the guardian to raise frivolous and untenable defences. (Vol 6) 1919 Lah 413 (414) (DB). * (Vol 1) 1928 Mad 945 (949, 950) (DB) * (Vol 24) 1937 Mad 846 (847) (DB).

[8] Guardian refusing to litigate a claim false and unfounded in fact is not guilty of dereliction of duty. (Vol 7) 1920 Cal 178 (183) (DB).

[9] The guardian's failure to prefer an appeal after contesting the suit does not amount to negligence. (Vol 30) 1943 Mad 187 (188) (DB). * (Vol 29) 1942 Mad 82 (84).

[10] To determine whether there has been gross neglect on the part of the guardian the test is to see whether there has been culpable neglect of the interests of the minor, and whether there has been in the conduct of the suit any act or omission on the part of the guardian which has resulted in prejudice to the minor. (Vol 28) 1941 Cal 401 (405): ILR (1941) 1 Cal 477. * (Vol 13) 1926 All 86 (83, 40, 41): 48 All 44 (DB) * (Vol 19) 1932 All 238 (296, 297, 302): 54 All 646 (FB).

12 Effect of fraud or gross negligence of guardian—[1] Where the guardian has been guilty of fraud or collusion, the minor can, under the provisions of S 44 of the Evidence Act, avoid the bar of *res judicata* against him by proving such fraud or collusion. (Vol 22) 1935 Lah 44 (46)

13. Probate proceedings—[1] As a rule of practice it is expedient to have a guardian appointed where a will, of which probate is sought, affects the interests of a minor. (Vol 7) 1920 Cal 743 (745) (DB)

[2] This order will not apply to proceedings in probate which have not reached a contentious stage. (Vol 27) 1942 Cal 236 (237) (DB) * (Vol 7) 1920 Cal 630 (631) (DB).

14. Effect of sub-rule (3).—[1] A guardian *ad litem* appointed in the trial Court continues to be guardian in the appellate and revisional Courts also. (Vol 28) 1941 Pat 224 (224) (DB).

[2] A guardian does not automatically cease to function on the minor attaining majority unless he is discharged by a specific order. (Vol 27) 1942 Pat 348 (349) (DB) * (Vol 26) 1939 Pat 601 (602, 603): 18 Pat 539 (DB).

[3] The minor must apply for the discharge of the guardian on his attaining majority. Majority will not affect validity of any proceedings where he fails to do so. (Vol 27) 1942 Pat 348 (349) (DB). * (Vol 26) 1939 Pat 601 (602): 18 Pat 539 (DB).

ORDER 32 RULE 4—SYNOPSIS.

- 1 Scope of the rule.
2. Who may be next friend or guardian of a minor.
3. Persons with adverse interest.
4. Guardian appointed by competent authority.
5. Appointment of person as guardian without his consent.
6. Officer of Court as guardian *ad litem*—Sub-rule (4).

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

[1882—Ss. 440, 443, 445, 456, 457; 1877—Ss. 440, 443, 445, 456; Cf. R. S. C., O. 65 R. 13.]

O. 32 R. 4 (contd.)

7. Wishes of the minor, if should be considered

8. Leave to sue or defend on behalf of a minor.

9. Local amendments.

1. Scope of the rule.—[1] This rule deals with the question as to who can act as next friend or be appointed as guardian of a minor for the suit, and any person who is of sound mind and has attained majority may so act or be so appointed, provided his interest is not adverse to that of the minor. (Vol 17) 1930 Lah 302 (302).

2. Who may be next friend or guardian of a minor.—[1] Any person can be the next friend or the guardian of a minor. (Vol 12) 1925 Mad 1285 (1286, 1287) (DB). (Natural father, a proper guardian to assert adoptive right of his minor son.) * (1862) 1 Bom H C R (O C) 134 (135) (Mother appointed guardian.) * (Vol 9) 1922 Mad 273 (274); 45 Mad 423 (DB) * (Vol 13) 1926 Oudh 406 (407); 1 Luck 462 (DB) (Do) * ('90) 13 Mad 197 (199) (DB) (Collector can be next friend of a ward.)

[2] A guardian cannot himself be a minor. (Vol 12) 1925 Oudh 178 (178).

[3] The guardian must not be adversely interested. (Vol 17) 1930 Pat 97 (97) (DB).

[4] An undischarged insolvent satisfying other conditions can be appointed a guardian. (Vol 12) 1925 Nag 876 (876)

3. Persons with adverse interest.—[1] A person holding an adverse interest to that of the minor is disqualified to be the guardian of the minor ('08) 31 All 572 (582); 36 Ind App 168 (PC).

[2] A decree obtained against a minor represented by a guardian holding adverse interest will be a nullity. (Vol 30) 1943 Bom 387 (388) (DB) * ('08) 31 All 572 (582); 36 Ind App 168 (PC).

[See however (Vol 16) 1929 Mad 393 (394) (DB) (The decision does not advert to 31 All 572; 36 Ind App 168 (PC) and therefore cannot be considered correct) * (Vol 7) 1920 Mad 645 (646); 43 Mad 342 (DB) (Do)]

[3] The question whether the interest of the guardian is adverse to that of the minor depends on the facts and the circumstances of each case (Vol 9) 1922 Nag 239 (241) * (Vol 2) 1915 Mad 433 (434) (DB) * ('80) 6 Cal L Rep 413 (415) * ('93) 1893 All W N 104 (105) (DB) * (Vol 23) 1936 Mad 951 (952) (DB) * (Vol 23) 1936 Lah 161 (163) (DB) * (Vol 22) 1935 Lah 44 (46) * (Vol 9) 1922 Pat 450 (474); 1 Pat 506 (DB).

[See however (Vol 4) 1917 Pat 700 (700) (DB) (Mortgage bond by grandfather—Mortgage suit—Minor's father appointed guardian *ad litem*—Held, minor properly represented)].

[4] The question whether a person who has executed a document or entered into a transaction on behalf of the minor is a person whose interests

are adverse to that minor in a suit based upon that document or transaction depends upon the facts of each case. (Vol 30) 1943 Bom 387 (388, 389) (DB) * (Vol 4) 1917 Pat 700 (700) (DB) * (Vol 16) 1929 Mad 213 (222); 52 Mad 275 (F.F.) * (Vol 20) 1933 Mad 806 (812) * (Vol 22) 1935 Oudh 183 (189); 10 Luck 293 (DB) * (Vol 24) 1937 All 552 (554) (DB) * (Vol 24) 1937 All 108 (110) (DB) (Do).

[But see (Vol 9) 1922 All 91 (93); 44 All 525 (DB) * (Vol 3) 1916 All 22 (23); 33 All 315 (DB) * (Vol 9) 1922 Pat 450 (474); 1 Pat 506 (DB) * (Vol 26) 1938 Rang 468 (474) (DB).

[5] The validity of a decree against a minor cannot be attacked in execution proceedings on the ground that the interest of the guardian *ad litem* was adverse to that of the minor. (Vol 23) 1936 Mad 618 (628); 59 Mad 642 (DB).

4. Guardian appointed by competent authority.—[1] Guardian appointed by competent authority should be appointed by Court unless for reasons stated it appoints some one else in the interest of the minor (Vol 2) 1915 Cal 40 (41) (DB) * (Vol 22) 1935 Cal 167 (165); 61 Cal 1038 (DB) * ('98) 20 All 162 (164) (DB) * ('91) 1891 All W N 42 (43) (DB).

[See (Vol 24) 1937 Pat 108 (109); 15 Pat 667 (DB)].

[2] Violation of provision making it the duty of Court to appoint as guardian *ad litem* a person who has already been appointed guardian by a competent authority is a mere irregularity which does not vitiate the proceedings in the absence of prejudice to minor. (Vol 20) 1942 All 248 (249); 1 L R (1942) All 509 (DB) * ('07) 29 All 290 (291) (DB) * ('08) 7 Cal L Jour 270 (278) (DB) * (Vol 5) 1918 Pat 520 (521) (DB).

[See however ('66) 1 Agra 175 (177)].

[But see (Vol 7) 1920 Mad 745 (746); 43 Mad 808 (DB) * (Vol 15) 1928 Mad 1057 (1058)].

[3] Testamentary guardian appointed by a Hindu father, even assuming he can be appointed under the Hindu Law, is not a guardian appointed by a competent authority. ('07) 31 Bom 413 (417) (DB).

[But see ('06) 8 Bom L R 522 (524)].

5. Appointment of person as guardian without his consent.—[1] Sub-rule (3) controls both sub-r. (1) and Sub-r. (2) and provides that no person shall, without his consent, be appointed guardian for the suit. (Vol 8) 1921 Cal 600 (601) (DB).

[2] Consent to be appointed as guardian may be express or implied. (Vol 12) 1925 Mad 30 (37); 47 Mad 783 (FB) * (Vol 8) 1921 All 338 (394, 395); 43 All 104 (DB) * (Vol 11) 1924 Lih 97 (98) * (Vol 10) 1923 Pat 231 (235); 2 Pat 236 (DB) * (Vol 14) 1927 Oudh 173 (174) (DB) * (Vol 14) 1927 Oudh 560 (560); 2 Luck 707.

PROVINCIAL AMENDMENTS

ALLAHABAD

Substitute the following for Rule 4 :

"4. (1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by clause (5) of this rule be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may in its discretion, for reasons to be recorded, award costs of the suit, or compensation under Section 35A or Section 95 against the next friend personally as if he were a plaintiff

(5) Costs or compensation awarded under clause (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable "

CALCUTTA

Substitute the words " Except as otherwise provided in this Order," for the words " where there is no other person fit and willing to act as the guardian for the suit." [13-6-1927.]

LAHORE

(i) New sub-rule (2a) was inserted :

"(2a). Where a minor defendant has no guardian appointed or declared by competent authority, the Court may, subject to the proviso to sub-rule (1), appoint as his guardian for the suit a relative of the minor.

If no person be available who is a relative of the minor, the Court shall appoint one of the other defendants, if, any, and failing such other defendant, shall ordinarily proceed under sub-rule (4) of this rule to appoint one of its officers or a pleader "

(ii) And the following words were added to Sub-rule (3) :

" but the Court may presume such consent to have been given, unless it is expressly refused."

(iii) In sub-rule (4) after the words " officers " insert the word " or a pleader " and for the word " officer " substitute the word " person."

MADRAS

Delete Rule 4. See now the Provincial Amendment made in Madras to Rule 3.

NAGPUR

For Rule 4, substitute the following :

Who may act as next friend or guardian "4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

for the suit. Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

O. 32 R. 4 (contd.)

[3] The object of the rule is to safeguard the interests of the minor by ensuring that the guardian has taken upon himself the defence of the minor. (Vol 5) 1918 Pat 211 (213) * ('81) 5 Bom 306 (309) (DB).

[4] Guardian appointed without express or implied consent of person so appointed—Decree passed is a nullity (Vol 3) 1916 All 22 (23) : 38 All 815 (DB) * (Vol 14) 1927 Cal 488 (471) : 54 Cal 450 (3B) * (Vol 8) 1921 Cal 600 (602) (DB) * (Vol 23) 1936 Pesh 40 (41) * (Vol 3) 1916 Mad 647 (648) (DB) * (Vol 4) 1917 Pat 161 (169) (DB) * (Vol 9) 1922 Pat 448 (449) : 2 Pat 7 (DB).

[See (Vol 25) 1938 Pat (97) (99) : 16 Pat 682 (DB).

[But see (Vol 12) 1925 Mad 80 (82) : 47 Mad 783 (FB) (A mere irregularity which will not vitiate in the absence of proof of prejudice to minor) * (Vol 10) 1923 Pat 242 (258, 259) : 2 Pat 835 (DB) (Do) * (Vol 4) 1917 Pat 657 (657) : 2 Pat L Jour 890 (DB) (Do).

[5] On face of record minor represented by a qualified person—Procedure in appointing guardians not complied with—Non-compliance may be ground for setting aside decree on proof of prejudice to minor—Otherwise decree not a nullity. (Vol 10) 1928 Pat 242 (250) : 2 Pat 835 (DB).

[6] Following are the views regarding presumptions that can be raised in respect of consent by proposed guardian :

[a] Consent cannot be presumed from the fact of issue of notice under O. 21 R. 22 to him (Vol 12) 1925 Cal 23 (25) (DB).

[See (Vol 8) 1921 Cal 584 (589) (DB)]

(b) Person named as guardian but fails to appear in suit cannot be presumed to have consented (Vol 12) 1925 Oudh 638 (638) (DB).

(c) Proposed person having opportunity to object but failing to do so will be presumed to have consented. (Vol 12) 1925 All 214 (215) (DB).

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act in either capacity.' [29-6-1943.]

ODDH

Substitute the following for Rule 4:

"4. (1) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by sub-rule (5) of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit, or compensation under Section 35A or Section 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under sub-rule (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

PATNA

In sub-rule (1) for the words "Where there is no other person fit and willing to act as guardian for the suit," in the first sentence of the sub-rule, *substitute the following* :

"Where the person whom the Court, after hearing objections, if any, under sub-rule (4) of Rule 3, proposes to appoint as guardian for the suit, fails, within the time fixed in a notice to him to express his consent to be so appointed."

RULE 4-A—ALLAHABAD

Add the following Rule 4A :

"R 4-A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or, where there is no such guardian, the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness, to act, or failing any such person, an officer of the Court.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit : Provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require."

O 32 R. 4 (contd.)

6. Officer of Court as guardian ad litem—Sub-rule (4)—[1] Where the proposed guardian does not appear an application should be made to the Court for the appointment of an officer of Court as guardian (1912) 16 Cal L Jour 318 (320, 321) (DR) * (1912) 15 Cal L Jour 446 (448) (DB) * (81) 5 Bom 310 (312) (DB).

[2] Where the proposed person declines the guardianship, the appointment of an officer of the court as guardian should be applied for. (Vol 8) 1921 Cal 534 (536) (DB) * (28) 110 Ind Cas 346 (346) (Lab) (DB).

[3] An officer of the Court can be appointed as guardian only when there is no other person fit

and willing to act as guardian. (Vol 4) 1917 Mad 655 (656) * (Vol 5) 1918 Cal 814 (815) (DB) * (Vol 17) 1930 Oudh 110 (112) : 5 Luck 453.

[See (Vol 21) 1934 Cal 474 (475) : 61 Cal 227.]

[4] The appointment of a court-guardian without any enquiry as to whether there was any other person fit and willing to act as guardian is only an irregularity which will not render the decree a nullity but will be a ground for setting it aside on proof of prejudice (Vol 16) 1929 Pat 860 (862) : 8 Pat 558 (DB) * (Vol 21) 1934 Pat 111 (113) * (Vol 11) 1924 Mad 281 (282) (DB)

[5] The appointment of court-guardian obtained by the fraud of the opposite party, instead of another who could have conducted the case better

NAGPUR

Add the following Rule 4A :

Procedure for appointment of guardian for the suit. "R 4A. (1) No person, except the guardian appointed or declared by competent authority shall, without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and to any guardian for the minor appointed or declared by competent authority, or, where there is no such guardian, the person in whose care the minor is, and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or, where he is considered unfit, or disqualified under sub-rule (3), the Court may, in the absence of any other person, fit and willing to act, appoint any of its ministerial officers, or a legal practitioner to be guardian for the suit. If a legal practitioner is appointed guardian for the suit, the Court shall pass an order stating whether he is to conduct the case himself or engage another legal practitioner for the purpose.

(6) In any case in which there is a minor defendant, the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit including the expenses of a legal practitioner appointed guardian for the suit shall be paid. The costs so incurred by the plaintiff shall be adjusted in accordance with the final order passed in the suit in respect of costs."

[29-6-1943.]

OUDH

Add the following Rule 4A :

"R. 4A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit, the natural guardian of the minor, if qualified, or, where there is no such guardian, the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit : Provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and circumstances of the case may require.

O. 32 R. 4 (contd.).

on behalf of the minor, is only an irregularity which will not render the decree a nullity but will be a ground for setting it aside on proof of prejudice to minor. (Vol 18) 1931 (Mad 674 (877) (Vol 10) 1923 Mad 558 explained).

[6] Payment of costs to be incurred by the guardian in conducting the proceedings on behalf of the minor may be provided for by the Court. ('28) 110 Ind Cas 346 (347) Lah (DB) * (Vol 20) 1933 Nag 329 (329) (Appellate Court also has the power) * (Vol 10) 1923 All 298 (298) : 45 All 350 (DB) * ('04) 28 Bom 626 (626) (DB) * (Vol 21) 1934 Cal 474 (477) : 61 Cal 27.

[7] Court-guardian not raising defence due to want of funds—Minor can avoid the decree passed

(Vol 13) 1926 Mad 950 (751) (DB) * (Vol 2) 1915 All 62 (64) : 37 All 179 (DB) * (Vol 6) 1919 All 324 (325) : 41 All 235 (DB).

7. Wishes of the minor, if should be considered—[1] Wishes of the minor should be considered while appointing his next friend. (Vol 16) 1929 Lah 257 (260) (DB).

[2] Where a guardian *ad litem* is appointed the minor should be consulted on the choice. (Vol 8) 1921 Pat 25 (26) : 6 Pat L Jour 82 (DB).

8. Leave to sue or defend on behalf of a minor.—[1] Leave to sue or defend is necessary only in cases where there is already a guardian and some other person wishes to represent the minor as the next friend or guardian *ad litem*. The absence of a formal order granting leave is

Representation of minor
by next friend or guardian
for the suit.

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

[1882—Ss. 441, 444; 1877—S. 441.]

O. 32 R. 4 (contd.).

not fatal to the suit. (1909) 31 All 7 (9) (DB)*
(Vol 22) 1935 All 649 (650).

9. Local amendments

(Allahabad)

[1] Under the rule amended by Allahabad High Court leave of Court allowing some person other than the certificated guardian need not be in writing and an oral leave can be inferred from the circumstances of the case. (Vol 27) 1940 All 202 (202, 203).

[2] Consent by a person in whose custody the minor is, is not necessary for being appointed as guardian. (Vol 27) 1940 All 467 (470) (DB).

(Patna)

[1] Appointment of pleader as guardian where the father of minor sons refused notices in a suit on mortgage executed by him on behalf of himself and the minors in spite of the mother being alive was held proper. (Vol 31) 1944 PC 14 (16): ILR (1944) Kar (PC) 164 (PC).

ORDER 32 RULE 5—SYNOPSIS

1. Applicability.
2. Who may apply.
3. Effect of application without next friend or guardian.
4. Duration of appointment
5. Pleader's liability for costs.
6. Suit for custody of minor.

1. **Applicability.**—[1] The rule is applicable only while proceedings in a suit are still pending. (Vol 27) 1940 Oudh 279 (280, 282): 15 Luck 850.

[2] The rule applies to proceedings for filing an award. (Vol 27) 1940 Lah 164 (165).

2. **Who may apply.**—[1] Every application on behalf of a minor other than one under R 10 Sub-R. (2) shall be made by his next friend or guardian. (Vol 26) 1938 All 601 (605): ILR (1938) All 829 (DB).

[2] Application by a discharged guardian is not valid and should be rejected. (Vol 9) 1922 Pat 256 (258): 6 Pat L Jour 171 (DB).

[3] Next friend can apply on behalf of minor to defendant transfer suit to some other Court

where such necessity arises before appointment of a guardian by Court. (1889) 16 Cal 771 (776).

3. **Effect of application without next friend or guardian.**—[1] An order passed on an application without the minor being represented by a next friend or guardian does not bind him. (Vol 27) 1940 Lah 164 (165) * (1873) 20 Suth WR 120 (122) (DB) * (1889) 18 Bom 244 (236) (DB).

[2] Court is not bound to discharge an order passed without the representation of the minor and Sub-R. (2) does not deprive the Court of its discretion to allow proceedings to continue in the interests of the minor. (Vol 26) 1939 Sind 332 (332, 333) (DB).

[See also (1938) 32 Sind LR 215 (220) (DB).

4. **Duration of appointment.**—[1] Guardian *ad litem* once appointed continues for the whole life unless the appointment is terminated by discharge, death or retirement of guardian. (1897) 14 All 35 (37) (DB) * (Vol 17) 1930 All 646 (646) (DB)* (1907) 5 Cal L Jour 434 (438, 439) (DB) * (1905) 1 Nag LR 128 (129). * (Vol 22) 1935 Mad 795 (796): 58 Mad 802 (DB).

[See (Vol 23) 1936 Pat 153 (156) (DB)]

[2] Appointment continues for the purposes of execution. (Vol 26) 1939 Rang 444 (445) * (Vol 17) 1930 Nag 185 (186) * (Vol 5) 1918 Oudh 379 (388) (DB). * (Vol 24) 1937 Cal 259 (261): ILR (1937) 2 Cal 127 (DB).

[3] The appointment continues for the purposes of appeal. (Vol 26) 1939 Rang 444 (445) * (Vol 17) 1930 All 456 (457): 52 All 494 (DB) * (Vol 11) 1924 All 79 (80): 45 All 623 (DB) * (1899) 22 Mad 187 (188) (DB) * (Vol 19) 1932 Cal 888 (889): 52 Cal 1108 (1109) * (Vol 13) 1931 Lah 635 (636) * (Vol 11) 1924 Nag 133 (134) * (Vol 17) 1930 Nag 177 (178).

[4] Deputy Registrar of High Court appointed guardian *ad litem* ceases to be such on admission of appeal to the Privy Council though he can represent the minor in an application for leave to appeal. (Vol 15) 1928 Cal 286 (287): 55 Cal 758 (DB).

5. **Pleader's liability for costs.**—[1] Pleader who might have known or knew about the minority and files an application without next friend or guardian is liable to pay costs to the other party. (1882) 11 Cal LRep 15 (16) (DB).

6. **Suit for custody of minor.**—[1] In a suit for custody of minor he need not be separately represented. (1913) 25 Mad L Jour 661 (660) (DB).

Receipt by next friend or guardian for the suit of property under decree for minor.

6. (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either —

- (a) by way of compromise before decree or order, or
- (b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

[1882—S. 461; 1877—S. 461.]

PROVINCIAL AMENDMENT

MADRAS

Add the following proviso to sub-rule (2) :

"Provided that the Court may, in its discretion, dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the karnavan of a Malabar tarwad and the decree is passed in favour of the joint family or the tarwad."

[R. O. C. No. 4806 B-1 of 1930.]

ORDER 32 RULE 6—SYNOPSIS

1 a Scope and applicability of the rule.

1. Right of manager of joint Hindu family to withdraw money or give discharge.

2. Payment to next friend without leave.

3. Security for protection of minor's property.

1. a. Scope and applicability of the rule.—

[1] This rule is based upon the principle that the Court has the right and the duty to see that the guardians act properly and *bona fide* in the interests of the minors and that no suits are instituted or carried on by them for their own benefit only. (Vol 20) 1933 Mad 890 (911) : 57 Mad 95 (FB) * (Vol 26) 1939 Cal 588 (592, 593) (DP) (Reversed in (Vol 30) 1943 P C 96 : 70 Ind App 68 : ILR (1943) Kar (PC) 97 (PC) on another point)

[2] The rule applies to a certificated guardian who acts as next friend of guardian *ad litem* for a minor plaintiff or defendant. (Vol 22) 1935 Cal 681 (692) : 63 Cal 92 (DB).

[3] This rule does not control the substantive provisions of law in S. 194 of the Succession Act of 1925. (Vol 20) 1933 Cal 17 (DB).

1 Right of manager of joint Hindu family to withdraw money or give discharge.—[1] Where the managing member of a joint Hindu family is himself the next friend or guardian of a minor party, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. (13) 36 Mad 235 (303) : 40 Ind App 132 (PC).

[2] The karta who represents minor parties to the suit as their next friend or guardian, cannot, without leave of the Court under this rule, give a valid discharge of the decree or withdraw any moneys deposited by the judgment-debtor for the benefit of the minor members. (42) 1942 2 Mad L Jour 736 (738, 739) (DB) * (Vol 12) 1925 Mad 78 (80) : 47 Mad 920 (DB) * (Vol 29) 1942 Lah 280 (283) (DB) * (Vol 24) 1937 Lah 387 (389) * (Vol 24) 1937 Cal 649 (651) (DB) * (Vol 26) 1939 Cal 588 (592) (DB) : 35 Cal 561, held impliedly overruled (1913) 36 Mad 295 : 40 Ind App 132 (PC) * (Vol 32) 1945 Nag 95 (96) : ILR (1945) Nag 242 (DB).

[But see (38) 35 Cal 561 (565, 566) (DB) (Decided before (1913) 36 Mad 295 : 40 Ind App 132 (PC) * (Vol 2) 1915 Lah 155 (156) (Assumed).]

[3] Subsequent to the receipt of money by the Karta in satisfaction of a decree, Karta certifying satisfaction of the decree to the Court and the Court entering satisfaction. Minor co-decree-holder cannot ignore such payment and seek to execute the decree again. (Vol 23) 1936 Mad 801 (803) (DB) (Overruled in (Vol 27) 1940 Mad 124 : ILR (1940) Mad 372 (FB) . on another point.)

[4] Managing member not being next friend or guardian of the minor His right to give a discharge on behalf of the family under the Hindu law is not affected by this rule. (Vol 14) 1927 Pat 329 (330) (DB) * (Vol 28) 1936 Mad 494 (496, 497) (DB).

[See (Vol 30) 1943 Pat 10 (11) : 21 Pat 322 (DB)]

[5] Where the decree itself dispenses with the separate application and sanction which might be necessary under this rule, and allows the manager to receive the amount so long as he furnishes security, the latter can give a valid discharge without the leave of the Court under this rule (Vol 16) 1929 Bom 382 (384).

2. Payment to next friend without leave.—

[1] Payment made by judgment-debtor to next friend or guardian without leave of the Court under this rule is not a valid payment. (Vol 11) 1924 Mad 279 (280) (DB).

[See also (Vol 30) 1943 Nag 231 (233) : ILR (1944) Nag 131 * (Vol 11) 1924 Lah 661 (682) * (Vol 17) 1930 Lah 496 (496) (DB)].

[2] Payment directed by a compromise decree to be made out of court to the next friend and compromise receiving sanction of the Court. Necessity for leave of the Court under this rule for the receipt of the money by the next friend under this compromise decree is not dispensed with. (Vol 26) 1939 Mad 814 (816) (DB).

3. Security for protection of minor's property.—

[1] The provision in sub-r (2) as to taking of security is mandatory. (Vol 30) 1943 Mad 334 (335) (DB).

[2] The fact that the next friend or guardian is the manager of a joint Hindu family does not exempt him from giving security under Sub R. (2) (Vol 3) 1916 Mad 938 (938) (Decision before the amendment of the rule by the Madras High Court). * (Vol 14) 1927 Sind 268 (269) (DB).

7. (1) No next friend or guardian for the suit shall, without leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise by next friend or guardian for the suit or agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

[1882—S. 462; 1877—S. 462. See S. 147.]

PROVINCIAL AMENDMENTS

MADRAS

Insert the following as sub-rule (1A) :

"(1A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this Schedule."

[Dis. No. 1647 of 1910.]

SIND

Add the following as sub-rule (1A) after sub-rule (1) :

"(1A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability, and such minor or other person under disability is represented by counsel (advocate) or pleader, the counsel (advocate) or pleader shall file in Court with application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party, shall recite the sanction of the Court there to and shall set out the terms of the compromise in Form No. 24 in Appendix D to this Schedule."

O 32 R. 6 (contd.).

[See also (Vol 14) 1927 Sind 187 (190) : 22 Sind LR 206 (DB)].

[See however (Vol 20) 1933 Cal 17 (18, 19) (DB)].

[But see ('08) 11 Oudh Cas 246 (247) (DB)].

[3] The bond should be duly stamped and affixed with court-fee stamp as required by Art 6, Sch. II of the Court-fees Act. (Vol. 12) 1925 Cal 906 (907) : 53 Cal 101 (FB).

[4] Portion of the money due under a decree in favour of a minor and his next friend deposited in Court. It is sufficient if the next friend furnishes security to the extent of the minor's share in the amount which is actually being sought to be withdrawn from the Court. (Vol 24) 1937 Sind 173 (173, 174).

ORDER 32 RULE 7—SYNOPSIS

1. Scope and object of the rule.
2. "Without the leave of the Court expressly recorded."
3. Where leave is granted under a mistake.
4. Effect of compromise without leave of the Court.
5. Bond executed by minor and an adult in pursuance of a compromise without the leave of the Court.

6. Compromise by natural guardian, father or managing member of a Joint Hindu family.
7. Compromise by adult members of a Malabar tarwad.
8. Compromise by adult members of a joint Hindu family.
9. Agreement to be bound by oath, if a compromise.
10. Abandonment of issue, if a compromise.
11. Withdrawal of suit.
12. Transfer without leave, of decree in favour of minor.
13. Agreement to refer to arbitration
 14. Gross negligence of next friend or guardian
 15. Fraud.
 16. Minor attaining majority pending suit.
17. Procedure to set aside a compromise decree.
18. Local amendments

1. Scope and object of the rule.—[1] The duty of safeguarding the interests of the minors against dishonest, careless or unintelligent guardians or next friends is thrown upon the Court. (Vol 28) 1941 All 481 (482) : ILR (1941) All 677. * (12) 1912 Pun Re No 95 (FB) 1912 (unW) R 159 15 Ind Cas 161 (168) * (Vol 22) 1935 Oudh 287 (288) : 11 Luck 30 (DR) * (Vol 24) 1937 Cal 658 (660) : ILR (1937) 1 Cal 556 * (Vol 25) 1938 Mad 539 (541) : ILR (1938) Mad 819 (FB) * (Vol 20) 1933 Mad 890 (911) : 57 Mad 95 (FB).

O. 32 R. 7 (contd.)

[2] A guardian or next friend to enter into an agreement or compromise on behalf of the minor should obtain the express leave of the Court which should give such leave only if it is in the interests of the minor (Vol 21) 1934 Mad 485 (487) * ('95) 17 All 581 (532) (DB) * (Vol 18) 1931 All 425 (426) (DB).

[3] When the result of evidence on what is beneficial to the minor is doubtful, the opinion of relatives and guardians of minor who have no personal interest in the matter is of great value. (Vol 30) 1943 Lah 313 (318) : ILR (1943) Lah 583 (DB).

[4] The rule applies only where the minor is a party to a pending suit and the agreement or compromise is with reference to such suit. (Vol 22) 1935 Sind 235 (239) * (Vol 27) 1940 Bom 33 (35) : 41 Bom L R 1208 (1211).

[5] The rule does not apply to a case where minor's interests may be affected by reason of a compromise in a suit to which he is not a party. (Vol 14) 1927 Cal 870 (873) : 55 Cal 210 (DB) * ('05) 1 Cal L Jour 388 (397) (DB).

[6] The rule does not apply where the agreement is entered into with a third person who is not a party to the suit. (Vol 30) 1943 P C 96 (97) : 70 Ind App 68 : ILR (1943) Kar (PC) 97.

[7] A compromise by the next friend of a minor assignee of a decree who has applied to be brought on the record under O 21 R. 16 will come under this rule even though the substitution has not yet been ordered. (Vol 29) 1942 All 150 (152) : ILR (1942) All 144.

[8] An application for leave to enter into compromise is necessary though no leave is necessary to negotiate the particular terms. (Vol 11) 1924 Nag 180 (182).

[9] Where an application is made, the Court will, having regard to the interests of the minor, pass a decree in terms thereof under O. 23 R. 8 (Vol 15) 1928 Cal 247 (248) * (Vol 21) 1934 Rang 168 (169, 171) (DB).

[10] Where the guardian withdraws his consent or refuses to assent to the compromise before the Court passes the decree, the Court will refuse to sanction the compromise ('99) 22 Mad 378 (380) (DB) * ('26) 91 Ind Cas 521 (521) (DB) (Mad) * (Vol 33) 1946 Sind 93 (97) : ILR (1945) Kar 466.

[11] The Court cannot force a compromise upon the minor against the wishes of his guardian. (Vol 27) 1940 Mad 650 (651) * (Vol 12) 1925 All 570 (571) : 47 All 782 (DB) * (Vol 10) 1923 Cal 685 (688) (DB).

[12] Where the guardian is acting improperly in refusing to assent to a compromise which is *prima facie* beneficial to the minor, the Court can remove the guardian and appoint another. (Vol 10) 1923 Cal 685 (688) (DB).

[13] Sub-rule (2) has no reference to the effect of any compromise between adults alone although the minor may be a party to the suit. (Vol 12) 1925 Cal 866 (869) (DB).

[14] The rule applies to compromise by all guardians including a certificated guardian. ('03) 7 Cal WN 90 (92) (DB) * (Vol 26) 1939 All 607 (608).

[15] The rule applies to compromises by a natural guardian. (Vol 26) 1939 All 607 (608).

[16] Merely because the guardian submits to decree it cannot be said that his interests are

adverse to minor. (Vol 80) 1943 Bom 387 (391) (DB).

2. "Without the leave of the Court expressly recorded."—[1] A suit relating to the estate of an infant has the effect of making him a ward of the Court and no act can be done affecting the property of the minor unless under the express direction of the Court. (Vol 29) 1942 All 85 (88) : ILR (1941) All 807 (DB) * (Vol 8) 1921 Pat 14 (16) : 6 Pat L Jour 190 (DB) * ('03) 27 Mad 377 (378) * ('02) 29 Cal 735 (737) (DB).

[2] The leave of the Court should be express in all cases. (Vol 30) 1943 Lah 313 (316) : ILR (1943) Lah 483 (DB) * (Vol 27) 1940 Pesh 12 (13) * (Vol 27) 1940 Pat 663 (665) : 19 Pat 343 (DB) * ('89) 13 Bom 137 (146) * ('31) 1931 All L Jour 76 (78) (DB) * (Vol 26) 1933 Bom 296 (297) * (Vol 26) 1939 Pat 278 (280) : 18 Pat 271 (DB) * (Vol 24) 1937 All 65 (69) : ILR (1937) All 317 (FB).

[See however (Vol 13) 1926 Sind 128 (128) : 20 Sind LR 116 (DB) * ('12) 14 Ind Cas 6 (6, 7) (Oudh)]

[3] Leave of Court cannot be implied from the mere fact that a decree has been passed by the Court adopting the terms of the compromise. (Vol 29) 1942 All 85 (88) : ILR (1941) All 807 (DB) * (Vol 12) 1925 All 570 (570) 47 All 782 (DB) * ('83) 9 Cal 810 (812) (DB) * ('81) 3 Mad 103 (104) (DB).

[But see (Vol 21) 1934 Lah 176 (177) : 15 Lah 726.]

[4] The fact that the minor is described as such in the title of the suit and that the terms of the compromise are before the Court is not enough to confer leave but there ought to be evidence in the order itself to show that the Court directly applied its attention to the fact of minority and gave leave. ('06) 28 All 585 (588, 589) : 33 Ind App 128 : 9 Oudh Cas 219 (PC).

[5] Leave to enter into an agreement or compromise must be obtained before the agreement is entered into. (Vol 27) 1940 Pat 663 (665) : 19 Pat 343 ((Vol 24) 1937 All 65 : ILR (1937) All 817 (FB) and (Vol 26) 1939 Pat 278 : 18 Pat 271 followed) * (Vol 33) 1946 Sind 93 (96) : ILR (1946) Kar 466 (Leave granted subsequent to decree is ineffective.) * (Vol 33) 1946 Mad 377 (379).

[But see (Vol 32) 1945 Pat 391 (397) : 24 Pat 529 (DB)].

[6] The rule does not require any particular form in which the permission must be recorded. (Vol 29) 1942 Nag 26 (28) : ILR (1942) Nag 642 (DB) * (Vol 26) 1939 Pat 387 (388) ((Vol 10) 1923 Pat 375 : 2 Pat 538 followed).

[7] The Court should before granting leave exercise a judicial discretion as to the propriety of the compromise in the interests of the minor. (Vol 29) 1942 All 85 (88) : ILR (1941) All 807 (DB) * (Vol 30) 1933 Lah 468 (469) (DB) * ('02) 7 Cal WN 90 (93) (DB) * ('05) 8 Cal L Jour 274 (277) (DB) * (Vol 19) 1932 Lah 521 (522) (DB) * (Vol 20) 1933 All 149 (150) (DB).

[8] The Court must have materials before it to satisfy its mind that the proposed compromise is for the benefit of the minor. (Vol 29) 1942 Pat 344 (DB) * (Vol 14) 1927 Cal 796 (799, 800) (DB) * ('48) 21 Mad 91 (93) (DB) * (Vol 24) 1937 Cal 656 (660) : ILR (1937) 1 Cal 686.

[9] No compromise involving an apparent surrender of the infant's rights ought to be sanctioned

O. 32 R. 7 (contd.)

by Court unless it is for the benefit of the minor (Vol 10) 1923 All 267 (269) : 45 All 263 (DB) * (Vol 1) 1914 Lah 112 (113) : 1914 Pun Re No 96 (DB) * (Vol 20) 1933 Lah 468 (469) (DB) * (Vol 22) 1935 Oudh 287 (288) : 11 Luck 30 (DB).

[10] What particular materials a Judge may call for deciding whether the compromise is in the interests and for the benefit of the minor, is a matter for the exercise of judicial discretion (Vol 18) 1926 Bom 291 (296) (DB) * (Vol 20) 1933 Lah 468 (469) (DB)

[11] An affidavit by the guardian setting forth the terms of the compromise and how they are beneficial to the minor and if it is a heavy case a certificate in addition from a Counsel that it is a fit and proper one to be sanctioned should be filed (Vol 28) 1941 All 431 (432) : ILR (1941) All 677 * (Vol 16) 1929 Bom 360 (451) (DB) * (Vol 17) 1930 Cal 539 (541, 543) (DB) * (Vol 22) 1935 Sind 95 (96, 97) (DB)

[12] There should be "a clear expression of opinion by the proper Court that such a compromise is a beneficial one" to the minor (Vol 9) 1922 PC 186 (187) : 48 Ind App 241 : 48 Cal 994 (PC).

[13] Compromise affecting interests of minors submitted to Privy Council for approval—High Court should certify its opinion whether compromise is in the interest of minors (Vol 24) 1937 PC 38 (35) : 64 Ind App 1 : ILR (1937) All 1 (PC)

[14] An order granting leave to compromise need not expressly state that it has considered the benefit of minor; the mere order saying "granted" implies that the Court has applied its mind to that question. (Vol 6) 1919 Mad 305 (307) (DB) - ('01) 26 Bom 109 (109, 114) (DB). (Chundavarkar, J Contra) * (Vol 14) 1927 Cal 796 (799) (DB) * ('12) 16 Ind Cas 397 (395) (DB) (Cal) * (Vol 14) 1927 Lah 330 (332) * (Vol 4) 1917 Lah 118 (114) : 1917 Pun Re No. 36 * (Vol 10) 1923 Pat 370 (377) : 2 Pat 538 (DB) * (Vol 25) 1938 Pat 202 (202) (DB) * (Vol 24) 1937 Oudh 521 (523) * (Vol 29) 1942 Nag 26 (26) : ILR (1942) Nag 642 (DB)

[But see (1895) 17 All 531 (532) (DB) * (1906) 29 Mad 104 (106) (DB) * (1908) 8 Cal L Jour 31 (33) (DB) * (Vol 24) 1937 Cal 658 (660, 661) : ILR (1937) 1 Cal 586]

[15] There would be a difference in degree between the scrutiny necessary when the application is merely to refer the dispute to arbitration and when it relates to a compromise which finally settles the matters in controversy. (Vol. 29) 1942 Nag 26 (29) : ILR (1942) Nag 642 (DB).

[16] Compromise otherwise valid and binding—Question cannot be raised in subsequent suit between the parties. (Vol. 27) 1940 All 143 (144) : ILR (1940) All 132 (DB),

3 Where leave is granted under a mistake.—

[1] A compromise entered into under a misapprehension as to material facts is not valid and binding upon minor though sanctioned by Court. (Vol 16) 1929 Lah 279 (280) (DB) * (Vol. 7) 1920 Lah 408 (409) : 1 Lah 344 (DB).

[2] A compromise brought about by the mistake of the parties and of the Court with regard to the subject-matter of the suit is not valid and binding upon the minor though sanctioned by the Court. (1916) Cal 337 (365, 706) (DB).

4 Effect of compromise without leave of the Court—[1] In the absence of leave, a compromise on behalf of the minor cannot be supported. (Vol 2) 1915 PC 33 (37) : 39 Mad 115 (PC).

[2] A compromise entered into without leave is not a nullity so far as regards parties other than the minor are concerned ('10) 14 Cal W N 322 (324) (DR) * (Vol 12) 1925 Nag 925 (326) : 21 Nag LR 43 * (Vol 23) 1936 All 811 (814).

[3] A compromise entered into without leave of Court cannot be avoided by any person other than the minor himself (Vol 28) 1941 Rang 103 (104) : 1940 Rang LR 772 * (Vol 27) 1940 Mad 650 (652) * (Vol 27) 1940 Sind 178 (180) : ILR (1940) Kar 327 (DB) * (Vol 11) 1924 All 625 (633) : 46 All 575 (DB) * ('99) 2 Oudh Cas 67 (73) (DB) * (Vol 18) 1931 Cal 211 (217) : 58 Cal 628 (DB) * (Vol 27) 1940 Pat 59 (60) : 13 Pat 708 (DB) * (Vol 26) 1939 Cal 588 (592) (DB) (Note—Reversed on another point in (Vol 30) 1943 PC 96 : 70 Ind App 68 : ILR (1943) Kar (PC) 107 (PC) * (Vol 26) 1939 Pat 278 (280) : 18 Pat 271 (DB).

[4] The minor has no option to ratify or affirm the compromise or to avoid it in proper proceedings. (Vol 2) 1915 PC 79 (80) : 43 Cal 250 : 43 Ind App 1 (PC) * (Vol 24) 1937 All 65 (69) : ILR (1937) All 317 (DB).

[5] A minor who wants to avoid a compromise entered into without leave must do so by a separate suit or in an application for review and failure to do so within the period of limitation will make the decree binding. (Vol 9) 1922 Lah 166 (167) : 3 Lah 164 (DB) * (Vol 11) 1924 All 625 (633) : 46 All 575 (DB) * (Vol 14) 1927 Bom 87 (87) (DB) * (Vol 18) 1931 Cal 211 (217) : 58 Cal 628 (DB)

[6] A decree in contravention of this rule is not void against the minor (Vol 27) 1940 Pat 59 (60) : 18 Pat 708 (DB) * (Vol 7) 1920 Nag 272 (273) * (Vol 32) 1945 Pat 391 (378) : 24 Pat 529 (DB) * ('44) 1944 Pat W N 108 (103).

[But see (05) 8 Oudh Cas 191 (192) * ('11) 36 Bom 53 () (DB) * ('11) 34 Mad 314 (318) (DB) * (Vol 23) 1936 All 811 (814)].

[7] No prejudice need be shown to set aside a decree based upon a compromise entered into without leave of Court. ('11) 35 Bom 322 (324) (DB) * (Vol 14) 1927 Bom 87 (97, 91) (DR) * ('11) 34 Mad 314 (318) (DB) (Dissenting from (1892) 20 All 93) * (Vol 5) 1918 Pat 507 (510) : 3 Pat L Jour 255 (SB) * ('99) 2 Oudh Cas 45 (49, 50) * ('03) 6 Oudh Cas 175 (179) (DB).

[But see (Vol 18) 1931 All 307 (310) : 53 All 428 (DB) * (Vol 6) 1919 All 243 (2 5, 246) : 41 All 553 (DB) * (Vol 14) 1927 Lah 685 (686) * (1911) 1911 Pun LR No 134 page 501 (506) : 1912 Pun Re No 2 (DB) * (Vol 29) 1942 Nag 26 (28) : ILR (1942) Nag 642 (DB).]

[8] Where the next friend or guardian has himself not consented to the compromise on behalf of the minor, the compromise is, of course, void *in toto*. (Vol 11) 1924 Oudh 85 (84) (DB).

[See however (Vol 27) 1940 Pat 59 (60) : 18 Pat 708 (DB)]

[9] The same guardian or next friend as had agreed to the compromise can raise the objection as to want of Court's sanction. (Vol 27) 1940 Mad 650 (652).

5. Bond executed by minor and an adult in pursuance of a compromise without the leave of the Court.—[1] Bond executed jointly by minor

O 32 R. 7 (contd)

defendant and adult party in pursuance of compromise without sanction of Court—The bond cannot be enforced as against the minor—But the adult co-obliges cannot be exonerated from liability. (Vol 27) 1940 Pat 671 (672) * (Vol 8) 1916 P C 2 (3): 39 Mad 409: 43 Ind App 99 (PC)

6. Compromise by natural guardian, father or managing member of a joint Hindu family.—[1] A father or managing member in a joint Hindu family may under certain circumstances and conditions enter into agreements which may be binding on the minor members of the family ('85) 9 Bom 365 (367) (DB) * ('04) 27 All 203 (250) (DB) * ('05) 15 Mad L Jour 494 (495) (DB)

[2] When in a suit in which the minor is a party, the father or managing member is appointed the next friend or guardian of the minor, he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian without the leave of the Court. ('13) 36 Mad 295 (303): 40 Ind App 182 (PC) (Overruling the decision in 19 Mad L Jour 4) * (Vol 90) 1943 Lah 313 (316): ILR (1943) Lah 583 (DB) * (Vol 82) 1945 Nag 90 (96) ILR (1945) Nag 242.

[2] A natural guardian of the minor dealing with minor's interest cannot act without leave of Court where he is appointed by Court as next friend or guardian in a suit (Vol 30) 1943 Nag 231 (232, 239) * (Vol 29) 1942 All 150 (152) ILR (1942) All 144 * (Vol 7) 1920 Bom 37 (39): 44 Bom 574 (DB).

[4] Where some person other than the father of the minor has been appointed guardian *ad litem* for a minor, this rule will not apply to a compromise entered into by the father as the natural guardian. (Vol 24) 1937 Mad 446 (447, 448) * (Vol 31) 1944 Mad 289 (292): ILR (1944) Mad 850 (DB).

[But see (Vol 27) 1940 Pat 663 (665): 19 Pat 343 (DB)]

7. Compromise by adult members of a Malabar tarwad.—[1] A compromise of a doubtful claim, entered into by the adult members of a tarwad *bona fide* and in the interests of the tarwad is binding on the minor members thereof. ('95) 18 Mad 38 (40) (DB).

8. Compromise by adult member of a joint Hindu family.—[1] A compromise entered into by the adult coparceners in a joint Hindu family in a pending litigation in which the minor coparcener had no interest separate from that of the adult members and the Court pronounced the compromise beneficial to the minor, is binding on the minor. ('07) 34 Cal 70 (71, 72) (PC)

9. Agreement to be bound by oath, if a compromise.—[1] An offer by the next friend or the guardian of a minor to be bound by the evidence given on oath by the opposite party or his witness does not amount to an agreement or compromise and no leave of the Court is necessary in such a case (Vol 14) 1927 All 534 (534) 49 All 842 (DB) * (1900) 27 Cal 229 (231) (DB) * (Vol 17) 1930 Cal 463 (464) (DB) * ('91) 1891 Pun Re No 18, page 110 (113) (FB) * ('89) 12 Mad 483 (484) (DB) * (Vol 28) 1986 Lah 285 (295) * (Vol 38) 1946 Pat 272 (174).

[2] Evidence given on oath by the opposite party or his witness on the offer of the guardian or

next friend binding upon the minor unless there is fraud or gross negligence on the part of the guardian in the conduct of the suit which results in prejudice to the minor ('89) 12 Mad 483 (484) (DB).

[3] An offer by the guardian *ad litem* to suffer a decree on the oath of the plaintiff if not sanctioned by the Court, is not binding on the minor (Vol 9) 1922 All 160 (161): 44 All 117 (DB)

10. Abandonment of issue, if a compromise.—[1] No leave is necessary for the abandonment or the giving up of an issue on the part of the next friend or guardian *ad litem* in the course of the conduct of the suit so as to bind the minor ('91) 18 Cal 99 (106) 17 Ind App 90 (PC)

11. Withdrawal of suit.—[1] Withdrawal of suit by the next friend in pursuance of an agreement with the defendant without leave of Court is voidable at the instance of the minor ('08) 27 Mad 377 (380) * ('89) 13 Bom 137 (146) * (Vol 15) 1928 Lah 792 (794)

[2] Leave to withdraw an appeal be granted only after being assured by the counsel at the Bar that the terms on which it was proposed to be withdrawn were beneficial to the minor. (Vol 7) 1920 P C 60 (61). 47 Ind App 88 (PC)

[3] Mere withdrawal of a suit not in pursuance of any agreement or compromise does not come within the purview of this rule ('02) 29 Cal 735 (737) (DB) * (Vol 6) 1919 Lah 395 (396). 1919 Pun Re No 59 (DB).

12. Transfer, without leave, of decree in favour of minor.—[1] This rule applies also to compromise entered even after a decree has been passed, and an adjustment of a decree to which a minor is a party is not binding on the minor unless leave of the Court has been obtained therefor. (Vol 4) 1917 Mad 409 (411) (DB) * (Vol 27) 1940 All 16 (17): ILR (1940) All 1 * (Vol 23) 1936 Mad 494 (495)

[2] This rule does not apply to the transfer by a guardian, of a decree passed in favour of a minor (Vol 30) 1943 PC 96 (97). 70 Ind App 68: ILR (1943) Kar (PC) 97 (PC) * (Vol 25) 1938 Mad 539 (540): ILR (1938) Mad 819 (FB) (Vol 8) 1921 Mad 587 overruled).

13. Agreement to refer to arbitration.—[1] Though the decisions referred to in this Note were pronounced with reference to the Second Schedule which has now been superseded by the Arbitration Act of 1940, they are still good law

[2] This rule does not apply to references made without the intervention of the Court ('02) 26 Bom 298 (301) (DB) * (Vol 22) 1935 Sind 235 (239) * (Vol 26) 1939 Lah 308 (308, 309).

[3] A decree passed on an award made on a reference without the intervention of Court and filed into Court under Paragraph 20 of the Second Schedule is not bad for want of sanction, though it may not be binding on the minor for other reasons. (Vol 5) 1918 Bom 123 (127): 43 Bom 255 (FB) * (Vol 17) 1930 Mad 38 (42) (DB) * (Vol 26) 1939 Cal 500 (502) * (Vol 27) 1940 Bom 38 (34) * (Vol 38) 1946 PC 72 (74): 73 Ind App 52 (PC).

[4] This rule applies to agreements to refer to arbitration made pending suit. (Vol 29) 1942 All 85 (86): ILR (1941) All 807 (DB) * (Vol 27) 1940 Mad 650 (652) * (Vol 27) 1940 Pesh 12 (13) * (Vol 27) 1940 Sind 178 (180): ILR (1940) Kar 327 (DB) * (1912) 15 Ind Cas 161 (167, 168): 1912

8. (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

[1882—S. 447; 1877—S. 447. Cf. Rule 3 sub-rule (3), Rule 4 sub-rules (1) and (4) and Rules 9 and 10 of this Order.]

O. 32 R. 7 (contd.)

Pun Re No. 95 (FB) * (Vol 24) 1937 All 65 (69) : ILR (1937) All 817 (FB) (28 All 85 overruled—The decisions in (Vol 1) 1914 All 446; 36 All 69 (FB) and (Vol 23) 1936 All 740 should also be regarded as overruled by the above Full Bench ruling).

[5] Compromise entered into after suit is referred to arbitration, accepted by arbitrators and award passed in terms thereof—Award not bad though compromise was not sanctioned by Court. (Vol 22) 1936 Mad 1068 (1069) : 59 Mad 149.

14. Gross negligence of next friend or guardian.—[1] The acts of the guardian must be based on considerations of actual necessity and advantage to the minor and not on calculations of any possible benefit. ('10) 37 Cal 897 (904) (DB) * (Vol 14) 1927 Pat 271 (278) : 6 Pat 388 (DB).

[But see (Vol 29) 1942 Lah 205 (206, 207) : ILR (1943) Lah 113 (DB)].

[2] Any concealment of essential and material facts by the guardian would amount to constructive fraud. (Vol 29) 1942 All 85 (89) : ILR (1941) All 307 (DB) * ('97) 24 Cal 853 (861) : 24 Ind App 107 (PC).

[3] Where the guardian acts *bona fide* and compromises a doubtful claim with the leave of the Court, the compromise will be binding on the minor. ('08) 31 Cal 111 (131) (DB) * ('04) 14 Mad L Jour 442 (DB) * (Vol 12) 1925 Mad 1255 (1286, 1287) (DB).

15. Fraud.—[1] A compromise duly entered into by the guardian and sanctioned by the Court will not be disturbed except upon very strong grounds. ('11) 11 Ind Cas 105 (108, 115) (DB) (Oudh) * (Vol 14) 1927 Bom 11 (13) : 50 Bom 716 (DB) * (Vol 17) 1930 Lah 250 (251) (DB) * (Vol 16) 1929 Mad 849 (350) (DB) * (Vol 1) 1914 Oudh 162 (164) * (Vol 1) 1914 Lah 180 (180, 181) (DB) * (Vol 25) 1938 Mad 13 (16).

[2] The grounds on which a compromise sanctioned by Court can be set aside, must be such "as to amount to fraud in the party claiming the benefit of the compromise. Fraud does not mean moral fraud. But fraud means also what in equity would amount to it. ('11) 11 Ind Cas 105 (109) (DB) (Oudh) * (Vol 25) 1938 Mad 13 (16) * (Vol 31) 1944 Sind 209 (210, 211) : ILR (1944) Kar 223 (DB).

[3] Fraud, however, must be strictly proved. (Vol 16) 1929 Mad 96 (105) (DB). (Per Reilly J.).

[4] Fraud must be definitely made cause of action—Facts constituting fraud must be specifically set out—General charge of negligence is not sufficient—Fraud is to be judged from surrounding circumstances. (Vol 29) 1942 Lah 205 (207) : ILR (1943) Lah 113 (DB).

[5] Next friend or guardian proved guilty of fraud or collusion—Compromise and the decree passed thereon will bind the minor. ('04) 1 All L Jour 130 (132).

[6] Sanction obtained by misrepresentation—Compromise is not binding on minor and neither party can claim under compromise—Minor can avoid compromise but is not entitled to enforce any assumed rights on basis of that compromise.

[See (Vol 30) 1943 Oudh 68 (76, 77) (DB)].

16. Minor attaining majority pending suit.—[1] Minor defendant attaining majority during the pendency of suit—Compromise by guardian subsequently does not bind the minor though sanctioned by Court.—(Vol 15) 1928 Mad 294 (296) : 51 Mad 763 (DB).

[But see (Vol 9) 1922 Lah 407 (407, 408).]

17. Procedure to set aside a compromise decree.—[1] A minor can file a separate suit to set aside a compromise decree or file an application for review in the same suit. ('99) 23 Bom 620 (623) (DB) * ('91) 15 Bom 594 (597, 598) (DB) * ('03) 30 Cal 613 (615) (DB) * ('07) 34 Cal 83 (89, 90) (DB) * (Vol 13) 1926 Mad 119 (120) * (Vol 11) 1924 Lah 427 (425) * (Vol 4) 1917 Mad 672 (680) : 39 Mad 853 (DB) * (Vol 23) 1936 All 811 (816).

[2] A minor can avoid a compromise by an application in revision. (Vol 27) 1940 Sind 178 (180, 181) : ILR (1940) Kar 327 (DB).

[3] The minor cannot take any objection as to the validity of the compromise decree in appeal. ('80) 30 Cal 613 (615) (Case under 1882 Code—Held no appeal lies.) * ('01) 5 Cal W N 877 (878) (DB) (Do).

[But see (Vol 23) 1936 All 811 (816).]

[4] The validity of the decree cannot be attacked in execution proceedings. (Vol 11) 1924 Mad 645 (646) (DB) * (Vol 10) 1923 Pat 375 (378, 379) : 2 Pat 533 (DB) * ('98) 1 Oudh Cas 49 (50).

[5] A compromise decree when set aside at the instance of the minor remits the minor to his original position in the suit. ('13) 35 All 487 (499) : 16 Oudh Cas 247 : 40 Ind App 182 (PC) * ('76) 2 Cal 184 (196) : 3 Ind App 291 (PC).

[6] Order recording compromise entered into without leave of Court during execution of decree in favour of minor—Minor cannot bring separate suit to set aside the order. (Vol 23) 1936 Pat 506 (507, 508) (DB).

[7] Suit by minor for declaration that decree was not binding on him—Court must decide whether compromise was for minor's benefit. (Vol 30) 1943 Lah 813 (817, 818) : ILR (1943) Lah 583 (DB).

[8] Reference to arbitration consented to by guardian—Minor desiring supersession of reference must apply through guardian *ad litem*. ('44) ILR (1944) All 356 (356).

18. Local amendments.—[1] (Madras)—(See (Vol 32) 1945 Mad 377 (379) : 47 Ori L Jour 173 (DB)).

ORDER 32 RULE 8—Note 1

[1] Provisions of sub-r. (1) are mandatory. Guardian of person and property of minor plaintiff

9. (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

[1882—S. 446; 1877—S. 446. Cf. R. 3, sub-rules (1) and (2), See R. 10.]

OBJECTS AND REASONS

"The Committee think it expedient that where a guardian insists on his right to be appointed next friend in the place of another there should be power to require him to become liable or give security for costs in the suit previously incurred."—S. O. R.

10. (1) On the retirement, removal or death of the next friend of a minor, Stay of proceedings on removal, etc., of next friend further proceedings shall be stayed until the appointment of a next friend in his place.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

[1882—S. 448, 449; 1877—S. 448, See Rules 8 and 9.]

11. (1) Where the guardian for the suit desires to retire or does not do his duty, or, where other sufficient ground is made to appear, Retirement, removal or death of guardian the Court may permit such guardian to retire or may remove for the suit him, and may make such order as to costs as it thinks fit.

O. 32 R. 8 (contd.).

appointed under Guardians and Wards Act (VIII of 1890), during pendency of suit superseding the next friend. There is no valid retirement in the absence of any application on the part of the next friend. ('08) 30 All 105 (108, 109) (DB).

ORDER 32 RULE 9—Note 1.

[1] Next friend failing to do his duty or ceasing to reside in British India is liable to be removed. (Vol 15) 1928 Nag 166 (167) * ('72) 18 Suth W R 169 (170) (DB) * ('07) 17 Mad L Jour 179 (179) (DB). (Case of guardian *ad litem*.)

[2] Next friend not doing his duty in relation to the suit—Court should adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and the appointment of a new next friend, or in order that the minor plaintiff himself may, on coming of age, elect to proceed with the suit or withdraw from it. ('04) 27 Mad 377 (378) * ('71) 16 Suth WR 142 (146) (DB) * ('82) 1882 Pun Re No. 125, page 366 (367) (DB).

[3] Next friend having an interest adverse to that of the minor plaintiff or his personal interest coming into conflict with his duty towards the minor can be removed. (Vol 7) 1920 Cal 178 (183) (DB) * (Vol 16) 1939 Mad 395 (394) (DB).

[See also (Vol 12) 1925 Mad 734 (735-6)]

[4] Decree passed against minor—Interest of

minor requiring that it should be appealed against—Guardian *ad litem* refraining from doing so with a view to safeguard his own interest and for his private benefit—Minor can, on attaining majority, be permitted to appeal and delay can be excused under S. 5, Limitation Act. ('96) 20 Bom 104 (109) (DB).

[5] Next friend guilty of neglect and committing default in appearance—Proper course is to stay further proceedings and not to dismiss suit for default. (Vol 8) 1921 Pat 103 (103) : 6 Pat L Jour 317 (DB).

ORDER 32 RULE 10—Note 1.

[1] Death of next friend during suit—Suit does not abate and should not be dismissed—Order of dismissal is nullity—Court should either appoint new guardian or keep suit pending till minor attains majority. (Vol 3) 1915 Mad 461 (462) * (Vol 20) 1983 Cal 508 (509) (DB).

ORDER 32 RULE 11—SYNOPSIS.

1. Retirement of guardian.
2. Removal of guardian.
3. Appointment of new guardian.
4. Costs.
 1. Retirement of guardian.—[1] Guardian duly appointed cannot retire except with leave of Court. (Vol 12) 1925 All 214 (215) (DB) * (Vol 13) 1926 All 487 (488) (DB) * (1911) 9 Ind Cas 436 (436) (DB) (Mad) * ('88) 18 Bom 568 (566) (DB)

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

[1882—Ss. 453, 459 ; 1877—Ss. 458 and 459]

Course to be followed by 12. (1) A minor plaintiff or a minor not a party to a minor plaintiff or applicant suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus:—

"A.B., late a minor, by C.D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

O. 32 R. 11 (contd.)

* (Vol 22) 1935 Mad 795 (796) : 58 Mad 802 (DB)
* (Vol 32) 1945 All 55 (53) : 1 L R (1945) All 20 (DB).

[2] Court has discretion to refuse leave in proper case. (Vol 19) 1926 All 497 (498) (DB) * (Vol 15) 1928 Mad 980 (980).

[9] Mere statement by guardian that he declines to act does not effect removal unless sanctioned by Court. (Vol 14) 1927 Mad 538 (541) : 50 Mad 567 (DB).

2. Removal of guardian.—[1] Guardian not acting properly or unwilling to act as guardian—Court is bound to remove him in interests of minor. (Vol 19) 1932 All 130 (132) (DB) * (1909) 4 Ind Cas 1108 (1108) (Mad) * ('06) 1 Nag L R 128 (129).

[See also (Vol 12) 1925 Mad 774 (775) (DB)
* (Vol 20) 1933 Cal 794 (795) (DB).

[2] The only way of getting rid of a guardian *ad litem*, who has once been properly appointed, is under the provisions of this rule (Vol 22) 1935 Cal 160 (160) : 61 Cal 1023 (DB) * (Vol 22) 1935 Mad 795 (796) : 58 Mad 802 (DB).

[See (Vol 22) 1936 Pat 153 (156) (DB).]

[See also (Vol 10) 1923 Lah 271 (272) : 3 Lah 417 (DB).

[3] Certificated guardian appointed guardian *ad litem*—Merely because he ceases to be certificated guardian, he does not *ipso facto* cease to be guardian *ad litem*. (Vol 22) 1935 Cal 160 (165) : 61 Cal 1023 (DB).

3. Appointment of new guardian.—[1] Guardian *ad litem* dying—Court is bound to appoint new guardian. (Vol 4) 1917 Mad 369 (370) (DB), * (Vol 13) 1926 Nag 40 (41).

[2] Guardian *ad litem* failing to do his duty—Court may appoint new guardian. (Vol 32) 1945 All 55 (58) : 1 L R (1945) All 20 (DB).

[3] Guardian of minor respondent dying pending appeal—Fresh guardian not appointed—Decree against minor is nullity. (Vol 15) 1928 Pat 163 (163) (DB) * (Vol 22) 1935 Lah 362 (362) (DB) * (Vol 32) 1945 Pat 570 (571) (DB).

[But see (Vol 10) 1923 Pat 43 (43) (DB).]

[4] Guardian of minor respondent dying pending appeal—Decree in favour of minor, is not nullity though new guardian is not appointed. ('12) 34 All 321 (322) (DB).

[5] No notice to minor is necessary before an order of fresh appointment of guardian is made. (Vol 10) 1923 Pat 385 (386) : 2 Pat 273 (DB).

[6] The power of the Court under sub-rule (2) may be exercised at any time during the pendency of the suit and the same is not taken away by the fact that an order to try the suit *ex parte* has been previously passed. (Vol 20) 1933 Pat 473 (477) (DB).

[7] While a guardian already appointed is alive and has not been discharged a new guardian *ad litem* cannot be appointed for the same minor. (Vol 7) 1920 Mad 213 (214) * (Vol 23) 1941 Pat 224 (224) (DB).

4. Costs.—[1] Rule does not restrict operation of S. 35 — Guardian *ad litem* himself party to suit—Court can order costs against him under S. 35. (Vol 15) 1928 Mad 590 (591) (DB).

[2] Guardian filing unnecessary and unsuccessful appeal on behalf of his ward—Court will order him to pay costs. ('00) 34 Bom 374 (376, 377).

[3] Guardian guilty of gross misconduct in conduct of case—Costs against guardian ordered. ('84) 8 Bom 391 (394).

[See also (Vol 21) 1934 Cal 474 (477) : 61 Cal 227.]

[4] Guardian applying at late stage for retirement and appointment of fresh guardian—Costs allowed against him upto that stage. (Vol 19) 1932 All 180 (183) (DB).

ORDER 32 RULE 12—SYNOPSIS.

1. Scope of the rule.

2. Title to be corrected.

3. Minor defendant becoming a major during the pendency of suit.

1. Scope of the rule.—[1] The rule is based on the substantive right of a person who has become *sui juris* to himself proceed with a suit instituted on his behalf during his minority. ('95) 22 Cal 270 (274) * (Vol 4) 1917 Mad 318 (319) : 37 Mad 1031 (DB) * ('69) 12 Sath. W R 103 (103) (DB).

(5) Any application under this rule may be made *ex parte*: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

[1882—Ss. 450 to 453; 1877—Ss. 450 to 453.]

13. (1) Where a minor co-plaintiff on attaining majority desires to repudiate the

Where minor co-plaintiff suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any to proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

[1882—S. 454; See R. 12. Cf. O. 1 R. 40.]

14. (1) A minor on attaining majority may, if a sole plaintiff, apply that

Unreasonable or a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

[1882—S. 455; See R. 12, sub-rule (4).]

O. 32 R. 12 (contd.)

[3] The Court should, as a matter of course, give him leave to proceed or act in his own name and cannot ignore his application ('95) 22 Cal 270 (274) * (Vol 15) 1928 Nag 166 (168).

[5] If on attaining majority, the minor elects to abandon a suit instituted by his next friend, he must pay the costs of the next friend unless he can establish that the suit was improperly instituted. (Vol 21) 1934 Mad 73 (74) * (Vol 27) 1940 Bom 58 (60); I L R (1940) Bom 135 (DB).

[4] It is only in case of misconduct by the next friend that he can be ordered to pay costs and in the absence of such misconduct, the defendant is not entitled to an order against the next friend for costs where the quondam minor elects to abandon the suit. (Vol 27) 1940 Bom 58 (60); I L R (1940) Bom 135 (DB).

[5] Where it is discovered in the course of the suit or appeal that the minor has attained majority, the Court cannot dismiss the suit or appeal for default, but should issue notice to the quondam minor to elect whether he intends to proceed with the suit or appeal. (Vol 16) 1929 Lah 555 (556) (DB).

[6] If the minor elects to continue the suit his rights should be determined as on the date on which the suit was originally instituted. (Vol 12) 1925 Sind 380 (340); 18 Sind L R 230.

[7] Where the minor continues to be represented *bona fide* by a pleader even after his attaining majority and subsequently the quondam minor ratifies his acts, they cannot be treated as invalid on the ground of non-compliance with this rule. (Vol 17) 1920 Lah 603 (604).

[8] The rule does not apply where the suit has been filed in the name of an alleged minor who is

really a major at the time. Hence such a person is not entitled to continue the suit under this rule when it is found that he was not a minor at the date of the filing of the suit. (Vol 27) 1940 Mad 522 (523).

2. Title to be corrected.—[1] The provision of this rule requiring the title of the suit to be corrected applies only where the suit is pending and not to proceedings taken after a final decree has been passed in the suit. ('95) 22 Cal 270 (275).

3. Minor defendant becoming a major during the pendency of suit.—[1] Liberty given under Rr. 12 to 14 to minor plaintiff to repudiate act of his guardian cannot be given to minor defendant. (Vol 24) 1937 Pat 625 (625).

[2] Defendant attaining majority during suit but not electing to conduct case himself—Decree passed in suit is binding. (Vol 15) 1928 Mad 294 (294, 295); 51 Mad 763 (DB). * (Vol 15) 1928 Lah 371 (373) * (Vol 26) 1939 Pat 601 (601); 18 Pat 539 (DB) * (Vol 25) 1938 Oudh 188 (190); 14 Luck 213 (DB).

[See also (Vol 13) 1926 Cal 1053 (1054) (DB) * (Vol 9) 1922 Mad 301 (302) (DB). * (Vol 5) 1918 Mad 545 (547) (DB).]

ORDER 32 RULE 15—Note 1

[1] The Court can under this rule order the next friend to pay the costs of all the parties if it is satisfied as to the impropriety or unreasonableness alleged. (Vol 27) 1940 Bom 58 (60); I L R (1940) Bom 135 (DB) * (Vol 21) 1934 Mad 73 (74).

[2] Suit by next friend in *forma pauperis* dismissed as false—Next friend can be ordered to pay costs. (Vol 30) 1948 Nag 329 (329, 330); I L R (1948) Nag 775.

PROVINCIAL AMENDMENT

Rule 14A—MADRAS

Add the following as Rule 14A :

"R. 14A The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi-judicial* act within the meaning of Section 123 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal."

[Dis. No. 1601 of 1914.]

15. The provisions contained in rules 1 to 14 so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

[1882—S 463 ; 1877—S 463]

O 32 R. 14 (contd.)

[3] No order as to costs can be made after the death of the next friend. (Vol 5) 1918 Oudh 21 (22) : 20 Oudh Cas 300.

ORDER 32 RULE 15—SYNOPSIS.

1. Persons of unsound mind.
2. Mental infirmity.
3. Persons of unsound mind not so adjudged.
4. Appointment of next friend or guardian for persons of unsound mind.
5. Decree against lunatic not represented, if can be challenged in execution proceedings.
6. Revision.
7. Privy Council appeal.

1. Persons of unsound mind.—[1] The present rule places persons of unsound mind in the same position as minors and makes the provisions of Rr. 1 to 14 applicable to them. (Vol 28) 1936 Lah 7 (8)

[2] A suit on behalf of a person of unsound mind has to be filed by a next friend and where the defendant is of unsound mind the Court has to appoint a guardian *ad litem*. (Vol 6) 1919 All 409 (412) (DB).

2. Mental infirmity.—[1] Under this rule a person of weak mind can sue through a next friend provided the Court is satisfied that he is incapable of protecting his interests. (Vol 12) 1925 Nag 245 (248) * (Vol 26) 1939 Mad 657 (662) (DB).

[See also (Vol 28) 1941 Mad 505 (506)].

[2] The rule applies to persons who are absolutely deaf and dumb (Vol 17) 1930 Lah 425 (428) : 12 Lah 65

[But see (70) 2 NWPSCR 414 (414, 415) (DB)]

[3] Person of high position renouncing world and neglecting worldly affairs—He is not thereby incapable of protecting his own interests within R 15—But delusions of being haunted by demons, persecution by imaginary voices etc would justify contrary inference. (Vol 14) 1927 P C 123 (126, 127) (PC).

3. Persons of unsound mind not so adjudged — [1] If the defendant alleges that he is of unsound mind and the plaintiff denies it, the Court must hold a judicial enquiry and come to a finding as to whether he is incapable of protecting his own interests. (Vol 28) 1941 Mad 505 (505) * (Vol 9) 1923 Cal 86 (86, 87) (DB) * (Vol 20) 1933 All 149 (151) (DB) * (Vol 23) 1935 Cal 224 (224) (DB) *

(21) 62 Ind Cas 770 (771) (DB) (Cal) * (Vol 26) 1939 Pat 25 (26) (DB).

[See also (Vol 13) 1926 All 212 (212, 214) : 48 All 356 (DB) * (1865) 2 Suth W R Misc 7 (7) (DB)].

[2] It is only when the Court on inquiry finds that the defendant, by reason of unsoundness of mind or mental infirmity, is incapable of protecting his interests, that it is necessary to appoint a guardian *ad litem*. (Vol 21) 1934 Cal 833 (833) * (Vol 28) 1936 Rang 121 (121, 122).

[See also (Vol 23) 1936 Oudh 67 (71) : 11 Luck 486 (DB)].

[3] Where a defendant alleged to be a lunatic dies before the issue of process, it cannot be said that the suit was not validly instituted against the deceased on account of the fact that no guardian was appointed. (Vol 21) 1934 Cal 833 (833).

[4] A finding in the lunacy proceedings that a person is not of unsound mind and incapable of managing his affairs does not preclude a finding under the present rule that the same person is by reason of mental infirmity incapable of protecting his interests in the suit. (Vol 15) 1928 All 108 (109, 110) : 50 All 335 (DB) (Note : overruled in (Vol 23) 1935 All 599 : 57 All 977 (FB) on another point).

[5] Rule applies to case where subsequent to passing of decree against person it is found that he was lunatic at time of suit—In such case such person can bring suit for declaration that decree is not binding on him as no guardian was appointed. (Vol 24) 1937 All 29 (31) (DB).

[But see (Vol 23) 1936 Oudh 67 (71, 72) : 11 Luck 486 (DB)].

[6] Plaintiff becoming of unsound mind during pendency of suit—Court should adjourn suit to enable suitable next friend to come forward. (Vol 23) 1936 Lah 7 (8).

[7] R 15 does not contemplate that there must be preliminary inquiry and finding that person by reason of unsoundness of mind was incapable of protecting his interests—Order of Court permitting next friend to represent person is not final—Court permitting next friend to sue on behalf of person of unsound mind—It is not competent to Court to raise independent issue in trial as to competency of next friend to represent him in suit. (Vol 28) 1941 Mad 524 (526, 527) (DB) * (Vol 26) 1939 Mad 657 (661) (DB).

[8] Plaint presented by person claiming to be next friend of alleged lunatic—Plaint found not to be lunatic—Plaint is not validly presented and

16. Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of [the Central Government, or the Crown Representative, or a Provincial Government] in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

[1882—S 464; 1877—S 464. See Ss 85 to 87.]

[a] Substituted by A. O. for "the Governor-General in Council".

PROVINCIAL AMENDMENT

Rule 17—MADRAS

Add the following as Rule 17 :

"R. 17. In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards, the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

[Dis. No. 644 of 1911]

ORDER XXXIII SUITS BY PAUPERS

Suits may be instituted
in *forma pauperis*.

1. Subject to the following provisions, any suit may be instituted by a pauper.

Explanation—A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

[1882—S 401; 1877—S 401; 1859—S. 297.]

O 32 R 15 (contd.)

must be re-presented—Limitation must be calculated upto time of representation—But Court may find that alleged next friend was authorized as agent of plaintiff to present plaint. ('37) 1937 Mad W N 358 (398).

4. Appointment of next friend or guardian for persons of unsound mind.—[1] If a person is not represented by a guardian in the suit, the decree will be null and void. (Vol 4) 1917 Mad 616 (618) (DB) * (Vol 2) 1915 Cal 19 (20) (DB) * (Vol 1) 1931 Cal 168 (169) (DB) * (Vol 24) 1937 All 29 (32) (DB) * (Vol 23) 1936 Lah 861 (862) (DB).

[See however (Vol 23) 1936 All 806 (807) (DB) (Decree in favour of unrepresented lunatic is not nullity)].

[But see (Vol 1) 1914 Low Bur 141 (141)].

[2] Where a manager of the property of the lunatic has been appointed under Lunacy Act, such person ought to be appointed as the next friend or guardian *ad litem* in the suit. ('99) 23 Bom 403 (405, 406) (DB) * ('90) 23 Cal 513 (514) (DB) * ('95) 22 Cal 729 (734) : 22 Ind App 90 (PC) * ('99) 1899 Pun Re No. 19, page 114 (118) * ('12) 16 Ind Cas 885 (885, 886) (Oudh) * ('69) 1869 Pun Re No. 89.

[See also ('67) 7 Suth W R 5 (6, 7, 8) (DB) * ('74) 22 Suth W R 200 (201) (DB)]

[See however (Vol 3) 1916 Cal 51 (56) (DB)].

5. Decree against lunatic not represented, if can be challenged in execution proceedings.—[1] Decree against lunatic not properly represented in suit—Enforceability or otherwise of decree is not a question under S. 47 and cannot be raised in execution proceedings. (Vol 4) 1917 Cal 844 (847) : 44 Cal 627 (DB).

[See also (Vol 4) 1917 Pat 140 (141) (DB)]

6. Revision.—[1] Order dismissing application for appointment of guardian *ad litem* does not amount to case decided and is not revisable. (Vol 32) 1945 Oudh 255 (256) (DB).

[2] Application for appointment of guardian *ad litem* dismissed without judicial inquiry—Revision allowed. (Vol 28) 1941 Mad 505 (506).

[3] High Court can under its inherent powers order stay of suit pending decision in lunacy proceedings against defendant under Lunacy Act (Vol 13) 1926 All 212 (218, 214) : 48 All 356 (DB) (Note—Overruled in (Vol 22) 1935 All 599 : 57 All 977 (FB) on another point).

7. Privy Council appeal.—[1] Rule does not in terms apply to proceedings before Privy Council. Appellant becoming insane during pendency of appeal to Privy Council—Fact that no guardian is appointed will not affect validity of decree. (Vol 23) 1936 Oudh 67 (71) : 11 Luck 466 (DB).

ORDER 32 RULE 16—Note 1.

[1] Ruling Prince not domiciled in British India is not governed by the Indian Majority Act and, therefore, is not minor for the purposes of Order 32 even though he may be under 18 years of age. He can act through his manager under S. 85 of the Code. (Vol 13) 1926 Cal 513 (514, 515) (DB)

ORDER 33 RULE 1—SYNOPSIS.

1. Suit by paupers.
2. Suit may be "instituted" by a pauper.
3. "Is not possessed of sufficient means."
4. Subject-matter of the suit, if can be considered in deciding sufficient means.
5. Necessary wearing-apparel.

OBJECTS AND REASONS.

Section 402 of the 1882 Code ran as follows:—
 "No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language or assault"

"The Committee have not preserved section 402. In the light of the case-law it is misleading

so far as it suggests that a suit will lie for loss of caste or abusive language, and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault."—S. O. R.

PROVINCIAL AMENDMENTS

BOMBAY

The following sentence shall be *added* to the Explanation, namely :

"In determining whether he is possessed of sufficient means, the subject-matter of the suit shall be excluded."
 [9-2-1925.]

MADRAS

The following shall be *substituted* for the existing Explanation to Rule 1 :

Explanation (i).—A person is a pauper,

(1) when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no fee is prescribed when he is not entitled to property worth one hundred rupees other than his wearing apparel and the subject-matter of the suit.

Explanation (ii).—Any part of the subject-matter of the suit which the opposite party relinquishes and places at the immediate disposal of the plaintiff shall be taken into account in considering the question of the possession of sufficient means by the plaintiff.

Explanation (iii).—Where the plaintiff sues in a representative capacity the question of pauperism shall be determined with reference to means possessed by him in such capacity."

[22-10-1940.]

O. 35 R. 1 (contd.)

6. Minor plaintiff.

7. Pauper defendant.

8. "Person," Meaning of.

9. Suit by executor, administrator or legal representative of pauper.

10. Suit by an official liquidator or official receiver.

11. Suit by mutwalli, trustee or shebait.

12. Married woman.

13. Award of costs against pauper.

1. Suit by paupers.—[1] The provisions of this order have been enacted for exempting poor persons from paying, in the first instance, the court-fee prescribed and allowing them to prosecute their suits in *forma pauperis*. ('93) 20 Cal 111 (115) (DB).

[2] The executor of a deceased person is entitled to obtain a probate in *forma pauperis*, though the petition for grant of probate is not a suit unless caveat is entered. (1894) 18 Bom 237 (237, 241).

[See also (Vol 25) 1938 Mad 486 (488). (Order '83 applies to application for probate or letters of administration)].

2. Suit may be "Instituted" by a pauper.—[1] It is competent to the Court to allow a suit not originally instituted in *forma pauperis* to be continued in *forma pauperis*. Suit instituted in ordinary manner—Application for leave to continue suit as pauper—Application dismissed for default—Suit itself then dismissed—Court has no jurisdiction to treat the application as one for leave to sue in *forma pauperis* as the dismissal of the suit puts an end to the cause of action. ('34) 30 Cal L Jour 537 (539) (DB). * (Vol 21) 1934 Cal 25 (25) : 60 Cal 327 (323) * ('84) 8 Bom 615 (615, 616) (DB) * (Vol 16) 1933 Mad 323 (323) : 53 Mad 43 (DB) * (Vol 25) 1938 Mad 486 (488) (Application for letters of Administration) * (Vol 28) 1936 Cal 221 (222) (DB) * (Vol 23) 1936 Mad 158 (159)

[But see (Vol 19) 1932 Cal 685 (687) (DB). (No provision exists for subsequent pauperism—*Obiter*.)]

3. "Is not possessed of sufficient means"—[1] The explanation to this rule furnishes two different tests to determine the pauperism of a person according as the law does or does not prescribe the payment of fee upon the plaint. (Vol 1) 1914 Cal 537 (537) (DB).

[2] Where a claim requires a court-fee of Rs. 1775 and the applicant is possessed of means to the extent of Rs. 1,600 only, he is a pauper for the purposes of that suit. ('06) 8 Bom L R 642 (644) (DB).

[3] Case is one which court-fee is payable on plaint—First part of Explanation and not second part supplies. ('36) 1936 Oudh WN 237 (238) (DB).

[4] Application for letters of administration treated as suit under the rules of the High Court on caveat being entered—But no court-fee being payable when the petition is so converted into a suit and the petitioner not being entitled to property worth more than Rs. 100, he is a 'pauper' within the meaning of this rule. (Vol 25) 1938 Mad 436 (438).

[5] Past carelessness is irrelevant for considering present poverty. (Vol 21) 1934 Nag 104 (105).

[6] The possession of "sufficient means" refers to the possession of sufficient realizable property which will enable the plaintiff to pay the court-fee on the plaint. The possession of hard cash is not necessary. (Vol 28) 1941 Pat 638 (640).

[7] Though a person may be entitled to property he may nevertheless be not possessed of sufficient means to pay the court-fee. It cannot, therefore be assumed that everyone who is entitled to property is possessed of means to the extent of the value of the property. (Vol 16) 1929 Nag 319 (320) : 26 Nag L R 115 * (Vol 31) 1944 Oudh 243 (243) (DB). (Mere right to enforce claim is not property

O 33 R 1 (contd.)

till decree is obtained—Person entitled to such claim cannot be said to possess means to extent of claims).

[8] Where though a person is entitled to property yet it is out of his reach and is thus not a realizable asset, or convertible into cash, it cannot be said that he is possessed of sufficient means to pay the court-fee. (Vol 15) 1928 Lah 271 (271) * (Vol 20) 1938 Lah 528 (528).

[9] A mere finding that the applicant is jointly interested in a property with another, but over which he has no dominion, would only show that he is entitled to property but not that he is possessed of means. (Vol 29) 1942 Nag 47 (48); ILR (1942) Nag 625 * (Vol 15) 1928 Nag 24 (27) * (Vol 17) 1930 Rang 324 (325).

[See (Vol 21) 1934 All 396 (397). (Share in joint family property may amount to means)].

[See however (Vol 12) 1925 All 547 (547): 47 All 872 (DB)].

[10] Applicant having share in husband's property but not in possession of it—Court should consider whether she could raise enough money to pay court-fee. (Vol 28) 1941 Pat 638 (640)

[11] Word "means" include all forms of realizable assets which can be converted into cash and as such can be used for financing the litigation. (Vol 15) 1928 Lah 271 (271) (Includes interest in decree) * ('35) 158 Ind Cas 368 (368) (Lah) (DB) * (Vol 16) 1929 Lah 821 (822) (Includes mortgage).

[12] A debt which is due from a third person cannot be said to be "means" of which the applicant is possessed, and the words "is not possessed of" must mean that the applicant has no actual control over it. (Vol 14) 1927 Cal 309 (310) (DB) * (Vol 29) 1942 All 819 (320): ILR (1942) All 859 (DB). (Claim for dower is not means).

[13] Where the petitioner is possessed of some property which is not cash, the test, to decide whether he is a pauper, is not whether in the abstract he has the power of raising money, but whether in the concrete circumstances of the case he can succeed in raising anything substantial by exercising that power. (Vol 20) 1935 Mad 888 (884) * (Vol 21) 1934 Mad 561 (561) * (Vol 21) 1934 Mad 562 (562) * (Vol 28) 1941 Pat 638 (640).

[See however (Vol 27) 1940 Oudh 208 (209): 15 Luck 397 (DB) (Inability to find buyer for property will not make him pauper)]

[14] Possession of an occupancy holding can be taken into consideration in deciding whether an applicant to sue *in forma pauperis* is possessed of sufficient means to enable him to pay the court-fee prescribed by law (Vol 25) 1938 Nag 176 (177): ILR (1938) Nag 171 (DB) (Overruling (Vol 12) 1925 Nag 438: 21 Nag L.R. 98).

[15] The fact that the sanction of the Collector is necessary under S. 7 (2) of U. P. Encumbered Estates Act to enable the applicant to dispose of his property will not make him a pauper. (Vol 27) 1940 Oudh 208 (209): 15 Luck 397 (DB).

[16] Where the applicant himself is proved to be a pauper he is entitled to the benefit of the rule and the fact that he has co-heirs or relations who are men of means is immaterial. ('10) 1 Upp Bur Rul 26 * (Vol 20) 1933 All 556 (556) (DB) *

(Vol 22) 1935 Lah 965 (966) (DB).

[17] The burden of proving that a person is a pauper within the meaning of the Explanation lies on the applicant (Vol 13) 1926 Nag 278 (278) * (Vol 14) 1927 Nag 340 (341).

[18] Where an applicant for succession certificate alleges pauperism, the test of pauperism is to see whether he can pay court-fee on the application and not to see whether he has the means to pay the sum required to be deposited under section 379 of the Succession Act. (Vol 22) 1935 All 735 (736) (DB).

[See however (Vol 25) 1938 Mad 486 (489)].

4. Subject-matter of the suit, if can be considered in deciding sufficient means—[1] The words "other than his necessary wearing apparel or the subject-matter of the suit" do not qualify the part of the Explanation, but apply only to cases where no specific court-fee is prescribed. (Vol 29) 1942 Nag 47 (48): ILR (1942) Nag 625 * (Vol 29) 1942 Pat 290 (291) * (Vol 27) 1940 Mad 754 (755) * ('06) 30 Bom 593 (597) (DB) * (Vol 21) 1934 All 323 (324) * (Vol 20) 1938 Pat 203 (204) * (Vol 13) 1926 Nag 273 (273) * (Vol 13) 1926 Mad 567 (568) * (Vol 17) 1930 Cal 147 (149): 57 Cal 980 (DB) * (Vol 24) 1937 All 740 (741): ILR (1937) All 918 (DB).

[But see (Vol 14) 1927 Cal 309 (310) (DB)].

[2] In dealing with the first part of the Explanation, the subject-matter need not always be taken into consideration. (Vol 29) 1942 Nag 47 (48): ILR (1942) Nag 625 (The matter is one for the consideration of the Court in each case). * (Vol 29) 1942 Pat 290 (291) * (Vol 17) 1930 Cal 147 (149, 150): 57 Cal 980 (DB).

[3] Where the subject-matter of suit is in possession of the petitioner, it cannot be excluded from consideration merely on the ground that it forms the subject-matter of the suit. (Vol 27) 1940 Lah 310 (311) * (Vol 27) 1940 Mad 754 (755) (Both parties agreeing that applicant has saleable interest in some items of property in suit) * (Vol 16) 1929 Nag 319 (321): 26 Nag L.R. 115 * (Vol 21) 1934 All 323 (324) * (Vol 20) 1938 Pat 203 (204) * ('11) 83 All 237 (240) (DB) * (Vol 16) 1929 Nag 319 (321): 26 Nag L.R. 115 (Suit for possession of ornaments decreed—Appeal *in forma pauperis* ornaments in possession defendant to be taken into account)

[See also (Vol 27) 1940 Lah 310 (311) (Value of subject-matter of appeal in applicant's possession being more than amount of court-fee to be paid—Applicant not a pauper.)]

[But see ('82) 1882 Pun Re No 99, p281 (282) (DB)]

[4] Where the subject-matter of the suit is not in possession of the applicant it cannot be taken into consideration. (Vol 29) 1942 Nag 47 (48): ILR (1942) Nag 625 * (Vol 29) 1942 Pat 290 (291) (Suit on mortgage bond—Value of bond cannot be taken into account) * (Vol 17) 1930 Cal 147 (149, 150): 57 Cal 980 (DB) * (Vol 21) 1934 Mad 568 (568) * (1881) 3 Mad 249 (250) (DB) (Applicant is not bound to try and raise funds by mortgaging his claim) * ('98) 1893 All W.N. 11 (12) (Do). * (Vol 11) 1924 Nag 44 (46): 19 Nag L.R. 165 (DB).

[See however (Vol 24) 1937 All 740 (741): ILR (1937) All 918 (DB). (Whether subject-matter of suit should or should not be excluded in determining the question of sufficient means is a matter

O 33 R. 1 (contd.)

for the consideration of the Court.) * (Vol 30) 1943 Oudh 58 ('61); 19 Luck 284 (Possibility of applicant raising money on security of interest in subject matter of appeal and other joint property can be taken into account.)

[5] Suit in *forma pauperis* decreed with respect to part of property—Appeal by plaintiff—Portion of property decreed cannot be taken into account in determining means of appellant (Vol 28) 1941 Oudh 113 (113, 114) (DB).

[6] Application for leave to sue as pauper—Defendant admitting part of liability and producing property or amount in discharge of such liability—Material date for determining pauperism of applicant is date of application and not date of its hearing.—Such property or amount cannot be taken into account in determining means. (Vol 10) 1923 Bom 247 (248); 47 Bom 523 (DB). (Dissemination from 10 Bom 207) * ('10) 34 Bom 638 (640) * (Vol 17) 1930 Cal 147 (149, 150). 57 Cal 980 (DB).

[But see (Vol 6) 1921 Mad 97 (98).]

[See also local amendment of this rule in Bombay and Madras].

[7] Where the plaintiff gets a decree in the lower Court, but wants to appeal as a pauper for higher amount, the amount deposited in Court by the judgment-debtor to the credit of the plaintiff in pursuance of the decree should be taken into consideration in determining whether he should be allowed to appeal as a pauper (Vol 13) 1926 Mad 567 (568).

[8] In a suit to enforce a mortgage the equity of redemption in the mortgagor or defendant cannot be regarded as the subject-matter of the suit and hence for the purpose of determining the question as to whether the mortgagor who appeals is a pauper or not, the value of the equity of redemption cannot be excluded from consideration (Vol 23) 1941 Cal 659 (660); ILR (1941) 1 Cal 423 (DB) ((Vol 17) 1930 Pat 868 relied on).

5 Necessary wearing-apparel.—[1] Ornaments which a woman ordinarily wears should be regarded as being in the nature of wearing-apparel. (Vol 14) 1927 Cal 309 (310) (DB).

[See (Vol 26) 1939 Pat 95 (96) (Doubted).

[But see (Vol 15) 1928 Lah 271 (271)]

6. Minor plaintiff.—[1] This rule applies to minors and a minor is competent to sue in *forma pauperis*. (Vol 33) 1946 Lah 81 (82).

[2] Application filed on behalf of a minor for leave to sue in *forma pauperis*—Circumstances of next friend should not be considered. Fact that next friend is possessed of sufficient means will not disentitle a minor plaintiff from suing in *forma pauperis*. (Vol 33) 1946 Lah 81 (82) * ('81) 3 Mad 3 ('1) (DI) * (Vol 11) 1924 Bom 440 (441) (DB) * (Vol 16) 1923 Cal 656 (656) (DI) * (Vol 16) 1929 Lah 746 (747) * (Vol 7) 1920 Cal (995) 995 (DR).

[But see (Vol 20) 1933 Sind 82 (34); 26 Sind LR 491 (DB)].

7 Pauper defendant.—[1] A defendant may, under the inherent powers of the Court, be allowed to defend a suit in *forma pauperis*, although there is no provision to that effect in the Code. ('80) 5 Cal 519 (820) * ('06) 33 Cal 927 (932) (DB). (Obiter) * ('18) 48 Cal 955 (960) (DB). (Obiter).

[But see ('05) 1305 Pun Re No. 54, page 188 (188) * (Vol 30) 1943 Mad 177 (177, 178) * (Vol 17) 1930 Rang 280 (281); 8 Rang 423 (DB)].

[2] An application for review of judgment cannot be filed in *forma pauperis*. (Vol 30) 1943 Mad 177 (177, 178) (Petition for review of judgment is not continuation of suit) * (Vol 17) 1930 Rang 280 (281); 8 Rang 423 (DB).

8. "Person", Meaning of.—[1] The word "person" occurring in the Explanation to this rule includes not only individual human beings but also juridical persons such as companies or associations or bodies of individuals whether incorporated or not. (Vol 12) 1925 Mad 765 (765) * (Vol 31) 1944 Oudh 248 (248) (DB). (Includes juristic persons).

[But see (Vol 17) 1930 Rang 259 (262, 263, 264) (DB) (Firm can be granted leave to appeal as pauper)].

[2] The word "person" in this rule does not include a limited liability company incorporated under the Companies Act (Vol 26) 1938 Cal 745 (745); ILR (1938) 1 Cal 81 (DB).

[3] The word "person" in this rule has reference to all those who have a right to institute a suit under the Code and an individual being a juridical person will come within the meaning of this rule. (Vol 22) 1935 Nag 209 (211); 31 Nag LR 413.

9. Suit by executor, administrator or legal representative of pauper.—[1] An executor or an administrator or the legal representative of a deceased person is entitled to institute or maintain or continue a suit in *forma pauperis* in his representative capacity, provided he has not come into possession of sufficient means out of the estate of the deceased. (Vol 15) 1928 Mad 68 (68, 69) * (Vol 12) 1925 Mad 765 (166, 767) * (Vol 17) 1930 Lah 730 (736). (Can sue as a pauper).

[But see (Vol 12) 1925 Mad 819 (819, 820) * ('12) 36 Bom 279 (281, 282) (He cannot sue unless he himself is shown to be pauper) * (Vol 20) 1938 Nag 334 (335); 30 Nag LR 84 * ('06) 33 Cal 1169 (1168) (DB) * (Vol 14) 1927 Lah 666 (666) (Cannot continue suit as a pauper).]

[2] Decree in favour of pauper in ignorance of his death—Appeal by defendant against legal representative—Remand and decree on a retrial—Defendant cannot object that plaintiff is not entitled to sue as a pauper. ('03) 25 All 137 (138) (DB).

[3] Death of parties pending pauper proceedings—Death of applicant during pendency of application—Right to apply being personal one does not survive to legal representative of applicant—Legal representative cannot be substituted for continuing application—Only course open to him is to file fresh application in his own right or to institute a separate suit for same relief on payment of court-fees. (Vol 30) 1943 Mad 646 (646) * (Vol 15) 1928 Mad 278 (278, 279) * 51 Mad 697 * ('11) 64 Ind Cas 63 (64) (DI) (Cal) * (Vol 1) 1914 Oudh 384 (384); 18 Oudh Cas 64 (DB) * ('06) 33 Cal 1166 (1166) (DB).

[4] In the following cases the legal representative has been allowed to be substituted in place of the deceased applicant, not for the purpose of continuing the application, but to enable the legal representative to continue the proceedings as a suit on payment of proper court-fee. (Vol 23) 1936

Contents of application.

2. Every application for permission to sue as pauper shall contain the particulars required in regard to plaints in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

[1882—S. 403; 1877—S. 403 ;—1859, Ss. 299, 300.]

O. 33 R. 1 (contd.).

Pat 591 (598) : 15 Pat 738 (DB) * (Vol 21) 1984 Mad 467 (469) : 58 Mad 169 * (Vol 1a) 1928 Mad 278 (370) : 51 Mad 697. * (Vol. 32) 1945 Oudh 219 (220) : 20 Luck 327 (DB)

[But see (Vol. 30) 1343 Mad 646 (646) (Legal representative cannot be granted time under S. 149 to pay court-fee).]

[5] Once the leave to sue in *forma pauperis* is granted, the plaint gets registered as a suit and if the plaintiff dies thereafter, his legal representative has a right to be brought on record in place of the deceased plaintiff where the right to sue survives in him. The legal representative can further continue the suit as a pauper if he is himself a pauper. If he is not a pauper, he should pay the court-fee; otherwise the suit will be struck off (Vol 20) 1933 Nag 314 (336) : 30 Nag LR 84 * (Vol 18) 1931 Mad 324 (324, 325) (Heir impleaded as legal representative—Heir himself not pauper—Heir can be dispaupered under O. 33 R. 9 read with S. 146) * (Vol 12) 1925 Mad 819 (820).

[See ('12) 36 Bom 279 (282)].

[6] Death of defendant pending application to sue in *forma pauperis*—O. 22 does not apply—Legal representative can be brought on record at any time. (Vol 16) 1929 Sind 136 (136) * ('83) 7 Bom 373 (376)

[7] See also notes on O. 22 Rs. 3 and 4.

10. Suit by an official liquidator or official receiver.—[1] The official liquidator of a company, though not a pauper himself, may file a suit in *forma pauperis* on behalf of a pauper company. (Vol 5) 1918 Mad 362 (363) : 41 Mad 624 (DB)

[2] An official receiver in insolvency can sue in *forma pauperis* under this rule. (Vol 24) 1937 Mad 549 (551) 1LR (1937) Mad 784 (E.M.). * (Vol 5) 1918 All 177 (177) (DB). (Where pauper plaintiff is declared insolvent, official receiver can continue suit.)

[But see (Vol 17) 1930 Rang 259 (261, 262) (DB). (Cannot sue unless he himself is pauper).]

11. Suit by mutwalli, trustee or shebait.—[1] When a plaintiff sues in a representative character for example as a mutwalli, trustee or a shebait unless he is in possession of property belonging to the waqf estate or trust or the idol for whom he sues, sufficient to enable him to pay the court-fee, he may be allowed to sue as a pauper, even if it is shown that he has sufficient personal property of his own. (Vol 27) 1940 Oudh 148 (152). 15 Luck 265 (FR) * (Vol 14) 1927 Cal 309 (311) (DB). * (Vol 21) 1934 Pat 531 (531) * (Vol 22) 1935 Nag. 209 (211) : 31 Nag L R 413.

[2] Suit by shebait for recovery of endowed property against co-shebait and their alienes—Plaintiff having no sufficient means to pay court-fee.—Fact that shebait defendants possess sufficient properties belonging to idol does not disentitle him to sue as pauper. (1912) 16 Cal W N 93 (94) (DB).

12. Married woman—The fact that the applicant's husband has got sufficient property to pay the court-fee due on her plaint is not a ground for refusing the application of a pauper married woman for permission to sue as a pauper (Vol 5) 1918 Pat 329 (329) : 3 Pat L Jour 175 (DB).

13. Award of costs against pauper.—[1] Court cannot pass an order for costs against the pauper in interlocutory applications in the suit. (Vol 9) 1922 Bom 385 (385) : 47 Bom 104 (DB) (Application for amendment of plaint)

[But see (Vol 26) 1941 Mad 437 (437, 438) (Pauper plaintiff can be directed to pay day costs as condition precedent to further hearing of suit—Such condition can be enforced by dismissal of suit. * (Vol 15) 1928 Rang 306 (307) : 6 Rang 561 (DB). (Costs of adjournment)).]

[2] It is wholly incorrect to permit a person to sue as pauper and at the same time make the permission conditional on his paying costs to the other side. (Vol 27) 1940 All 261 (261) : 1LR (1940) All 258 (DB)

ORDER 33 RULE 2—Note 1.

[1] Applicant not settling forth, with utmost good faith, schedule of his movable and immovable property with its estimated value—Application held not properly framed and was liable to be rejected (Vol 17) 1930 Pat 368 (369) (DB). * (Vol 10) 1923 Oudh 118 (119) * ('08) 11 Oudh Gas 19 (20). (Following 1895 All W. N. 84—Case of appeal.) * ('13) 7 Low Bur Rul 60 (62) (DB).

[See also (Vol 21) 1934 Cal 632 (633) (DB).]

[2] Suit to enforce mortgage—Appeal by mortgagor—Value of equity of redemption cannot be excluded in determining whether the mortgagor is pauper or not. (Vol 20) 1941 Cal 659 (660) : 1LR (1941) 1 Cal 426 (DB).

[3] Share which a minor has in joint family property must be mentioned. (Vol 21) 1934 All 396 (396).

[4] Particulars of property given in plaint—Mere omission to attach separate schedule to application is not material omission. (Vol 29) 1942 Oudh 239 (239, 240) : 17 Luck 605 (DB).

[5] The Court should not throw out the application unless the omission was an act of bad faith. (Vol 19) 1932 Pat 308 (309).

[6] Application should not be rejected on the following grounds:—

(a) An item of property omitted to be given in the schedule. (Vol 25) 1941 Pat 638 (638). (Unless the omission is *mala fide*). * (Vol 28) 1941 Pat 621 (623). * (Vol 2) 1915 Mad 662 (662) (DB). * ('87) 1887 Pun Be No 27, page 59 (20) (DB). * (Vol 21) 1934 Cal 640 (641) (DB).

(b) Schedule not signed and verified by the applicant. (Vol 25) 1942 Loh 538 (645) * (Vol 21) 1934 Loh 281 (282). * (Vol 29) 1943 All 256 (257) : 55 All 316 (DB).

3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

[1882—S. 404; 1877—S. 404; 1883—S. 301.]

PROVINCIAL AMENDMENTS

ALLAHABAD

After the word "unless he is exempted from appearing in Court" add the words "or detained in prison".

MADRAS

The following shall be added to Rule 3. "The High Court may by general or special order exempt any person or class of persons from the obligation to present in person an application for permission to sue as a pauper."

[22-10-1940]

O. 33 R. 2 (contd.).

(c) Applicant unable to name all the persons in possession of the property left by the deceased in an administration suit. (Vol 19) 1932 Lah 828 (330).

[7] Defective application should be returned for amendment. (Vol 29) 1942 Oudh 240 (248): 17 Luck 628 * (Vol 29) 1942 Oudh 169 (171): 17 Luck 462 (DB) * ('37) 39 Pun L. R. 665 (666). * (Vol 23) 1936 All 475 (476) (DB).

[See (Vol 24) 1937 Nag 108 (110): ILR (1938) Nag 245.]

[See also (Vol 21) 1934 Cal 640 (642) (DB).]

[8] Application in time—Verification and signature after limitation—Application held properly presented (Vol 18) 1931 Bom 47 (50)

[9] An intentional departure from good faith must result in the rejection of the application although the omitted item may not be sufficient to affect the question of the alleged pauperism of the applicant. (Vol 30) 1943 Mad 11 (11) ((Vol 19) 1932 Pat 308 distinguished)

[9a] Leave to appeal in *forma pauperis* obtained by practising fraud on Court by non-disclosure of assets—Leave must be cancelled. (Vol 32) 1945 Mad 296 (296): ILR (1945) Mad 628 (DB).

[10] Plaint filed with stamp duty and registered as suit—Plaintiff subsequently finding that additional court-fees is required applying to continue the suit in *forma pauperis*—The fact that the application is not in the form prescribed by this rule will not necessarily entail the dismissal of the application. (Vol 27) 1940 Pat 667 (668) (DB). * (Vol 16) 1929 Mad 828 (829): 53 Mad 43 (DB).

[See (Vol 28) 1941 Pat 621 (622).]

[11] The property which is the subject-matter of the suit should also be included in the schedule. (Vol 25) 1938 Pesh 50 (51)

[12] Where the verification of the statements made in the application is not made in accordance with the provisions of O 6 R 15., the Court is bound to reject the application under R 5. (Vol 30) 1943 Mad 11 (11) * (Vol 30) 1943 Bom 292 (296) (DB) * (Vol 29) 1942 Oudh 169 (171): 17 Luck 462 (DB). * ('12) 6 Low Bur Rul 117 (118) (DB).

[13] Applicant not verifying contents of petition at foot of petition, but by a separate affidavit

in which statements in the application were said to be true—Held, affidavit might be treated as part of the application. (Vol 10) 1923 Lah 684 (684). (6 Low Bur Rul 117 to the contrary not followed).

ORDER 33 RULE 3—Note 1

[1] Application presented to officer of Court—Presentation is valid (Vol. 11) 1924 Mad 901 (902): 48 Mad 785. (Insistence is on the words "in person" and not on "to the Court") * (Vol. 8) 1921 Nag 106 (107): 17 Nag LR 22.

[2] Rule is mandatory—Application not presented in person—Court must reject it under R. 5. (Vol 29) 1942 Oudh 169 (171): 17 Luck 462 (DB). * ('87) 10 Mad 193 (194) (DB). (Several applicants—One only presenting application in person—It must be rejected against others). * ('09) 12 Oudh Cas 381 (387): (Do).

[3] Where, personal appearance in Court is impossible or exempted appearance by authorised person would be sufficient compliance with the law. (Vol. 5) 1918 Mad 363 (363, 364): 41 Mad 624 (DB) * ('99) 1899 Pun Re No 19, page 114 (117) (DB) (Presentation of appeal in *forma pauperis* by manager appointed under Act XXXV of 1858 is proper.) * (Vol 16) 1929 Pat 27 (28): 7 Pat 825 (DB) (Overruled in (Vol 18) 1931 Pat 183: 10 Pat 606 on another point) * (1902) 24 All 172 (173) (DB). * (Vol. 24) 1937 Lah 318 (319) (DB). (Under rules of Lahore High Court application must show on its face that personal appearance is exempted)

[4] Rule does not apply in the following cases:—

(a) Where plaint returned by one Court is presented to another Court. (Vol 18) 1931 Mad 418 (419).

[But see ('33) 1933 M.W.N. 197 (198).]

(') Where plaintiff is allowed to continue his suit as pauper. (Vol 16) 1929 Mad 828 (829): 53 Mad 43 (DB).

(c) Where application is returned for amendment and amended application is presented. (Vol 20) 1933 Rang 410 (413): 11 Rang 414 (DB).

[5] The term "authorized agent" is not the same as "recognized agent" in O 3 R. 2. (Vol. 16) 1929 Pat 27 (28): 7 Pat 825 (DB).

4. (1) Where the application is in proper form and duly presented, the Examination of Court may, if it thinks fit, examine the applicant, or his agent applicant. when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

If presented by agent, (2) Where the application is presented by an agent, Court may order applicant the Court may if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

[1882—S. 406; 1877—S. 406; 1859—Ss. 302, 304.]

Rejection of 5. The Court shall reject an application for permission to sue application. as a pauper—

- (a) where it is not framed and presented in the manner prescribed by Rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

[1882—Ss. 405, 407; 1877—Ss. 405, 407; 1859—Ss. 302, 304 Cf. O. 7 R. 11.]

PROVINCIAL AMENDMENTS

ALLAHABAD

(1) Add the following Explanation at the end :

"Explanation : An application shall not be rejected under Cl. (d) merely on the ground that the proposed suit appears to be barred by any law"

(2) Add in Cl (a) between the figure "3" and the word "or" the following :

"and the applicant, on being required by the Court to make any amendment within a time to be fixed by the Court, fails to do so."

MADRAS

Substitute the following for clause (d) :

(d) Where the allegations do not show a cause of action, or

(di) Where the suit appears to be barred by any law, or,"

[22-10-1940]

ODDH :

In Rule 5 (a) insert the words :

"And the applicant on being required by the Court to make any amendment within a time to be fixed by the Court fails to do so, between the figure "3" and the word "or"

O. 33 R. 3 (contd.).

(Note—Overruled in (Vol. 18) 1931 Pat 183 : 10 Pat 606 (FB) on another point)

[6] A pleader may be a duly authorized agent within this rule. ('71) 15 Suth W. R. 195 (199, 200) (DB).

[7] He must be specially authorized to present an application under this Order and must fulfil the other conditions detailed in this rule. (Vol 2) 1915 Lah 369 (370) * ('74) 21 Suth W R 308 (308) (DB) (Ordinary retainer not sufficient.) * (Vol 24) 1937 Lah 318 (319) (DB).

ORDER 33 RULE 4—Note 1.

[1] Object of the examination under this rule is to ascertain whether allegations do or do not show a cause of action (Vol 29) 1942 Ouddh 361 (361) (DB) * (Vol 6) 1919 Cal 385 (386) : 46 Cal 651 (DB) * (Vol 20) 1933 Rang 410 (415) : 11 Rang 414 (DB) * (1911) 18 Cal L Jour 593 (596) : (DB).

[2] Rejection of application under cl. (d) of R. 5 may be based on examination under this rule.

(1862-63) 1 Bom H C R 102 (103). (Enquiry under this rule should be made by the Judge himself)

[3] Application considered under rule 4 cannot be dismissed on ground of non-disclosure of cause of action because plaint is against decision of Full Bench of same Court (Vol 31) 1944 Bom 287 (282, 233) . I L R (1944) Bom 133.

[4] Applicant examined under this rule—Opposite party has a right to cross-examine him on merits of the claim. (Vol 7) 1920 Cal 692 (693) (DB).

ORDER 33 RULE 5—SYNOPSIS

1. Scope and applicability.
2. Clause (a).
3. Clause (b).
4. Clause (d).
5. Clause (e).
6. Appeal.

1. Scope and applicability.—[1] An application for permission to sue as a pauper shall be rejected

O. 33 R 5 (contd.).

in the events enumerated in the rule (Vol 15) 1918 Low Bur 86 (81) 9 Low Bur Rul 93 (8 B) * (Vol 19) 1932 All 457 (89) (DB)

[2] The rule should be interpreted strictly ('85) 7 All 661 (668) (FR) (Per Mahomed, J) * (Vol 20) 1933 Rang 410 (412) 11 Rang 414 (DB)

[3] The rule is not exhaustive, an application for leave can be rejected on other grounds also (Vol 26) 1339 Pat 385 (386) (DB)

[But see (Vol 28) 1941 Mad 398 (399) ((1937) Mad W N 415 distinguishing)]

[4] An order of rejection of an application must be made on preliminary grounds before notice is issued ('96) 20 Bom 86 (1) (DP) (Per Ransade, J)—Note—the words used in this case imply that a plaint can also be rejected only at the preliminary stages of a suit. This is not correct. See Order 7 Rule 11 Note 10)

2 Clause (a) —[1] Application for leave to sue *in forma pauperis* framed as prescribed in Rule 2 —But defective in some particulars with regard to substance of plaint—Held, Court was not bound to reject the application (Vol 28) 1941 Pat 638 ('88) * (Vol 27) 1910 Pat 667 (668) (DB). * (Vol 20) 1933 Rang 410 (412) 11 Rang 414 (DB). (Dissenting from (Vol 16) 1929 Rang 128 7 Rang 359)

[See (Vol 29) 1942 Oudh 299 (299, 240) 17 Luck 605 (DB)].

[2] Omission of property owned by applicant apparent on the face of the application—The application should be rejected. (Vol 26) 1938 Pesh 50 (52)

[3] Court has power to allow amendment of application to make it conform to the law (Vol 29) 1942 Oudh 240 (242, 24) 17 Luck 628. * (Vol 1) 1912 Mad 255 (255) * (Vol 20) 1933 All 295 (297) 55 All 2 6 (DB) * (Vol 20) 1933 Rang 410 (412) 11 Rang 414 (DB) (Dissenting from (Vol 16) 1929 Rang 128 7 Rang 359) * (Vol 23) 1936 All 475 (476) (DB) * (Vol 24) 1937 Nag 108 (108) ILR (1938) Nag 245 * (Vol 25) 1938 Pat 209 (210) (DB)

[See also (Vol 29) 1942 Oudh 169 (171) 17 Luck 462 (DB) * (Vol 21) 1934 Lah 231 (232)]

3 Clause (b) —[1] The Court is bound to proceed on the valuation given in the plaint. It cannot go into an investigation of the question, whether the suit has been overvalued. ('21) 61 Ind Cas 891 (891) (DB) (Pat) * ('12) 16 Ind Cas 612 (614) (Mad)

[2] Where a Court finds that an applicant who applies to sue *in forma pauperis* is unable to pay the court-fees upon his claim, it should allow him to sue as a pauper for the whole amount claimed. It is illegal on the part of the Court to confine the permission to permit the claim, because it finds that he may succeed only as to that part. ('81) 1881 Pat 21 (21) page 177 (178) (DB).

[3] Court cannot go into the merits of the case when dealing with the question of pauperism of the applicant. ('82) 4 Mid 323 (24) (DB) * ('78) 2 Cal W N 474 (478, 477) * ('04) 8 Cal W N 70 (78) (DB)

[See (Vol 21) 1934 All 323 (324)]

[4] Applicant found pauper—Court need not give finding on other matters in the rule unless grounds for objection of application on other reasons mentioned therein appear to exist (Vol 19) 1926 Lah 642 (643) : 7 Lah 337,

3 Clause (d) [1] An application for permission to sue *in forma pauperis* can be rejected in the following cases —

[a] Claim *prima facie* barred by Limitation (Vol 28) 1941 Nag 330 (333) I L R (1942) Nag 459 ((V 1 19) 1932 All 543 54 All 525 dissented) * ('86) 7 All 661 (664) (FI) * (Vol 1) 1919 Lah 4 (5) 1319 Pun Re No 184 * (Vol 21) 1934 Rang 111 (112) 12 Rang 124 * ('94) 1894 Pun Re No 130 pages 474 (496) (DB) * (Vol 7) 1920 Mad 122 (129) * (Vol 2) 1915 Mad 318 (319) (DB) * (Vol 24) 1937 Oudh 481 (488) 18 Luck 660 (DB)

[See however (Vol 19) 1932 All 543 (546) 54 All 525 (DB)]

[b] Res Judicata (Vol 23) 1936 Pesh 39 (40)

[c] Unlawful (Vol 4) 1917 Low Bur 18 (19).

[d] Immoral or opposed to public policy ('89) 13 Bom 126 (130).

[2] An application can be rejected on the ground of want of territorial jurisdiction (Vol 29) 1942 Mad 16 (16).

[3] In considering whether the applicant has a cause of action or not, the Court has to look only into the allegations made by the applicant and cannot enter into the merits of the claim (Vol 30) 1943 Mad 663 (664) * (Vol 28) 1941 Mad 398 (399) * (Vol 27) 1910 Nag 258 (258) I L R (1940) Nag 549 * (Vol 22) 1935 Lah 961 (961) * (Vol 23) 1936 Pat 2 (3) (DB)

[See (Vol 23) 1936 Sind 180 (182) : 30 Sind LR 814]

[4] It is open to the Court to consider along with the allegations contained in the plaint also the facts appearing in the examination of the applicant (Vol 2) 1942 Oudh 361 (363) (DB) * (Vol 6) 1919 Cal 325 (326) 46 Cal 661 (DB) * (Vol 21) 1934 Rang 214 (216) (DB) * (1911) 13 Cal L Jour 528 (529) (DB) * ('09) 1909 Pun L R No 91 page 337 (339) (DB) * ('82) 4 Mad 323 (324) (DB) * (Vol 15) 1928 Sind 118 (116) : 22 Sind L R 441 * ('98) 20 All 399 (301) (DB) * (Vol 19) 1932 Bom 584 (585) 56 Bom 585 * (Vol 26) 1938 Oudh 146 (151) 14 Luck 116 (DB).

[5] In order to see whether allegations show a cause of action, Court should not go beyond facts apparent on face of plaint or appearing in the examination of the applicant (Vol 30) 1943 Mad 663 (664) * (Vol 21) 1934 Rang 214 (216) (DB) * (Vol 21) 1934 Lah 231 (232) * (Vol 19) 1933 Rang 107 (112, 113) 10 Rang 347 (FR). ((Vol 16) 1929 Rang 273 overruled) * (Vol 25) 1938 Oudh 146 (151) 14 Luck 116 (DB) * (Vol 24) 1937 Cal 516 (516) * (Vol 33) 1946 Pat 316 (325) : 25 Pat 58. (Dissenting from (Vol 20) 1933 Pat 284)

6. Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

[1832—S 408 1877—E. 408 1859—S 305.]

O 33 R 5 (contd.)

[6] In deciding the application, complicated questions on the following subjects cannot be gone into

(a) Limitation (Vol 5) 1185 Mad 60 (61) 41 Mad 620 (DB) * (Vol 6) 119 Mad 218 (219, 220) * (Vol 16) 1929 Lah 498 (498) * (10) 1 Upp Bur Rul 29 * (Vol 24) 1937 Cal 516 (517) * (Vol 28) 1941 Nag 380 (33) * I L R (194-) Nag 45

(b) Res Judicata (Vol 25) 1941 Mad 398 (399) * (Vol 12) 1925 All 275 (276)

[But see (70) 14 Suth W R 231 (232) (DB)]

(c) Local Jurisdiction in (Vol 21) 1934 Lah 231 (232)

(d) Other questions (Vol 29) 1936 Mad 83 (84) (Questions relating to the interpretation of Act II of 1923)

[7] The Court cannot refuse the application on the ground that, on the merits, the litigation is very likely to end in failure (Vol 17) 1930 All 758 (759) 52 All 927 (DB) * (Vol 22) 1935 Lah 121 (124) * (10) 6 Ind Cas 703 (703) (All) * (Vol 12) 1925 Cal 990 (990) (DB) * (98) 2 Cal W N 474 (478, 479) (DB) * (Vol 11) 1924 Lah 659 (660) * (Vol 11) 1924 Mad 80 (80) * (1912) 16 Ind Cas 612 (614) (Mad) * (129) 75 Ind Cas 744 (745) (Nag) * (Vol 18) 1931 Rang 79 (80) * (11) Ind Cas 857 (858) (Low Bur)

[See also (Vol 30) 1943 Bom 338 (338) (Maintenance claim on the allegation that petitioner is the illegitimate child of the respondent—Claim not absurd although success of cause of action may be doubtful—Application to sue as pauper hold should not be rejected under Rule 5 (d) although Court can refuse application subsequently under R 7)]

[8] The Court should exercise great caution in considering the question of cause of action because—

(a) The applicant is often without advantage of the aid of Counsel (Vol 13) 13 Bom 126 (128)

(b) The opposite party can urge those very objections under Rul 7 (104) 27 Mad 37 (39) * (Vol 3) 1116 Mad 1017 (1018)

[See also (98) 4 Mad L Tim 302 (303)]

5. Clause (e)—[1] Litigation not *bona fide* plaintiff set up by another for purpose of evading Court-fee—Court will not allow him to sue as a pauper (Vol 27) 1940 Pesh 13 (13) * (Vol 6) 1919 Pat 56 (57) (DB) * (Vol 2) 1938 Mad 153 (154) * (Vol 20) 1939 Pat 385 (386) (DB) * (Vol 26) 1949 Mad 902 (903)

[2] Agreement should have reference to the subject-matter of the suit and should be of a champertous character for this clause to operate (Vol 4) 1917 All 188 (186) (DB) * (Vol 21) 1934 Cal 740 (740) (DB) * (Vol 21) 1934 Rang 214 (215) (DB) * (Vol 27) 1940 Bom 49 (50) (DB).

[But see (Vol 24) 1937 Mad 161 (162) I L R (1937) Mad 584 (DB)]

[3] The agreement must be one between the proper and a third party (Vol 5) 1918 Mad 362 (364) 41 Mad 621 (DP)

[4] The agreement should be subsisting and effective at the time of the application (Vol 22) 1935 Qudh 20 (21) 10 Luck 363 (DB) * (Vol 24) 1937 Mad 161 (162) I L R (1937) Mad 584 (DB) * (Vol 27) 1940 Bom 49 (50).

[5] The word "interest" is used in its general and ordinary sense and not in the technical sense of the interest of a trustee who mortgage or co-owner of charge-holder and the combined operation of the Transfer of Property Act and the Registration Act. (Vol 25) 1938 Mad 491 (492) (DB) * (Vol 26) 1938 Mad 153 (153)

[6] Interest should be a vested and complete interest (Vol 25) 1938 Mad 491 (492) (DB).

[7] An agreement with the pleader that he is to recover the fees out of the fruits of the decree that may be obtained is within the prohibition of the section (85) 9 Bom 371 (372) (DB)

[See (Vol 25) 1938 Mad 491 (492).]

[8] Mere agreement to pay fees when decree is obtained—No condition as to its recovery out of decretal amount—The agreement does not fall under this clause (Vol 19) 1932 Rang 68 (69). * (Vol 29) 1936 Lah 612 (648).

[9] The suit or appeal need not have been contemplated at the time of agreement (Vol 24) 1937 Mad 161 (162) I L R (1937) Mad 584 (DB). (Confirming (Vol 29) 1936 Mad 666)

[10] Where the plaintiff assigns a part of the share claimed by him in partition to another he will not be exempted from the operation of this clause merely because he does not include in his claim the share assigned by him (Vol 17) 1940 Bom 41 (40) (DB)

[11] Plea that applicant was being financed depends on facts and cannot be raised for the first time in revision (Vol 29) 1942 Nag 17 (40) I L R (1942) Nag 225

6. Appeal—[1] An order rejecting an application for permission to sue *in forma pauperis* is not appealable (Vol 30) 1948 Mad 663 (664). * (85) 7 All 661 (668) (FB). * (90) 21 All 183 (186) (FB) * (Vol 17) 1930 Rang 254 (254) (DB) * (Vol 18) 1931 Rang 129 (129). 9 Rang 86.

[2] Order rejecting application under Cl. (d) based on erroneous decision of question whether applicant's allegations do not show cause of action is revisable. (Vol 33) 1946 Pat 316 (321) 25 Pat 58 (DB)

ORDER 33 RULE 6—Note 1

[1] The provision directing notice is imperative. (Vol 14) 1927 Cal 464 (464) (DB) * (Vol 1) 1914 Cal 537 (537) (DB)

PROVINCIAL AMENDMENT.

MADRAS

The following shall be substituted for Rule 6.

"R. 6. Where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall nevertheless fix a day (of which at least ten days' clear notice shall be given to the opposite party and to the Government Pleader for receiving such evidence as the applicant may adduce to prove that the application is not subject to any of the prohibitions in Rule 5 and for hearing any evidence which may be adduced to the contrary."

[22-10-1940.]

a 7. (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

[1882—S. 309 ; 1877—S. 309 ; 1859—S. 306.]

[a]. The provisions of this rule, so far as they relate to the making of a memorandum, are not applicable to the Chief Court of Oudh : see the Oudh Courts Act, 1925 (U. P. 4 [IV] of 1925) Section 16 (2).

PROVINCIAL AMENDMENT.

MADRAS

The following shall be added as Sub-rule (4) to Rule 7 :

"(4) Where the application is for leave to sue in a representative Capacity under explanation (iii) to Rule 1, or, under Sections 91, 92 or under Order 1 Rule 8, the Court may if it thinks fit, for reasons to be recorded in writing direct that the plaintiff shall give security for the payment of Court fee."

[22-10-1940]

O. 33 R. 6 (contd.).

[2] An order made without notice to the Government pleader or to the opposite party is without jurisdiction and is open to revision. (Vol 14) 1927 Cal 464 (464) (DB).

[3] The notice under this Rule must be served on the whole body of the opposite party if there be more than one. (Vol 28) 1941 Pat 594 (595) : 29 Pat 765 (DB).

ORDER 33 RULE 7—SYNOPSIS.

1. Scope of the inquiry under this rule.
2. Limitation when the application is granted.
3. Limitation when application is refused.
4. Limitation when application is converted into a plaint on payment of court-fee.
5. Limitation where plaintiff is dispaupered.
6. Order rejecting application, whether appealable.
7. Appeal from decree—Whether propriety of order allowing suit in forma pauperis can be questioned.

1. Scope of the inquiry under this rule.—[1] An examination of the applicant under R 4, and

an examination under this rule are contemplated by this order. ('12) 1912 Mad WN 173 (174). * (Vol 7) 1920 Cal 995 (995) (DB).

[See also (Vol 3) 1916 Mad 1047 (1048).]

[2] The examination under this rule is confined to the question of the applicant's pauperism. (Vol 30) 1943 Bom 318 (319) : I L R (1943) Bom 547. * (Vol 28) 1941 Nag 330 (334) : I L R (1942) Nag 459. * (Vol 6) 1919 Cal 385 (386) : 46 Cal 651 (662) (DB). * (Vol 10) 1923 All 577 (577) : 45 All 548 (DB). * ('85) 7 All 661 (663, 664) (FB). * ('08) 18 Mad LJour 292 (295, 296) (FB). (19 Mad 197 overruled) * (Vol 14) 1927 Rang 72 (73). * (Vol 19) 1932 Bom 584 (585, 586) : 56 Bom 585. * (Vol 25) 1938 Pat 209 (210) (DB). * ('37) 1937 Mad WN 415 (416).

[See (Vol 20) 1933 All 779 (780) (DB)].

[See however (Vol 25) 1938 Nag 210 (211) : I L R (1940) Nag 463.]

[But see (Vol 6) 1919 Pat 58 (59) (DB).]

[3] The Court cannot allow the examination of witnesses on the following topics :—

[a] Existence of a cause of action. (Vol 80) 1943 Bom 318 (320) : I L R (1943) Bom 547 (DB)

O 33 R. 7 (contd.)

* ('98) 2 Cal W N 474 (478, 479) (DB). (See comments on this case in (Vol 6) 1919 Cal 385: (46 Cal 651) * (1911) 11 Ind Cas 857 (358) (Low Bur) * (Vol 14) 1327 Rang 72 (73). * (Vol 16) 1929 Rang 278 (273): 7 Rang 361 (DB). * (Vol 19) 1932 Bom 584 (588): 56 Bom 585. * (Vol 11) 1924 Lah 659 (660) * (Vol 25) 1938 Oudh 146 (151): 14 Luck 116 (DB)

[b] Title of the applicant to institute the suit. (Vol 10) 1923 All 577 (578): 45 All 548 (DB).

[c] Limitation. (Vol 6) 1919 Cal 385 (386): 46 Cal 651. * ('76) 25 Suth W R 74 (74) (DB) * (1909) 6 Mad L Tim 359 (359) (DB). * (Vol 12). 1925 Pat 30 (31): 3 Pat 275 (DB).

[d] *Res judicata*. ('03) 18 Mad L Jour 292 (295, 296) (FB). (19 Mad 197 which took a contrary view, overruled).

[See ('37) 1937 Mad W N 415 (416)].

[4] The Court can after hearing evidence and arguments under this rule change its mind and dismiss the application for reasons contained in Rule 5. (Vol 30) 1943 Bom 398 (399): I L R (1943) Bom 426 * (Vol 28) 1941 Mad 398 (398, 399).

[5] The Court can hear arguments on the question whether the applicant is or is not subject to any of the prohibitions specified in R. 5. (Vol 30) 1943 Bom 318 (320): I L R (1943) Bom 547 (DB). * (Vol 28) 1941 Mad 398 (398, 399). * (Vol 28) 1941 Nag 330 (334): I L R (1942) Nag 459. * (Vol 19) 1932 Rang 107 (111, 112): 10 Rang 357 (FB). * ('37) 1937 Mad W N 415 (416) * (Vol 25) 1938 Pesh 50 (51).

[See (Vol 22) 1935 Nag 168 (170): 31 Nag L R 386.]

[6] The Court has no jurisdiction to reject the application on other grounds than those specified, in R. 5. (Vol 27) 1940 Nag 268 (269): I L R (1940) Nag 549. * ('03) 18 Mad L Jour 292 (295, 296) (FB). * ('98) 2 Cal W N 474 (478, 479) (DB). * (1904) 8 Cal W N 70 (73) (DB) * (Vol 12) 1925 Pat 30 (31): 3 Pat 275 (DB).

[7] In the following cases it was held that the application cannot be rejected:—

[a] On the ground that other co-heirs are seeking to establish their rights through the applicant who is a pauper. ('10) 1 Upp Bur Rul 26.

[b] On the construction of documents filed by parties. (Vol 30) 1943 Mad 663 (664) * ('04) 8 Cal W N 70 (73) (DB). * (Vol 14) 1927 Mad 441 (442).

[But see ('70) 14 Suth W R 281 (283) (DB).]

[c] On any complicated questions of law. (Vol 28) 1941 Mad 398 (399).

[8] The Court can only consider the applicant's allegations and not the other evidence in coming to a conclusion whether there is a cause of action.

(Vol 30) 1943 Mad 663 (664) * (Vol 32) 1945 Oudh 79 (81) (DB).

[9] Even in the absence of any arguments by the other party under sub-r (2), the Court can consider the application *sub motu* if it comes under R. 5. ('03) 27 Mad 37 (39).

[10] Court can deal with the technical objections in R. 5 before hearing the evidence as to whether the petitioner is a pauper or not. (Vol 25) 1938 Pesh 50 (51).

[See (Vol 27) 1940 Pesh 13 (13, 14)].

[11] The merits of the suit can be entered into only after the admission of the pauper application. (Vol 27) 1940 Nag 258 (259): I L R (1940) Nag 549.

[12] An order under this rule can only be passed after notice has been served as provided by R. 6. (Vol 28) 1941 Pat 594 (595): 20 Pat 765.

[13] Leave to sue as pauper should not be made conditional upon payment of costs to the other party. (Vol 27) 1940 All 251 (251): I L R (1940) All 253 (DB).

[14] Report of Tahsildar that applicant is pauper—Application opposed by Government pleader—Judge has jurisdiction to make further inquiry as to applicant's pauperism. ('40) 187 Ind Cas 184 (185) (Lah).

2. *Limitation when the application is granted.*—[1] Application to sue in *forma pauperis* granted—Suit is deemed to be instituted on the date of the presentation of the application and not when the applicant is allowed to sue as a pauper. (Vol 30) 1943 Bom 292 (296, 297) (DB) * (Vol 15) 1928 Mad 278 (279): 51 Mad 697. * (Vol 3) 1916 Mad 685 (685) (DB) * ('82) 4 All 37 (39) (DB). * (Vol 24) 1937 Lah 151 (153): 17 Lah 831 (DB). * (Vol 26) 1939 Bom 418 (419).

[See also (Vol 27) 1940 Oudh 441 (442): 16 Luck 184 (DB) * (1861) 9 Moo Ind App 66 (94, 95) (PC)].

[2] Application to sue in *forma pauperis* made before the amendment of the Court fees Act but registered as a suit after the amendment.—Amount of Court-fees should be calculated on the basis of the old Court-fees Act. (Vol 13) 1926 Mad 159 (159)

3. *Limitation when application is refused.*—

[1] Different views are held in the following cases as to the power of the Court to allow under S. 149 the Court-fees to be paid upon the refusal of the application for leave to sue as a pauper:—

[a] Court cannot under S. 149 allow the Court fees to be paid. (Vol 30) 1943 Bom 292 (296, 297) (DB). * ('07) 9 Bom L R 204 (207) (DB). (2 All 241 distinguished; 20 Bom 508 followed). * (Vol 24) 1937 Rang 185 (187, 189): 1937 Rang L R 321 (DB). * (Vol 20) 1938 Nag 237 (238). * (Vol 15) 1929 Nag 268 (269). * (Vol 26) 1939 Mad 316 (317).

O. 33 R. 7 (contd.)

* (Vol 26) 1930 Cal 304 (398) : I L R (1930) 2 Cal 68. * ('97) 24 Cal 889 (891) (DB) * (Vol 24) 1937 Lah 151 (154) : 17 Lah 831 (DB) * (Vol 25) 1938 Pat 120 (123) : 17 Pat 281 (DB) * ('95) 17 All 526 (528) (DB).

[b] Court can permit the court-fee to be paid under S. 149. (Vol 30) 1943 Mad 646 (646). * (Vol 23) 1936 Mad 101 (102) : 59 Mad 805 * (Vol 24) 1937 All 781 (783) : I L R (1938) All 11. * (Vol 23) 1936 Cal 28 (39) : 62 Cal 711 (DB). * (Vol 25) 1938 Cal 730 (733, 734) : ILR (1939) 1 Cal 112 (DB). * (Vol 25) 1938 Lah 41 (42) (DB) * (Vol 16) 1929 Pat 637 (639) : 9 Pat 439 (DB).

[c] Court can permit the Court-fee to be paid under S. 149 if the application to sue as a pauper is rejected under R. 5 but cannot permit if the application is refused under R. 7. (Vol 23) 1936 All 584 (592) : ILR (1937) All 22 (F'B).

[See however (Vol 24) 1937 All 781 (783) : I L R (1938) All 11. (This decision proceeds on the footing that the Court has power, while dismissing an application for leave to sue as a pauper, to allow court fees to be paid under S. 149—But the Full Bench decision in (Vol 23) 1936 All 584 : I L R (1937) All 22 (F'B) is not referred to and the decision cannot be accepted as binding authority in the Allahabad High Court).

[2] Time taken in prosecuting *mala-fide* application for leave cannot be deducted while computing period of limitation for suit. (Vol 26) 1939 Cal 304 (398) : ILR (1939) 2 Cal 68.

4. Limitation when application is converted into a plaint on payment of Court-fee.—[1] Applicant paying the court-fee in respect of the plaint during the pendency of application to sue as a pauper—Plaint registered as a suit—Suit held to be instituted when the application was filed. ('80) 2 All 241 (250, 251) : 6 Ind App 126 (PC). (Reversing 1 All 230 Case decided under Code of 1859) * (Vol 31) 1944 Nag 357 (358) : ILR (1944) Nag 623.

[2] Application made *bona fide*.—Suit deemed to be instituted on the date of the application to sue in *forma pauperis* and not on the date when the Court-fees are paid. (Vol 30) 1943 Bom 292 (296, 297) (DB). * (Vol 29) 1942 Pesh 27 (27). * ('01) 28 Cal 427 (430) (DB). * (Vol 3) 1916 Mad 685 (686) (DB). * (Vol 9) 1922 Nag 160 (161) : 18 Nag L R 44. * ('03) 1903 Pun Re No. 59, page 268 (269) (DB). * (62) 1862 Suth W R Sp. No. 53 (53) (DB). * (Vol 26) 1939 Cal 304 (398) : I L R (1939) 2 Cal 68. * (Vol 22) 1935 Mad 878 (879). * (Vol 27) 1940 Oudh 59 (62) : 15 Luck 68 (DB). * (Vol 21) 1934 Mad 487 (469) : 58 Mad 169. * (Vol 24) 1937 Nag 36 (37) : ILR (1938) Nag 183. * (Vol 27) 1936 Oudh 340 (354).

[See (Vol 26) 1939 Rang 56 (57, 58) : 1938 Rang 2 R 629.]

[But see ('96) 18 All 206 (209) (DB). (2 All 241 distinguished on the ground that it was decided apparently to some extent in the belief that there was a practice in Indian Courts justifying what had taken place in that case).]

[3] Application made *mala fide*.—Applicant found possessed of means to pay the court-fees. —Suit deemed to be instituted only on the date on which court-fees are paid, and not on the date when the application was presented. (Vol 29) 1942 Pesh 27 (27). * (Vol 27) 1940 Lah 446 (447) : ILR (1941) Lah 652 (DB). * (Vol 16) 1929 Nag 268 (269). * (Vol 12) 1925 Mad 793 (793). * (Vol 10) 1923 Rang 256 (257) : 1 Rang 196. * (Vol 24) 1937 Nag 36 (37) : ILR (1938) Nag 183.

5. Limitation where plaintiff is dispaupered.—[1] A plaintiff dispaupered under R. 9 can continue the suit on payment of Court-fees and no question of limitation arises. ('95) 17 All 526 (528) (DB).

6. Order rejecting application, whether appealable.—[1] No appeal lies from an order rejecting an application to sue in *forma pauperis* whether under Rule 5 or under R. 7. ('78) 1 All 746 (747) (FB). * ('90) 21 All 133 (136) (FB). * ('70) 1870 Pun Re No. 62, page 168 (168). * ('10) 1 Upp Bur Rul 23.

[See (Vol 4) 1917 Cal 696 (697) (DB).]

[2] In proper cases it is open to revision by the High Court. (Vol 29) 1942 Pesh 29 (29). * ('85) 7 All 661 (669, 672) (FB). * (Vol 4) 1917 All 186 (186) (DB). * ('80) 5 Cal 807 (810, 811) (DB). * ('75) 24 Suth W R 62 (62) (DB). * (Vol 17) 1930 Lah 735 (736).

[3] Revision may lie from an order granting an application to sue in *forma pauperis*. (Vol 20) 1933 All 225 (206) : 55 All 216 (DB). * (Vol 21) 1934 Lah 231 (231). * (Vol 25) 1938 Oudh 146 (149) : 14 Luck 116 (DB).

[See (Vol 21) 1934 Lah 235 (206).]

[4] Final order of a Judge sitting on the original side of the High Court on an application to sue in *forma pauperis* is a "judgment" under cl. 15 of the Letters Patent, and is appealable. (Vol 12) 1925 Mad 167 (168) : 48 Mad 700 (DB).

[See however (Vol 15) 1926 All 446 (446) : 48 All 493 (DB).]

[5] An order returning a petition for permission to sue as a pauper is not an order under O. 7 R. 10 and, is not appealable. (Vol 22) 1935 Mad 1043 (1043).

7. Appeal from decree—Whether propriety of order allowing suit in *forma pauperis* can be questioned.—[1] In an appeal from the decree Appellate Court cannot entertain the plea that the plaintiff should not have been allowed to sue as a pauper. ('01) 23 All 364 (365) (DB).

8. Where the application is granted, it shall be numbered and registered, and shall be deemed Procedure if applica- the plaint in the suit, and the suit shall proceed in all other respects as a tion admitted. suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

[1882-S. 410; 1877-S. 410; 1859-S. 308.]

9. The Court may, on the application of the defendant, or of the Government pleader, of Dispaupering. which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

- (a) if he is guilty of vexatious or improper conduct in the course of the suit;
- (b) if it appears that his means are such that he ought not to continue to sue as a pauper; or
- (c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

[1882-S. 414; 1877-S. 414. Cf. O. 38 R. 5.]

ORDER 33 RULE 8—SYNOPSIS.

1. Scope.

2. Exemption from court-fee.

3. Insolvency of plaintiff.

4. Lis Pendens.

1. Scope.—[1] An application to sue as a pauper cannot be deemed a plaint till leave is granted; and the court must return the plaint for presentation to the proper Court. (Vol. 6) 1919 All 213 (214) (DB).

[2] Till leave is granted to sue as pauper the court cannot order rejection of plaint under O. 7 R. 11. (Vol. 27) 1940 Lah 446 (447): I L R (1941) Lah 652 (DB).

[3] Plaint filed in forma pauperis with leave returned for presentation to proper court—Re-presentation after omitting portion of claim.—Held, fresh leave was necessary to file amended plaint. (Vol. 32) 1945 Mad 7 (8).

[4] Until the leave is granted, there is no suit in existence; ('88) 7 Bom 373 (376) (DB). * ('86) 10 Bom 207 (209). * (Vol. 24) 1987 Oudh 452 (453) (DB). * (Vol. 25) 1933 Oudh 146 (148): 14 Luck 116 (DB).

[5] The Court cannot direct an attachment of properties before judgment, until plaintiff has been permitted to sue as a pauper. (Vol. 4) 1917 Cal 852 (853) (DB).

[But see (Vol. 30) 1943 Bom 143 (144): I L R (1943) Bom 138 (DB). (Plaintiff can apply under O. 29 R. 7 on the same day on which leave is sought to sue as pauper).]

[6] Plaintiff bearing insufficient court-fee—Plaintiff unable to make up deficiency applying to continue suit as pauper—Court should scrutinize plaint to see whether it discloses cause of action and then allow suit to continue if applicant is found a pauper in the enquiry. (Vol. 16) 1929 Mad 328 (329): 53 Mad 43. * (Vol. 23) 1936 Mad 158 (159).

[7] Proper fees paid up to the date of application to be admitted as pauper—No funds to continue suit—Plaintiff can be allowed to continue as pauper. (Vol. 25) 1938 Mad. 488 (488).

[8] Application for leave granted—Evidence of pauperism cannot be required again on the subsequent addition of new defendants. (Vol. 23) 1936 Pesh 51 (52).

2. Exemption from Court-fee.—[1] The exemption does not extend to the liability to pay stamp duty or penalty in respect of a document which owing to defect in stamp is inadmissible in evidence. ('68) 10 Suth W R 357 (358) (DB).

[2] An application for review of judgment passed in a suit or appeal in forma pauperis is maintainable without court-fee. (Vol. 23) 1936 Cal 752 (753) (DB).

[3] Application for probate or letters of administration allowed to be made in forma pauperis—Applicant should be exempted from fee required under section 19-I of the Court-fees Act. (Vol. 25) 1938 Mad 486 (488).

[4] Petitioner filing revision cannot file it without payment of court-fees. (Vol. 33) 1946 Mad 257 (258).

3. Insolvency of plaintiff.—[1] Plaintiff, permitted to sue as pauper, subsequently adjudged insolvent—Official Receiver entitled to continue suit (Vol. 15) 1918 All 177 (177) (DB).

4. Lis pendens.—[1] The doctrine of lis pendens will apply to suits instituted in forma pauperis. ('08) 30 All 5 (102) (DB).

[2] The doctrine will operate from the date of presentation of application for leave. (Vol. 23) 1936 Mad 853 (854, 855).

ORDER 33 RULE 9—SYNOPSIS.

1. Scope.

2. "Vexatious or improper conduct."

3. "Ought not to continue to sue as a pauper."

4. "Agreement with reference to the subject-matter."

1. Scope.—[1] The plaintiff cannot be dispaupered after the suit or appeal has been disposed of. (Vol. 28) 1941 Mad 217 (219) (DB). * ('94) 18 Bom 464 (467) (DB). (Case overruled in 31 Bom 10 (FB). on another point).

10. Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-costs where pauper fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the [Provincial Government] from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

[1832-S. 411; 1877-S. 411; 1859-S. 309.]

a. Substituted by A.O. 1937, for "Government."

O. 33 R. 9 (contd.)

[2] An order granting leave to sue as pauper does not operate as *res judicata*. (Vol. 21) 1934 All 323 (324).

[3] A plaintiff can be dispaupered only on the grounds mentioned in this rule. (Vol. 22) 1935 Pat 449 (450), * (Vol. 23) 1936 Pesh 51 (52).

[4] Where during the trial it is found that the plaintiff has no cause of action, he should not be dispaupered but the suit should be dismissed. (Vol. 22) 1935 Pat 449 (450).

[5] Dispaupering a plaintiff under this rule is in the discretion of the Court. (Vol. 23) 1936 Mad 662 (663); 59 Mad 901.

2. "Vexatious or improper conduct"—[1] A mere omission to state in the list of assets a life insurance policy worth about Rs. 245 where the court-fee to be paid on the plaint was over Rs. 500 was held not to be vexatious or improper conduct. (Vol. 9) 1922 Bom 215 (215); 46 Bom 1017 (DB).

[2] Intentional delays in prosecuting proceedings may amount to vexatious or improper conduct. (Vol. 16) 1929 Sind 186 (186).

3. "Ought not to continue to sue as a pauper."—[1] Receipt of an interim allowance during the suit barely sufficient for maintenance will not disentitle the plaintiff to continue suit as a pauper. (Vol. 11) 1924 Pat 27 (28, 29); 2 Pat 879 (DB)

[2] Fact that plaintiff has a rich relation is no ground for dispaupering him (Vol. 11) 1924 Pat 27 (28, 29); 2 Pat 879 (DB).

[3] Appearance by an eminent counsel is no ground. (Vol. 11) 1924 Pat 27 (30); 2 Pat 879 (DB).

[But see (Vol. 7) 1915 Lah 77 (77).]

[4] Plaintiff receiving money sufficient to pay court-fee subsequently—Court can dispauper him even though the money was paid to a creditor. (Vol. 8) 1921 Mad 97 (98).

[5] Possession of non-transferable property is no ground for dispaupering plaintiff. (Vol. 28) 1941 Mad 217 (219, 220) (DB).

4. "Agreement with reference to the subject-matter"—[1] The object of the rule is to prevent:—

(a) Champertous agreements. ('94) 18 Bom 464 (467) (DB). (Note—Overruled in 31 Bom 10 (FB) on another point).

(b) Third parties from evading court-fee. ('13) 7 Sind LR 52 (52, 53) * (Vol. 23) 1936 Mad 662, (663); 59 Mad 901 * (Vol. 25) 1938 Mad 153 (154), * (Vol. 14) 1927 Rang 283 (284) (Agreement to pay advocate large sum of money in the event of success).

[2] Provisions of order 33 are for the benefit of bonafide litigants only—Pauper entering into agreement with another to repay money advanced and to be advanced—In default, agreement to sell portion of property in suit—Such agreement held, was covered by Rule 9 and such person should be dispaupered. (Vol. 25) 1938 Mad 153 (154).

[3] Clause does not apply where the parties have settled their differences in order to put an end to litigation. ('94) 18 Bom 464 (467) (DB). (Note—Overruled in 31 Bom 10 (FB) on another point).

(4) The clause does not cover a case where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. (Vol. 24) 1937 Mad 574 (575).

[5] Application of the clause is not confined to the party who has entered into the agreement and legal representative of the original plaintiff or appellant can be dispaupered for an agreement entered into by his predecessor-in-interest. (Vol. 25) 1938 Mad 491 (493) (DB).

ORDER 33 RULE 10—SYNOPSIS.

1. Scope.
2. Court-fees to be first charge.
3. Effect of the first charge.
4. Crown entitled to precedence in respect of court-fees.
5. Recovery of court-fees by Government.
6. Realization of court-fees
7. Appeal.

1. Scope—[1] The object of the rule is to secure to the Government the Court-fees the payment of which is temporarily suspended. [See however (Vol. 17) 1930 Rang 342 (343); 8 Rang 294 (DB).]

[2] The rule is mandatory and an order for payment of court-fees should be passed *suo motu*. This rule deals with the case of a pauper plaintiff who succeeds in the suit and Rule 11 deals with the case of a pauper plaintiff who fails in the suit. (Vol. 29) 1942 Bom 274 (275, 276); 1 LR (1942) Bom 456.

(3) In the case of a plaintiff succeeding in part and failing in part, the Court has to deal with it by combining the provisions of this rule with R. 11 and by appropriating the Court-fees between the plaintiff and the defendant in proportion to the extent of success of each party. (See (Vol. 3) 1916 All 327 (328); 38 All 464).

[See however (Vol. 28) 1941 All 221 (244).]

[4] It is not open to the Court to direct the defendant to pay court-fees exceeding the amount which would be payable on that portion

O. 33 R. 10 (contd.)

of the plaintiff's claim on which the plaintiff succeeds. (Vol. 3) 1916 All 327 (328) : 38 All 469 (DB).

[See also—('37) 1937 All L. J. 804 (805) : * (Vol. 17) 1930 Mad 1000 (1001) : 53 Mad 780 (DB). * (Vol. 15) 1928 Mad 216 (223) (DB).]

[See however—(Vol. 12) 1925 Mad 786 (787) (DB). (Pauper appeal allowed on a point not touching merits—Court ordered court-fees to be paid by parties in equal moieties). * (Vol. 17) 1930 Pat 353 (354) (DB). * (Vol. 12) 1925 Mad 786 (787) (DB).]

[But see—(Vol. 29) 1942 Bom 274 (276) : I L R (1942) Bom 456. * (Vol. 15) 1928 Cal 196 (198) : 55 Cal 488 (DB). * (Vol. 23) 1941 Oudh 66 (67) : 16 Luck 252.]

[5] The Government is entitled to the full court-fee, although the plaintiff or appellant may have succeeded only partially. (1934) 36 Pun L R 22 (22) (DB).

[6] Where, in a pauper suit, the amount decreed to the plaintiff fell short of the amount payable by him as costs to the defendant, he was held not to have succeeded within the meaning of this rule. (Vol. 9) 1922 Mad 125 (126) (DB).

[7] This rule is applicable also to Chartered High Courts in the exercise of their original civil jurisdiction (Vol. 15) 1928 Mad 385 (387).

2. Court-fees to be first charge.—[1] The Court-fee payable to the Government is a first charge on the subject-matter of the suit. ('75) 1 Bom 7 (9) (DB). * (Vol. 21) 1934 All 438 (439) (DB). * ('07) 29 All 537 (540) (FB). * ('94) 18 Bom 237 (240). * ('02) 25 Mad 733 (735) (DB).

[2] Pauper succeeding in part only on compromise or otherwise—Charge will be on interest recovered (Vol. 20) 1933 Bom 350 (351) : 57 Bom 507 (DB).

[3] Court fee payable should be calculated according to the law at the time of institution of suit ; subsequent amendment will not alter the amount payable. (Vol. 13) 1926 Mad 474 (475) (DB) * (Vol. 20) 1933 Sind 354 (354) : 27 Sind L R 240 (DB).

[4] Plaintiff amended subsequently and valuation reduced—Still court-fee must be paid on original valuation. (Vol. 28) 1941 All 221 (223, 224).

3. Effect of the first Charge.—[1] The effect of the first charge is that a sale in execution of the same prevails as against a subsequent sale. ('02) 25 Mad 733 (735) (DB).

[2] Claim of Government will prevail against any cross-claim or claims under cross-decrees against the plaintiff in favour of the defendant. ('87) 9 All 64 (67) (DB).

[3] Where the defendant actually applied to execute his cross-decree before the application by Government, he will not be defeated by the latter's claim. (Vol. 9) 1922 Mad 125 (126) (DB).

4. Crown entitled to precedence in respect of court-fees.—[1] Claims of the State are entitled to precedence over other claims. ('68) 5 Bom H C R (O C) 23 (25) (DB).

[2] The amount of court-fees due to Crown is entitled to precedence over the claims of other creditors of a pauper decree-holder. (Vol. 26) 1939

Lah 488 (490) : I L R (1940) Lah 124. * (Vol. 31) 1944 Bom 239 (239) (DB). (Pauper plaintiff giving up his share after preliminary decree for partition as share in debts was greater—Government has first charge on the share.)

[3] This rule does not preclude the Crown or its representatives from urging its prerogative rights in any other manner. ('06) 33 Cal 1040 (1045). (Attachment of fund realised by sale of other properties in court is not necessary for making payment to the Government). * (Vol. 23) 1936 Mad 602 (603) : 59 Mad 872 (Defendant ordered to pay court-fees—Other properties sold under decree of another person—Government has priority over that decree-holder to take that money).

[4] Precedence in respect of court-fees cannot be claimed against lien-holders. ('12) 34 All 223 (233) (PC). (Government could not attach and sell defendant's property so as to destroy rights of previous mortgagee.) * ('07) 29 All 537 (540) (FB). (Overruling 2 All 196).

[See also (Vol. 18) 1926 Cal 859 (860) (DB). (Maintenance decreed in pauper suit with charge on defendant's properties—Government selling said properties for court-fees—Government's right is subject to maintenance charge).]

[5] Decree for maintenance making future maintenance a charge upon certain properties—Proceeds of sale of that property cannot be attached for court-fees. (Vol. 22) 1935 Sind 21 (22).

5. Recovery of court-fees by Government.—[1] The Government can proceed against the person ordered to pay court-fees personally or against his properties. See (84) 8 Bom 577 (582) (FB).

[2] The words "from any party ordered by the decree to pay the same" do not exclude an order for payment of court-fees after the decree has been passed. (Vol. 25) 1938 Cal 778 (777) : I L R (1939) 1 Cal 94 (DB).

[3] Suit in forma pauperis—Decree on basis of compromise—Court-fee made payable by plaintiff and made a first charge on decree amount—Payment of decretal amount out of Court and recording of satisfaction—Execution against defendant for court-fee is not maintainable. ('36) 164 Ind Cas 264 (265) (Cal) (DB).

6. Realization of Court-fees.—(1) An order for recovery of Court-fee is equivalent to a decree passed in favour of Government. ('04) 26 All 346 (348) (DB).

[2] The order may be executed either against the suit property or against the person ordered to pay the court-fee or against his property. (Vol. 6) 1919 Pat 99 (101) : 4 Pat L Jour 166 (DB). * ('96) 18 All 419 (421) (DB).

[3] No separate suit lies for the recovery of the Court-fee payable. (Vol. 6) 1919 Pat 99 (101) : 4 Pat L Jour 166 (DB). * ('96) 18 All 419 (421) (DB).

[4] Passing of possession of the suit property to the successful party from party ordered to pay does not affect Government's right to enforce the charge. (Vol. 6) 1919 Pat 99 (101) : 4 Pat L Jour 166 (DB) * ('96) 18 All 419 (421, 422) (DB). * (Vol. 32) 1945 Mad 462 (463) (Property passing to the other party under consent-decree).

[5] Decree in favour of pauper attached cannot be sold but should be executed and court-fee recovered. See ('93) 20 Cal 111 (115) (DB).

Procedure where 11. Where the plaintiff fails in the suit or is dispaupered, or where the pauper fails. suit is withdrawn or dismissed,—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

[1882—S 412; 1887—S. 412]

PROVINCIAL AMENDMENT.

MADRAS

Substitute the following for Rule 11.

"11. Where the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or where part of the claim is abandoned or where the suit is dismissed—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fees or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff or any person added as a co-plaintiff to the suit, to pay the court-fee and in the case of abandonment of part of the claim, the proportionate court-fee, which would have been payable by the plaintiff if he had not been permitted to sue as a pauper.

In cases where the plaintiff is dispaupered the Court may, instead of proceeding under the previous paragraph, order the plaintiff to pay the requisite court-fee within a time to be fixed by it and in default dismiss the suit and make an order for the payment of court-fee as in the previous paragraph.

Where the Court finds that the suit has been instituted unreasonably or improperly by a next friend on behalf of a minor plaintiff on a cause of action which accrued during the minority of such plaintiff, the Court may order the next friend to personally pay the court-fee" [22-10-1940]

O. 33 R. 10 (contd)

[6] Where the pauper plaintiff has obtained decree for future maintenance, a receiver should be appointed to collect the maintenance amount and pay the Government. (Vol. 13) 1926 Mad 565 (565) 49 Mad 567 (DB). *(Vol 22) 1935 Sind 21 (22).

[See also (Vol. 12) 1925 P C 176 (176): 47 All 385: 52 Ind App. 262 (PC).]

[But see (Vol. 20) 1933 Bom 350 (351, 352): 57 Bom 507 (DB).]

[7] Where the decree-holder himself has paid or where the court itself took the precaution to have the amount paid, he can be allowed to take out execution against the judgment-debtor. (Vol. 16) 1929 All 905 (906) (DB).

[8] A sale for court-fee wrongly believed to be due is a nullity. ('93) 13 All 324 (326).

[9] A sale of the property of a third person in execution of an order for the court-fee due is a nullity. ('04) 26 All 346 (352) (DB).

[10] An application by the Government for recovery of the court-fee must be made within three years from the date of the decree. ('83) 7 Bom 546 (548, 552, 553) (DB). * ('82) 4 Mad 155 (157) (DB).

[See however ('69) 11 Suth W R 67 (68) (DB).]

7. Appeal.—[1] An order on application by the Government for payment of the court-fee under this rule is appealable as a decree ('11) 35 Bom 448 (449) (DB). *(Vol. 26) 1939 All 327 (328) (DB).

ORDER 33 RULE 11—SYNOPSIS.

1. Scope
- 2 Where the suit is withdrawn or dismissed.
- 3 Costs.
4. Costs of successful defendant.

1. Scope.—[1] The provisions of this rule are mandatory and the Court must in the decree provide for the payment of court-fee by the plaintiff. (Vol. 29) 1942 Bom 274 (276): I L R (1942) Bom 456. *(Vol 26) 1939 All 327 (328) (DB). *('91) 13 All 326 (329) (DB).

[2] Plaintiff who succeeds partly and fails partly may be ordered to pay the whole costs. (Vol. 29) 1942 Bom 274 (276): I L R (1942) Bom 456.

[3] When dismissing a pauper suit, a defendant cannot be ordered to pay the court-fees because his interest is the same as that of the plaintiff. (Vol. 30) 1943 Mad 585 (586) (DB).

2. Where the suit is withdrawn or dismissed.—[1] Plaintiff should be ordered to pay the court-fee even where the suit is dismissed for reasons other than those contained in this rule. ('11) 35 Bom 448 (451) (DB).

[2] Return of plaint for presentation to proper Court does not amount to failure of the suit and order for payment cannot be made under this rule. ('82) 6 Bom 590 (592) (DB).

[3] Rejection of the plaint without enquiry regarding pauperism on the ground of plaintiff's

a 11A. Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the Court shall order that the amount of court-fees which pauper suit abates. would have been paid by the plaintiff if he had not been permitted to sue as a pauper, shall be recoverable by the Provincial Government from the estate of the deceased plaintiff.

a. Added by the Code of Civil Procedure (Second Amendment) Act, 1942 (24 [XXIV] of 1942), s. 2 [1-10-1942] .

Provincial Government 12. The a[Provincial Government] shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 b[rule 11 or rule 11A.]

a. Substituted by A.O., for "Government."

b. Substituted by the Code of Civil Procedure (Second Amendment) Act, 1942 (24 [XXIV] of 1942), s. 2 for "or Rule 11"

13. All matters arising between the a[Provincial Government] and any party to the suit - Provincial Government under rule 10, rule 11 b[rule 11A] or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

a. Substituted by A.O., for "Government."

b. Inserted by the Code of Civil Procedure (Second Amendment) Act, 1942 (24 [XXIV] of 1942), s. 2.

O. 33 R 11 (contd)

minority and absence of next friend—Order for payment of the Court-fees from the estate of minor held illegal. ('89) 13 Bom 234 (236) (DB).

3. Costs—[1] Though the Court-fee may not be costs, but only revenue so far as the Government is concerned, it is costs incurred by the party paying it and therefore court can order under S. 35 the next friend or guardian to pay that. (Vol. 30) 1943 Nag 329 (329, 330) : I L R (1943) Nag (575) * (Vol. 18) 1931 Mad 249 (250, 251) : 53 Mad 716 (DB).

[2] An order for the payment of court-fees against the next friend of a minor plaintiff under S. 35 cannot have the effect of depriving the Government of the right expressly given to it by Rr. 11 and 12 to have an order that the plaintiff shall pay the Court-fee to the Government on the failure of the pauper suit. But the Government cannot apply under R. 12 for an order against the next friend for payment of court-fees. (Vol. 24) 1937 Mad 145 (145, 146).

4 Costs of successful defendant—[1] This rule does not prevent the court from ordering the plaintiff to pay the costs of a successful defendant under S. 35 ('84) 8 Bom 577 (579) (FB).

ORDER 33 RULE 12—NOTE. 1.

[1] This rule entitles the Government to apply to the Court at any time to make an order under Rule 10 or Rule 11. (Vol. 25) 1938 Cal. 776 (777) : ILR (1938) 1 Cal. 94 (DB).

[2] The rule is confined in its operation to cases in which the Court has not already *suo motu* passed an order either under Rule 10 or Rule 11. (Vol. 29) 1942 Bom 274 (276) : ILR (1942) Bom 456. * (Vol. 26) 1939 All 327 (328) (DB).

[See however (Vol. 28) 1941 All 221 (223).]

[3] The right of the Government under this rule is to apply to the trial Court and the appellate court seized of appeal against order of dismissal cannot direct payment on pain of dismissal of appeal. (Vol. 24) 1937 All 280 (282) : ILR (1937) All 484.

[4] The present rule being a rule of procedure has a retrospective effect and applies to cases of dismissal of suits before the new Code came into force. ('11) 35 Bom 448 (451) (DB).

[5] Decree not containing any order regarding costs—Order under the rule passed subsequently—Right of Government cannot be defeated by any adjustment and Court may refuse to record an adjustment calculated to defeat it. (Vol. 22) 1935 Sind 111 (112) : 29 Sind LR 317.

[6] An order passed under this rule for payment of court-fee is appealable. ('11) 35 Bom 448 (450) (DB). * (Vol. 26) 1939 All 327 (328) (DB). * (Vol. 24) 1937 All 280 (282) : ILR 1937 All 484.

[7] Decree containing order as to costs—Failure of Government to appeal within time—Decree becomes final. (Vol. 29) 1942 Bom 274 (276) : ILR (1942) Bom 456. * (Vol. 26) 1939 All 327 (328) (DB).

[See however (Vol. 28) 1941 All 221 (223).]

ORDER 33 RULE 13—NOTE 1.

[1] This rule operates as a bar against institution of any suit in respect of question arising under rules 10 to 12 between Government and any of the parties. (Vol. 6) 1919 Pat 99 (101) : 4 Pat L. Jour. 166 (DB).

[2] Any defendant directed to pay costs to the Government becomes the judgment-debtor and the Government becomes the decree-holder. (Vol. 23) 1936 Mad 602 (603) : 59 Mad 872.

[3] Government is not entitled to security for court-fees in a pauper appeal to which the Government is not a party. (Vol. 24) 1937 Mad 267 (268).

ORDER 33—RULE 14—NOTE 1.

[1] The Court has to only send the copy of the decree to the Collector and cannot direct him to collect the amount. (Vol. 17) 1930 Rang 342 (343) : 8 Rang 294 (DB).

*** 14.** Where an order is made under Rule 10, Rule 11 or Rule 11A the Court shall forthwith cause a copy of the decree or order to be forwarded to the Collector, who may, without prejudice to any other mode of recovery recover the amount of court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue.

a. *Substituted by the Code of Civil Procedure (Second Amendment) Act, 1942 (24 [XXIV] of 1942), s. 2 for original rule 14.* [1-10-42]

15. An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the [Provincial Government] and by the opposite party in opposing his application for leave to sue as a pauper.

[1882—S. 418; 1877—S. 418; 1859—S. 310]

a. *Substituted by A.O. for "Government."*

ORDER 33—RULE 15—SYNOPSIS.

1. Scope of the rule.
2. Bar to subsequent application.
3. Dismissal of an application for default.
4. "Right to sue."
5. Costs incurred.

1. Scope of the rule.—[1] The rule does not bar a subsequent suit provided the costs of the Government and of the opposite party are paid. ('95) 17 All 526 (528) (DB). * ('96) 20 Bom 568 (510) (DB). * ('97) 24 Cal 889 (890) (DB). * (Vol. 19) 1932 All 312 (314): 54 All 390 (DB).

[See (Vol. 26) 1939 Cal 894 (898): ILR (1939) 2 Cal 68 * (Vol. 22) 1935 Pat 193 (194).]

[2] The refusal of the pauper application does not bar an application for a review of that order. ('80) 4 Bom 414 (415) * (1869) 11 Suth W R 22 (22, 23) (DB). * (1870) 5 Beng L R App 29 (30) (DB). * ('98) 20 All 410 (411) (DB).

[3] The provisions of this rule apply also to applications for leave to appeal as a pauper. ('98) 22 Bom 849 (859) (DB). (Farran, C. J. dissenting as to the reasoning.) * ('05) 3 Low Bur Rul 194 (195).

[See also (10) 4 Sind L R 263 (264). (The applicant can file a fresh appeal).]

[4] Where an application is rejected under Order 33, Rule 7, the only remedy is to file a fresh suit under this rule. (Vol. 31) 1944 Bom 63 (64): ILR (1943) Bom 721.

2. Bar to subsequent application.—[1] The refusal referred to in the rule is the one under R. 7 and not the rejection of an application under Rule 5. (Vol. 29) 1942 Oudh 169 (171): 17 Luck 462 (DB) * (Vol. 28) 1941 Lah 253 (256): I L R (1941) Lah 709 (DB). * (Vol. 28) 1941 Pat 594 (595, 596): 20 Pat 765 (DB). * (Vol. 27) 1940 All 251 (251): I L R (1940) All 253 * ('85) 7 All 661 (664) (FB) * ('96) 20 Bom 86 (94, 95) (DB) * (Vol. 7) 1920 Lah 327 (328): Lah 151. * (Vol. 13) 1926 Mad 875 (876): 50 Mad 63 (DB) * (Vol. 19) 1932 Rang 195 (196): 10 Rang 475 (DB). [(Vol. 13) 1926 Rang 200: 4 Rang 245 * (Vol. 5) 1918 Low Bur 86: 9 Low Bur Rul 93 (FB). * (Vol. 16) 1929 Rang 128: 7 Rang 359 were held overruled by (Vol. 19) 1932 Rang 107: 10 Rang 357 (FB)] * (Vol. 20) 1933

Oudh 534 (534) (DB) * (Vol. 24) 1937 Pesh 85 (86) * (Vol. 22) 1935 Nag 168 (169): 31 Nag L R 336 * (Vol. 23) 1933 Cal 549 (550, 551): 60 Cal 639 (DB). (Dissenting from (Vol. 4) 1917 Cal 696)

[See however (Vol. 11) 1924 Cal 1039 (1039) (DB).]

[2] Order returning application for presentation to the proper Court—Order is not an order of refusal. (Vol. 4) 1917 Cal 696 (697) (DB).

[3] The Court is bound to take notice of objection under this rule, although it is raised at a late stage in subsequent proceedings. ('96) 20 Bom 86 (96) (DB).

3. Dismissal of an application for default.—[1] Dismissal of an application for default of appearance does not amount to an order of refusal so as to bar a second application. (Vol. 28) 1941 All 166 (168): I L R (1941) All 313. * (Vol. 28) 1941 Pat 594 (596): 20 Pat 765 (DB) * (Vol. 13) 1926 Rang 200 (201): 44 Rang 245. * (Vol. 12) 1925 Mad 988 (987) * ('96) 1896 Pun Re No. 64, page 183 (188) * (Vol. 11) 1924 Rang 161 (161) * (Vol. 20) 1933 Cal 549 (550): 60 Cal 630 (DB). (Dissenting from (Vol. 11) 1924 Cal 1039.)

[2] Order rejecting an application as the applicant does not wish to proceed with it amounts to a refusal of the same. ('96) 20 Bom 86 (91, 92, 97) (DB) * (Vol. 28) 1941 All 166 (168): I L R (1941) All 313 * (Vol. 6) 1919 Cal 330 (331) (DB) * (Vol. 11) 1924 Lah 312 (313).

[But see (Vol. 18) 1931 Rang 79 (80).]

4. "Right to sue." [1] If the cause of action for a second application to sue as a pauper is different or arose subsequent to that in the prior application, the bar under this rule cannot apply. (Vol. 7) 1920 Cal 632 (633) (DB).

[2] Where leave to sue in forma pauperis for specific performance of a contract to sell immovable property is refused, a subsequent application for leave to sue for refund of money paid under the contract is not barred. (Vol. 23) 1933 Nag 236 (280): I L R (1937) Nag 423.

5. Costs incurred.—The pauper applicant can file a fresh suit only if he pays the costs of the Government and also of the opposite party. ('02) 25 Mad 733 (735) (DB) * ('71) 15 Suth W R 205 (206) (DB).

Costs. 16. The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

[1882—S. 415.]

ORDER XXXIV.

["Some of the rules in this Order have been re-drafted. The Transfer of Property Act does not contain any provision for the passing of a final decree in cases where payment is made in accordance with the terms of the preliminary decree. This is in our opinion an omission and we have provided in Rules 3 (1), 5 (1) and 8 (1) for the passing of final decrees in such cases,

We approve of the proposal to repeal the provisions of section 99 of the Transfer of Property Act. We think that those provisions have worked considerable hardship and are not really needed. The first part of the section enacts that a mortgagee shall not bring the mortgaged property to sale other wise than by instituting a suit under section 67 of the Act. In so far as it precludes the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage-debt, it is in our opinion inexpedient; it is beyond doubt competent to a mortgagee to purchase the equity of redemption from the mortgagor by an agreement subsequent to and distinct from the mortgage-transaction and we can see no reason why it should not be equally competent to him to have it sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage (*Khiarajmal v. Daim*, I. L. R. 82 Cal 296; *Lisle v. Reeve*, 1902 A.C. 461). In so far as it precludes the mortgagee from selling the property under a judgment for the mortgage-debt, it serves no useful purpose. We understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the debt as such and in execution selling the mortgagor's interest in the property: we, however, think that no such provision was needed seeing that, under the law as it stood prior to the Act, the Court never allowed the sale of a bare equity of redemption under a judgment on the covenant, *Syed Emam v. Rajhumar*, 23 W.R. 187; *Khiarajmal v. Daim*, I. L. R. 82 Cal. 296)."—S.C.R.]

O. 33 R. 15 (contd)

[See also (84) 8 Bom 577 (579) (FB).]

[2] Costs must be paid prior to the institution of the suit. (Vol. 22) 1935 Bom 421 (423): 59 Bom 738. * (Vol. 22) 1935 All 723 (726, 727): 58 All 191 (FB). (Dissenting from 14 Ind Cas 297.)

[But see (Vol. 30) 1943 Bom 409 (412) I L R (1943) Bom 525 (DB).]

[3] Where costs are paid only after the institution of suit, it need not be dismissed but may be treated as instituted on the day on which the costs were paid. (Vol. 30) 1943 Mad 547 (548) (DB) * (Vol. 23) 1938 Mad 24 (25) (DB).

[But see (Vol. 30) 1943 Bom 409 (412): I L R (1943) Bom 525 (DB).]

[See however (Vol. 22) 1935 Bom 421 (423): 59 Bom 738 * (Vol. 27) 1940 Bom 44 (47): I L R (1940) Bom 17 (DB). (Non-payment an irregularity, which, if not waived, will entail dismissal.)]

[4] Where the Court has disallowed costs or has passed no order as to costs, the plaintiff is not bound to pay any costs under this rule. (Vol. 22) 1935 All 723 (727): 58 All 191 (FB).

[See also (Vol. 24) 1937 All 781 (783): I L R (1938) All 11.]

[5] The proviso as regards the payment of costs will apply only where a fresh suit is to be instituted. (Vol. 24) 1937 All 781 (783): I L R (1938) All 11. (Permission to pay Court-fees, in plaint as embodied in application—No fresh suit.)

ORDER 33 RULE 16—NOTE 1.

[1] Leave to sue in forma pauperis granted—Thereafter the Court allowing amendment—Costs of the amendment cannot be ordered—The suit cannot be dismissed for default of payment of

such costs. (Vol. 9) 1922 Bom 385 (385): 47 Bom 104 (DB).

[2] An order making the payment of the costs of the adjournment, a condition for allowing time for amendment of the plaint, can be made. (Vol. 15) 1928 Rang 306 (307): 6 Rang 561 (DB).

ORDER 34 RULE 1—SYNOPSIS.

1. Suits relating to mortgages.
2. Transfer of Property Act, Section 85.
3. Scope and object of the rule.
4. "Subject to the provisions of this Code."
5. "Persons having an interest either in the mortgage-security or in the right of redemption."
6. Parties to a suit for foreclosure, sale or redemption.
7. Trustees, executors or administrators.
8. Benamidar.
9. Sub-mortgagee.
10. Prior mortgagees—Explanation.
11. Mahomedan co-heirs.
12. Joint Hindu family.
13. Assignee of mortgage.
14. Receiver in insolvency.
15. Lessee.
16. Landlord.
17. Parties to appeal.
18. Effect of non-joinder.
19. A person cannot be both a plaintiff and a defendant.
20. Joinder of parties.
21. Revision.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY

Parties to suit for foreclosure,
sale and redemption.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

[T.P. Act, old S. 85. See O. 1 Br 1, 3, 9, 10; and O. 31 R. 1.]

Objects and Reasons

“The proviso to section 85 of the Transfer of Property Act, 1882, has given rise to certain doubts which the Committee have sought to remove by substituting for it the words now added with a view to making clear that a person not a party is not bound by a decree (*Ram Nath Rai v. Lachman Ram*, L. R. 2 I A. 193). The explanation has been inserted in order to remove doubts which have arisen from the conflict of authorities on the point.”—S. O. R.

O. 34 R. 1 (*contd.*).

1. Suits relating to mortgages.—[1] One of the objects with which this order was enacted was to set at rest the conflict of decisions:—(a) as to whether an application for an order absolute after a preliminary decree for sale was an application in execution or was one in the suit itself for a further decree; (b) as to the applicability of Art. 178 (now Art. 181) of the Limitation Act, to applications for orders absolute, in mortgage suits ('11) 38 Cal 913 (921) (DB).

[2] In suits relating to mortgages, Courts should be guided by the provisions of O. 34 and not by the English practice. (Vol. 13) 1926 Oudh 113 (114).

[3] The High Court on its original side is also governed by provisions of Order 34. (10) 87 Cal 907 (910).

[4] This Order applies to charges also. ('05) 1 Nag L R 117 (120).

[5] The provisions of this Order have no application to suits under S. 12 of the Redemption of Mortgages Act (Punjab Act II of 1913). (Vol. 20) 1933 Lah 179 (181); 14 Lah 218.

[6] Compromise decrees O. 34 does not apply. (Vol. 22) 1935 Pat 385 (395); 14 Pat 488 (DB).

[7] As to the applicability of this Order to mortgages of movables, see the following cases. (Vol. 20) 1933 Bom 51 (54,55); 57 Bom 346 (DB). (Order 34, Rule 14 does not apply to mortgages of moveable property) * (Vol. 19) 1932 Cal 524 (533); 59 Cal 667 (DB). (In absence of any statutory provisions to the contrary, Rules of Order 34 should be applied in suits on mortgages of moveable property).

2 Transfer of Property Act, Section 85 — [1] The omission of the proviso to S. 85 in the present rule shows that a person may be a necessary party to a mortgage suit, though the plaintiff may not be aware of that person's interest in the mortgaged property. (Vol. 29) 1942 Oudh 197 (198); 17 Luck 482. * ('11) 33 All 71 (78) (DB).

3 Scope and object of the rule.—[1] The object of the rule is to avoid multiplicity of suits. (Vol. 30) 1943 Oudh 218 (223, 224); 19 Luck 183 (DB). * ('01) 28 Cal 517 (530) (SB). * ('11) 14 Cal Jour 108 (109) (DB) * (Vol. 6) 1919 Bom 135

(185). 43 Bom 575 (DB) * (Vol. 14) 1927 P C 32 (36); 51 Ind App 68; 50 Mad 180 (PC) * (Vol. 11) 1924 All 107 (108). * (Vol. 24) 1937 Mad 136 (139).

[2] The rule does not apply to suits for ejectment. ('04) 1 Ind Cas 560 (560) (DB) (Mad).

[3] The rule does not prohibit the joining of any party. (Vol. 7) 1920 Nag 247 (248).

[4] All the persons having an interest in the mortgage security need not be arrayed on the same side. (Vol. 23) 1936 Pat 439 (441).

[See (Vol. 23) 1936 Pat 306 (307) (DB).]

4. “Subject to the provisions of this Code.—

[1] The present rule is subject not only to Order 31, Rule 1, but also to other provisions of the Code such as Order 1 Rule 9 or Order 30. (Vol. 30) 1943 Oudh 218 (223); 19 Luck 183 (DB) * (Vol. 29) 1942 Pat 218 (226); 20 Pat 904 (DB). * (Vol. 27) 1940 Oudh 235 (236); 15 Luck 390. * (Vol. 11) 1924 All 107 (108). * (Vol. 23) 1936 All 512 (514). * (Vol. 22) 1935 Rang 139 (141). * (Vol. 20) 1933 Cal 325 (328); 60 Cal 87 (DB). * ('11) 12 Ind Cas 629 (630) (DB) (All).

[See also (Vol. 19) 1932 Cal 34 (36).]

5. “Persons having an interest either in the mortgage security or in the right of redemption.”—

[1] A person claiming adversely to the mortgagor and the mortgagee, i.e., a person claiming a paramount title is not a necessary or a proper party to a suit relating to a mortgage. (Vol. 32) 1945 Nag. 53 (55); I. L R (1944) Nag 577 (DB). * ('09) 31 All 11 (12, 13) (DB) * (Vol. 29) 1942 Pat 226 (229, 230); 20 Pat 941 (DB) * (Vol. 28) 1941 Nag 133 (133). (Vol. 26) 1939 Cal 692 (693); I. L R (1939) 2 Cal 551 (DB). * (Vol. 14) 1927 Sind 265 (266, 267) * (Vol. 22) 1935 All 205 (206) (DB) * (Vol. 17) 1930 Oudh 97 (99); 5 Luck 658 (DB). * (Vol. 14) 1927 Oudh 607 (608) (DB). * (Vol. 15) 1923 Mad 764 (766, 767) (DB). * (Vol. 8) 1921 Mad 701 (704) (SB). * (Vol. 16) 1929 Cal 672 (673, 675) (DB) * (Vol. 7) 1920 Pat 630 (631) (DB). * (Vol. 7) 1920 Bom 96 (97). * (Vol. 18) 1926 Nag 67 (68) (DB). * ('32) 33 Pun LR 240 (241) (DB). * (Vol. 23) 1936 Mad 338 (340). * (Vol. 26) 1939 Rang 185 (186). * (Vol. 24) 1937 Rang 351 (354) (DB).

O. 34 R. 1 (contd.)

[See also (Vol. 27) 1940 Sind 103 (104): ILR (1940) Kar 202.]

[See however (Vol. 3) 1916 Oudh 25 (27).]

[2] A person impleaded as the legal representative of a deceased mortgagor cannot have a paramount title to the property determined in the suit. (Vol. 13) 1926 Rang 208 (209), 210: 4 Rang 214 (DB). * (Vol. 17) 1930 Lah 1063 (1069), * (Vol. 8) 1921 Cal 343 (343) (DB). * (Vol. 14) 1927 Sind 265 (266, 267). * (Vol. 13) 1926 Mad 744 (746) (DB). * (Vol. 5) 1918 All 81 (84): 40 All 584 (DB). * (Vol. 5) 1918 Cal 557 (578) (DB). * (Vol. 3) 1916 PC 18 (19): 43 Ind App 187: 33 All 483 (PC) ('09) 31 All 11 (13) (DB). * (Vol. 18) 1931 Pat 64 (68): 10 Pat 234 (DB). * ('06) 29 Mad 217 (224) (DB).

[See also (Vol. 19) 1932 Cal 12 (13): 58 Cal 12 (22) (DB).]

[But see (1911) 13 Cal L. Jour 85 (87) (DB).]

[3] Redemption suit—person claiming the right of redemption in opposition to the plaintiff may be a proper party to the suit. ('10) 1910 Pun L Re No. 32, Page 71 (72) (DB). * ('68) 3 Agra 144 (144) (DB).

[See also (Vol. 11) 1924 Pat 234 (234): 2 Pat 805 (DB).]

[But see (Vol. 5) 1918 Mad 705 (705) (DB). ('10) 8 Ind Cas 885 (886) (Mad).]

[4] Even in suits for redemption, persons asserting a paramount title to the mortgaged property should not be joined as parties. (Vol. 14) 1927 Pat 45 (45) (DB).

[5] A person asserting a paramount title erroneously made party to the suit—he should be discharged from the suit. (Vol. 29) 1942 Nag 83 (83): ILR (1942) Nag 309 (DB). * (Vol. 28) 1941 Nag 132 (134). * ('40) 72 Cal L Jour 493 (498) (DB). * (Vol. 11) 1924 Oudh 19 (22, 23) (DB). (Vol. 13) 1926 Cal 1192 (1192, 1193) (DB). * (Vol. 24) 1937 Rang 351 (353) (DB). * (Vol. 23) 1936 Rang 193 (200) (DB). * (Vol. 25) 1933 Mad 293 (294) (DB). * (Vol. 23) 1936 Mad 338 (340).

[6] Objection on the ground of joinder of a person claiming paramount title—It is an irregularity curable under S. 99. (Vol. 15) 1928 Nag 306 (307). * (Vol. 12) 1925 Cal 973 (976, 978) (DB). * (Vol. 5) 1918 Mad 705 (705) (DB).

[7] A party claiming paramount title allowing the suit to go on will be bound by the decision. (Vol. 29) 1942 Pat 226 (229): 20 Pat 431 (DB). * (Vol. 28) 1941 Pat 243 (244). * (Vol. 11) 1924 Oudh 19 (23) (DB). * (Vol. 21) 1934 Oudh 50 (54): 9 Luck 291 (DB). * (Vol. 8) 1921 Nag 67 (68): 17 Nag LR 176 * (Vol. 11) 1924 Mad 193 (196) (DB). * (Vol. 5) 1918 Cal 933 (937): 44 Cal 425 (DB). * (Vol. 3) 1916 Cal 173 (173) (DB).

[See also (Vol. 23) 1936 Mad 338 (340).]

[8] Rule as to the exclusion of the person claiming paramount title is not inflexible in proper cases such person can be conveniently made party to a mortgage suit. (Vol. 28) 1941 Nag 133 (134). * (Vol. 5) 1918 Pat 356 (363) (DB). * (Vol. 1) 1914 Mad 332 (333). * (1911) 14 Cal L. Jour 108 (109) (DB). * (Vol. 4) 1917 Oudh 159 (159). * (1911) 13 Cal L. Jour 85 (87) (DB). * (Vol. 23) 1936

Mad 338 (340). * (Vol. 24) 1937 Nag 376 (377): ILR (1937) Nag 498 * (Vol. 24) 1937 All 251 (254) (DB). * (Vol. 29) 1942 Nag 60 (61). ILR (1942) Nag 701 * (Vol. 11) 1924 Pat 613 (615): 3 Pat 244 (DB).

[9] Where it is alleged that the person claiming paramount title is only a benamidar for the mortgagor, he can be joined as a party to the suit and the question can be decided therein. (Vol. 15) 1928 Mad 2 (4, 5). * (Vol. 12) 1925 Cal 973 (978) (DB).

[10] Mortgage of joint family property by Manager—Other members of the family joined as defendants to a suit on the mortgage, a question the validity of the mortgage. (Vol. 3) 1916 Oudh 25 (26). * (Vol. 15) 1928 Mad 764 (769) (DB). * (Vol. 15) 1928 Mad 199 (200).

[See also (Vol. 8) 1921 PC 118 (119): 47 Ind App 265 (PC). * (Vol. 17) 1930 Nag 89 (90).]

[11] A person dismissed from a suit on a mortgage on the ground of his claiming a paramount title cannot subsequently sue for redemption. ('86) 12 Cal 414 (421, 422). 12 Ind App 171 (P). * (Vol. 3) 1916 Nag 120 (121): 18 Nag L R 69.

[12] Suit on a mortgage in favour of a deceased person—Person claiming the estate of the deceased mortgagee in opposition to the plaintiff is not a necessary party to the suit. (Vol. 15) 1928 Mad 978 (979).

[13] Death of plaintiff mortgagee—Some of his legal representatives brought on record—Person who claims to be another legal representative cannot be added as party on that ground and allowed to raise questions purely between himself and the rival claimants *inter se*. (Vol. 14) 1927 Mad 1071 (1072).

[See also (Vol. 20) 1933 Cal 325 (328): 60 Cal 87 (DB).]

[14] Question of the relative liability of each of several co-mortgagors cannot be gone into in a mortgage suit. (Vol. 14) 1927 Pat 117 (120) (DB).

[See also (Vol. 10) 1923 Pat 199 (201) (DB). * (Vol. 18) 1931 Nag 161 (165): 27 Nag LR 312 (DB).]

6. Parties to a suit for foreclosure, sale on redemption.—[1] The interest of a person in the mortgage security or in the right of redemption should be subsisting at the time of the suit. ('89) 13 Bom 51 (53, 54) (DB). * ('92) 16 Bom 599 (602) (DB). * (Vol. 2) 1915 Mad 1203 (1203) (DB). * (Vol. 18) 1931 Nag 161 (165): 27 Nag LR 312 (DB).

[See also (Vol. 30) 1943 Oudh 164 (167): 18 Luck 60 (DB): ('71) 8 Bom HCR (OC) 1 (19) (DB).]

[2] The owner of a contingent interest like that of a Hindu reversioner is not a necessary party to the suit. (Vol. 27) 1940 Oudh 437 (438): 16 Luck 168 * ('08) 30 All 437 (498) (DB).

[3] A transferee pending a suit on the mortgage is not a necessary party to the suit. (Vol. 14) 1927 Nag 299 (299). * ('99) 21 All 149 (151) (DB). * ('89) 1889 All WN 91 (92) (DB). * ('26) 95 Ind Cas 213 (214) (Oudh). * (Vol. 8) 1921 Cal 801 (803) (DB).

[4] A co-mortgagee is a necessary party as being interested in the mortgage security. (Vol. 28) 1941 Mad 710 (711). * (Vol. 6) 1919 PC 24 (26): 46 Ind App 272: 47 Cal 175 (PC). * (Vol. 20) 1933 Cal 621 (622): 60 Cal 777 (DB). * ('87) 9 All 68 (73) (FB). *

O. 84 R. 1 (contd.)

(Vol. 1) 1914 All 225 (225) (DB). * (Vol. 8) 1916 Pat 411 (414) (DB). * (Vol. 18) 1926 Cal 416 (417) (DB).

(5) The following persons are necessary parties as being interested in the equity of redemption:

(a) All persons mentioned in S. 91 of the Transfer of Property Act ('12) 17 Ind Cas 432 (432) (DB) (Cal) * (Vol. 7) 1920 Nag 247 (248). * (Vol. 13) 1926 All 46 (47); 48 All 171 (DB) * (Vol. 18) 1931 Oudh 410 (410, 411) (DB) * ('86) 10 Bom 648 (655, 656) (DB). * (13) 18 Ind Cas 181 (182) (Low Bur) * (Vol. 16) 1929 All 814 (814) (DB). * ('72) 14 Moo Ind App 144 (149) (PC). * (Vol. 17) 1930 Mad 1017 (1020) (DB). * (Vol. 34) 1937 Pat 642 (642, 643) * (Vol. 28) 1941 P C 90 (90, 91). I L R (1941) Kar P C 127; 68 Ind App 186; I L R (1942) Mad 82 (P C). * ('08) 1908 Pun Re No. 64 page 309 (311). * (Vol. 8) 1916 Lah 219 (219): 1916 Pun Re No. 86 (DB). * ('94) 21 Cal 116 (120) (DB) * (Vol. 14) 1927 Bom 474 (477) 51 Bom 771 (DB) * (Vol. 18) 1926 Nag 496 (497): 23 Nag L R 128. * (Vol. 25) 1938 Oudh 10 (11): 13 Luck 625 (DB).

[See also (Vol. 23) 1936 Mad 814 (816): 59 Mad 1042 (DB).]

[But see (Vol. 30) 1943 Oudh 164 (168): 18 Luck 601 (DB). (*Obiter*—Puisne mortgagee not necessary but only proper party.)]

(b) The amended S. 91 of the Transfer of Property Act does not mention an attaching creditor as one of the persons entitled to redeem a mortgage and he is not a necessary party to a mortgage suit (Vol. 32) 1945 Oudh 87 (88, 89): 20 Luck 53 (DB) * (Vol. 23) 1936 All 512 (513) * (Vol. 26) 1939 Lah 146 (147). * (Vol. 23) 1936 Nag 209 (213, 214): I L R (1936) Nag 127 (DB).

[See however (Vol. 25) 1938 Cal 471 (474) (DB).]

(c) Suit to enforce a mortgage executed with the sanction of the Court by a receiver appointed under O 40, R. 1.—Owners of the property who have interest in the right of redemption are necessary parties especially when they allege fraud and collusion between the mortgagee and the receiver. (Vol. 29) 1942 Cal 394 (401) (DB).

(6) The following persons are not necessary parties to a suit relating to a mortgage:

(a) A prior mortgagee. See the Explanation.

(b) A person merely in possession of the mortgaged property. (Vol. 11) 1924 Nag 191 (193, 194) * (Vol. 8) 1921 Nag 67 (68): 17 Nag L R 176.

(c) A person whose name is merely entered in the village papers as having some title to the plots in question but who is in no way connected with the mortgage. (Vol. 12) 1925 All 593 (593).

(d) A person who has a right to be maintained out of the income of the mortgaged property when such right is not made a charge on the property. (1900) 22 All 191 (199): 27 Ind App 51 (PC). (*Obiter*).

(e) A person having merely an inchoate title to the property ('85) 9 Bom 10 (14, 15) (DB).

(f) A receiver appointed in a partition suit previous to the mortgage suit. (Vol. 15) 1923 Pat 304 (315): 7 Pat 520 (DB).

[See also (Vol. 12) 1925 Sind 167 (169): 19 Sind L R 369 (DB).]

(g) One of two co-owners mortgaging his undivided share—Suit brought in relation to such mortgage—Other co-owner is not a necessary party ('05) 32 Cal 746 (748) (DB).

(h) Number of persons owning equity of redemption in distinct shares—Mortgagee, in his suit exempting one or more of such shares—Owners of exempted shares are not necessary parties. ('05) 2 Cal L Jour 202 (216) (DB) * ('08) 31 Mad 333 (336) (DB). * ('03) 30 Cal 755 (757) (DB) ('06) 28 All 174 (177, 180) (FB). * ('05) 1905 All W N 156 (156) (DB) * ('09) * Ind Cas 80 (81) (DB) (Mad).

[See (Vol. 18) 1931 Nag 44 (45): 27 Nag L R 4. If mortgagee claims the whole debt from the rest, the exempted sharer in the equity of redemption would be a necessary party.]

(i) Mortgagee releasing from the mortgage any portions of the property—Owners of the portions released are not necessary parties ('03) 30 Cal 755 (757) (DB). * ('05) 1905 All W N 156 (156) (DB).

(j) Mortgagee through negligence, allowing strangers to trespass upon and acquire parts of the mortgaged property—Such persons are not necessary parties to a suit for redemption. (Vol. 9) 1922 Bom 156 (2) (157): 46 Bom 218 (DB).

(k) A judgment-creditor who has obtained an order for the appointment of a receiver in execution proceedings for holding the property of the judgment-debtor (mortgagor) is not a necessary party to a suit by the mortgagee. ('37) I L R (1937) 1 Cal 65 (70).

(7) Trustees, executors or administrators—[1] The words "subject to the other provisions of the Code" would include O. 81 R. 1.—Persons beneficially interested need not, therefore, be joined as parties to a suit relating to the mortgage. ('02) 6 Cal W N 488 (489) (DB). (Vol. 18) 1931 Bom 533 (537) (DB).

[2] Court has a discretion to join the beneficiaries in a proper case. ('84) (10) Cal 713 (718) (DB). * (Vol. 14) 1927 Bom 49 (50): 51 Bom 16 (DB) * ('89) 13 Mad 197 (206, 207) (DB).

[3] In the case of joint trustees all of them should be impleaded in any suit relating to the mortgage. (1911) 2 Mad W N 537 (538) (DB). * (Vol. 26) 1939 Oudh 161 (171): 14 Luck 543 (DB).

[Contra (1911) 34 Mad 406 (414) (DB). * ('03) 26 Mad 649 (653) (DB).]

8. Benamidar.—[1] A benamidar can sue or be sued in his own name. This applies to mortgage suits also. The real owner is not a necessary party to such a suit. ('96) 18 All 69 (74) (DB). * (Vol. 20) 1933 Mad 635 (636) (DB). * ('99) 21 All 380 (382, 384) (DB). * ('98) 22 Bom 672 (678, 679) (DB). * ('05) 28 Mad 205 (207) (DB). * (Vol. 1) 1914 Cal 323 (324) (DB). * (1900) 13 C P L R 33 (37). * (Vol. 5) 1918 P C 140 (143): 46 Cal 566: 46 Ind App 1 (P C). * (Vol. 11) 1924 Pat 453 (459): 3 Pat 81 (DB). * ('98) 22 Bom 820 (823) (DB). * (Vol. 12) 1925 Cal 973 (978, 979) (DB).

[2] There is no impropriety in adding the real owner as a party in proper cases. (Vol. 16) 1920 Mad 268 (269, 270) (DB).

9. Sub-mortgagee.—[1] A sub-mortgagee is entitled to bring to sale the interest of the sub-mortgagor in the mortgage. ('07) 29 All 385 (406) (FB).

O. 34 R. 1 (contd.)

* ('04) 26 All 611 (613, 617) (DB) * (1908) 9 Cal L Jour 429 (431) (DB). * ('97) 20 Mad 35 (38, 39) (DB) * (1900) 1900 Pun Re No. 31, page 102 (111) (FB).

[2] Original mortgagor is not a necessary party to a suit on sub-mortgage. (1909) 10 Cal L Jour 470 (472) (DB). * (1910) 12 Cal L Jour 137 (139) (DB). * (1911) 13 Bom L. R. 90 (91) (DB) * (Vol. 8) 1921 Lah 253 (254) (DB).

(3) Mortgagor made a party to the suit on sub-mortgage. The sub-mortgagee may sue for sale or foreclosure of the mortgaged property itself in cases and in the circumstances which would have entitled the sub-mortgagor on the date of the sub-mortgage to claim that relief, for the purpose of working out his rights against the sub-mortgagor. (Vol. 27) 1940 Pesh 25 (26) * (1909) 9 Cal L Jour 429 (431) (DB). * ('97) 20 Mad 35 (38, 39) (DB) * ('04) 26 All 611 (617) (DB) * ('13) 18 Ind Cas 389 (390, 391) (Oudh) * ('05) 27 All 472 (477, 478) (DB).

[See also (1900) 1900 Pun Re No. 31, page 102 (111) (FB).]

[But see (Vol. 24) 1937 Rang 56 (60) (DB).]

[4] The mortgagor is not a necessary party to a suit for redemption by the sub-mortgagor against his sub-mortgagee. (Vol. 9) 1922 Bom 424 (426) (DB).

[5] Suit for redemption by the mortgagor against his mortgagee—The sub-mortgagee is a necessary party. (Vol. 19) 1932 Mad 115 (116); 55 Mad 320 (DB) * ('06) 28 All 638 (640) (DB). * ('91) 15 Bom 692 (693, 694) (DB) * (Vol. 9) 1922 Bom 350 (351): 46 Bom 993 (DB). * (Vol. 14) 1927 Mad 703 (704).

[See ('10) 37 Cal 239 (250); 37 Ind App 19 (PC).]

[6] Where the mortgagor, not having notice of the sub-mortgage, fails to implead the sub-mortgagee in suit for redemption and pays off the mortgage amount to the mortgagee the sub-mortgagee cannot, after that redemption, bring the right mortgaged to him to sale (Vol. 27) 1940 Pesh 25 (26) * (Vol. 19) 1932 Mad 115 (117): 55 Mad 320 (DB) * (Vol. 8) 1921 Mad 374 (376) (DB).

10. Prior mortgagees—Explanation—[1]. Under the explanation to the rule a prior mortgagee or his transferee is not a necessary party to a suit relating to a puisne mortgage. (Vol. 13) 1926 Nag 135 (136) * (Vol. 3) 1916 Pat 113 (114). 2 Pat L Jour 118 (DB) * ('12) 1912 Mad W N 41 (41) (DB) * ('09) 36 Cal 193 (210) (DB) * (Vol. 7) 1920 Pat 630 (631) (DB) * ('98) 1 Oudh Cas 105 (111, 112) * ('09) 1 Ind Cas 139 (139) (DB) (Cal) * (Vol. 1) 1914 Bom 268 (269): 38 Bom 24: 21 Ind Cas 39 (41) (DB).

[See however (Vol. 25) 1938 Oudh 10 (11): 13 Luck 625 (DB).]

[2] There is no prohibition against joining a prior mortgagee in a suit on puisne mortgage. (Vol. 32) 1945 Mad 91 (92, 93); I. L. R. (1945) Mad 578 * (Vol. 16) 1929 Nag 135 (136): 25 Nag L R 171 * ('97) 1 Cal W N 453 (455).

[See also (Vol. 23) 1936 Rang 340 (341)]

[3] Decree for sale passed on foot of a puisne mortgage, without making the prior mortgagee a party to the suit—Rights of the prior mortgagee are in no way affected. ('12) 16 Ind Cas 779 (779) (DB) (Mad) * (Vol. 17) 1930 All 113 (114): 52 All 426 (DB) * ('95) 22 Cal 33 (46) * (Vol. 16) 1929 All 126 (127).

[4] Prior mortgagee made a party to the puisne mortgagee's suit—Priority of his right not in any way impugned—Decree in the suit cannot affect his rights. (Vol. 11) 1924 Nag 191 (193) * (Vol. 17) 1930 All 113 (113): 52 All 426 (DB) * (Vol. 18) 1931 All 76 (79, 80) (DB) * (Vol. 7) 1920 P C 81 (83): 47 Cal 662: 47 Ind App 11 P C * (Vol. 2) 1915 Cal 373 (374) (DB) * 1912 Mad W N 41 (41) (DB) * (Vol. 7) 1920 Pat 630 (631) (DB) * (Vol. 18) 1931 Pat 33 (38): 9 Pat 816 (DB) * (Vol. 24) 1937 Cal 446 (449) (DB) * (Vol. 23) 1936 All 578 (583) 58 All 1056 (FB).

[But see ('04) 8 Cal W N 385 (389, 390) (DB). Puisne mortgagee being a necessary party must, when impleaded, set up his prior as well as subsequent mortgages.]

[5] Prior mortgagee impleaded and his prior right impugned or sought to be postponed—He is bound to assert his right under the prior mortgage. (Vol. 10) 1923 Pat 290 (291): 2 Pat 435 (DB) * ('04) 31 Cal 428 (431, 432) (DB) * (Vol. 18) 1931 Pat 33 (38): 9 Pat 816 (DB) * ('02) 24 All 429 (436): 29 Ind App 118 (P C). * ('12) 39 Cal 527 (557, 558): 39 Ind App 68 (P C).

[6] Prior mortgagee purchasing equity of redemption and in possession of mortgaged property made defendant to a suit upon the puisne mortgage. The decree may direct the puisne mortgagee to redeem the prior mortgage before bringing the property to sale ('12) 34 All 323 (328) (DB) * ('08) 31 Mad 425 (428) (DB) * (Vol. 10) 1923 All 423 (423).

[See (Vol. 20) 1933 Mad 595 (596).]

[But see (Vol. 16) 1929 All 296 (298) (DB).]

[7] The prior mortgagee is not precluded from setting up the prior mortgage and if he so sets it up, it should be adjudicated upon by the Court. ('11) 9 Ind Cas 643 (643) (DB) (Mad).

[See also (Vol. 23) 1936 Rang 340 (341).]

[8] Where a person's claim to priority rests on the fact of his being subrogated to the rights of a prior mortgagee by payment, he must assert the right to such priority on pain of being precluded by *res judicata* from putting it forward in a subsequent suit. (Vol. 3) 1916 Cal 808 (808) (DB) * ('12) 39 Cal 527 (545). 39 Ind App 68 (P C). * (Vol. 18) 1931 Pat 33 (38): 9 Pat 816 (DB).

[But compare (Vol. 14) 1927 Nag 38 (39).]

(9) Where puisne mortgagee admits in the plaint the right of the prior mortgagee to priority, he need not appear in Court and set up his rights under the prior mortgage. (Vol. 23) 1936 All 578 (583): 58 All 1056 (FB).

11. Mahomedan Co-heirs—[1] Where a Mahomedan mortgagor or mortgagee dies leaving a number of heirs, all the heirs should be made parties to a suit relating to the mortgage ('87) 11 Bom 425 (428) (DB).

O. 34 R. 1 (contd.)

See also (Vol. 19) 1932 Cal 34 (35).]

[2] Failure to implead some of the heirs of a mortgagor is no ground for dismissing the entire suit, which may be decreed so far as the shares of the heirs actually joined are concerned. (Vol. 1) 2 1915 Bom 272 (272): 39 Bom 729 (DB) * (Vol. 6) 1919 Bom 135 (136): 43 Bom 575 (581) (DB).

[3] If one of the co-heirs is in possession of the property of the deceased liable to be proceeded against, a decree passed against him alone would bind the entire estate. ('05) 32 Cal 296 (313, 314): 32 Ind App 23 (P C) * (Vol. 12) 1925 All 479 (480): 47 All 466 (DB). * (Vol. 27) 1940 Oudh 230 (231): 15 Luck 463 (DB). * (Vol. 2) 1915 Bom 272 (272): 39 Bom 729 (DB). * ('94) 21 Cal 311 (318) (DB). * (82) 8 Cal 370 (374) * ('96) 20 Bom 338 (345) (DB) * (75) 1 All 57 (59) (FB).

12 Joint Hindu family.—[1] In a suit by or against the manager of a Joint Hindu family to enforce or redeem a mortgage, the manager effectively represents the other members of the family and the latter cannot impugn the proceedings as not binding on them, merely on the ground of their not having been individually made parties to the suit. ('11) 33 All 272 (278): 38 Ind App 45 (P C) * (Vol. 1) 1914 P C 136 (137): 36 All 383: 41 Ind App 216 (P C) * (Vol. 7) 1920 P C 1 (2, 3): 47 Cal 924: 47 Ind App 91 (P C) * (Vol. 14) 1927 P C 56 (56, 57): 51 Bom 450: 54 Ind App 122 (P C). (S. 11 Explanation VI is applicable to a Joint Hindu family). ('12) 35 Mad 685 (688, 691) (DB). * (Vol. 17) 1930 Mad 69 (71) (DB). (Vol. 19) 1932 Pat 80 (85): 10 Pat 670 (DB) * (Vol. 23) 1936 Pat 3 (4, 5) (DB). * (Vol. 14) 1927 Oudh 27 (29, 30): 2 Luck 288 (DB). * ('10) 34 Bom 354 (358) (DB). * ('12) 14 Ind Cas 333 (335) (DB) (Cal.). * ('12) 34 All 549 (554, 555, 558) (FB). * ('13) 9 Nag L R 1 (7, 8) * (Vol. 2) 1915 Cal 432 (433) (DB). * (Vol. 11) 1924 Oudh 17 (19) (DB). * (Vol. 11) 1924 All 908 (908): 46 All 709 (DB). * (Vol. 16) 1929 Bom 213 (214): 53 Bom 444 * (Vol. 4) 1917 Nag 105 (106) * (Vol. 23) 1936 Sind 87 (89, 90): 30 Sind L R 42 (DB).

[2] Suit against father—Son impleaded as a legal representative of his father—He cannot object to the decree in the executing Court on the ground of the plaintiff's failure to implead him. ('99) 21 All 356 (357, 358) (DB).

[3] Plaintiff mortgagee does not lose his right to sue the son separately by his failure to join him in the suit against the father. ('99) 21 All 301 (307) (DB).

[4] Suit by or against the manager of a joint Hindu family—The manager need not be expressly and specifically stated as suing or as being sued in his representative capacity as manager. (Vol. 17) 1930 Pat 295 (297) (DB) * (Vol. 10) 1923 All 284 (284) (DB) * ('12) 34 All 549 (571) (FB) * (Vol. 8) 1921 Pat 377 (378): 6 Pat L Jour 640 (DB). * (Vol. 23) 1936 Sind 87 (89, 90): 30 Sind L R 42 (DB).

[But see (Vol. 3) 1916 Bom 278 (279): 40 Bom 2 8 (DB). (Vol. 3) 1916 Pat 310 (311): 1 Pat L Jour 468 (DB).]

[5] Suit by or against a manager—Other coparceners would be proper parties. ('03) 25 All 162 (164) (DB) * (Vol. 26) 1939 All 6 (7) * (Vol. 24) 1937 Nag 121 (122): 1 L R (1937) Nag 866.

[6] Right of other coparceners to object on the ground of the debt being not binding on them, or as being tainted with illegality or immorality, is not affected by proceedings to which they are not parties. ('03) 25 All 214 (223) (DB). * ('10) 34 Bom 354 (357) (DB) * ('98) 21 All 222 (225) (DB). * (Vol. 26) 1939 All 6 (7).

[7] Suit on a mortgage of joint family property—Manager not made a party. All the other members are necessary parties. (Vol. 29) 1942 Oudh 197 (198): 17 Luck 482 * ('13) 21 Ind Cas 712 (713) (DB) (All).

[8] Where father is impleaded but he does not, or cannot, act in a representative character, the other members should be joined if their interests are sought to be affected. (Vol. 7) 1920 Oudh 84 (86). * (Vol. 1) 1914 Nag 31 (31): 10 Nag L R 72 * (1913) 11 All L Jour 36 (38) * (Vol. 4) 1917 Mad 761 (763, 765) (DB) (once the parties have become divided in interest the father cannot sue on behalf of his son.)

[See also (Vol. 20) 1933 Nag 44 (46): 29 Nag L R 77].

[9] Suit against members of a Mitakshara joint family for the enforcement of a mortgage—Mother is not a necessary party. (Vol. 23) 1936 PC 20 (24): 63 Ind App 33: 63 Cal 691 (P C).

[10] Suit to enforce mortgage of the share of one coparcener alone—Other coparceners are not necessary parties. ('13) 21 Ind Cas 689 (690) (Bom).

[11] Mortgage entered into by a member of joint family in his individual capacity—Other members are not necessary parties. ('02) 1902 Pun Re No. 15, p. 53 (56) (DB). * ('04) 1 All L Jour 367 (368) * (Vol. 2) 1915 Mad 387 (390) (DB).

[See also ('89) 13 Bom 51 (53) (DB)].

[12] Son, under Customary law, entitled only to a reversionary interest, for the protection of which he has the right to interfere to prevent unnecessary alienations of the property.—He is not entitled to be made a party to a suit on the mortgage. (Vol. 6) 1919 Lah 40 (40): 1919 Pun Re No. 125.

13. Assignee of mortgage.—[1] Suit for redemption of a mortgage against the assignee thereof—Original mortgagee is not a necessary party. (Vol. 18) 1926 Sind 145 (147): 20 Sind L R 277.

[2] Suit to enforce mortgage brought by the assignee of the mortgage—Mortgagor denying receipt of consideration—Original mortgagee is a necessary party. ('10) 7 Ind Cas 69 (69) (DB). (All).

14. Receiver in insolvency.—(1) Mortgagor becoming insolvent after the date of the mortgage—Mortgagee bringing a suit on his mortgage is bound to implead the Official Receiver or Official Assignee as a party thereto. (Vol. 14) 1927 P C 108 (109): 54 Ind App 190: 54 Cal 595 (P C). (Reversing (Vol. 12) 1925 Cal 785) * (Vol. 22) 1935 Lah 316 (318). * ('02) 25 Mad 406 (423) (DB). * (Vol. 22) 1935 Cal 460 (462): 62 Cal 483 (DB).

15. Lessee.—(1) A lessee who is indented on the land by the mortgagor or by the mortgagee and whose interest will be affected by the result of the suit is a necessary party to a suit relating to the mortgage. (Vol. 13)

O. 34 R. 1 (contd.).

1926 Bom 522 (523) (DB) * (Vol. 6) 1919 Pat 325 (327) * ('07) 29 All 679 (682) * ('82) 8 Cal 79 (87) (DB) * ('94) 21 Cal 116 (120) (DB) * (Vol. 13) 1928 Nag 495 (496) * (Vol. 15) 1928 Mad 1270 (1270) (DB) * (Vol. 10) 1923 Nag 273 (273) : 19 Nag L R 18 * (Vol. 14) 1927 Pat 411 (411, 412) (DB). (Mokararidar).

[But see (Vol. 28) 1941 Nag 72 (76) : I L R (1942) Nag 145 (DB) * ('83) 9 Cal 643 (644) (DB)].

[2] Person having merely a *vaiyati* interest in the land is not entitled to be joined as a party to a suit on the mortgage. ('01) 5 Cal W N 83 (85) (DB).

16. Landlord.—[1] Suit on mortgage—Landlord of the mortgagor may, in some cases, be conveniently joined as a party thereto. (Vol. 16) 1929 Pat 222 (227) : 8 Pat 439 (DB) * (Vol. 5) 1918 Cal 95 (96) (DB) * (Vol. 17) 1930 Nag 89 (90).

[2] Landlord in possession of mortgaged property by virtue of a title improperly and collusively obtained from the tenant under a decree for ejectment—He is a necessary party to suit on the mortgage. ('12) 16 Ind Cas 703 (705) (DB) (Cal).

17. Parties to appeal.—(1) The provisions of this rule apply also to appeals. ('99) 9 Mad L Jour 49 (50) (DB) * ('05) 2 Cal L Jour 202 (216) * (Vol. 3) 1916 Mad 828 (829) (DB).

[But see (Vol. 14) 1927 Cal 479 (480)].

[2] Appeal by sub-tenants against a decree for redemption of a *kanom* obtained by a *jenmi* *kanomdar* is a necessary party. ('02) 25 Mad 568 (571) (DB).

[3] *Melcharathdar* along with the *jenmi* obtaining a decree for the redemption of a *kanom*—*Kanomdar* appealing against the decree, claiming compensation for improvements—*jenmi* is a necessary party to the appeal. ('11) (1911) 1 Mad W. N. 148 (148) (DB).

18. Effect of non-joinder—[1] Non-joinder of any person having an interest in the mortgagee security or in the right of redemption as a party to suit relating to the mortgage is not a fatal defect ; a decree can be passed so far as regards the parties actually on the record are concerned. (Vol. 30) 1943 Oudh 218 (223) : 19 Luck 183 (DB) * (Vol. 29) 1942 Cal 226 (227) (DB) * (Vol. 28) 1941 Nag 72 (75) : I L R (1942) Nag 145 (DB) * (Vol. 27) 1940 Oudh 235 (236) : 15 Luck 399. * (Vol. 22) 1935 Rang 139 (141). * (Vol. 16) 1929 All 941 (942) : 52 All 134 (DB) * (Vol. 6) 1919 Bom 135 (136) : 43 Bom 575 (DB) * ('04) 28 Bom 11 (17) (DB) * (Vol. 10) 1923 Nag 234 (235) * ('08) 35 Cal 519 (523) (FB) * (Vol. 20) 1933 Lah 179 (182) : 14 Lah 218 * (Vol. 24) 1937 Pat 414 (416) * (Vol. 26) 1939 Pat 49 (51) : 13 Pat 141 (DB) * (Vol. 26) 1939 Cal 403 (407) : I L R (1939) 1 Cal 493 (DB) * (Vol. 24) 1937 Mad 136 (139) * (Vol. 22) 1935 Rang 315 (315) (DB) * (Vol. 23) 1936 All 512 (514).

[See (Vol. 24) 1937 All 646 (647) : I L R (1937) All 723 (DB)].

[But see (Vol. 3) 1916 Pat 310 (311) : 1 Pat L Jour 468 (DB)].

[2] No relief possible to be given even as regards parties actually on record in the absence of person omitted—Person omitted is a necessary party. (Vol. 33) 1946 Pat 225 (227, 228) (DB) * (Vol. 30) 1943 Oudh

164 (168) (DB) : 18 Luck 601 * (Vol. 29) 1942 Oudh 197 (198) : 17 Luck 482 * (Vol. 28) 1941 Nag 5 (8) : I L R (1941) Nag 615 (DB) * (Vol. 14) 1927 All 290 (290) * (Vol. 20) 1933 Cal 621 (622) : 60 Cal 777 (DB) * (Vol. 5) 1918 Pat 154 (154, 155) * (Vol. 3) 1916 Mad 828 (829) (DB) * (Vol. 24) 1937 Rang 220 (223, 224) : 1937 Rang L R 13 (DB) * (Vol. 22) 1935 Sind 131 (133) (DB) * (Vol. 26) 1939 All 688 (689) (DB) * (Vol. 21) 1934 Pesh 38 (40) (DB).

[See ('06) 30 Bom 156 (161) (DB)].

[3] Party on the record effectually representing others not joined—Decree will bind the interests of the latter. (Vol. 30) 1943 Oudh 218 (222) : 19 Luck 183 (DB) * (Vol. 12) 1925 Cal 94 (95) (DB) * (Vol. 14) 1927 Mad 1071 (1072).

[4] Court has ample powers under Order 1, Rule 10 to add, in proper cases, any parties it considers necessary for the disposal of the suit. (Vol. 16) 1929 All 941 (942) : 52 All 134 (DB) * (Vol. 8) 1921 Bom 152 (154) : 45 Bom 1009 (DB) * ('11) 10 Ind Cas 776 (778) (DB) (Low Bur) * (Vol. 23) 1936 Pat 153 (154) (DB).

[See (Vol. 28) 1941 Nag 5 (8) : I L R (1941) Nag 615 (DB)].

[5] Where, in a mortgage suit, some of the persons interested in the equity of redemption have not been impleaded, the suit may be decreed so far as the shares of the persons actually on the record are concerned and the mortgagee is entitled to a decree for the entire mortgage amount. (Vol. 26) 1939 Pat 49 (51) : 18 Pat 141 (DB) * (Vol. 26) 1939 Cal 403 (407) : I L R (1939) 1 Cal 493 (DB).

[But see (Vol. 29) 1942 Cal 226 (227) * (Vol. 22) 1935 Cal 666 (670) (DB)].

[6] Although the non-joinder of persons, who ought to have been joined as parties under this rule, is not fatal to the suit, the result of this cannot in any way affect the rights and liabilities of such persons. (Vol. 32) 1945 Pat 106 (107, 108) : 23 Pat 648 (DB) * (Vol. 31) 1944 Pat 119 (123) : 22 Pat 761 (DB) * (Vol. 31) 1944 Nag 57 (59) : I L R (1943) Nag 796 * (Vol. 29) 1942 Cal 394 (401) (DB) * (Vol. 28) 1941 Nag 72 (75) : I L R (1942) Nag 145 (DB) * (Vol. 27) 1940 Sind 195 (197) * (Vol. 5) 1918 P C 34 (35) : 40 All 407 : 45 Ind App 130 (PC) * (Vol. 21) 1934 Pat 648 (650) : 13 Pat 364 (DB) * ('70) 14 Moo Ind App 144 (149) (PC) * ('91) 18 Cal 164 (179) : 17 Ind App 201 (PC) ('94) 21 Cal 70 (79) : 20 Ind App 165 (PC) * ('10) 37 Cal 239 (250) : 37 Ind App 19 (PC) * (Vol. 18) 1931 Oudh 358 (362) : 6 Luck 715 (DB) * (Vol. 13) 1928 Pat 337 (338) : 5 Pat 513 (DB) * (Vol. 15) 1928 Rang 127 (127) : 6 Rang 122 * ('12) 39 Cal 527 (539) : 39 Ind App 68 (PC) * (Vol. 1) 1914 Bom 268 (269) : 33 Bom 24 * ('13) 7 Low Bur Rul 135 (137) * (Vol. 3) 1916 Oudh 151 (152) * (Vol. 5) 1918 Mad 103 (105) : 41 Mad 513 (DB) * (Vol. 23) 1936 All 512 (514) * (Vol. 23) 1936 Mad 70 (74) : 59 Mad 312 (DB) * (Vol. 26) 1939 Pesh 34 (37) (DB) * (Vol. 23) 1936 Nag 128 (129) : I L R (1936) Nag 9 * (Vol. 23) 1936 Sind 87 (89) : 30 Sind L R 42 (DB).

[7] (a) C executes a simple mortgage in favour of A and then sells his interests in the mortgaged property to D. A files a suit on his mortgage, against C without impleading D, and in execution of the decree obtained therein, purchases the property himself. Being obstructed by D in the possession proceedings

O. 34 R. 1 (contd).

A sues D for possession. The suit is not maintainable. (Vol. 28) 1941 Cal 613 (618) : I L R (1941) 2 Cal 209 (DB). * ('97) 19 All 541 (542) (FB). * (Vol. 18) 1931 Mad 542 (547) (DB). * (Vol. 14) 1927 Pat 411 (411, 412) (DB). * (Vol. 8) 1921 Low Bur 61 (63) : 11 Low Bur Rul 119 (DB). * (Vol. 13) 1926 Rang 183 (184) : 4 Rang 96 (DB). * (Vol. 16) 1929 Nag 246 (250) : 25 Nag L R 19 * (Vol. 10) 1923 Nag 273 (274) : 19 Nag L R 18 * (Vol. 12) 1925 Sind 193 (195) : 17 Sind L R 281 (DB). * (Vol. 25) 1938 Cal 524 (525) (DB). * (Vol. 3) 1916 Pat 401 (402, 408) * (Vol. 5) 1918 Oudh 184 (185) : 21 Oudh Cas 70. * (Vol. 14) 1927 All 611 (612) : 49 All 923 (D purchasing C's interest in execution of money decree rule applies.) * (Vol. 9) 1922 Bom 334 (335) (DB). (Do.) * (Vol. 10) 1923 Cal 274 (275) : 49 Cal 1048 (DB). (Do.)

[8] The remedy of **A** in such cases would be to file a fresh suit on his mortgage against **D** if not barred by limitation. (Vol. 28) 1941 Cal 613 (618) : I L R (1941) 2 Cal 209 (DB). * (Vol. 18) 1931 Mad 542 (549) (DB). * (Vol. 17) 1930 Rang 175 (176) * (Vol. 14) 1927 Pat 411 (411, 412) (DB). * (Vol. 10) 1923 Nag 273 (274) : 19 Nag L R 18. (Transferee a lessee.) (Vol. 13) 1926 Rang 183 (184) : 4 Rang 96 (DB). * (Vol. 16) 1929 Nag 246 (250) : 25 Nag L R 19. * (Vol. 11) 1924 Mad 650 (655) : 47 Mad 551 (DB). * (Vol. 10) 1923 All 232 (232) (DB). * (Vol. 18) 1931 Lah 438 (438) (DB). * (Vol. 29) 1942 Bom 146 (146, 148) (DB). * (Vol. 15) 1928 Rang 189 (190) : 6 Rang 297 (DB). * (Vol. 25) 1938 Cal 524 (525).

[9] The following cases hold that the result of not impleading **D** would be to make the decree so obtained ineffectual only against the right of redemption vested in **D**, so that **A** would be entitled to possession against him subject to his right of redemption. (Vol. 28) 1941 Nag 72 (75) : I L R (1942) Nag 145 (DB). * (Vol. 19) 1932 All 356 (358) (DB). * ('91) 16 Bom 486 (491) (DB). * (Vol. 14) 1927 Cal 259 (260) (DB). * (Vol. 8) 1921 Cal 157 (158) (DB). * (Vol. 11) 1924 Pat 452 (453) : 3 Pat 114 (DB). * ('92) 17 Mad 17 (20) (DB). * ('86) 10 Bom 224 (226) (DB). * (Vol. 23) 1936 Mad 70 (77) : 59 Mad 312 (DB).

[10] English mortgage under such a mortgage—Mortgagee is entitled to possession and this right passes to the purchaser under the mortgage decree and prevails over the right of a person who has acquired an interest in the mortgaged property after the creation of the mortgage. (Vol. 27) 1940 Sind 195 (197, 198).

(b) [11] **D** being a usufructuary mortgagee in possession.—The principles stated in class (a) will equally apply. (1911) 21 Mad L Jour 213 (225) (SB). (Overruling - 26 Mad 537) * ('87) 1887 All W N 125 (125) * ('94) 21 Cal 116 (120) (DB). * (Vol. 3) 1916 Oudh 74 (76) : 18 Oudh Cas 347 (DB). * (Vol. 2) 1915 Low Bur 49 (50, 51) : 8 Low Bur Rul 266.

(c) [12] **C** execute simple mortgages first in favour of **A** and then in favour of **B**. **B** sues on his mortgage without impleading **A** and, in execution of the decree obtained therein, purchases the property in court-auction and enters into possession. Thereafter, **A** sues on his mortgage without impleading **B** and purchases the same property in execution of his decree. **A** cannot maintain a suit for possession against **B** or a suit for possession subject to redemption by **B**. ('95) 18 Mad 500 (502) (DB). * ('99) 21 All 235 (237, 238) (FB). * (Vol. 5) 1918 Sind 26 (28) : 12 Sind L R 1 (DB). * ('98) 21 All 235 (237, 238) (FB). * ('03) 26 Mad 484 (485) (DB). * (Vol. 3) 1916 Nag 120

(121) : 13 Nag L R 69. * (Vol. 22) 1935 Cal 139 (141) : 62 Cal 75 (DB). * (Vol. 25) 1938 Cal 634 (636) (DB). * (Vol. 10) 1923 All 449 (449) : 45 All 189 (DB).

[But see (1913) 11 All L. Jour 362 (364) (DB). (Decree must be for possession, subject to redemption by **B**.)]

[13] **A** can bring a fresh suit for sale on his mortgage against **B**, provided that on the date of such suit the claim on the mortgage is not barred by limitation. ('95) 18 Mad 500 (502) (DB). * ('10) 32 All 119 (124) (DB). * ('12) 39 Cal 527 (558) : 39 Ind App 63 (PC). * (Vol. 13) 1926 All 480 (483, 489) (DB). * (Vol. 22) 1935 Rang 139 (141) * (Vol. 22) 1935 Cal 139 (141) : 62 Cal 75 (DB).

[See also ('12) 16 Ind Cas 779 (779) (DB) (Mad).]

[But see (Vol. 7) 1920 Mad 1026 (1029) (DB).]

(d) [14] **C** executes simple mortgages first in favour of **A** and then in favour of **B**. **A** obtains a decree upon his mortgage without impleading **B** and in execution thereof purchases the property himself and obtains possession. **B** thereafter files a suit on his mortgage, purchases the same property in execution of his decree and then sues for possession. The suit does not lie. (Vol. 10) 1923 Nag 225 (226) * (Vol. 24) 1937 Oudh 478 (480) (DB). *

[See (Vol. 21) 1934 All 73 (75) (DB).]

[See also (Vol. 24) 1937 Oudh 33 (34) : 12 Luck 690 (DB).]

[15] **B** can redeem **A**. (Vol. 27) 1940 Sind 251 (254) : I L R (1940) Kar 447 (DB). * (Vol. 10) 1923 Nag 225 (226). * (Vol. 11) 1924 Nag 198 (199). * (Vol. 8) 1921 All 339 (341) : 43 All 204 (FB). * ('03) 13 Mad L Jour 72 (74).

[See also (Vol. 20) 1933 Bom 25 (26) (DB).]

[But see (Vol. 8) 1921 Mad 648 (649) (DB) : ('04) 28 Bom 153 (162) (DB).]

[16] **B** can also sue **A** for sale on the subsequent mortgage subject to the prior mortgage. (Vol. 27) 1940 Mad 646 (647) * ('03) Cal 599 (604, 605) (FB). * (Vol. 4) 1917 Pat 214 (217) (DB). * (Vol. 7) 1920 Mad 650 (651) (DB). * (Vol. 11) 1924 Pat 484 (486) : 3 Pat 435 (DB). * (Vol. 7) 1920 Nag 251 (253) : 16 Nag L R 215 * ('12) 39 Cal 527 (558) : 39 Ind App 68 (P C).

[17] If **B** redeems **A**, the latter, in his turn, as owner of the equity of redemption, can redeem **B**. (Vol. 9) 1922 All 135 (137) : 44 All 462 (DB).

[See however (Vol. 19) 1932 Pat 270 (272) : 11 Pat 415 (DB).]

[18] Rights of redemption of **B** and **A** can be adjusted in the same suit (Vol. 28) 1941 Cal 484 (488) : I L R (1941) 1 Cal 514 (DB). * (Vol. 9) 1922 All 135 (137) : 44 All 462 (DB). * (Vol. 9) 1922 Nag 89 (91, 92) (FB).

* [See also (Vol. 18) 1931 Pat 434 (435, 436).

[19] If **B** sues **A** for sale on the subsequent mortgage subject to the prior mortgage. (Vol. 29) 1942 Cal 138 (140, 141) (DB). * (Vol. 28) 1941 Cal 484 (488, 439) : I L R (1941) 1 Cal 514 (DB). * (Vol. 18) 1931 All 466 (481) : 53 All 1023 (FB). * (Vol. 27) 1940 Mad 646 (649). * (Vol. 9) 1922 P C 11 (13) : 48 Ind App 465 : 43 All 469 (PC). * (Vol. 20) 1933 All 412 (413) (DB). * ('12) 1912 Pan W R 203 (DB). * (Vol. 9) 1922 Mad 249 (259) (DB). * (Vol. 18) 1931

O. 34 R. 1 (contd.)

Rang 105 (106, 107) : 9 Rang 1 (DB) * (Vol. 10) 1923 Rang 107 (108) (DB) (Vol. 19) 1932 Pat 270 (271) : 11 Pat 415 (DB) * (Vol. 26) 1939 Pesh 34 (37) (DB). * (Vol. 24) 1937 Oudh 478 (480) (DB).

[But see (Vol. 4) 1917 Mad 751 (753) : 40 Mad 77 (DB) (Disseminated from in (Vol. 19) 1932 Mad 566 : 56 Mad 115 and also contrary to (Vol. 9) 1932 P C 11 : 48 Ind App 465 : 43 All 469 (P C).]

[20] This right of A can be set up notwithstanding the fact that the claim on the mortgage itself is barred by limitation. (Vol. 27) 1940 Mad 646 (649) * (Vol. 9) 1922 P C 11 (13) : 48 Ind App 465 : 43 All 469 (P C).

(e) [21] J mortgaging with possession certain property to G. Latter allowing him to remain in possession under a rent deed executed by him—J purporting to mortgage the same property to S with possession. Thereafter G obtaining decree for sale on foot of his mortgage and purchasing the property himself in execution of the decree—S not made party to the suit.—G attempting to obtain possession but resisted by S in possession.—G suing S for possession entitled to succeed in the suit. (Vol. 23) 1936 Lah 153 (155, 156) (DB).

(f) [22] C making a mortgage in favour of A. Thereafter, in execution of a money decree against C, the mortgaged property attached and sold and purchased by D—Pending attachment, A purchasing by private sale the property from C in satisfaction of the mortgage and entering into possession. In a suit by D against A for recovery of possession, A cannot set up his mortgage as a shield as a defence to the suit. (Vol. 16) 1929 PC 288 (289) (PC).

[But see (Vol. 13) 1926 Nag 21 (23, 24) : 23 Nag L R 86 (Transferee *lis pendens* held entitled to set up prior mortgage as shield.)]

[23] A can sue D on the mortgage See (Vol. 24) 1937 Rang 359 (360).

(g) [24] C executes simple mortgages first in favour of A and then in favour of B. A sues C on his mortgage without impleading B—B also institut's a parallel suit on his own mortgage without impleading A—A purchases, pending B's suit, the mortgaged property in execution of his decree, and thereafter B purchases the same property in execution of his decree.—Different views are held on the question whether doctrine of *lis pendens* applies to such a case.

(i) The following cases while holding that the doctrine of *lis pendens* applies to such cases, have come to the conclusion that A can get a decree for possession subject to redemption by B. (Vol. 8) 1921 Pat 150 (151) 152 (DB). * (Vol. 9) 1922 Nag 89 (91, 92) (FB). * (Vol. 1) 1914 Sind 131 (132) : 8 Sind L R 264 (DB).

[But See (Vol. 13) 1926 All 480 (486) (DB).]

[11] The High Court of Allahabad has held that the doctrine of *lis pendens* applies to such case but has further formulated the following conclusions:—

If A sues B as plaintiff for possession, then, if he was the earlier purchaser, (i. e., purchaser pending B's suit) in point of time, he can redeem B and recover possession even though his (A's) mortgage is barred by time; If he is the later purchaser (i. e., if B's purchase is pending A's suit) then his suit even for redemption cannot be decreed. If B sues as plaintiff for possession, then, if B is the earlier purchaser in point of time, he must redeem A and A cannot

compel B to submit to redemption by him. If B is the later purchaser in point of time, he must first redeem A, but A will have the right to redeem B next and retain possession. (Vol. 18) 1931 All 466 (481, 482, 486) : 53 All 1023 (FB).

(iii) The High Courts of Madras and Calcutta have held that a sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*. (Vol. 21) 1934 Mad 585 (586, 587) * (Vol. 20) 1933 Mad 583 (584, 590) : 56 Mad 846 (FB). * (Vol. 29) 1942 Cal 394 (401) (DB). * (Vol. 20) 1933 Cal 181 (182).

[25] When the puisne mortgagee, who has not been impleaded in a suit on the prior mortgage, seeks to redeem a prior mortgage, he should pay the amount due under the prior mortgage and not merely the amount due under the decree thereon ('31) 18 Cal 164 (169) : 17 Ind App 201 (PC) * (Vol. 28) 1941 Cal 484 (486) : I L R (1941) 1 Cal 514 (DB). * (Vol. 28) 1941 Lah 96 (96). * (Vol. 26) 1939 Cal 15 (18) : I L R (1938) 2 Cal 643. * (Vol. 13) 1926 Nag 214 (214, 215) : 21 Nag L R 165. * (Vol. 20) 1933 Lah 75 (76). * (Vol. 20) 1933 All 412 (414) (DB). * (Vol. 17) 1930 All 435 (436, 437) : 52 All 331 (D.B.). * (Vol. 9) 1922 P C 11 (13) : 48 Ind App 465 : 43 All 469 (PC). * (1912) 23 Mad L. Jour 284 (286) (DB). * (Vol. 19) 1932 Pat 270 (272) : 11 Pat 415 (DB). * (Vol. 23) 1936 Nag 128 (129) : I L R (1936) Nag 9.

[26] Puisne mortgagee impleaded in a suit to enforce a prior mortgage, and a decree for sale or foreclosure passed—Effect is to extinguish his security if he does not exercise his right of redemption or his security is not expressly saved. ('04) 7 Oudh Cas 243 (247) (DB). * ('06) 1906 All W N 112 (113). * (Vol. 9) 1922 Mad 307 (308) (DB). * (Vol. 15) 1928 Lah 505 (507). * (Vol. 3) 1916 Pat 64 (65) : 1 Pat L Jour 261. * (Vol. 19) 1932 Cal 126 (131) : 59 Cal 117 (DB).

[See however (Vol. 2) 1915 All 297 (298).]

19. A person cannot be both a plaintiff and a defendant. [1] A and B are the first mortgagees and A and C are the puisne mortgagees of a property—Suit by A and B for foreclosure of their mortgage—C alone can be joined as defendant as a puisne mortgagee ('02) 24 All 179 (183, 184) (DB). * ('01) 25 Bom 606 (612) (DB).

20. Joinder of parties. [1] A misjoinder of plaintiffs in a mortgage suit, some of whom are not entitled to any relief, is not fatal to the suit. (Vol. 12) 1925 Nag 366 (368).

[2] This rule does not prohibit joinder of any person whom it is proper to add under Order 1, Rr. 1 and 3. (Vol. 7) 1920 Nag. 247 (248).

(3) After commencement of trial of suit, application made to Court for adding persons alleged to be interested in subject matter—Matter is in the discretion of court (Vol. 11) 1924 Oudh 53 (53, 54) : 26 Oudh Cas 317. * ('05) 1905 All W. N. 35 (36).

21. Revision. [1] S. 115 does not apply to the case of a mere refusal to add a person as a plaintiff in a mortgage suit. (Vol. 13) 1926 Pat 207 (208) : 4 Pat 723 (DB).

[2] An order discharging necessary parties from the suit is open to revision. (Vol. 18) 1931 Oudh 410 (410, 411) (DB).

[3] The decision as to when a person who claims a paramount title is a necessary party to the mortgage suit is open to revision. (Vol. 29) 1941 Nag. 133 (134).

Preliminary decree in a 2 (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

- (a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—
- (i) principal and interest on the mortgage,
 - (ii) the costs of suit, if any, awarded to him, and
 - (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or
- (b) declaring the amount so due at that date; and
- (c) directing—
- (i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and
 - (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

[T. P. Act, old S. 86. See Rule 3, 10 and 11]

a. Rule 2 was substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929) section 4, for the original rule.

PROVINCIAL AMENDMENT.

PATNA.

In sub-rule (2) insert the words, "of its own motion for" after the words "The Court may".

(7-1-1936).

ORDER 34 RULE 2.

Synopsis.

1. Scope.
2. Persons entitled to the right of foreclosurs.
3. Form of preliminary decree.
4. "Ordering that an account be taken."
5. Principal.
6. Interest.
7. Costs of the suit.
8. Other costs, charges and expenses.

9. Account against mortgagee in possession.
10. Accounts in suits by or against sub-mortgagees.
11. Subsequent mortgagees.
12. "Pays into Court."
13. "On or before such date as the court may fix within six months."
14. Extension of time.
15. Plaintiff to apply for final decree.
16. Mortgage of chattel and intangible property
17. Appeal.

O. 34 R 2 (contd.)

1. **Scope.**—[1] The object of this rule is that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that after the expiration of that day, if the property be not redeemed, the matter shall pass from the domain of contract to that of judgement and the rights of the mortgagee should thenceforth depend, on the directions in the decree. ('07) 34 Cal 150 (161): 34 Ind App 9 (PC). (Observations apply equally to the present rule).

[See also (Vol. 29) 1942 Cal 367 (368): I L R (1942) 1 Cal 395.]

[2] The object of this rule is to prevent mortgagees from realizing their securities otherwise than in the mode prescribed by the rule. ('95) 22 Cal 813 (816) (DB).

2. **Persons entitled to the right of foreclosure.**—[1] S. 67 of the T. P. Act now provides that no mortgagee "other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose", can institute a suit for foreclosure. ('96) 19 Mad 249 (252, 253): 23 Ind App 32 (PC) * (Vol. 22) 1935 All 778 (781) (DB). * (Vol. 7) 1920 Oudh 204 (206) (DB).

3. **Form of preliminary decree.**—[1] The Court cannot, except with the consent of parties, direct payment of the mortgage-money, by instalments. ('79) 2 All 320 (321, 322) (DB). * ('83) 7 Bom 332 (335) (DB).

[2] Where a preliminary decree allowing payment by instalments is passed by consent of parties, Kr. 2 and 3 may still apply. (Vol. 15) 1928 Nag 333 (335): 25 Nag L R 175.

[3] A preliminary decree for foreclosure which does not conform to the form prescribed by this rule is irregular, but after it is made absolute, the defendant cannot object to delivery of possession under the decree to the decree-holder. ('06) 4 Cal L Jour 533 (535) (DB).

[See also appendix D, Form Nos. 3, 3A, 9 and 10.]

4. **"Ordering that an account be taken"** [1] Rule 2 contemplates a declaration of the amount due at the date of the decree, this declaration to be made (a) at the time of judgment itself or (b) after taking an account. (Vol. 19) 1932 Pat 332 (334) (DB).

[2] The accounts have to be taken before the final decree. ('12) 1912 Mad W N 400 (401).

[3] In taking accounts, sums due by the mortgagor and also by the mortgagee should be taken into consideration. (Vol. 4) 1917 Cal 853 (854) (DB).

[4] If decree silent, the parties may select a person to take accounts and his award will be binding on them. ('09) 33 Bom 216 (218, 219) (DB).

[5] The accounting is to be restricted to the mortgage transaction in question. (Vol. 14) 1927 Oudh 170 (173) (DB). * (Vol. 12) 1925 Pat 59 (63): 3 Pat 829 (DB).

[6] Failure to direct accounts to be taken is not serious error, when the result of taking accounts would be to give the same sum as that for which decree was passed. (Vol. 14) 1927 P C 17 (17) (PC).

5. **Principal.**—[1] Where the mortgage deed is inadmissible, the mortgagee cannot recover anything beyond what the mortgagor admits to be due. ('82) 6 Bom 669 (670) (DB).

[2] The statement in the mortgage deed is *prima facie* proof of the amount due. (Vol. 1) 1914 All 319 (319): 36 All 478 (DB).

[3] The mortgagor can plead a total or partial discharge of the debt or that the recital as to consideration in the bond is wholly or partially untrue. (Vol. 7) 1920 Cal 888 (888) (DB).

[4] Recitals in deeds are not evidence against third parties. ('95) 17 All 428 (430) (DB). * ('07) 5 Cal L Jour 653 (653) (DB).

[5] Where only part of the alleged consideration is proved to have been paid, the mortgage is valid to the extent of the part so paid. ('06) 10 Cal W N 932 (933) (DB).

6. **Interest.**—[1] In the absence of anything to the contrary in the mortgage deed, interest as well as the principal constitutes a charge on the property. * (Vol. 11) 1924 P C 183 (183, 184): 5 Lah 425: 51 Ind App 377 (P C). * (Vol. 30) 1943 Mad 109 (110) * (Vol. 12) 1925 Lah 182 (182) (DB). * (Vol. 8) 1921 Bom 28 (29): 45 Bom 523 (DB).

7. **Costs of the suit.**—[1] Though as a general rule in mortgage suits mortgagee is entitled to his costs, the Court in view of mortgagee's conduct and peculiar circumstances of any case, can refuse to award him costs. (Vol. 26) 1939 Bom 322 (333) (DB). * ('83) 8 Bom 190 (193) (DB). * ('87) 14 Cal 99 (108): 13 Ind App 116 (P C).

[2] Ordinarily costs awarded against a mortgagor are part of the mortgage money, and are recoverable from mortgaged property. (Vol. 12) 1925 Cal 1155 (1155, 1156) (DB). * (Vol. 12) 1925 Oudh 351 (351): 29 Oudh (as 34). * (Vol. 17) 1930 Oudh 167 (168): 5 Luck 595 (DB). * (Vol. 15) 1928 Bom 123 (129, 130): 52 Bom 459 (DB). * (Vol. 5) 1918 All 366 (366): 40 All 103 (113). * ('89) 2 C P L R 94 (97, 98). * (Vol. 26) 1939 Cal 166 (163) (DB).

[But see ('09) 4 Ind Cas 545 (545) (DB). (Cal) * ('88) 10 All 179 (181).]

[3] The Court can, in its discretion under S. 35, make costs recoverable from the mortgagor personally. ('87) 14 Cal 185 (187) (DB). * (Vol. 6) 1919 All 297 (298, 299): 41 All 473 (DB). * (Vol. 5) 1918 Nag 185 (185). * (Vol. 26) 1939 Cal 166 (168) (DB). * ('98) 20 All 523 (527) (FB) * (1898 All WN 33 Overruled)

[4] Where a defendant in a mortgage suit claiming title paramount to that of the mortgagor is struck off from the array of parties and is awarded costs, the mortgagor should not be made liable for such costs. (Vol. 21) 1934 Nag 264 (268): 30 Nag L R 331 (DB).

[5] A puisne mortgagee who is party to a suit on the mortgage is entitled to his costs. ('10) 37 Cal 907 (913).

[6] A co-mortgagee is entitled to his costs even though in a suit on a mortgage he was joined as a defendant. (Vol. 16) 1929 Cal 544 (544) (DB).

[7] Costs are to be awarded to the mortgagee on the scale of costs as between attorney and client. ('77) 1 Ind Jur (N S) 22. * ('81) 8 Cal L Rep 437 (438).

8. **Other costs, charges and expenses.**—[1] The rule makes express provision for payment to the mortgagee of all expenses properly incurred by him in respect of the mortgage security, together with interest thereon. (Vol. 28) 1941 Oudh 498 (501): 16 Luck 812 (DB). * (Vol. 20) 1933 Rang 112 (112).

O. 34 R 2 (contd.)

[2] (See also Ss. 72 and 63 A of Transfer of Property Act).

9. Account against mortgagee in possession.—(See Ss. 76 and 77 of the T. P. Act.)

10. Accounts in suit by or against sub-mortgagee—

[1] A sub-mortgagee is entitled to sue for sale or foreclosure to the same extent as the original mortgagee himself. ('97) 20 Mad 35 (40) (DB).

[2] Where a sub-mortgagee is party to suit on mortgage, proper course is to direct accounts to be taken, both of amounts due to the original mortgagee and of amounts due to the sub-mortgagee and to order that, out of the sum due to the original mortgagee, the sub-mortgagee should be paid the amount due to him on his mortgage, that the balance should be paid to the original mortgagee and that, thereafter, both the mortgagees should re-convey to the mortgagor the mortgaged property. See also Appendix D, Form No. 11. ('91) 15 Bom 692 (693, 694) (DB).

11. Subsequent mortgages.—[1] Where puisne mortgagees are impleaded as parties in a suit on a prior mortgage, a form similar to the one in use in the Chancery Division in the High Court in England may be adapted. ('05) 27 All 325 (330): 32 Ind App 123 (PC).

[2] The chief point to be noted in such cases is to give effect to the principle "redeem up, and foreclose down". ('83) 7 Bom 526 (529) (DB). * ('11) 10 Ind Cas 174 (175) (Oudh) * ('05) 27 All 325 (331, 332, 333): 32 Ind App 123 (PC).

[3] A subsequent mortgagee who has been added as a party to a suit for foreclosure by a prior mortgagee and who pays off the decree amount can, on his being transposed as plaintiff, apply for a final decree. (Vol. 15) 1923 Nag 145 (146): 24 Nag L R 119.

[But see ('05) 27 All 325 (332): 32 Ind App 123 (PC) (Case under the Transfer of Property Act).]

12. "Pays into court"—[1] The rule requires the payment to be made only into the court in all cases. (Vol. 26) 1933 Lah 79 (81): 1 L R (1939) Lah 313 * (Vol. 5) 1913 Cal 472 (473) (DB). * (Vol. 6) 1919 Mad 792 (792): 42 Mad 61 * ('13) 16 Ind Cas 987 (987) = 1913 Pun Re No. 12 (DB). * (Vol. 17) 1930 Mad 105 (107, 108) (DB).

13. "On or before such date as the Court may fix within six months"—[1] The Court has a discretion to fix any shorter period it thinks fit. (Vol. 14) 1927 PC 17 (17) (PC).

[2] Where accounts are directed to be taken, the period of six months should be calculated from the date on which the Court confirms and countersigns the accounts taken under its decree. (Vol. 2) 1915 Cal 502 (503) (DB).

[3] Rules under S. 43, Co-operative Societies Act of 1912, depriving right of six months under O. 34 r. 2 are not *ultra vires*. (Vol. 20) 1933 Nag 211 (213) (DB).

14. Extension of time.—[1] Sub-rule (2) empowers the Court, on good cause being shown, to extend the time fixed for payment of the mortgage-money under the preliminary decree. ('90) 5 C P L R 54 (55). * ('91) 5 C P L R 104 (104) * (Vol. 5) 1918 All 98 (99): 40 All 579 (DB) * (Vol. 8) 1921 Oudh 138 (138).

[See also (Vol. 20) 1933 Nag 164 (166): 29 Nag L R 227 (DB).]

[2] The mortgagor is not entitled to an extension of time as of right. (Vol. 6) 1919 Pat 497 (500): 4 Pat L

Jour 347 (DB) * (Vol. 3) 1916 Mad 882 (882): 39 Mad 882.

[3] Court has no power to grant an extension of time where no good cause has been shown for extension. (Vol. 15) 1928 P C 137 (139): 55 Ind App 207: 55 Cal 821 (PC) * (Vol. 7) 1920 Nag 24 (25) * ('02) 25 Mad 244 (289) (FB) * ('99) 22 Mad 133 (136) (DB).

[See however ('91) 13 All 400 (403).]

[4] Time may be extended even after the expiry of the period originally fixed, provided a final decree has not been passed. (Vol. 5) 1918 Cal 424 (424) (DB).

[5] The mortgagor may pay in the money at any time before the final decree is passed, though there may not be an express order extending the period. ('23) 70 Ind Cas 152 (152, 153) (DB) (Cal). * ('89) 16 Cal 246 (249) (DB). * ('02) 25 Mad 300 (307) (FB). * (Vol. 13) 1931 All 223 (223) (DB). * (Vol. 18) 1931 Oudh 121 (122): 6 Luck 610 (FB). * ('03) 25 All 231 (233). * ('98) 1 Oudh Cas 91 (92, 93) * ('10) 7 Ind Cas 50 (50) (DB) (All) * (Vol. 1) 1914 Oudh 209 (211): 17 Oudh Cas 347 (DB) * ('09) 36 Cal 122 (129).

[6] Even where a preliminary decree is passed by consent, the Court can exercise its power of extending the period fixed for payment. (Vol. 9) 1922 Nag 182 (184) * (Vol. 6) 1919 Cal 68 (69) (DB).

[But see (Vol. 13) 1926 Nag 280 (281).]

[7] Express application for extension of time is not necessary. ('03) 28 Bom 102 (105) (DB).

[8] The application need not be in writing. ('01) 26 Bom 121 (126) (DB).

[9] The Court cannot postpone the passing of a final decree, on the application of a third party. ('02) 6 Cal W N 654 (655) (DB).

15. Plaintiff to apply for final decree.—(1) Held that a final decree passed in the presence of the mortgagor on the application of the transferee from the mortgagee is binding on the mortgagor (Vol. 6) 1919 Pat 497 (500): 4 Pat L Jour 347 (DB).

16. Mortgage of chattel and intangible property.—[1] Different views are held as to right of mortgagee of chattel to sue for foreclosure. - See also (Vol. 2) 1915 Cal 161 (163): 42 Cal 455.

[a] Mortgagee of chattel is entitled to sue for foreclosure. (Vol. 2) 1915 Cal 161 (163): 42 Cal 455.

[b] Mortgagee is not so entitled. (Vol. 3) 1916 Bom 77 (80) * ('11) 7 Nag L R 72 (78) * ('01) 4 Oudh Cas 301 (302).

[2] Mortgagee of a turn of worship is entitled to sue for foreclosure of that right (Vol. 2) 1915 Cal 161 (163): 42 Cal 455 (DB).

17. Appeal.—[1] Appeal lies from a preliminary decree. (Vol. 5) 1918 Nag 185 (185).

[2] Under O. 43 R. 1 (0), an appeal lies from an order refusing to extend time under this rule, but not from an order granting an extension of time. (Vol. 18) 1931 Nag 1 (3) (FB). * ('37) 9 All 500 (502) (DB). * (Vol. 3) 1916 Mad 694 (695): 39 Mad 376 (DB). * (Vol. 1) 1914 Nag 8 (9): 10 Nag L R 150.

[3] An application for revision may lie from an order granting extension of time. (Vol. 18) 1931 Nag 1 (3) (FB).

[4] No appeal lies against an order refusing to extend time after a final decree has been passed. (Vol. 17) 1930 Nag 240 (240).

a 3. (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into foreclosure suit. Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

[T. P. Act, old S. 87.]

[a.] The rule was substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 4, for the original rule.

ORDER 34 RULE 3.

Synopsis.

1. "Where before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed."
2. Effect of appeal on time fixed for payment.
3. Where payment in accordance with sub-rule (1) has not been made.
4. Final decree for foreclosure.
5. Partial foreclosure.
6. Discharge of debt, etc., on foreclosure.
7. Delivery of title-deeds.
8. Limitation for application for final decree.
See Limitation Act, Art. 181.
9. Application for execution of final decree.
10. Appeal.
11. Court-fee.

1. "Where before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed"—[1] Rule makes it clear that defendant is entitled to make payment before final decree debarring him from right to redeem is passed (Vol. 18) 1931 Oudh 121 (122): 6 Luck 610 (DB).

[2] Preliminary decree for foreclosure—Subsequently mortgagee entering into possession before day fixed for payment—Mortgagor can demand fresh account and extension of period—But mortgagor keeping quiet for long time may deprive him of this right (Vol. 13) 1926 Bom 273 (277) (DB).

2. Effect of appeal on time fixed for payment.—[1] The mere pendency of an appeal from the preliminary decree does not extend the time fixed, and is no bar to the passing of a final decree, unless the Appellate Court expressly or by necessary implication

extends the period for payment. (Vol. 17) 1930 Pat 227 (229) (DB) * ('96) 1 Cal W N 197 (197) (DB) * ('96) 18 All 455 (457, 458) * (Vol. 5) 1918 Cal 424 (424) (DB) * ('06) 1906 All W N 203 (203).

[2] Pendency of an appeal is no ground for enlarging the time fixed by the preliminary decree for payment. ('06) 10 Cal W N 910 (912) (DB). * ('89) 13 Bom 106 (109) (DB) * ('93) 17 Bom 547 (553, 554) (DB) * ('13) 17 Cal L Jour 120 (123) (DB).

3 Where payment in accordance with sub-rule (1) has not been made. [1] Sum due not in dispute—Whole amount due not paid into court—Mortgagee is entitled to insist on final decree being passed. ('10) 11 Cal L Jour 226 (233, 234) (DB) * ('07) 10 Oudh Cas 354 (356) (DB) * (Vol. 26) 1939 All 52 (55).

[2] Mortgagor depositing sum found due by lower Court—Sum increased by Appellate Court—Payment by mortgagor reduces debt *pro tanto*—Interest is payable only on balance. ('10) 11 Cal L Jour 226 (235) (DB). * ('12) 16 Ind Cas 374 (375) (DB) (Cal).

[3] The mortgagee is not bound to accept payment after the passing of the final decree for foreclosure. (Vol. 5) 1918 Cal 424 (424) (DB).

4. Final decree for foreclosure.—[1] An application for a final decree for foreclosure should be made by the plaintiff. (Vol. 6) 1919 Pat 497 (500): 4 Pat L Jour 347 (DB).

[2] Application should be made to the Court of first instance, even though the preliminary decree was modified in appeal. ('01) 23 All 88 (89) (DB). * (1900) 23 Mad 521 (523) (DB) * ('11) 15 Cal L Jour 459 (462, 463) (DB).

[See ('81) 6 Cal 513 (515) (DB).]

[3] A defendant, who is present and allows a final decree to be passed on the application of a transferee from the plaintiff, will be estopped from questioning the validity of the decree afterwards. (Vol. 6) 1919 Pat 497 (500): 4 Pat L Jour 347 (DB).

O. 34 R 3 (contd.)

[4] No notice is necessary to be given under this rule to the defendant before a final decree is passed. ('02) 25 Mad 506 (507) (DB). * ('01) 29 Cal 644 (646) (DB). * (Vol. 10) 1923 Nag 13 (15) (DB). * ('06) 4 Cal L Jour 317 (318) (DB). * ('96) 9 C P L R 5 (8).

[But see ('93) 6 C P L R 1 (3). (Application for order absolute against legal representatives of deceased mortgagor—Notice necessary.)]

[5] In practice, notice is generally given on grounds of justice and equity. (Vol. 10) 1923 Nag 320 (320): 19 Nag L R 124. * (Vol. 22) 1935 Mad 716 (717) (DB). (Vol. 17) 1930 Mad 105 (107, 108) (DB). * (Vol. 4) 1917 Oudh 320 (321): 20 Oudh Cas 268. * (Vol. 17) 1930 Nag 136 (136). * ('10) 6 Ind Cas 306 (307) (DB) (Cal). * ('09) 10 Cal L Jour 91 (100, 101) (DB). * ('07) 3 Nag L R 55 (63).

[6] Notice is necessary where the defendant happens to be a minor. (Vol. 11) 1924 All 573 (573) (DB). * (Vol. 13) 1926 All 757 (758, 759): 48 All 828 (DB).

[7] The failure to give notice is, if anything, only an irregularity and unless the merits of the case are affected, will not invalidate the proceedings. (Vol. 13) 1926 All 757 (758, 759): 48 All 828 (DB). * (Vol. 22) 1935 Mad 716 (717) (DB). * ('06) 28 All 193 (195) (DB). * ('01) 25 Bom 337 (347, 348): 27 Ind App 216 (PC).

[See also (Vol. 19) 1932 All 698 (699, 700) (DB).]

[8] An *ex parte* final decree can be set aside under O. 9, R. 13, if "sufficient cause" within the meaning of that rule is established. (Vol. 16) 1929 All 279 (280): 51 All 634. * ('05) 32 Cal 253 (256) (FB). * ('07) 3 Nag L R 55 (56). * ('03) 16 C P L R 92 (94). * (Vol. 31) 1944 Nag 181 (182): 1 L R (1944) Nag 425.

[See ('01) 4 Oudh Cas 238 (240).]

[See also ('99) 12 C P L R 82 (83).]

[9] The dismissal for default of an application for a final decree does not preclude a fresh application for the same purpose. (Vol. 14) 1927 Oudh 49 (50) (DB).

[10] The procedure for obtaining a final decree applies to a preliminary decree passed on compromise between the parties. (Vol. 9) 1922 Nag 182 (184).

[See also (Vol. 24) 1937 All 108 (112) (DB).]

[11] Parties can contract out of R. 3 and agree to have decree passed in such terms as to make it operate as final decree automatically—When decree is so passed final decree is unnecessary. ('11) 14 Cal L Jour 648 (651) (DB). * (Vol. 18) 1931 Cal 546 (548) (DB). * (Vol. 12) 1925 Bom 509 (509, 510) (DB). * (Vol. 31) 1944 Oudh 106 (107, 109, 110).

[12] A conditional decree for foreclosure is not contemplated by the rule. (Vol. 8) 1921 Oudh 138 (139).

[But see ('99) 12 C P L R 103 (105, 106).]

[13] Where a party is entitled to pre-emption on foreclosure, the right arises, not on the expiry of the period fixed for payment, but on the passing of the final decree for foreclosure. ('98) 20 All 315 (319) (FB). * ('98) 20 All 353 (361). * ('98) 20 All 375 (377) (DB). * (Vol. 24) 1937 All 108 (112) (DB).

[14] Omission to draw up final decree is only an irregularity—Court erroneously passing order absolute instead of final decree—Order could be enforced

by execution. (Vol. 14) 1927 Bom 131 (133): 51 Bom 125 (DB).

5. **Partial foreclosure**—[1] Where a suit for foreclosure is decreed only with respect to some of the properties, but dismissed with regard to others and an appeal is filed from that portion of the decree which dismisses the suit, the mortgagee cannot first obtain a final decree in respect of the portion of the decree favourable to him and then, on succeeding in the appeal as to the rest, another final decree in respect thereof. (1905) 27 All 501 (504) (FB).

6. **Discharge of debt, etc., on foreclosure**—[1] Though mortgagee's liabilities come to an end as soon as decree becomes final, decree itself is not satisfied unless execution proceedings are taken and mortgagee decree-holder gets possession of mortgaged property. (Vol. 29) 1942 Cal 224 (225) (DB).

[See also ('10) 6 Nag L R 27 (29).]

[2] The mortgagee's right to redeem revives if, notwithstanding the foreclosure, the mortgagee pursues his personal remedy against the mortgagor. ('11) 13 Bom L R 162 (168).

[3] Person holding several mortgages on same property—First mortgage foreclosed—Mortgagee cannot sue mortgagor personally for debt secured by second mortgage. ('87) 11 Bom 112 (113, 114) (DB). * ('79) 4 Cal 475 (481) (DB).

[4] Subsequent mortgagee made party to decree under R. 2 but not made party to decree under R. 3 and redeeming prior mortgage—Mortgagee cannot redeem subsequent mortgage. ('11) 10 Ind Cas 174 (176) (Oudh).

7. **Delivery of title-deeds**—[1] A mortgagor can institute a separate suit to recover compensation for loss of title-deeds; the Court may also grant, in the mortgage decree itself, an alternative relief for damages for such loss. But if no such alternative relief for damages is provided for in the preliminary and final decrees, the Court cannot grant it in execution. (Vol. 9) 1922 Mad 299 (300) (DB).

8. **Limitation for application for final decree**. (See Limitation Act, Art 181).

9. **Application for execution of final decree**. [1] An application for the execution of a final decree is governed by Art. 182 of the Limitation Act. (Vol. 14) 1927 Pat 215 (217): 6 Pat 780 (DB).

[See also (Vol. 1) 1914 P C 66 (67): 36 All 350 (PC).]

[2] A final decree in a mortgage suit may be adjusted out of Court. (Vol. 10) 1923 Nag 20 (21) (DB).

[3] Where a mortgage decree is time-barred, it cannot be enforced the mortgage itself having merged in the decree. ('13) 35 All 250 (253) (DB).

[4] Section 48 of the Code applies to a final decree under O. 34, though the preliminary decree, on which it was based, had been passed under the Transfer of Property Act. (Vol. 11) 1924 All 696 (696) (DB).

[5] Where in a foreclosure decree against the defendants, costs are awarded to them O. 21 R. 19 is no bar to their executing the decree for costs. ('08) 16 C P L R 73 (75, 76).

[6] Where a foreclosure decree contains no direction for delivery of possession, the mortgagee cannot obtain possession by applying in execution. The proper course is to apply for an order for possession. ('04) 17 C P L R 62 (64).

(a) 4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

[T. P. Act, Old S. 88.]

[a.] The Rule was substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 4, for the original rule.

PROVINCIAL AMENDMENTS.

ALLAHABAD.

In sub-rule (2) after the words "The Court may", insert the words "of its own motion, or."

CALCUTTA.

Re-number sub-rules (3) and (4) as sub-rules (4) and (5) respectively and insert the following as sub-rule (3):

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage-debt, the mortgagor shall pay the balance personally."

[3-2-1933.]

Oudh.—Same as that of Allahabad.

O. 34 R 3 (contd.)

10. Appeal.—[1] Order dismissing application for final decree having effect of dismissing suit of mortgagee is decree and is appealable (Vol. 19) 1932 Lah 214 (215) (DB).

[2] Order refusing application for making preliminary foreclosure decree final on ground of its being premature is not decree—No appeal lies—Revision is competent (Vol. 32) 1945 Nag 277 (279): I L R (1945) Nag 885.

11. Court-fee.—[1] *Ad valorem* court-fee is payable on an appeal against a final decree in a mortgage suit. (Vol. 15) 1928 Nag 146 (147) * (Vol. 2) 1915 Oudh 121 (121): 18 Oudh Cas 114 (DB).

ORDER 34 RULE 4

Synopsis.

1. Rule, if retrospective.

2. Who may obtain a decree for sale.

3. Decree for money in suit for sale.

4. Form of decree.

5. Contents of decree in suit for sale by first mortgagee

6. Court's power to adjust equities.

7. Decree for sale in a foreclosure suit—Sub-rule (3)

8. Order in which properties should be sold.

9. Interest. See note 2 on Order 34, Rule 11.

10. Costs.

11. Succession certificate.

12. Consent decree.

13. Appeal.

14. Calcutta amendment.

O. 34 R 4 (contd.)

1. Rule, if retrospective.—[1] The rule is not retrospective in effect so as to affect decrees already passed under the Transfer of Property Act at the time of coming into force of the new Code. (Vol. 8) 1921 Mad 126 (128) (DB).

2. Who may obtain a decree for sale.—[1] A decree for sale cannot be obtained by a usufructuary mortgagee as such or a mortgagee by conditional sale as such. Such a decree can be obtained only by a simple mortgagee, an English mortgagee, an equitable mortgagee and an anomalous mortgagee. (Vol. 27) 1940 Lah 197 (197) (Punjab Land Alienation Act, S. 16—No decree for sale can be passed against a statutory agriculturist as under S. 16 of the above Act his land cannot be sold—Decree creating a charge on the property can be passed). *('89) 11 All 367 (370, 373) (DB). (Usufructuary mortgagee not entitled to sue for sale.) * (Vol. 22) 1935 All 778 (781) (DB). (In the case of an anomalous mortgage, Court has discretion to pass a decree for sale in lieu of a decree for foreclosure.) * ('93) 17 Bom 425 (428) (DB). Case of anomalous mortgage—Sale allowed. * ('89) 12 Mad 109 (111) (DB). (Case of usufructuary mortgage—In this case *Muttusami Ayyar, J.*, held that 11 Mad 88 was incorrectly decided). * ('97) 24 Cal 677 (680) (DB). (Case of usufructuary mortgage—Sale not allowed). * ('96) 20 Bom 296 (298) (DB). (Do.) * ('94) 17 Mad 131 (133) (FB). (Personal covenant in usufructuary mortgage—Mortgagee entitled to sue for sale). * ('04) 27 Mad 526 (528) (FB). (Combination of a simple and usufructuary mortgage—Mortgagee has a right to decree for mortgage-money and for sale). * ('97) 24 Cal 348 (350). (Equitable mortgage—Appropriate remedy is a decree for sale). * (Vol. 23) 1936 Pesh 43 (45) (DB). (Anomalous mortgage).

[2] A mortgagee of chattel is entitled to obtain a decree for sale in enforcement of his mortgage quite as much as a mortgagee of immovable property. (Vol. 20) 1933 Mad 241 (241, 242): 56 Mad 560.

3. Decree for money in suit for sale.—[1] Mortgagee can relinquish his security and content himself with simple money decree. (Vol. 26) 1939 Pesh 34 (35). * ('02) 24 All 456 (457) (DB).

[2] Decree for money creating charge on immovable property for decretal amount is not preliminary decree. (Vol. 12) 1925 Mad 1101 (1103).

[3] Decree for money authorizing decree-holder to enforce decree by selling certain property is not preliminary decree. (Vol. 12) 1925 Mad 1083 (1084).

4. Form of decree. [1] In framing decrees in mortgage suits, the provisions contained in order 34 should not be overlooked. (Vol. 1) 1914 Lah 524 (528): 1915 Pun Re No. 29: (DB) * ('11) 5 Sind L R 71 (76, 77) (DB).

[2] A preliminary decree in a mortgage suit must fix a period within which the mortgagor should pay the mortgage-money and the decree should direct a sale of the property only if the mortgagor fails to pay the money within the period fixed. (Vol. 2) 1915 Lah 221 (223) (DB).

[See (Vol. 24) 1937 Pesh 31 (32) (DB). (Decree for payment by annual instalments and for possession on default was held erroneous).]

[3] Preliminary decree containing provision regarding mortgagor's personal liability is not proper. (Vol. 27) 1940 Bom 276 (277): I L R (1940) Bom 640.

* (Vol. 6) 1919 Pat 365 (366) (DB). * (Vol. 1) 1914 Cal 214 (215). * (Vol. 12) 1925 Lah 640 (641) (DB). * ('04) 31 Cal 792 (795) (DB).

[4] Accounts between the mortgagor and the mortgagee should be taken before passing the final decree. A direction in the decree for taking accounts in execution is against law. ('12) 1912 Mad W N 400 (401) (DB).

[5] Decree directing sale of mortgaged property in default of mortgage-money being paid within fixed time is in substantial compliance with rule. ('95) 22 Cal 931 (934) (DB). * (Vol. 20) 1933 Cal 316 (318) (DB).

[6] Decree for debt providing that mortgaged property shall be liable for debt substantially complies with rule. ('97) 24 Cal 473 (488, 489) (SB). * ('98) 25 Cal 580 (583) (DB). * ('99) 26 Cal 166 (171) (DB). * ('06) 20 Mad 78 (79) (DB).

[7] Mortgage decree ambiguous—It should be construed so as to accord with law. ('98) 20 All 597 (599) (DB).

5. Contents of decree in suit for sale by first mortgagee. [1] In a suit on a prior mortgage, in which puisne mortgagees are also impleaded as parties, each of them is entitled to an order that an account be taken of the amount due to him and to a declaration of his right to participate in the surplus sale proceeds, remaining after paying off the prior mortgage in the order of his priority. ('06) 33 Cal 92 (110, 111) (SB) * (Vol. 32) 1945 Bom 169 (170, 171).

[See (Vol. 27) 1940 P C 134 (136): I L R (1940) 2 Cal 436: I L R (1940) Kar P C 271: 67 Ind App 309 (PC).]

[2] Where the prior mortgagee is paid off before the sale under a prior mortgage is held, the puisne mortgagee cannot ask for a sale of the property. ('10) 37 Cal 907 (910, 911) * (Vol. 6) 1919 Mad 100 (102): 42 Mad 90 (DB).

[See (Vol. 19) 1932 Cal 126 (129): 59 Cal 117 (DB).]

[But see (Vol. 23) 1936 Oadh 183 (195): 12 Luck 72 (DB).]

[3] Where the puisne mortgage includes some properties in addition to those mortgaged to the prior mortgagee, the puisne mortgagee cannot ask that, if the sale proceeds of the properties subject to the prior mortgage are not sufficient to pay off both the prior and the puisne mortgages, the additional properties subject to the puisne mortgage should also be sold. His right is only to have his mortgage debt satisfied out of the sale proceeds of the properties subject to the prior mortgage. ('10) 37 Cal 907 (910, 911) * ('04) 26 All 504 (506) (DB). * (Vol. 24) 1937 Cal 717 (718) (DB).

[See (Vol. 19) 1932 Cal 126 (129): 59 Cal 117 (DB).]

[See also (Vol. 24) 1937 Cal 446 (450) (DB).]

[4] In a suit by a prior mortgagee impleading both the mortgagor and the puisne mortgagee, the mortgagor cannot be called upon to pay off both the mortgages on pain of his property being sold. ('05) 1 Cal L Jour 31 (35) (DB). (Prior to the Transfer of Property (Amendment) Act of 1929).

[5] The puisne mortgagee's right to have his mortgage debt satisfied out of the surplus sale proceeds is not affected by such sale proceeds being withdrawn

O. 34 R. 4 (contd.)

from the Court by a person having notice of the puisne mortgagee's title. (Vol. 8) 1921 All 312 (314): 43 All 268 (DB).

6. Court's power to adjust equities.—[1] Where a sale of the mortgaged properties is impossible, as where the mortgaged properties have been sold for arrears of revenue or rent, the decree must be suitably modified. The court has inherent power, in such cases, to give appropriate directions for the disposal of the fund which represents the property. (Vol. 29) 1942 Pat 185 (187). * (Vol. 2) 1915 Cal 203 (207) (DB).

[2] Where part of the mortgaged property has been acquired by the Government under the Land Acquisition Act, the proper decree to pass will be a decree for sale of the available mortgaged property with a direction that in case the entire mortgage debt is not realized by the sale of such property, the mortgagee shall be entitled to a simple money decree against the mortgagor for a sum not in excess of the amount withdrawn by the mortgagor as compensation money in the land acquisition proceedings. (Vol. 25) 1938 All 221 (227); I L R (1938) All 513 (FB).

7. Decree for sale in a foreclosure suit—Sub-rule (3). [1] Sub-rule (3) as amended in 1929, applies only to anomalous mortgagees. (Vol. 22) 1935 All 778 (781) (DB).

[But see ('13) 18 Ind Cas 24 (25) (DB) (Oudh) (No longer good law).]

[2] The Court in order to protect the interests of all parties concerned can, in the exercise of its discretion under this sub-rule, pass a decree for sale instead of one for foreclosure, although the suit may be for foreclosure. (Vol. 28) 1941 All 169 (171, 172); I L R (1941) All 240 * (Vol. 27) 1940 Nag 156 (156, 157); I L R (1941) Nag 607 (DB). * (Vol. 13) 1926 Oudh 487 (489); 2 Luck 388 (DB). * (Vol. 25) 1938 Nag 112 (114); I L R (1938) Nag 91 (DB).

[3] The court will not pass a decree for sale instead of one for foreclosure under this sub-rule where it does not appear that the property was undervalued. (Vol. 8) 1921 Oudh 176 (182) (DB). * ('13) 18 Ind Cas 24 (27) (DB) (Oudh).

[See also (Vol. 28) 1941 All 169 (172); I L R (1941) All 240.]

[4] Mortgagee suing for foreclosure on alleged mortgage by conditional sale—Mortgage not found to be so—Suit should not be dismissed—Relief under sub-rule (3) should be granted. ('85) 1885 All W N 329 (329) (DB).

8. Order in which properties should be sold.—[1] *Prima facie*, the decree-holder is entitled to have the mortgaged properties sold in any order he likes. (Vol. 11) 1924 Mad 366 (367); 47 Mad 688 (DB). * ('09) 4 Ind Cas 398 (399) (DB) (Cal). * ('67) 8 Suta W R 379 (382) (DB). * ('07) 34 Cal 13 (17) (DB). * ('95) 17 All 434 (435) (DB). * ('12) 22 Mad L Jour 125 (126) (DB). * (Vol. 11) 1924 Pat 700 (703) (DB). * (V. I. 27) 1940 Cal 159 (160); I L R (1939) 2 Cal 455 (457).

[2] The Court has, under this rule, the power to direct the order in which the various mortgaged properties should be sold, for the purpose of protecting the equities that may exist in favour of any of the parties. (Vol. 11) 1924 Pat 459 (464); 3 Pat 522

(DB) * (Vol. 6) 1919 Pat 281 (282); 4 Pat L Jour 207 (DB) * (V. I. 18) 1931 Nag 91 (94); 13 Nag L R 213. * ('08) 31 Mad 419 (423, 424) (FB). * (Vol. 14) 1927 Cal 522 (526). * ('11) 15 Cal W N 80 (82) (DB). * ('11) 36 B m 63 (76). * ('03) 25 All 42 (45) (DB). * (Vol. 11) 1924 Mad 509 (510) (DB) * (Vol. 19) 1932 All 85 (87, 88, 90); 53 All 391 (DB) * (Vol. 26) 1939 All 314 (316, 318); I L R (1939) All 150 (DB).

[3] Son agreeing to sale of his share if sale of his father's share was not sufficient to satisfy mortgage—Father's share may be directed to be sold first. ('11) 36 Bom 68 (76).

[4] A and B mortgage certain items of property to C—B then mortgages to D his own items of the mortgaged property—In a suit by C, D cannot claim that the items belonging to A alone should be sold first. (Vol. 17) 1930 Mad 178 (180).

[5] S. 56 of the Transfer of Property Act as amended by Act XX of 1929 is exhaustive and the right of marshalling in law since 1929 is co-extensive with the right in equity and so, there is no justification to extend the legal right of marshalling by relying on the provisions of O. 34 Rr. 4 and 5 in a way which cannot be justified by any well established principle. (Vol. 27) 1940 Mad 776 (776) (DB).

9 Interest. (See Order 34 Rule 11).

10. Costs [1] Costs to a mortgagee in a suit for sale on a mortgage are part of the mortgage-money. (Vol. 1) 1914 All 444 (445). * (Vol. 19) 1932 Cal 524 (533, 534); 59 Cal 687 (DB). * (Vol. 3) 1916 Pat 1 (1); 2 Pat L Jour 51 (D3). * (Vol. 24) 1937 Rang 71 (72); 14 Rang 538 * (Vol. 22) 1935 Rang 514 (517) (DB). * (Vol. 22) 1935 Oudh 452 (453). * (Vol. 22) 1935 Mad 101 (105); 58 Mad 418 (DB).

[See also (Vol. 12) 1933 Rang 81 (83).]

[2] Costs are primarily recoverable from the mortgaged property and not from the mortgagor personally. (98) 20 All 523 (526, 527, 528) (FB). * (Vol. 5) 1918 All 366 (366); 40 All 109 (DB). * (Vol. 3) 1916 Pat 1 (1); 2 Pat L Jour 51 (DB). * (Vol. 5) 1918 Oudh 445 (445) (DB). * ('07) 30 Mad 464 (465, 466). * (Vol. 12) 1925 Cal 1135 (1135, 1136) * (Vol. 13) 1926 Oudh 27 (23). * (Vol. 22) 1935 Oudh 452 (453). * (Vol. 22) 1935 Mai 101 (105); 58 Mad 418 (DB). * (Vol. 26) 1939 Cal 166 (166, 169) (DB).

[See also (Vol. 26) 1939 Lah 303 (304).]

[3] Mortgagor may be personally made liable for costs. (Vol. 30) 1943 Nag 178 (183); I L R (1943) Nag 422 (DB). * (Vol. 6) 1919 All 297 (298); 41 All 473 (DB). * (Vol. 18) 1931 Rang 153 (159, 160); 9 Rang 186 (DB). * (Vol. 20) 1933 Lah 329 (330) (DB). * ('83) 10 All 127 (129) * (Vol. 26) 1939 Cal 166 (163, 169) (DB).

[See also (Vol. 17) 1930 Bom 11 (15) (DB).]

[4] Ordinarily in a mortgage suit, a puisne mortgagee is not personally made liable for the costs. * (Vol. 20) 1933 Rang 335 (336) (DB). * (Vol. 19) 1932 Rang 153 (153); 10 Rang 303 (DB).

[5] Puisne mortgagee making himself personally responsible for any unnecessary contest in suit—He may be made personally liable for costs. (Vol. 20) 1933 Rang 335 (336) (DB). * (Vol. 19) 1932 Rang 153 (153); 10 Rang 303 (DB). * (Vol. 22) 1935 Mad 101 (105); 58 Mad 418 (DB). * (Vol. 23) 1936 Lah 607 (603); 17 Lah 520 (DB).

^a 5. (1) Where, on or before the day fixed or at any time before the confirmation of a Final decree in sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,
and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,
and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

[T. P. Act, Old S. 89, Cf. O. 21 R. 89.]

[a.] The Rule was *substituted* by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 4. for the original rule.

PROVINCIAL AMENDMENT.

MADRAS.

Substitute the following for sub-rule (3):

“Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf and after notice to all the parties, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4.”

[R. O. C. No. 4953 of 1930.]

O. 34 R 4 (*contd.*)

[See also (Vol. 23) 1936 Nag 184 (184): 1 L R (1937) Nag 32.]

[6] Purchaser subject to mortgage does not become personally liable for costs—Costs cannot be ordered to be recovered personally from him. (Vol. 30) 1943 Nag 178 (184): 1 L R (1943) Nag 422 (DB).

11. Succession certificate. [1] S. 4 of the Succession Certificate Act (now S. 214 of the Succession Act, 1925) does not apply to suits for sale on mortgages of immovable property, where no personal decree against the mortgagor is asked for. ('04) 28 Bom 630 (633, 634, 635) (DB). * ('99) 26 Cal 839 (841, 842) (DB). * ('92) 19 Cal 336 (339) (DB) (Do). * ('95) 22 Cal 143 (149) (DB). (Do) * ('06) 29 Mad 77 (78, 79) (DB).

[But see ('94) 16 All 259 (268) (FB).]

12. Consent decree. [1] A decree passed in terms of compromise need not conform to the provisions of O. 34. (Vol. 30) 1943 All 321 (326): 1 L R (1943) All 684 (DB). * (Vol. 7) 1920 Pat 731 (733): 5 Pat L Jour 672 (DB). * (Vol. 8) 1921 Pat 320 (320) (DB). * (Vol. 13) 1926 Oudh 385 (386): 29 Oudh Cas 26 (DB) * (Vol. 14) 1927 Pat 271 (277): 6 Pat 388 (DB).

* (Vol. 10) 1923 Pat 375 (378): 7 Pat 28 (DB). * (Vol. 11) 1924 Mad 645 (646) (DB). * (Vol. 8) 1921 Lah 334 (335). (Do). * (Vol. 9) 1922 All 383 (384): 44 All 668 (DB). * (Vol. 22) 1935 Pat 385 (395): 14 Pat 488 (DB). * (Vol. 24) 1937 Lah 874 (875).

[2] It is open to mortgagor to waive benefit of provision as to final decree—In such case final decree is unnecessary. ('11) 14 Cal L Jour 648 (651) (DB). * (07) 34 Cal 886 (890) (DB) * (Vol. 1) 1914 P C 150 (151, 152): 42 Cal 776: 42 Ind App 88 (PC) * (Vol. 10) 1923 Cal 626 (628): 50 Cal 650 (DB).

[3] Compromise decree providing mortgage-money to be paid in instalments - In default property to be sold - Final decree is not necessary. (Vol. 30) 1943 All 321 (326): 1 L R (1943) All 684 (DB). * (Vol. 30) 1943 Lah 189 (190, 191). * ('07) 34 Cal 886 (890) (DB). * (Vol. 8) 1921 Lah 384 (385) * (Vol. 21) 1934 Cal 735 (736) (DB). * (Vol. 16) 1929 Lah 330 (331). * ('11) 10 Cal L Jour 91 (98) (DB). * (Vol. 16) 1929 Cal 11 (12, 14) (DB). * (Vol. 14) 1927 All 167 (168): 49 All 297 (FB).

[See also (Vol. 10) 1921, Ca. 626 (628): 50 Cal 650 (DB).]

O-34-R. 4 (contd.)

[4] Instalment decree in terms of compromise-Default in payment of instalments - Decree-holder can apply for final decree. (Vol. 10) 1931 All 340 (341) (DB).

[See also (Vol. 24) 1937 Oudh 453 (454).]

[5] Where the parties have agreed that the decree should be drawn up under R. 4, a final decree under R. 5 is necessary. (Vol. 16) 1929 All 881 (883) (DB). * (Vol. 18) 1931 All 340 (341) (DB).

[See also (Vol. 27) 1940 Oudh 90 (92): 15 Luck 95.]

[6] A compromise decree on a mortgage may fix a longer period than the six months allowed under the rule, for payment by the mortgagor. (Vol. 30) 1943 All 321 (326): 1 L R (1943) All 684 (DB). * (Vol. 16) 1929 All 881 (883) (DB).

[7] Where a compromise mortgage decree authorises its enforcement against properties other than the mortgaged property, execution of the decree by the arrest of the mortgagor is permissible. (Vol. 16) 1929 Lah 86 (87) * (Vol. 19) 1932 All 439 (440): 54 All 763 (DB).

[See also (Vol. 19) 1932 Cal 775 (778, 780): 59 Cal 1314 (DB).]

13. Appeal. [1] No appeal lies from an order refusing to extend time for payment under this rule after the final decree has been passed. (Vol. 17) 1930 Nag 240 (240).

[2] Under S. 97 of the Code, where a preliminary decree is not appealed from, it cannot be questioned in an appeal from the final decree. (Vol. 3) 1916 Bom 305 (307): 40 Bom 321 (DB).

14. Calcutta amendment.—[1] Bengal Money-lenders Act - Preliminary decree incorporating personal decree is not satisfied until personal liability is also satisfied - Personal liability also can be scaled down if personal decree is made after 1st January, 1939: (Vol. 30) 1943 Cal 372 (376): 1 L R (1943) 2 Cal 417 (DB).

ORDER 34 RULE 5.**Synopsis.**

1. Scope of the rule.
2. Final decree, when can be passed.
3. Consent decrees and decrees on award.
4. Only one final decree to be passed.
5. Form of final decree for sale.
6. Court cannot go behind preliminary decree.
7. Application for final decree.
8. Notice to judgment-debtor.
9. Limitation.
10. Mortgagor's rights before confirmation of sale.
11. Payment into Court.
12. Return of documents.
13. Dismissal of application for final decree.
14. "Directing that.....be sold."
15. Power to enlarge time.
16. Effect of sale under mortgage decree.
17. Execution of final decree for sale.
18. Transfer of final decree.
19. Injunction restraining mortgagor from receiving income of mortgaged property.
20. Construction of mortgage decree.
21. Appeal.

22. Costs not recoverable personally**23. Dekkhan Agriculturists' Relief Act.****24. Nature of proceedings for final decree.****25. Joint decree-holders.**

1. Scope of the rule.—[1] Rule applies only where a preliminary decree has been passed under rule ('09) 10 Cal L Jour 91 (99) (DB).

[2] The term 'plaintiff' should be interpreted comprehensively—It includes transferees of plaintiff (Vol. 31) 1944 Nag 296 (301): 1 L R (1944) Nag 885 (DB).

2. Final decree, when can be passed.—[1] A final decree under R. 5 is necessary only when the decree originally passed is a preliminary decree under R. 4. See (Vol. 32) 1945 Cal 322 (324) (DB). (Court instead of passing preliminary decree for sale, at once pronouncing final decree—Final decree though irregular is not altogether nullity).

[2] Where only a money decree has been passed, a final decree under the rule is not necessary although the decree may authorize the decree-holder to realize the decree amount by sale of the judgment-debtor's property. (Vol. 12) 1925 Mad 1083 (1084).

[3] Decree already passed under S. 88, I.P. Act Final decree under the present rule is not necessary. (Vol. 11) 1924 Mad 603 (603) (DB). * (Vol. 4) 1917 Mad 315 (315, 316) (DB).

[See however (Vol. 5) 1918 Pat 41 (45): 4 Pat L Jour 213 (DB). * (Vol. 3) 1921 Mad 126 (130, 131) (DB). * (Vol. 14) 1927 Mad 190 (191, 192). (Property charged for payment of decretal money Decree absolute for sale must be obtained—Attachment not necessary.)]

[4] Where the plaintiff is directed under a preliminary decree to pay off a prior mortgage before sale, he is entitled to apply for a final decree for sale, even though he has made the payment only after the time fixed by the decree. ('02) 24 All 479 (481) (DB).

[See also (1900) 1900 All W N 95 (95) (DB).]

[5] Where the purchaser of a portion of the equity of redemption is made one of the defendants to a suit on a mortgage and, after the preliminary decree is passed, he obtains an assignment of the mortgagee's rights, he is entitled to apply for a final decree, although only for a proportionately reduced portion of the mortgage amount. (Vol. 14) 1927 Mad 560 (562).

[6] Mortgagor who allows execution to take place, without raising any objection, will be estopped from contending that the want of a final decree is fatal to the proceedings. (Vol. 29) 1942 Pat 343 (344). (Sale held after final decree but application for execution made before final decree—Sale only irregular and not void.) * (Vol. 5) 1918 Pat 41 (46): 4 Pat L Jour 213 (DB). * (Vol. 1) 1914 Mad 365 (365) (DB). * (Vol. 14) 1927 Bom 131 (133): 51 Bom 125 (DB).

3. Consent decrees and decrees on award.—[1] A final decree under this rule is not necessary in case of a consent decree providing for payment by instalments. (Vol. 14) 1927 Pat 271 (277): 6 Pat 388 (DB). * (Vol. 15) 1928 Mad 38 (39) (DB). * (Vol. 8) 1921 Lah 384 (385). * (Vol. 16) 1929 Cal 11 (14) (DB). * (Vol. 10) 1928 Cal 626 (628): 50 Cal 650 (DB). * (Vol. 16) 1929 Bom 227 (228). * (Vol. 14) 1927 All 187 (188): 49 All 297 (FB). * (Vol. 32) 1945 Nag 289 (291) ILR (1945) Nag 643 (DB). (Unless a compromise decree is so drawn up as to require a final decree, it must be treated as execut-

O. 34 R. 5 (contd.)

to require a final decree, it must be treated as executable decree.). * (Vol. 18) 1931 Cal 546 (548) (DB). (Soleman expressly stating that no final decree is needed.)

[See also (Vol. 30) 1943 All 321 (326) I L R (1943) All 684 (DB). (Order 34 is not exhaustive - Even in suit for sale parties by compromise can settle form of decree - They can do away with necessity of passing preliminary and then final decree). * (Vol. 22) 1935 Pat 385 (395) : 14 Pat 488 (DB).]

[2] A decree on an award is not a preliminary decree under Rule 4 and no final decree is necessary. (Vol. 17) 1930 Lah 116 (117). * (Vol. 14) 1927 Sind 103 (104) : 19 Sind L R 202 (DB). * (Vol. 11) 1924 Pat 263 (264) : 3 Pat 221. * (Vol. 20) 1933 Lah 48 (50) : 14 Lah 243 (Order 34 not applicable to decrees on an arbitration.)

[3] A decree-holder is not precluded from applying for a final decree where a preliminary decree by consent has been passed. (Vol. 30) 1943 All 321 (326) : I L R (1943) All 684 (DB). (Agreement between parties that on the happening of certain event, decree-holder shall have right to apply for a final decree - Decree-holder has to apply for final decree - Art. 181, Limitation Act applies). * (Vol. 18) 1931 All 340 (341) (DB). * (07) 34 Cal 886 (891) (DB). * (Vol. 23) 1936 Oadh 173 (173) : 11 Luck 757 (DB). (Compromise decree described as preliminary decree for sale and providing for final decree in certain eventualities - Application for final decree is not barred.)

[See also (Vol. 32) 1945 Nag 289 (291) : I L R 1945 Nag 643 (DB). (If compromise decree itself provides for it, final decree may be necessary).]

[4] See also notes on Rule 4.

[5] A mortgage which is opposed to a certain statute cannot be validated by a consent decree and the mortgagor can resist an application for final decree on the ground that the mortgage is not binding on him. (Vol. 6) 1919 Mad 429 (431) (DB).

4. Only one final decree to be passed.—[1] This rule contemplates the passing of only one final decree. (Vol. 4) 1917 All 163 (164) : 39 All 641 (SB).

[2] Preliminary decree appealed from—Final decree should be based on appellate decree. (Vol. 30) 1943 Mad 449 (450) : I L R (1943) Mad 804 (DB). (The fact that pending appeal, a final decree is passed by the trial Court, would not make the appellate decree from the preliminary decree a final decree). * (Vol. 29) 1942 Pat 348 (348) (DB). (But final decree based on trial Court's decree is not nullity). * (Vol. 4) 1917 All 163 (164) : 39 All 641 (DB). * (Vol. 21) 1934 All 89 (90, 91) (DB). (This principle will apply even if appeal is by some defendants only, provided the appeal is against the whole decree). * (Vol. 13) 1926 P C 93 (94) : 53 Ind App 197 : 6 Pat 24 (FC).

[3] A final decree can be passed pending an appeal from the preliminary decree and a final decree so passed is valid and executable. (Vol. 18) 1931 All 386 (388) : 53 All 283 (FB). * (Vol. 13) 1926 All 291 overruled. * (Vol. 26) 1939 Cal 601 (604) : I L R (1939) 1 Cal 477 (DB). (Final decree passed pending appeal from preliminary decree is not destroyed if preliminary decree is affirmed on appeal). (Vol. 15) 1928 Lah 904 (906) : 10 Lah 132 (DB). * (Vol. 24) 1937 Mad 421 (424). (Appeal from preliminary decree - Final decree passed during pendency of appeal - Preliminary decree confirmed in appeal - Final decree already passed is valid and execu-

table - No application for making fresh final decree is necessary.). * (Vol. 21) 1934 Pat 225 (227) : 13 Pat 379 (DB).

[4] Where a final decree is passed and subsequently the preliminary decree is modified on appeal, the Court of first instance may either prepare a new final decree or amend the preliminary decree already passed. (Vol. 13) 1926 All 134 (135). * (Vol. 33) 1946 Mad 383 (386) (DB). (Application for carrying out modifications in preliminary decree - There is no bar of limitation to such application). * (Vol. 21) 1934 Mad 65 (68).

[But see (1932) 15 Nag L Jour 124 (127, 128) (DB). (Preliminary decree affirmed on appeal - Final decree passed - Amendment of preliminary decree not allowable).]

5. Form of final decree for sale.—[1] For the form see Appendix D, Form No. 6.

[2] Mortgaged property need not be specified in the decree. (Vol. 4) 1917 All 443 (444, 445) : 38 All 398 (DB).

[3] Mortgage-money payable under the bond in a lump sum—High Court is not justified in allowing instalments. (Vol. 17) 1930 Lah 132 (133).

[4] Co-mortgagee made party defendant - Decree for sale directing payment to him of part of the decretal amount—Held the form of decree was correct. (Vol. 17) 1930 All 634 (636) (DB).

[5] Absence of the word "absolute" after "order" in order under S. 89 was not fatal (03) 5 Bom L. R. 389 (392) (DB).

[6] Final decree made by endorsement on preliminary decree itself - Absence of separate final decree is merely an irregularity (Vol. 13) 1926 Lah. 364 (364, 365).

[7] Mortgage of different properties to mortgagee under separate mortgages - Mortgagee obtaining final decree in a suit on the different mortgages - Final decree should contain position of parties under each mortgage, and money due under each separately. (Vol. 22) 1935 Rang 514 (515) (DB).

[8] Decree not in proper form - Decree-holder can realize his decree from the mortgaged property. (Vol. 26) 1939 Pesh 34 (37) (DB).

6. Court cannot go behind preliminary decree.—[1] Court cannot go behind the preliminary decree when preparing a final decree. (Vol. 16) 1929 All 252 (253) (DB). * (Vol. 21) 1934 Oadh 45 (46) (DB). (But Court can interpret preliminary decree and also correct accidental mistakes.)

[See also (Vol. 18) 1931 All 637 (658, 659) (DB). (Order in which properties are to be sold put in issue and negated - Not incorporated in preliminary decree - Not to be introduced in the final decree). * (Vol. 19) 1932 Bom 136 (146) : 56 Bom 36 (DB). (Preliminary decree - Person not agriculturist - Plea of being agriculturist cannot be raised at the time of final decree).]

[2] The amount fixed in the preliminary decree cannot be altered except for some reason which may have arisen subsequent to the preliminary decree. (Vol. 14) 1927 All 589 (589) : 49 All 809 (DB).

[See also (Vol. 20) 1933 Rang 323 (325) (DB). (Mortgage decree with interest at contract rate till suit and at Court rate till realization - Judge on application by defendant allowing instalments and ordering that decree should cease to bear interest - Order is without jurisdiction.). * (09) 13 Cal W N 744 (746) (DB). (Provision for any further interest than that provided for in preliminary decree cannot be added).]

O. 34 R. 5 (contd.)

[3] Where after the passing of a preliminary decree the mortgagor (a Hindu) dies and his heirs are substituted as his legal representatives, their objection that the mortgage is not binding on them cannot be raised in the proceedings for the preparation of the final decree. (Vol. 27) 1940 All 99 (100) : 1 L R (1940) All 153 (DB).

[See however (Vol. 24) 1937 Mad 918 (922). (Acharyapursha service inam. Mortgage of - Object on as to alienability can be raised on ground of public policy).]

[4] Where the mortgaged property has been sold for arrears of revenue free from the mortgage and is no longer liable to be sold under the mortgage decree but the preliminary decree provides for its sale, the mistake need not be repeated in the final decree and such decree must be against the surplus sale proceeds remaining after the payment of revenue. (Vol. 29) 1942 Pat 185 (187).

7. Application for final decree.—[1] Application for final decree must be made only to the court of first instance. (1900) 23 Mad 521 (DB). * ('11) 13 Cal L Joar 459 (463) (DB).

[2] The mortgagee must apply for a final decree. (Vol. 5) 1918 Bom 217 (219) : 42 Bom 309 (DB). * (Vol. 2) 1915 All 264 (265) : 37 All 414 (DB). (Benamidar Transferee of preliminary decree can apply) * (Vol. 32) 1945 Mad 463 (463, 465) (DB). (Suit for sale by original mortgagee - Sub-mortgagee impleaded as defendant—Preliminary decree ascertaining amount due to sub-mortgagee - Sub-mortgagee can apply for final decree).

[3] An application for sale of the mortgaged property may be treated as an application for a decree absolute. (Vol. 4) 1917 Mad 669 (669) (DB). * (Vol. 12) 1925 Lah 640 (642) (DB). (Where the objection to decree-holder's application for sale on the ground that there is no decree absolute under which properties could be sold is raised too late, objection will be disallowed.)

[But see (Vol. 10) 1923 Sind 14 (15). 17 Sind L R 255 (DB).]

[4] Application for a final decree in a mortgage suit need not be in writing. (Vol. 13) 1926 Nag 152 (153).

[5] Properties with respect to which final decree for sale is applied for need not be described. (Vol. 16) 1929 All 551 (551) (DB). (Item of property omitted from application - Final decree can include it.)

[6] A decree-holder who attaches in execution of his decree a preliminary mortgage decree obtained by his judgment-debtor cannot apply for a final decree under this rule. (See also the case noted below). (Vol. 23) 1936 All 857 (858) : 1 L R (1937) All 82 (DB).

[7] Compromise in suit for dower stating the amount decreed and making it a charge on the defendant's property and also providing that a decree under O. 34 R. 4 should be passed in terms of the compromise - Suit decreed in terms of the compromise - But the blank spaces in the form of the decree for amount due and date within which it is to be paid not filled up - Held in the circumstances of the case that the decree did not specify any amount as due nor fix any period within which it was to be paid and consequently there was no default by the judgment-debtor, so that the decree-holder did not have any occasion for applying for a final decree and so his failure to do so did not affect his rights under the decree owing to the efflux of any period of limitation. (Vol. 30) 1943 All 321 (326) : 1 L R (1943) All 684 (DB).

8. Notice to judgment-debtor.—[1] This rule does not require any notice to be issued to the judgment-debtor before the passing of a final decree though, as a matter of practice, such notice should generally be given. (Vol. 9) 1922 Nag 175 (177) * (Vol. 17) 1930 Mad 105 (107, 108) (DB). (Remedy of the aggrieved party is to come up under O. 9 R. 13) * (Vol. 22) 1935 Mad 716 (717, 718) (DB). (Notice sent to some defendants only - Application can be dismissed only as against defendants to whom notice has not been sent.) * ('06) 4 Cal L Joar 317 (318) (DB). * ('01) 25 Mad 506 (507) (DB). * ('95) 9 C P L R 5 (8). * ('99) 22 Mad 133 (136) (DB). * (Vol. 16) 1929 Mad 393 (394) (DB). * (Vol. 24) 1937 Sind 273 (274, 278) : 31 Sind L R 180.

[2] Where a final decree has been passed ex-parte against a mortgagor to whom no notice has been given, the Court has inherent jurisdiction to set aside the ex-parte decree in furtherance of justice and equity. ('05) 32 Cal 253 (256) (FB).

[3] Application for final decree - Notice to all parties is not compulsory - But if any party is aggrieved by omission to issue notice, decree can be set aside. (Vol. 22) 1935 Mad 716 (717) (DB).

[4] Practice of issuing notice is firmly established in Central Provinces. (Vol. 17) 1930 Nag 136 (136).

[5] Notice for passing final decree is not necessary - Judgment-debtor therefore cannot as of right claim setting aside ex-parte decree. (Vol. 30) 1943 Pesh 31 (32).

[6] Notice served - Defendant not appearing - Second notice not necessary - If one is ordered but not served, there is no ground for setting aside the ex-parte decree. (Vol. 10) 1923 Nag 320 (320) : 19 Nag L R 124.

9. Limitation.—[1] See notes on Art. 181 Limitation Act.

[2] There is no limitation for the mortgagor's application for deposit of the mortgage-money under the preliminary decree (Vol. 9) 1922 Oudh 33 (34).

[3] Application under O. 34 R. 5 - Art. 186, Limitation Act does not apply. (Vol. 32) 1945 Cal 6 (13) : 1 L R (1943) 2 Cal 485.

[4] Application by sub-mortgagee defendant, for his transposition as plaintiff to enable him to apply for final decree made more than three years after date for payment fixed under preliminary decree, is barred. (Vol. 32) 1945 Mad 463 (464) (DB).

10. Mortgagor's rights before confirmation of sale.—[1] Under S. 89 of the Transfer of Property Act, the defendant's right to redeem and the security became both extinguished on the passing of the order absolute. (Vol. 5) 1918 P C 34 (35) : 40 All 407 : 45 Ind App 130 (PC). * (Vol. 16) 1929 Cal 233 (236) (DB). * (Vol. 7) 1920 P C 79 (80) : 42 All 364 : 47 Ind App 71 (PC).

[But see ('06) 29 Mad 37 (40) (DB). * ('06) 28 All 778 (780) (DB). * ('04) 9 Cal W N 171 (174). (Until sale is confirmed mortgage subsists.)

[2] The words as to the extinguishment have been omitted in the present rule with the effect that a final decree does not now extinguish the mortgage security or the right to redeem. (Vol. 19) 1922 P C 11 (12, 13) : 48 Ind App 465 : 43 All 469 (PC). * ('43) 1 L R (1943) 1 Cal 324 (331). * (Vol. 27) 1940 Bom 321 (328) : 1 L R (1940) Bom 605. * (Vol. 26) 1939 Cal 15 (17) : 1 L R (1938) 2 Cal 643. * (Vol. 11) 1924 Mad 650 (653) : 47 Mad 551 (DB). (A second suit on a mortgage against a person not impleaded in the previous suit on the same mortgage is not be barred.)

O. 34 R. 5 (contd.)

[But see (Vol. 12) 1925 All 6 (8) (DB). * (Vol. 18) 1926 Mad 816 (819) : 49 Mad 691 (DB). (Payment by the defendant after order absolute for sale is *qua* judgment-debtor and not as a mortgagor).]

[3] The mortgagor's right to redeem continues till the confirmation of the sale. (Vol. 31) 1944 Bom 35 (36) (DB). (Only defendant can avoid sale—Junior member of Hindu joint family represented by the manager in the suit is a 'defendant' within the meaning of sub-rule (1)). * (Vol. 27) 1940 Bom 321 (323) : 1 L R (1940) Bom 605. * (Vol. 21) 1934 Cal 822 (823). (Even though the confirmation is delayed by the act of the judgment-debtor himself). * (Vol. 24) 1937 Mad 560 (511). * (Vol. 24) 1937 Nag 196 (196) : 1 L R (1939) Nag 310. * (Vol. 23) 1936 Lah 562 (563, 564) (DB). (sale taking place after 1st April 1930 - Order 34 Rule 5 as amended coming into force on 1st April 1930 - Amended law applies.)

[4] Under this provision a stranger purchaser can get five percent only on the amount he has actually paid into Court and not on the amount of the accepted final bid and a decree-holder purchaser who sets off his decree against the price can get nothing on the amount set off. (43) 1 L R (1943) 1 Cal 324 (336). (Sale by Registrar under Original Side Rules).

[5] Deposit by mortgagor after sale under mortgage decree—Deposit whether should include costs—Procedure indicated. Case relating to Registrar's sale on Original Side. (Vol. 29) 1942 Cal 44 (45).

[6] Auction-purchaser of the mortgaged property in execution of the final decree is not a necessary party to a proceeding under sub-rule (1) by the mortgagor. (Vol. 23) 1936 Lah 562 (564) (DB).

11. Payment into Court.—[1] The rule provides that mortgage-money should be paid into the Court. (Vol. 26) 1939 Lah 79 (81) : 1 L R (1939) Lah 313. (Terms as to payment in Court are imperative).

[See also (Vol. 23) 1936 Oudh 152 (153) : 11 Luck 500 (DB). (Difference between payment 'in' Court in presence of Judge and payment 'into' Court is technical—Procedure is not defective if payment is made in former manner).]

[2] Where money is paid out of Court to the mortgagee after the final decree is passed, O. 21 R. 2 will apply and the payment can be certified to the executing Court. In the absence of such certification within the limitation period, the execution Court will not take cognizance of it. (12) 16 Cal L Jour 169 (172, 173) (DB). (After order absolute under T.P. Act).

[3] If the payment is made after the preliminary decree and before final decree is passed, the Court executing the final decree cannot recognize such a payment unless certified. (Vol. 7) 1920 Mad 97 (99) (DB). * (Vol. 14) 1927 All 710 (710) : 50 All 111 (DB).

[4] As mortgage suit continues until final decree is passed—Mortgagor can allege and prove an adjustment or payment out of Court and though the decree-holder may not admit it, the Court passing the final decree can inquire into the disputed adjustment or payment and pass an appropriate decree in accordance with its finding. (Vol. 32) 1945 P C 152 (156) : 20 Luck 461 : 72 Ind App 277 (PC). * (Case law discussed) (Vol. 29) 1942 Oudh 558 : 18 Luck 71 Reversed ; (Vol. 14) 1927 Oudh 275 * (Vol. 22) 1935 Oudh 318 : 11 Luck 116 (Vol. 23) 1936 Oudh 152 : 11 Luck 500 ; * (Vol. 19)

1932 Lah 231 ; * (Vol. 22) 1935 Lah 168 ; * (Vol. 26) 1939 Lah 79 : 1 L R (1939) Lah 313 and * (Vol. 6) 1919 Mad 792 : 42 Mad 61 (Overruled).

[5] In the case of a compromise decree, rule 5 does not apply and the Court can recognize payments made out of Court. (Vol. 9) 1922 All 383 (384) : 44 All 668 (DB). * (Vol. 7) 1920 Pat 731 (733) : 5 Pat L Jour 672 (DB).

[6] Mortgagee in possession as receiver must account for rents and profits before he can obtain order absolute for sale (11) 13 Cal L Jour 459 (462) (DB).

[7] Payment into Court within a certain time ordered—It is sufficient compliance if judgment-debtor brings the money into Court within the time fixed and diligently takes the necessary steps for actual payment into the treasury (82) 8 Cal 528 (529) (DB).

[8] Preliminary decree providing that plaintiff should redeem certain prior mortgages—Plaintiff paying the money into Court but subsequently withdrawing it—Payment is illusory. (98) 1898 All W N 105 (106).

[9] The mortgagor applied to the Debt Conciliation Board for the settlement of the debt and in accordance with the direction of the Board, an agreement was executed by the parties, whereby it was agreed that the mortgagor should pay the amount within a period of four months and that if it was not paid within that time, the mortgagee should be at liberty to recover the sum with interest which had accrued thereon and costs of executing the agreement as a decree for the sale of the mortgaged property. The agreement was registered under S. 14 (2) of the Madras Debt Conciliation Act. The mortgagor failed to pay what was due and consequently, the mortgagee instituted execution proceedings. The property was sold and purchased by the mortgagee. Before the sale was confirmed, the mortgagor paid into Court the amount due and asked that the deposit should be treated as payment under O. 34, r. 5 : Held, that the agreement before the Board when registered must be regarded as a final decree in a mortgage suit and that therefore, O. 34, r. 5 applied. The mortgagor was entitled to have the money paid into Court treated as a deposit under O. 34, r. 5 (Vol. 32) 1945 Mad 422 (423) (DB).

12. Return of documents.—[1] Where the preliminary decree does not provide for the payment of damages by the plaintiff if he fails to deliver all the documents relating to the mortgaged property, Court cannot grant such relief by way of execution. The mortgagor may sue separately for damages. (Vol. 9) 1922 Mad 299 (300) (DB).

(See also notes on S. 51 and O. 34 R. 3).

13. Dismissal of application for final decree.—[1] Plaintiff's absence is not a ground for dismissing his application for final decree. If it is dismissed on this ground, the dismissal should be set aside and a final decree passed. (Vol. 21) 1934 Oudh 209 (210) (DB). (If dismissed, refusal to restore it, is failure to exercise jurisdiction vested by law.) * (Vol. 20) 1933 Oudh 229 (231) : 8 Luck 496 (DB). (Such a dismissal amounts not only to refusal to pass the final decree but to reversal of the preliminary decree). * (Vol. 12) 1925 All 623 (623) : 47 All 546 (DB). * (Vol. 14) 1927 All 439 (440) : 49 All 592 (DB).

[See also (Vol. 18) 1931 Mad 795 (796, 797) (Dismissal for not taking steps as ordered—Period of three months under O. 9 R. 5 not given—*Ultra vires*).]

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[2] The Court can entertain a fresh application for final decree in case of dismissal of prior one for absence. (Vol. 5) 1918 All 285 (286) : 40 All 235 (DB).

[See also (Vol. 20) 1933 Oudh 229 (231) : 8 Luck 469 (DB). (Preliminary decree for sale passed—Application for final decree dismissed under O. 9 R. 3—Application after period of 2½ years under S. 151 to set aside dismissal should be entertained and final decree passed). * (Vol. 20) 1933 Mad 55 (56) : 56 Mad 310 (DB). (Dismissal for non-payment of batta—Fresh application allowed under O. 9 R. 4 and Section 141) * (Vol. 24) 1937 Sind 273 (278) : 31 Sind L R 180 (Application for final decree dismissed for non-payment of costs for issuing notice—Fresh application can be made under O. 9 R. 4 read with S. 141).]

[3] Failure to give a list of properties in respect of which the final decree prayed for on wrong calculation of interest.—Application cannot be dismissed. (Vol. 14) 1927 All 439 (441) : 49 All 592 (DB).

14. "Directing that.....be sold."—[1] Where Court passing mortgage decree definitely lays down order in which properties are to be sold, executing Court cannot ignore the order and change it. (Vol. 20) 1933 Pat 161 (163) : 12 Pat 77 (DB).

[2] Court cannot overrule any specific provision in the mortgage deed itself concerning the order (Vol. 6) 1919 Pat 281 : 4 Pat L Jour 207 (DB).

[3] Where the mortgaged property has been compulsorily acquired by the Government under the Land Acquisition Act, the rights of the mortgagee are transferred to the compensation money awarded under the Act. ('07) 10 Cal L Jour 150 (177, 178) (DB) * ('07) 6 Cal L Jour 745 (747, 748) (DB).

[4] Where the property has been sold for arrears of Government revenue the final decree should be directed against the surplus sale proceeds. (Vol. 29) 1942 Pat 185 (187). (If O. 34 R. 5, sub-rule (3) is not wide enough to cover such a case Court may act in exercise of its inherent powers under S. 151, C. P. Code.)

[5] Share in joint family property mortgaged.—Subsequent *bona fide* partition of family properties—Property mortgaged allotted to another coparcener, Mortgagee can proceed only against the property allotted to his mortgagor. ('99) 26 Cal 434 (438) (DB). * ('07) 6 Cal L Jour 46 (49) (DB). (The mortgagee is entitled to proceed against only the substituted security.) * ('99) 23 Bom 385 (390) (DB).

[6] Mortgagee is entitled to bring to sale any portion of the mortgaged property if he is satisfied that the sale of such property will be sufficient for the purpose of enabling him to realise his dues. (Vol. 27) 1940 Cal 159 (160) : 1 L R (1939) 2 Cal 455 (457). * (Vol. 26) 1939 All 314 (314) : ILR (1939) All 150 (DB).

[See also (Vol. 28) 1941 Cal 205 (207) : ILR (1940) 2 Cal 520. (It cannot be said that by failure to proceed against the entire property, he waives his right to do so in a subsequent execution case).]

[7] Mortgagee cannot release from his claim any portion of the properties so as to prejudice the persons interested in the other portions. ('06) 33 Cal 613 (622) (DB).

[8] Where the judgment-debtor contends that the decree refers to some other property than the one proceeded against by the judgment-creditor, it is for him to show which that property is. ('74) 22 Suth W R 330 (331) (DB).

15. Power to enlarge time.—[1] Rule 4 as amended by Act XXI of 1929 empowers the Court to enlarge the time fixed for payment of the mortgage money under a preliminary decree. (Vol. 20) 1933 Rang 323 (325) (DB) (In granting time interests of mortgagee should also be considered—Mortgagee banker pressed by creditors—Time should not be extended merely to allow mortgagors to reap benefit of rise in price that may eventually).

[2] See also note 5 on section 148.

16. Effect of sale under mortgage decree.—[1] A sale under a mortgage decree passes the interest both of the mortgagor as well as of the mortgagee. (Vol. 32) 1945 Nag 289 (291) : ILR (1945) Nag 643 (DB). * ('78) 2Mad 108 (112) (DB) * ('93) 16 Mad 121 (125, 126) (DB). * ('96) 20 Bom 390 (393) (DB). * (Vol. 9) 1922 All 495 (496) : 44 All 438 (DB). * (Vol 19) 1932 Cal 126 (132, 133) : 59 Cal 117 (DB). (Purchase by puisne mortgagee in prior mortgagee's suit—Right of redemption of mortgagor is extinguished, though puisne mortgagee gets subrogated to plaintiff's rights) * (Vol. 23) 1936 Rang 127 (128). Mortgagee auction-purchaser is in the same position as independent purchaser.)

[See however (Vol. 18) 1931 All 466 (480) : 53 All 1023 (FB).]

[But see ('09) 12 Oudh Cas 45 (51) (DB). Per Chamier (JC).]

[2] Where the mortgagee has waived his claim against a particular mortgagor, the sale does not operate on the rights of that mortgagor. ('11) 12 Ind Cas 199 (200) (Upp Bur).

[3] Any enlargement which takes place in the interest of the mortgagor subsequent to the final decree ensures for the benefit of the auction-purchaser. ('91) 18 Cal 164 (176, 177) : 17 Ind App 201 (PC). * ('12) 40 Cal 89 (102) : 39 Ind App 228 (PC).

[4] Liability to pay the Government revenue accruing due on the property after the purchase is on the auction-purchaser. ('12) 40 Cal 89 (102, 103) : 39 Ind App 228.

[5] A mortgagee decree-holder purchasing the mortgaged property in execution of his decree is not bound to give credit to the mortgagor for the market value of the property but only for the actual price for which he purchased it. ('96) 18 All 31 (33).

[6] A mortgagee who himself purchases the mortgaged property in execution of his decree for sale becomes the owner of the property and cannot maintain, as against subsequent purchasers, the position that the mortgage still remained an encumbrance. (Vol. 13) 1926 Cal 155 (166, 167) (DB).

[7] Final decree for sale containing no exemption of particular property sold—Subsequent correction of decree does not affect validity of sale. (Vol. 17) 1930 All 578 (579) (DB).

[8] Judgment-debtor standing by and allowing sale to take place is estopped from questioning validity of sale so as to prejudice the interest of the innocent purchaser ('04) 27 All 62 (66) (FB).

17. Execution of final decree for sale.—[1] Proceedings for sale under a final decree or under an order absolute are proceedings in execution. (1900) 3 Oudh Cas 1 (7) (DB).

[2] Court executing the final decree cannot go behind the decree. ('05) 28 All 193 (195) (DB). * ('98)

O. 34 R. 5 (contd.)

1 Oudh Cas 49 (50). * (Vol. 5) 1918 Cal 459 (460) (DB). * (Vol. 17) 1930 All 520 (520) (DB). (Final decree passed by Court having jurisdiction cannot be contested by judgment-debtor who remains absent on notice being served.) * (Vol. 26) 1939 Pat 113 (114) (DB). (Terms of final decree varying from those of preliminary decree—Judgment-debtor not objecting to such final decree—Execution sale held and confirmed—Judgment-debtor cannot say that the final decree or sale is not binding on him). * (Vol. 24) 1937 Oudh 455 (454). (Judgment-debtor not objecting to preparation of final decree though served with notice—He cannot contend in execution that final decree was unnecessary). * (Vol. 24) 1937 Lah 874 (875). (Passing of final decree by consent without preliminary decree—Decree not appealed against—Executing Court cannot question its validity.)

[See also (Vol. 24) 1937 Mad 918 (921). (Doctrine that executing Court cannot go behind decree is not applicable where objection is taken at the stage of passing of final decree in mortgage suit. * (Vol. 3) 1916 Mad 795 (798) (DB). (Accounts not allowed by decree can be taken in execution by consent of parties)].

[3] It is only the final decree that can be executed. ('05) 8 Oudh Cas 75 (76). * (Vol. 8) 1921 Pat 320 (320) (DB). * ('99) 9 Mad L Jour 349 (350) (DB).

[4] A decree for sale providing in terms that the rights of prior mortgagees should not be prejudiced is not incapable of execution. (Vol. 3) 1916 All 323 (324) (DB).

[5] No attachment is necessary before sale under a mortgage decree. ('80) 4 Bom 515 (520) (FB). * (Vol. 3) 1916 Mad 786 (788) (DB). * (Vol. 26) 1939 Lah 473 (474); ILR (1940) Lah 231.

[6] O. 21 R. 58 does not apply to claims preferred against the execution of mortgage decree. (See notes under O. 21 R. 58).

[7] The transferee of the mortgagor's interests after the final decree is not a necessary party to the execution proceedings. (Vol. 17) 1930 All 597 (599) (DB). * ('21) 68 Ind Cas (144) (DB) (All).

[8] A court can sell under a mortgage decree only the property comprised in the mortgage. (Vol. 4) 1917 PC 197 (200) (PC). * (1900) 22 All 442 (444) (DB). (Even though mortgage decree erroneously includes non-hypothecated properties also) * (Vol. 23) 1936 Rang 127 (129). (Property not included in mortgage decree fraudulently inserted in sale certificate—Purchaser gets property that was included in mortgage decree only.)

[See also ('02) 5 Oudh Cas 108 (109) (DB). (Mortgagee cannot remedy against other property of mortgagor in executing his decree).]

[9] Proceedings for execution of a final decree for sale can be stayed under Order 41 Rule 6 of the Code. (Vol. 16) 1929 Lah 552 (552).

[10] Mortgage-decree against manager of joint Hindu family—Junior member of family can apply to stop sale under R. 5. (Vol. 31) 1944 Bom 35 (36) (DB).

18. Transfer of final decree.—[1] Transfer of a final decree for sale requires registration.

[See (Vol. 12) 1925 Oudh 399 (399) : 28 Oudh Cas 382 (Not good Law).]

19. Injunction restraining mortgagor from receiving income of mortgaged property.—[1] After passing of

final decree for sale, Court cannot grant an injunction restraining the mortgagor from receiving the income of the mortgaged property. It can only bring the property to sale (Vol. 2) 1915 All 277 (278) : 37 All 423 (DB).

20. Construction of mortgage decree.—[1] Suit by mortgagee on simple mortgage—Decree passed for payment of mortgage amount within three months 'on failure of which mortgagee to be put in possession as provided in the bond' Decree becoming final—Mortgagee put in possession Suit by mortgagor for accounts—Decree held did not amount to foreclosure—Possession of mortgagee was only as a mortgagee, not precluding right of redemption ('96) 19 Mad 249 (254) : 23 Ind App 32 (FC).

[2] Decree providing for sale on default of two instalments—Decree-holder cannot sell property on default of one instalment (Vol. 7) 1920 Bom 56 (57) : 44 Bom 981 (DB).

[3] Suit on bond for payment of money hypothecating immovable property as collateral security—Claim against defendant personally and also against property—Decree simply stating 'claim of plaintiff be decreed'—Decree held not merely a money decree but also against property ('81) 3 All 588 (390) (FB).

[4] Suit on bond hypothecating immovable property—Defendant agreeing to pay amount by instalments—On default, plaintiff at liberty to sell property—Decree passed in terms of agreement—Decree held only a money decree and not giving lien on property. ('81) 3 All 216 (219) (FB).

[5] Mortgage decree as per plaint wrongly including non-hypothecated properties also—*Held*, intention was only to pass decree against hypothecated properties specified in the plaint (1900) 22 All 442 (444) (DB).

[6] Mortgaged property ordinarily means hypotheca—If an part is found invalid it will be excluded from the decree (Vol. 20) 1933 Oudh 1 (3) : 8 Luck 217 (FB).

21. Appeal.—[1] As an appeal lies from a final decree for sale, it is not open to revision under S. 115 ('02) 25 Mad 244 (263) (FB). * ('20) 5 Pat L Jour 342 (343) (DB). * ('02) 29 Cal 651 (653, 654) (DB).

[2] An order rejecting an application for a final decree is appealable as a decree (Vol. 6) 1919 Mad 709 (709, 710) : 42 Mad 52 (DB). * (Vol. 8) 1921 Cal 551 (552) (DB). * (Vol. 19) 1932 Lah 214 (215) (DB).

[See (Vol. 28) 1941 Mad 817 (819) : ILR (1942) Mad 60 (DB). (Refusal to pass final decree is appealable as a decree under S. 96 but it does not amount to dismissal of suit).]

[3] Where Court merely postpones passing of final decree on account of the pendency of an appeal against preliminary decree, the order is not a decree—It is however revisable. (Vol. 21) 1934 Pat 225 (226) : 13 Pat 379 (DB).

[4] An order allowing an application under this rule is not appealable (Vol. 21) 1934 Mad 198 (198) : 57 Mad 437 (DB).

[See also (Vol. 29) 1942 Pat 340 (341) (DB). (Order directing that accounts be taken and final decree made out—No appeal lies—Party should await completion of final decree).]

[5] A decision as to the order in which the mortgaged properties should be sold may amount to a decree if it affects the rights of co-defendants *inter se*. (Vol. 16) 1929 Mad 506 (508) (DB).

- * 6. Where the nett proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application due on mortgage in suit for sale. by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

[T. P. Act, Old S. 90 (1).]

[a.] Substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 4.

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[6] Where after a sale in execution of a mortgage decree, the mortgagor applies for an order under sub-rule (1) of this rule, the decision of the executing Court on such application is covered by S. 47 and is appealable. (Vol. 19) 1932 All 85 (89) : 53 All 391 (DB). * (Vol. 23) 1936 Lah 562 (564) (DB).

22. Costs not recoverable personally.—[1] In the absence of anything to the contrary in the decree itself, the costs awarded against a mortgagor cannot be recovered personally from the mortgagor. (Vol. 11) 1924 All 104 (104, 105) : 45 All 630 (DB). * (Vol. 15) 1928 Mad 604 (606). (Question is one of construction of mortgage decree in each case.) * (Vol. 13) 1926 All 424 (425) : 48 All 425 (DB). * (Vol. 3) 1916 Pat 1 (1) : 2 Pat L Jour 51 (DB). * ('98) 20 All 523 (526) (FB). (Overruling 1898 All W N 33). * ('08) 35 Cal 431 (433) (DB). (Only in the event of the mortgaged property being found insufficient, properties other than those mortgaged can be proceeded against) * ('07) 30 Mad 464 (465) (DB). (Do.) * (Vol. 24) 1937 Rang 71 (72) : 14 Rang 538.

[2] Costs subsequent to final decree need not be added to mortgage money (Vol. 13) 1926 All 68 (69).

[3] Unless the decree directs specifically, a puisne mortgagee defendant is not personally liable for costs of the suit. (Vol. 19) 1932 Rang 153 (153) : 10 Rang 308 (DB).

[4] Purchaser of equity of redemption—Fruitless defence in the mortgage suit—Court can make him personally liable for costs of mortgage (Vol. 18) 1931 Mad 272 (272) (DB). * (Vol. 20) 1933 Lah 329 (330) (DB). (Non-mortgagor defendant raising false pleas made personally liable for costs.)

[See also (Vol. 6) 1919 All 297 (298, 299) : 41 All 473 (DB). (Unsuccessful mortgagor appellant).]

[5] Appeal from preliminary decree impleading some defendants against whom suit was dismissed—Decree for costs against these defendants only—Mortgagee can recover costs personally against them (Vol. 26) 1939 Cal 166 (168, 169) (DB).

23. Dekkhan Agriculturists' Relief Act.—[1] A decree for sale upon a mortgage under S. 15 (b) of the Dekkhan Agriculturists' Relief Act is not a decree nisi and no final decree is necessary before it can be enforced. (Vol. 30) 1943 Bom 24 (26) (DB). * (Vol. 11) 1924 Bom 169 (170) : 48 Bom 172 (DB).

[2] Now see the Bombay Agricultural Debtors' Relief Act, XXVIII of 1939.

24. Nature of proceedings for final decree.—[1] The present Code makes it clear that a decree under R. 4 is incapable of execution. (Vol. 13) 1926 Mad 415 (416) (DB).

[2] The proceedings under R. 5 are proceedings in the suit itself for a supplemental decree and not proceedings in execution. (Vol. 8) 1921 Cal 551 (552) (DB). * (Vol. 20) 1933 Cal 798 (799). * (Vol. 22) 1935 Pat

385 (389, 390, 394) : 14 Pat 483 (DB). * (Vol. 3) 1916 Mad 523 (523, 524) : 39 Mad 488 (DB). * (Vol. 12) 1925 Nag 15 (16). * (Vol. 13) 1926 Sind 20 (21). (Application for joinder of legal representatives after preliminary decree and before final decree is not one in execution proceeding). * (Vol. 18) 1931 All 386 (387, 388) : 53 All 283 (FB). * (Vol. 24) 1937 Mad 918 (921).

[3] The provisions of O. 22 apply to proceedings for final decree. (Vol. 6) 1919 Pat 430 (433) : 4 Pat L Jour 240 (FB). * (Vol. 4) 1917 All 429 (429) : 39 All 551 (DB).

[4] The doctrine of *lis pendens* applies to such proceedings. (Vol. 2) 1915 All 27 (28) (DB). * ('09) 13 Cal W N 1138 (1143) (DB). (Doctrine of *lis pendens* applies to an *ex-parte* decree in a mortgage suit *Obiter*).

[See (Vol. 2) 1915 Nag 23 (23) : 12 Nag L R 50 (Suit for foreclosure).]

[5] A mortgage suit must be considered to be pending, till a final decree under sub-rule (1) or sub-rule (3) of this rule is passed and the mere dismissal of an application for a final decree, though it may amount to a decree and be appealable under S. 96, is not equivalent to a dismissal of the suit. (Vol. 28) 1941 Mad 817 (819) : I L R (1942) Mad 60. (Mortgage suit—Application for final decree—Dismissal of application, decree having been satisfied under S. 19, Madras Act IV of 1938—This does not terminate the suit and decree-holder may still apply for final decree for balance due).

25. Joint decree-holders.—[1] One of several joint decree-holders cannot certify satisfaction of the decree beyond his own interest in the decree so as to bind the other decree-holders. ('04) 26 All 318 (320) (DB).

[See also ('09) 32 All 164 (166) (DB).]

[See also notes under O. 21 R. 15].]

ORDER 34 RULE 6.

Synopsis.

1. Personal decree for balance against mortgagor.
2. Personal liability of purchaser from mortgagor.
3. Personal liability is a question of construction of the instrument.
4. Personal decree against person not the mortgagor.
5. Personal decree against the heirs of the mortgagor.
6. Personal remedy under compromise decrees.
7. Personal remedy under decree on award.
8. Where nett proceeds of any such sale are found insufficient.
9. "Amount due".
10. "Legally recoverable".
11. "Legally recoverable from the defendant otherwise than out of the property sold".
12. Prior and puisne mortgagees.

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13. Costs against puisne mortgagee.

14. Insolvency of mortgagor.

15. Limitation.

16. Succession certificate.

17. Notice.

18. Execution of personal decree.

19. Appeal.

20. Nature of proceedings under Rule 6.

1. Personal decree for balance against mortgagor—

[1] The mortgagee may, by way of application, obtain a personal decree against the mortgagor, for the balance still remaining due to him after the mortgaged property is sold. (Vol. 13) 1926 All 343 (344). * (Vol. 14) 1927 Lah 445 (447) : 8 Lah 721 (DB). * ('11) 35 Bom 452 (461) (DB).

[2] The object of the rule is to enable a decree for balance due after sale of mortgage properties to be passed in the mortgage suit itself and to avoid multiplicity of proceedings. ('06) 28 All 365 (371, 372) (DB). * ('92) 14 All 513 (516) (DB). * (Vol. 7) 1920 Bom 95 (95) (DB). * ('02) 25 Mad 244 (286) (FB).

[3] A separate suit for enforcing the personal liability would be barred under the provisions of Order 2 rule 2. (Vol. 7) 1920 Oudh 251 (252) : 23 Oudh Cas 145 (DB). ('02) 25 Mad 244 (287) (FB). * (Vol. 9) 1922 Pat 450 (458) : 1 Pat 506 (DB).

[4] A personal decree under this rule will be granted only after the mortgagee has exhausted his remedies against the security. (Vol. 30) 1943 Cal 372 (376) : I L R (1942) 2 Cal 417. * (Vol. 29) 1942 Pesh 85 (86) * ('32) 62 Mad L Jour 170 (173, 174) (PC). * (Vol. 17) 1930 Oudh 377 (378) : 6 Luck 202 (FB). * (Vol. 17) 1930 All 69 (71) : 52 All 363 (FB). * (Vol. 23) 1936 Mad 34 (37) : 59 Mad 188 (FB).

[5] The mortgagee plaintiff will not be precluded from applying under the rule on the ground.

[a] Omitting to include prayer for the relief in the plaintiff. ('99) 1899 All W N 72 (72) (DB). * ('09) 4 Ind Cas 256 (257) (DB) (Bom) * (Vol. 20) 1933 Oudh 520 (521) : 9 Luck 211 (DB).

[But see (Vol. 11) 1924 Lah 132 (135, 136) (DB).]

[b] Omission from the original decree to reserve the liberty to apply under this rule for a personal decree. ('32) 62 Mad L Jour 170 (174) (PC). (Confirming (Vol. 16) 1929 Cal 387) * (Vol. 31) 1944 Mad 65 (66) : I L R (1944) Mad 572 (DB).

[6] Compromise in mortgage suit providing for payment by instalments with a default clause that decree will be executed on default—Right to apply for personal decree not reserved—*Held* there was no waiver of benefit of the personal covenant—Court's power to give relief did not depend on this rule or the clause reserving the right in preliminary decree. ('32) 62 Mad L Jour 170 (173, 174) (PC) (Confirming (Vol. 16) 1929 Cal 387).

[7] The liberty clause in a preliminary decree is intended to make it clear that no inference should be drawn from the omission to deal with it in the preliminary decree. ('42) 1942 Nag L Jour 144 (145) (DB) * (Vol. 23) 1936 Mad 34 (39) : 59 Mad 188 (FB).

[8] Providing for personal relief against mortgagor for balance due in the decree for sale itself is irregular. ('04) 31 Cal 792 (796) (DB). * ('07) 31 Bom 244

(248) (DB). * (Vol. 10) 1923 Bom 32 (32) (DB) * ('12) 15 Cal L Jour 684 (688) (DB). * (Vol. 5) 1918 Mad 1187 (1190) : 40 Mad 989 (FB).

[See however ('11) 5 Sind L R 71 (77). * (Vol. 20) 1933 Oudh 352 (354, 355) : 9 Luck 51 (FB).]

[But see (Vol. 7) 1920 Mad 479 (480) : 43 Mad 421 (DB).]

[9] The preliminary decree should not direct that properties not mortgaged should not be proceeded against—Leave the question for decision at the proper time. (Vol. 1) 1914 Cal 214 (215).

[10] Where at the time of the original decree, a decision has been given as to the personal liability of the defendant, the question cannot be raised again. (Vol. 3) 1916 Nag 1 (2) : 13 Nag L R 76 (DB). * (Vol. 20) 1933 Lah 329 (330) (DB). * ('09) 32 Mad 534 (535, 536) (DB). * ('06) 28 All 365 (369, 370) (DB). * (Vol. 17) 1930 Oudh 378 (381) : 4 Luck 132 (FB) (Srivastava, J., Dissenting) * (Vol. 24) 1937 All 54 (55) (DB). * (Vol. 31) 1944 Mad 553 (554) : I L R (1945) Mad 165.

[See however (Vol. 12) 1925 Oudh 462 (464) (DB).]

[11] Plaintiff claiming personal relief—Preliminary decree silent—Plaintiff not precluded from applying under this rule. (Vol. 22) 1935 All 411 (413, 414) : 57 All 797 (DB).

[12] A decree for sale providing for execution thereof personally against mortgagor in case of deficiency is not void on that ground. (Vol. 29) 1942 Pesh 85 (86) (DB). * (Vol. 5) 1918 P C 159 (160) : 47 Cal 370 (PC).

[13] Fresh supplementary decree under Rule 6, where the original decree itself provides for personal remedy against deficiency for enforcing personal liability. ('12) 16 Cal L Jour 318 (321, 322) (DB).

[See however (Vol. 8) 1921 Pat 49 (51) : 6 Pat L Jour 106 (DB).]

[14] Fresh supplementary decree is not necessary in the case where original decree itself has provided for personal remedy before enforcing the liability. ('93) 15 All 334 (335, 336). * ('07) 29 All 12 (13) (DB). * (Vol. 5) 1918 Mad 607 (608) (DB). * (Vol. 6) 1919 Cal 432 (433) (DB). * ('12) 16 Cal W N 731 (732) (DB). * (Vol. 2) 1915 Mad 452 (453) : 38 Mad 677 (DB). * (Vol. 1) 1914 Oudh 245 (245) : 17 Oudh Cas 153 (DB). * (Vol. 1) 1914 Oudh 333 (334) : 18 Oudh Cas 55 (DB). * (Vol. 11) 1924 Pat 262 (263) : 2 Pat 796 (DB). * (Vol. 23) 1936 Pat 568 (569) : 15 Pat 345 (DB).

[15] Execution of personal liability cannot be issued until the mortgaged property has been sold and the proceeds found insufficient to satisfy the mortgage. (Vol. 5) 1918 P C 159 (160) : 47 Cal 370 (PC). * (Vol. 31) 1944 Mad 65 (66) (DB).

[16] Mortgagee cannot proceed against the non-hypothecated property under the original decree for sale without a personal decree under this rule. (Vol. 28) 1941 Lah 171 (173). * ('37) 11 Bom 537 (539) (DB). * ('03) 6 Oudh Cas 59 (60). * (Vol. 7) 1920 Bom 95 (96) (DB). * (88) 10 All 632 (633). * (Vol. 13) 1926 Mad 415 (416) (DB). * (Vol. 17) 1930 Lah 103 (104). * ('13) 17 Cal W N 1039 (1042). * (13) 16 Oudh Cas 233 (244, 245) (DB). * ('99) 26 Cal 166 (171) (DB). * (Vol. 23) 1936 Pesh 71 (72).

[17] Execution allowed against non-hypothecated property, under original decree for sale though no personal decree was obtained—Mortgagor failing to object

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cannot object to execution subsequently. (Vol. 28) 1941 Lah 171 (173). * ('04) 14 Mad L Jour 103 (104) (DB) * ('97) 2 Cal W N 254 (256) (DB) * (Vol. 23) 1936 Pat 563 (570): 15 Pat 345 (DB).

[18] A personal decree under R. 6 can only be passed in respect of the mortgage to which the decree for sale under which the mortgaged property has been sold relates. ('09) 31 All 373 (376) (DB) * ('90) 12 All 537 (538) (DB).

[But see ('93) 15 All 331 (332)].

[19] Two mortgage decrees against same property—Execution under both decrees—Sale proceeds if found insufficient to discharge both decrees personal decree can be passed in respect of balance under the second decree. (Vol. 23) 1936 Oudh 50 (51): 11 Luck 519 (DB).

[20] Puisse mortgagee-decree-holder joined as party in a suit on prior mortgage—Property sold under decree on prior mortgage—Puisse mortgagee cannot apply for personal decree even though sale proceeds are insufficient to satisfy his decree also. (1900) 22 All 404 (404, 405) (DB) * ('99) 1899 All W N 208 (209) (DB) * (Vol. 7) 1920 All 155 (156): 42 All 519 (DB).

[But see (Vol. 3) 1916 Oudh 79 (80, 81) (DB)].

[21] The Plaintiff must apply for a decree under this rule and that the Court cannot pass the decree *suo motu*. (Vol. 3) 1916 Nag 1 (3): 13 Nag L R 76 (DB).

[22] The application need not be in writing nor need it be signed. (Vol. 11) 1924 All 804 (805) (DB).

[23] A decree under R. 6 can be made only against the defendants in the original suit. (Vol. 14) 1927 All 691 (692).

[24] A personal decree under this rule can be executed either against the person of the mortgagor or by attachment and sale of his other properties. ('89) 16 Cal 423 (425) (DB) * (Vol. 12) 1925 All 352 (352).

[25] A decree under this rule should not direct the realization of the amount from any specific property. ('99) 1899 All W N 125 (126) (DB).

[26] A personal decree may be passed in the same suit against the mortgagor on the basis of the personal covenant even in an invalid mortgage deed. (Vol. 18) 1931 Mad 121 (128) (DB) * (Vol. 6) 1919 Pat 365 (366) (DB) * (Vol. 2) 1915 Bom 102 (105): 39 Bom 358 (DB).

[27] Obtaining personal decree without disclosing previous refusal by Court is not fraudulent. (Vol. 2) 1915 All 397 (400): 33 All 7 (DB).

[28] Personal decree may be obtained irrespective of the validity of the preliminary and final decrees so long as not set aside. (Vol. 24) 1937 Rang 12 (14) (DB).

[29] Where decree was passed on compromise and not in terms of R. 2 or 4 of O. 34 final decree under R. 5 or an application under this rule is not necessary and the compromise decree itself is executable as a personal decree. (Vol. No. 32) 1945 Nag 289 (291): 1 I L R (1945) Nag 643 (DB).

2. Personal liability of purchaser from mortgagor.—

[1] Purchaser of equity of redemption is not a defendant and therefore a personal decree cannot be passed against him. ('42) 1942 Nag L Jour 144 (145) (DB) * (Vol. 10) 1923 PC 54 (54) (PC).

[2] Even if the purchaser had contracted with the mortgagor to pay off the mortgage and had retained with himself a portion of the consideration for the purpose, a personal decree cannot be passed against him. ('12) 34 All 63 (64): 39 Ind App 7 (PC).

[3] A Personal decree for costs cannot be passed against an auction-purchaser of the mortgaged property unless his conduct in the suit makes him liable for the costs. (Vol. 30) 1943 Nag 178 (184): 1 I L R (1943) Nag 422 (DB).

3. Personal liability is a question of construction of the instrument.—[1] A personal liability to pay the mortgage amount is a question of the construction of the mortgage deed. ('09) 9 Cal L Jour 5 (8) (DB) * ('82) 4 All 3 (5) (DB) * (Vol. 5) 1918 Mad 530 (530) (DB) * (Vol. 9) 1922 Cal 52 (52, 53) (DB) * (Vol. 3) 1916 Mar 13 (14) (DB) * (Vol. 19) 1932 Lah 164 (166, 167): 13 Lah 259 (DB) * (Vol. 24) 1937 Pat 261 (262) (DB).

[2] Every simple mortgage involves *prima facie* a personal obligation to pay. ('06) 29 Mad 491 (495) (DB) * (Vol. 21) 1934 Pat 433 (435) * ('06) 4 Cal L Jour 246 (248, 253) (DB) * ('07) 5 Cal L Jour 287 (289) (DB). * ('08) 30 All 388 (390) (DB) * (Vol. 9) 1922 Nag 98 (99): 18 Nag L R 145 (DB).

[3] Every English mortgage involves, *prima facie*, a personal obligation to pay. ('81) 7 Cal 394 (401) (DB).

[4] *Prima facie*, there is no personal obligation to pay in a usufructuary mortgage or a mortgage by conditional sale. (1900) 22 All 149 (159): 27 Ind App 53 (PC).

4. Personal decree against person not the mortgagor. [1] The word "defendant" means the mortgagor defendant. ('01) 23 All 439 (440) (DB) * ('04) 26 All 507 (508, 509) (DB) * ('10) 7 Ind Cas 784 (785) (DB) (Cal) * (Vol. 3) 1916 Mad 753 (764) (DB) * (Vol. 19) 1932 Cal 775 (779): 59 Cal 1314 (DB) * (Vol. 4) 1917 Oudh 241 (241).

[2] Mortgage bond executed by the Court of Wards on behalf of a ward, a decree may be passed against the ward under this rule for the balance of mortgage-money due. (Vol. 9) 1922 Nag 98 (100, 101): 18 Nag L R 145 (DB).

[3] Personal decree against manager of Hindu joint family - Junior members of the family though not parties to suit, are bound. ('01) 22 All 408 (409, 410) (DB).

5. Personal decree against the heirs of the mortgagor.—[1] Mortgage decree obtained against heirs of mortgagor - Mortgage property insufficient - Personal decree to the extent of assets of deceased mortgagor in the hands of the heirs can be passed against them. ('12) 14 Ind Cas 55 (55) (All) * (Vol. 2) 1915 Lah (374) (374) (DB) * (Vol. 18) 1931 All 363 (369) (DB) * ('09) 9 Cal L Jour 5 (9) (DB).

[2] Personal decree against son's share and mortgage decree against father - Decree under R. 6 is necessary to proceed against father's other properties - Decree as it stands could be executed against son's share (Vol. 8) 1921 Pat 357 (357) (DB).

[3] Decree under the rule exempting person and property of manager—Mortgagor-decree to the extent of assets of mortgagor in the hands of sons—Such assets passing by survivorship to sons are liable under the decree. ('10) 11 Cal L Jour 862 (864) (DB).

[4] When the son's share is exempted from the mortgage decree against the father, it is also exempt

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from a decree under the present rule. ('03) 1903 All WN 41 (42) (DB).

6. Personal remedy under compromise decrees.—

[1] That original decree was a compromise decree is no bar to a personal decree being passed under this rule. (Vol. 27) 1940 Oudh 90 (92) : 15 Luck 95 (DB) * ('82) 62 Mad L Jour 170 (173, 174) (PC) (Confirming (Vol. 16) 1929 Cal 387).

[2] A compromise decree in a mortgage suit may be executed against the mortgagor personally without any decree being passed under R. 6 although it does not expressly provide for personal relief. (Vol. 28) 1941 Bom 90 (91) : I L R (1941) Bom 299 (FB) (Overruling (Vol. 7) 1920 Bom 95 and (Vol. 28) 1941 Bom 71 : I L R (1941) Bom 186 * (Vol. 15) 1928 Cal 668 (669) (DB).

[But see (Vol. 5) 1918 Pat 262 (263) : 3 Pat L Jour 649 (DB).]

[3] Where the compromise decree itself expressly provides for personal relief a fresh decree under this rule is not necessary. (Vol. 15) 1928 Oudh 490 (490) : 3 Luck 411 (DB) * (Vol. 23) 1936 Pat 568 (569) : 15 Pat 345 (DB).

7. Personal remedy under decree on award.—[1] Preliminary decree passed on the basis of an award—Award silent as to personal remedy—Plaintiff can apply for personal decree under this rule. (Vol. 23) 1936 Oudh 61 (63) (DB).

8. Where net proceeds of any such sale are found insufficient.—[1] Personal decree passed before sale without objection from mortgagor—Mortgagor is estopped from subsequently questioning its validity. (Vol. 11) 1924 All 225 (226, 227) : 46 All 32 (DB) * (Vol. 20) 1933 Lah 881 (882).

[2] Mortgaged property ceasing to exist through no fault of mortgagee—He can straightaway apply under this rule without initiating sale proceedings. (Vol. 27) 1940 Pat 616 (617) * (Vol. 2) 1915 Mad 452 (452) : 38 Mad 677 (DB) * (Vol. 22) 1935 Lah 536 (537) * (Vol. 21) 1934 Lah 174 (175) : 15 Lah 607 * ('12) 22 Mad L Jour 125 (126) (DB) * (Vol. 8) 1921 Pat 49 (51) : 6 Pat L Jour 106 (DB) * (Vol. 16) 1929 Cal 121 (123) (DB) * (Vol. 15) 1928 Bom 323 (323) (DB) * (Vol. 15) 1928 All 71 (72, 73) : 50 All 321 (DB) * (Vol. 6) 1919 Cal 951 (956) : 45 Cal 702 (DB) * ('04) 26 All 25 (27) * (Vol. 20) 1933 Oudh 1 (3, 4) : 8 Luck 217 (FB).

[But see ('12) 9 All L Jour 569 (573) * ('07) 29 All 260 (261).]

[3] In the following cases it was held that an application under this rule is maintainable without sale proceedings preceding it :

(a) Mortgage property not available because of their sale under a decree on prior mortgage (Vol. 20) 1933 Lah 792 (793) (DB) * (Vol. 22) 1935 Oudh 260 (262) (DB) * (Vol. 25) 1938 Pat 525 (526) : 17 Pat 538 (DB) * (Vol. 22) 1935 Lah 850 (852, 853) : 17 Lah 67 (DB) * (Vol. 21) 1934 Mad 726 (727).

(b) Portion of mortgage property situate in a Native state and consequently sale thereof impossible. (Vol. 8) 1921 Pat 49 (50, 51) : 6 Pat L Jour 106 (DB).

(c) Mortgage by father found not for legal necessity—Conditional decree against father personally may be passed. (Vol. 7) 1920 Mad 479 (480, 481) : 43 Mad 421 (DB).

[4] Sale in execution of mortgage decree set aside on the ground that the mortgagor had no saleable interest—Personal decree may be passed against the mortgagor. (Vol. 14) 1927 All 395 (396) : 49 All 506 (DB) * (Vol. 19) 1932 All 358 (360) (DB).

[5] Personal decree should not be passed against the mortgagor till the entire mortgaged property ordered to be sold has been sold and the proceeds are found insufficient. (1900) 22 All 404 (DB) * ('06) 22 Cal 890 (892) (DB).

[6] Where mortgagee gives up claim in respect of a portion of the property and the sale proceeds of the portion ordered to be sold are not sufficient the plaintiff may obtain a personal decree against the mortgagor. ('03) 25 All 79 (82) (DB) * (Vol. 4) 1917 Pat 555 (555) : 2 Pat L Jour 538 (DB) * ('06) 28 All 19 (20) (DB) * ('07) 29 All 369 (371).

[See however ('06) 33 Cal 890 (892) (DB) * (Vol. 24) 1937 Oudh 252 (254) : 13 Luck 129 (DB) * (Vol. 24) 1937 Oudh 20 (23, 25) : 12 Luck 313 (DB) * (Vol. 7) 1921 Mad 221 (222) (DB).]

[7] Arrangement after final decree for sale to pay decretal amount which was to include money due in respect of another mortgage—Application for personal decree in respect of it is not maintainable. (Vol. 24) 1937 PC 256 (259) : 64 Ind App 302 I L R (1938) 1 Cal 66 : 31 Sind L R 637 (PC).

[8] The sale need not be necessarily a judicial sale but may also be a private sale. ('06) 2 All L Jour 353 (355) (DB) * ('08) 28 All 660 (664) (DB) * (Vol. 25) 1938 Rang 353 (356) (DB).

[But see (Vol. 1) 1914 Mad 251 (252) (DB).]

[9] Mortgagee decree-holder purchasing with leave of Court is bound to give credit only for amount bid by him and can apply under this rule for the balance. ('89) 16 Cal 632 (692) : 16 Ind App 107 (PC).

[10] Property sold free of mortgage under S. 130 C. P. Law Revenues Act and purchased by mortgagee himself. Mortgagee can apply for personal decree for balance under their rule. (Vol. 32) 1945 Nag 289 (291) : I L R (1945) Nag 643 (DB).

[11] Portion of mortgaged property compulsorily acquired by government—Mortgagee should bring the rest to sale and apply under this rule for the balance. ('94) 16 All 78 (79).

[But see ('07) 6 Cal L Jour 745 (748) (DB) (Mortgagee is transferred to compensation money in the hands of collector—Mortgagee should take out such money without applying under this rule)].

9. "Amount due."—[1] The "amount due" is the amount for the recovery of which a decree for sale has been previously passed. (Vol. 16) 1929 All 15 (16) (DB).

[2] Costs awarded to the mortgagee form an integral part of the "amount due" ('08) 11 Oudh Cas 377 (378) * ('08) 35 Cal 431 (433) (DB) * ('07) 30 Mad 464 (465) (DB) * ('98) 20 All 523 (527) (FB) * (Vol. 5) 1918 All 866 (867) : 40 All 109 (DB) * ('12) 12 Mad L Tim 312 (313) (DB) * (Vol. 17) 1930 Oudh 328 (329) (DB) * (Vol. 3) 1916 Pat 1 (1) : 2 Pat L Jour 51 (DB).

[But see ('87) 14 Cal 185 (187, 188) (DB) * (Vol. 19) 1932 Mad 155 (156, 157) : 55 Mad 332 (DB) * (Vol. 18) 1931 Rang 153 (158) : 9 Rang 186 (DB)].

[3] Puisse mortgagee paying off a prior encumbrance is entitled to a personal decree for the deficit due to him in having paid off the prior mortgage. ('04) 26 All 93 (95) (DB).

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10. "Legally recoverable."—[1] A personal decree in a suit for sale upon a mortgage can be passed only where the defendant by his contract or otherwise is under a personal obligation to pay the mortgage debt. ('04) 28 Bom 630 (634) (DB).

[2] Purchaser of equity of redemption agreeing to pay off the mortgage money is not personally liable for the same. But subsequent agreement between him and mortgagee can fasten such liability to him. (Vol. 32) 1945 Oudh 65 (67, 69) : 20 Luck 179.

[3] To pass a personal decree plaintiff's right to enforce the personal obligation should not have been barred by limitation at the date of the suit for sale. ('85) 7 All 502 (505) : 12 Ind App 12 (PC). * (Vol. 33) 1946 Lah 97 (102) : 1 L R (1945) Lah 355 (FB).

11. "Legally recoverable from the defendant otherwise than out of the property sold."—[1] The balance must be one the realisation of which from other properties is not precluded by the terms of mortgage and not barred by limitation. ('92) 14 All 513 (518) (DB).

12. Prior and puisne mortgagees.—[1] Personal decree cannot be passed against a puisne mortgagee (Vol. 17) 1930 Lah 791 (792) (DB) * ('12) 16 Cal L Jour 394 (400) (DB).

13. Costs against puisne mortgagee.—[1] A prior mortgagee is not entitled to a personal decree for costs against a puisne mortgagee. ('04) 26 All 507 (508, 509) (DB) * ('01) 23 All 439 (440, 441) (DB).

[See however (Vol. 18) 1931 Rang 153 (159) : 9 Rang 186 (DB) * (Vol. 18) 1931 Rang 181 (183) (DB) * (Vol. 25) 1938 Nag 237 (239) : 1 L R (1939) Nag 201 (DB)].

14. Insolvency of mortgagor.—[1] Mortgagor declared insolvent pending suit on mortgage—Plaintiff can still proceed against mortgaged property ('11) 34 All 106 (107) (DB).

[2] Mortgaged property of insolvent insufficient to satisfy decree—Mortgagee can prove claim for balance in insolvency proceedings if personal liability was not barred on the date of suit. (Vol. 29) 1942 Mad 151 (151). (Overruled in (Vol. 29) 1942 Mad 273 : 1 L R (1942) Mad 448 on another point). * (Vol. 29) 1942 Mad 273 (274) : 1 L R (1942) 448 (DB) * ('11) 34 All 106 (109) (DB) * (Vol. 12) 1925 Pat 438 (440) : 4 Pat 128 (DB) * (Vol. 17) 1930 Oudh 20 (26) (DB).

[But see (Vol. 26) 1939 All 401 (402) : 1 L R (1939) All 492 (DB) * (Vol. 19) 1932 All 336 (337) : 54 All 428 (DB)].

[3] Mortgaged property of person declared insolvent pending suit found insufficient—Mortgagee can obtain personal decree for balance. (Vol. 8) 1921 Lah 270 (270) : 2 Lah 95 (DB) * (Vol. 17) 1930 Oudh 20 (26) (DB) * (Vol. 26) 1939 All 401 (402) : 1 L R (1939) All 492 (DB).

[But see ('11) 34 All 106 (109) (DB)].

[4] An order of adjudication of the mortgagor as an insolvent and his subsequent discharge do not affect the mortgagee's right to get a personal decree under this rule. (Vol. 26) 1939 All 401 (402) : 1 L R (1939) All 492 (DB) * (Vol. 19) 1932 All 336 (337) : 54 All 428 (DB).

[See however (Vol. 29) 1942 Mad 273 (274) : 1 L R (1942) Mad 448 (DB). (Overruling (Vol. 29) 1942 Mad 151) * (Vol. 25) 1938 Lah 217 (218) (DB). (Where he could have proved but has not done so, the liability is extinguished under S. 44 of the

Provincial Insolvency Act and he cannot afterwards get a personal decree under this rule)].

15. Limitation.—[1] Article 132 of the Limitation Act does not apply to the personal remedy under a mortgage. (Vol. 13) 1928 PC 56 (59) : 5 Pat 585 : 53 Ind App 134 (PC) * ('85) 7 All 502 (505) : 12 Ind App 12 (PC).

[2] Mortgage decree providing sale of mortgaged property and realisation from other parties of any balance—Period of limitation for enforcing personal liability runs from date of decree and not from date of sale of mortgaged property. (Vol. 14) 1927 PC 73 (74, 75) : 54 Cal 500 : 54 Ind App 129 (PC) * (Vol. 4) 1917 PC 85 (85) (PC).

[3] Application for personal decree should be made within 3 years from the date on which the right to apply accrues. (Vol. 33) 1946 Cal 65 (69).

16. Succession certificate.—[1] Personal decree cannot be passed in favour of the heirs of a mortgagee in the absence of a succession certificate. ('08) 35 Cal 767 (772, 773) (DB) * ('08) 7 Cal L Jour 658 (664) (DB) * ('04) 28 Bom 630 (634) (DB).

[2] Production of succession certificate is not necessary to pass a decree in favour of a person succeeding to the estate of mortgagee by right of survivorship. (Vol. 9) 1922 Pat 529 (531) : 1 Pat 387 (DB).

17. Notice.—[1] The proper procedure for the Court is to issue notice to the judgment-debtor calling upon him to show cause why application for a personal decree against him should not be granted and to hear his objection, if any. (Vol. 17) 1930 Lah 103 (104) * (Vol. 3) 1916 Low Bur 20 (21) : 8 Low Bur Rule 450.

[2] In the absence of fraud, a suit does not lie to set aside an ex-parte personal decree under the rule, on the ground of failure to serve notice on the judgment-debtor. ('12) 16 Ind Cal 5 (6) (DB) (All).

[3] Without a supplemental decree under this rule execution should not be directed without notice to the judgment-debtor. (Vol. 7) 1920 Cal 533 (534) (DB).

18. Execution of personal decree.—[1] The validity of a personal decree which has become final cannot be examined by executing Court. (Vol. 4) 1917 Pat 330 (331).

19. Appeal.—[1] Order granting or refusing personal decree under the rule is a decree and appealable as such. (Vol. 5) 1918 All 97 (97) : 40 All 553 (DB) * (Vol. 19) 1932 All 336 (337) : 54 All 428 (DB) (Revision not competent) * (Vol. 32) 1945 Nag 289 (290) : 1 L R (1945) Nag 643.

[2] *Ad valorem* court-fee is payable on an appeal from such an order as well as on an appeal from a decree under the rule. (Vol. 28) 1941 Pesh 56 (56) (DB) * (Vol. 5) 1918 All 97 (97) : 40 All 553 (DB) * (Vol. 11) 1924 All 292 (293) (DB) * ('13) 18 Cal L Jour 133 (137) (DB) * (Vol. 2) 1915 Oudh 122 (123) : 18 Oudh Cas 121 * ('35) 62 Cal 568 (569) * (Vol. 32) 1945 Nag 289 (290) : 1 L R (1945) Nag 643 * (Vol. 32) 1945 Mad 425 (425).

[3] An order returning an application for personal decree for presentation to the proper Court is not appealable under O. 43 R. I. (Vol. 18) 1931 All 192 (193) (DB).

20. Nature of proceedings under Rule 6.—[1] Provisions of O. 9 are applicable to proceedings for a personal decree under this rule. (Vol. 17) 1930 All 841 (843) : 52 All 839 (DB) * (Vol. 19) 1932 All 466 (466) (DB).

Preliminary decree in redemption suit. ^a 7. (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

[T. P. Act, Old S. 92. See Rules 2, 4 and 9.]

[a] Substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 4.

ORDER 34 RULE 7.

Synopsis.

1. Scope of the rule.
2. Mode of taking accounts—Sub-rule (1) clause (a).
3. Interest.
4. Costs.
5. Pays into Court on a day within six months.

6. "Shall deliver up to the plaintiff all documents."
7. "Shall re-transfer the property to the plaintiff."
8. Procedure on default of payment.
9. Extension of time fixed for payment.
10. Form of decree.
11. Who can redeem.
12. Trespass by mortgagor before redemption.

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1. Scope of the rule.—[1] Decree under Rule 7 is preliminary and incapable of execution without a final decree being passed. (Vol. 7) 1920 Upp Bur 43 (44, 45) : 3 Upp Bur Rul 183 * ('98) 22 Bom 771 (773) (DB) * (Vol. 9) 1922 Bom 127 (128) : 46 Bom 348 (DB). (Rules 7 and 8 are somewhat inconsistent.)

[See (Vol. 1) 1914 Nag 8 (13) : 10 Nag LR 150].

[2] Where a decree for accounts is first passed and then another preliminary decree for redemption, it is irregular and has only the effect of an interlocutory order for accounts. (Vol. 12) 1925 All 707 (708) : 47 All 803 (DB) * (Vol. 11) 1924 Bom 33 (35) (DB) * (Vol. 11) 1924 Oudh 140 (140, 141).

[3] A decree for possession on condition of the plaintiff's paying a certain sum within a certain time is not a preliminary decree. (Vol. 11) 1924 Lah 635 (636). (Decree is capable of execution as it is.) * ('13) 19 Ind Cas 856 (857) (DB) (Lah).

[4] The rule applies only to a suit for redemption against a mortgagee. (Vol. 10) 1923 Lah 129 (131) (DB).

[5] A compromise decree in a redemption suit, does not require a final decree. (Vol. 13) 1926 Mad 644 (644, 645).

[6] No application for a final decree can be made under this rule and Rule 8 where a decree had been passed under section 92 of the Transfer of Property Act. (Vol. 1) 1914 Mad 392 (392) (DB). (Final decree under Rule 8 can only be made where there is preliminary decree under the present rule.)

[7] Ordinarily, a suit for an account on a mortgage cannot be asked for, unless the mortgagor asks for redemption also. ('81) 5 Bom 614 (616) (DB) (Under the Dekkhan Agriculturists' Relief Act XVII of 1879, S. 16, an agriculturist mortgagor has no right to sue his mortgagee for accounts only.)

[See also (Vol. 30) 1943 Bom 65 (65) : ILR (1943) 71 (DB)].

[8] The mere fact that the defendant denies the mortgage is no ground for decreeing possession without any payment by the mortgagor ('69) 6 Bom HCR AC 9 (11, 12) (DB).

[9] A conditional decree for redemption on payment of the amount due may be passed even though the Court finds that the mortgage has not been satisfied out of the mortgaged property as alleged in the plaint. ('80) 1 All 524 (525) (DB) * ('01) 24 Mad 408 (411) (DB).

2. Mode of taking accounts—Sub-rule (1), Clause (a).—[1] A mortgagee in possession is bound under S. 76 of the T. P. Act to account for the rents and profits of the property, and the mortgagor is entitled to deduct from the mortgage-money all sums thus owed by the mortgagee ('99) 26 Cal 1 (7) : 25 Ind App 241 (PC) * ('72) 14 Moo Ind App 443 (451) (PC).

[2] Suit to redeem puisne mortgagee who has redeemed prior mortgage—Mortgagor is liable to pay amounts of both mortgages ('05) 27 All 308 (310) (DB).

[3] Mortgagee obliged to sue to obtain possession—Mortgagee is entitled to add costs of such

suit to mortgage-money. (Vol. 28) 1941 Oudh 498 (501, 502) : 16 Luck 812 (DB).

[4] Prior mortgagee suing on his mortgage without impleading puisne mortgagee and purchasing property in execution—Puisne mortgagees subsequently suing for redemption is bound to pay amount due on mortgage on date on which prior mortgagee obtained possession after purchase. ('01) 24 All 135 (137) (DB) * (Vol. 1) 1914 All 42 (42) : 36 All 123 (DB).

[5] Mortgagee who has refused a valid tender of mortgage money does not cease to be a mortgagee and subsequent accounts between him and the mortgagor should be included in suit for redemption. ('07) 34 Cal 223 (223, 229) (DB).

[6] Suit for redemption—Sub-mortgagee joined as a party—Decree should direct accounts to be taken of mortgage and sub-mortgage and should provide that out of mortgage money, sub-mortgagee should be paid amount due to him and balance to be paid to mortgagee. ('91) 15 Bom 692 (693) (DB) * (Vol. 4) 1917 Oudh 141 (143) * ('06) 28 All 638 (641) (DB).

[7] In suits for redemption the account should be taken up to the date of actual redemption or sale as the case may be. ('08) 30 All 86 (37) * (Vol. 5) 1918 Mad 587 (588) (DB).

[See also (Vol. 22) 1935 Bom 122 (123) (DB). (Section 13 of the Dekkhan Agriculturists' Relief Act provides for account only up to date of suit. Thereafter this rule applies.) * (Vol. 22) 1935 Bom 97 (98) (DB) (Do) * (Vol. 25) 1938 Mad 405 (411) (DB)].

[8] See also under Ss. 72 and 76, T. P. Act.

3. Interest.—[1] Mortgagee's right to interest is not limited to that accruing during the six years preceding the suit. (Vol. 1) 1914 Lah 344 (345) (DB) * ('90) 14 Bom 113 (114, 115) (DB).

[2] Where a mortgagee who is entitled to possession obtains a decree for possession, he is not entitled to any interest between the date of the decree and the date of the delivery of possession. ('89) 1889 All W N 177 (177).

4. Costs.—[1] The mortgagee defendant is entitled to all costs unless he has refused a valid tender of the mortgage-money or has otherwise been guilty of misconduct. ('84) 8 Bom 190 (193) (DB) * (Vol. 19) 1932 Oudh 123 (134) : 7 Luck 454 (DB) * (1900) 13 C P L R 74 (75 to 77) * (Vol. 5) 1918 Mad 942 (945) (DB) (Laches) * ('05) 27 All 313 (317, 320) (DB) * (Vol. 13) 1926 Mad 405 (406) * (Vol. 11) 1924 Bom 172 (173).

[2] Costs are part of the mortgage-money and in the absence of any express provision in the decree to the contrary, are not personally recoverable from the mortgagor. (Vol. 13) 1926 All 424 (425) : 43 All 425 (DB) * (Vol. 12) 1925 All 492 (494) (DB).

[3] Where the plaintiff mortgagor has been awarded costs in a redemption suit he is entitled to set off the amount of his costs against the mortgage-money payable by him. ('79) 4 Cal 742 (744) * ('98) 17 Bom 33 (34).

5. Pays into Court on a day within six months.—[1] A decree under this rule should state a period within which the mortgage-money should be paid. (1909) 10 Cal L Jowr 115 (117, 118) (DB) * ('13) 18 Ind Cas 48 (49) (Lab) * ('74) 1974 Bom P J 7 (7) (DB).

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[2] This period may be less than six months. (Vol. 14) 1927 P C 17 (17) (PC).

[3] In computing the period the date of the decree should be excluded. ('88) 1888 All W N 80 (80, 81).

[4] If the decree for redemption fixes no period for payment it must be taken as an ordinary decree to which Art. 179 of the Limitation Act would apply. ('13) 18 Ind Cas 48 (49) (Lab) * ('09) 10 Cal L Jour 115 (117, 118) (DB) * ('05) 28 Mad 211 (213) (DB) * ('99) 23 Bom 592 (594) (DB).

[5] Where in a suit for sale by a puisne mortgagee the preliminary decree directed the plaintiff to pay off the prior mortgage before bringing the mortgaged property to sale, but fixed no period it was held that the decree, in that respect, was one for redemption and the period allowable for payment of the prior mortgage amount could not exceed six months. (Vol. 8) 1921 All 56 (58) : 43 All 320 (DB).

6. "Shall deliver up to the plaintiff all documents."—[1] On payment of the mortgage-money, the mortgagor is entitled to the return of the mortgage-bond. *See* (Vol. 13) 1926 All 741 (743) : 49 All 78 (DB).

[2] Where the mortgagee defendant has lost the title deeds, the executing Court cannot, in the absence of any express provision in the decree to that effect, compel him to give security for the value of the property. ('02) 12 Mad L Jour 63 (63, 64) (DB).

7. "Shall.....re-transfer the property to the plaintiff."—[1] If the mortgagee has leased the property to another the lease is not binding on the mortgagor who can eject the lessee as a trespasser. ('06) 3 All L Jour 517 (519).

[2] Where the mortgagee has taken a mortgage of the holding of a tenant, the mortgagor is entitled, on redemption, to the possession of the holding, provided he pays the amount due on its mortgage. ('09) 10 Cal L Jour 33 (37) (DB).

[3] The rule requires that a mortgagee with possession should, on redemption, put back the mortgagor in possession. ('10) 33 Mad 71 (73).

[See also ('10) 12 Cal L Jour 620 (622, 623)].

8. Procedure on default of payment.—[1] The rule provides that on default by the mortgagor in the payment of the mortgage-money within the time allowed by the Court, the mortgagee is entitled to apply for a final decree for sale or foreclosure. (Vol. 29) 1942 Pesh 96 (96) (Mortgagor is not entitled to apply for decree for sale).

[2] Omission to draw up proper decree under S. 92 of the Transfer of Property Act did not deprive mortgagee of his right to relief under S. 93 ('01) 25 Bom 101 (103) (DB).

[3] Mortgage executed by son—Suit for cancellation by father—Son found to be minor at the time of execution of mortgage—Debt found to be binding on family—Order that mortgage is to be cancelled on father paying amount within certain period—Amount not so paid—Mortgagee is entitled to apply under O. 34, R. 7 for sale of properties. (Vol. 22) 1935 Mad 478 (479) (DB).

[4] Subsequent mortgagee's redemption suit—Prior mortgagee defendant is a decree-holder and his transferee of the decree can apply for final decree on

default of payment. (Vol. 18) 1931 Mad 592 (595) : 54 Mad 708 (DB).

9. Extension of time fixed for payment.—[1] Time for payment may be extended though the period originally fixed may have expired. (Vol. 20) 1933 All 157 (158) (DB) * (Vol. 20) 1933 Mad 762 (763, 764) : 57 Mad 398 (DB) * ('06) 2 Nag L R 137 (140, 141, 143) * ('09) 6 All L Jour 537 (538) * ('02) 26 Bom 121 (126) (DB) * (Vol. 14) 1927 Bom 175 (176) (DB).

[2] Extension of time may be granted irrespective of the nature of the mortgage in question. (Vol. 15) 1928 All 480 (481) : 50 All 882 (DB).

[3] Even though a decree for redemption may have been passed by the Appellate Court, an application for extension of time should be made to the Court of first instance. ('09) 31 All 328 (329) (DB) * (Vol. 4) 1917 All 239 (239) : 39 All 396 (DB) * (Vol. 3) 1916 Mad 694 (695) : 39 Mad 876 (DB).

[4] Where, in a partition suit, the alienation of a certain property belonging to the joint family was found to be binding only to a limited extent and a decree was passed for possession thereof on condition of a certain amount being paid to the alienee within a fixed date, it was held that this was in effect a decree for redemption and that the Court could extend the time for payment. (Vol. 7) 1920 Mad 99 (100, 101) : 43 Mad 357 (DB).

[See also (Vol. 20) 1933 Mad 762 (763, 764) : 57 Mad 398 (DB)].

[But compare (Vol. 2) 1915 Ondh 226 (227) : 18 Ondh Cas 58. (Powers to enlarge time can be exercised only in cases to which rule strictly applies)].

[5] Section 148 does not apply to extension of time fixed by a decree for redemption. ('12) 34 All 388 (390) (DB).

[6] The limitation for an application for a final decree for redemption runs from the date of payment although the Court may have extended the period for payment originally fixed. (Vol. 14) 1927 Bom 32 (34) : 50 Bom 730 (DB).

[7] Preliminary decree for redemption of usufructuary mortgage—Default in payment within time fixed—Mortgagor can still redeem and apply for final decree under R. 8 before his right to redeem is barred—Sub-r. (2) of R. 7 does not apply. (Vol. 33) 1946 Pat 99 (100) : 24 Pat 575 (DB) * (Vol. 33) 1946 Mad 38 (42).

[8] See also notes under O. 34, R. 2.

10. Form of decree.—[1] For the form of a preliminary decree under this rule, *see* Appendix D, form Nos. 7, 7A, 7B and 7C. The decree ought not to contain unnecessary declarations. ('81) 9 Ind App 21 (25, 26) (PC).

[2] It should not direct that the defendant should not be evicted till he has cut the crops sown by him. ('86) 8 All 502 (508, 509) (DB).

11. Who can redeem.—[1] If a purchaser in execution sale of the equity of redemption sues for redemption before he has obtained a certificate of sale, but obtains such certificate before the hearing, he should have a decree for redemption. ('82) 6 Bom 139 (142, 143) (DB).

[See also (Vol. 16) 1929 Bom 337 (338) (DB)].

[2] In a suit by a purchaser of the equity of redemption the mortgagee cannot question the

a 8. (1) Where, before a final decree debarring the plaintiff from all right to redeem the Final decree in mortgaged property has been passed or before the confirmation of a sale held in redemption suit. pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

[T. P. Act, Old S. 93. See Rules 3, 5 and 7. See also O. 21 R. 89]

[a.] Substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 4.

O. 34 R. 7 (contd.)

adequacy of the consideration for the sale. ('88) 1888 Bom. P J 91 (91) (DB) * ('68) 3 Agra 30 (31) (DB).

[3] See also S. 91, T. P. Act.

12. Trespass by mortgagor before redemption.—[1] Where a redemption decree has been made but the mortgagor, without having made any payment, unlawfully trespasses upon the property and dispossesses the mortgagee in possession, the latter can sue to recover back possession. (Vol. 12) 1925 Oudh 255 (255, 256) : 28 Oudh Cas 46.

ORDER 34 RULE 8.

Synopsis.

1. Scope of the rule.
2. Decree for redemption.
3. Redemption after due date.

4. Sub-rule (3).

5. Power to enlarge time.

6. Limitation.

7. Appeal.

1. Scope of the rule.—[1] A final decree under the present rule is necessary to terminate a suit for redemption. (Vol. 9) 1922 Bom 127 (128) : 46 Bom 343 (DB) * ('08) 33 Bom 273 (277).

[2] In a suit for redemption there should be a complete settlement of all accounts between the parties in relation to the mortgage. (Vol. 7) 1920 Mad 531 (532) (DB).

[3] A, a mortgagee suing on his mortgage without impleading B, the assignee of the equity of redemption, obtaining decree, buying property under the decree and entering into possession—B subsequently suing for redemption—Suit decreed—B depositing in Court the decretal amount but A appealing from the decree

O. 34 R. 8 (contd.)

and continuing in possession—Appeal dismissed—B cannot claim accounts for the period subsequent to the deposit in Court. (Vol. 12) 1925 Rang 13 : 2 Rang 382 distinguished as being a case of a usufructuary mortgage on whom there is a statutory obligation to account. (Vol. 27) 1940 Cal 550 (552) : ILR (1940) 1 Cal 544.

2. Decree for redemption.—[1] Under Sub-rule (1) all rights acquired by the mortgagee under the mortgage must, on redemption, be re-transferred to the mortgagor. (Vol. 7) 1920 Lah 239 (240) * (Vol. 7) 1920 Oudh 24 (24). (Mortgagee need not vacate possession till he has received full amount.)

[2] A mortgagor is not disentitled to a decree for redemption simply because he has attached under his decree for costs against the mortgagee, the mortgage-money deposited by himself in Court to the mortgagee's credit and withdrawn a portion of it. (04) 27 All 392 (394, 395) (DB).

[3] The mortgagee is not entitled to notice of payment into the Court of the mortgage-money under the preliminary decree. (Vol. 11) 1924 Mad 102 (102) (DB).

[4] A mortgagor is not required to make an application to the Court before paying in the money. (Vol. 12) 1925 Oudh 255 (256) : 28 Oudh Cas 46.

[5] The refusal of the treasury officer to accept the mortgage-money though offered within the proper time does not amount to default by the judgment-debtor. (V L 16) 1929 All 881 (882) (DB).

[6] Where the mortgagor has paid into the Court, the sum ascertained by the first Court, pending an appeal by the mortgagee as to the amount due, the mortgagor is entitled to credit the amount paid though it lapsed to the Government through the failure of the mortgagee to take the money out of Court. ('12) 10 All L Jour 379 (381) (PC).

[7] Payment to an unauthorised person does not discharge a mortgage. (Vol. 11) 1924 Lah 738 (740) (DB).

3 Redemption after due date.—[1] Preliminary decree for redemption on usufructuary mortgage—Default by mortgagor in payment—Mortgagor still can redeem and apply for final decree. (Vol. 33) 1946 Pat 99 (100) : 24 Pat 575.

See also Note 5.

4. Sub-rule (3).—[1] The provision in the rule is imperative. (Vol. 14) 1927 All 305 (305) * (1900) 25 Bom 101 (108) (DB). (No provision in prelim-decree for passing of final decree—Final decree can be passed) * (Vol. 18) 1931 All 427 428 (DB). (Subsequent mortgagee's suit for redemption—Prior mortgagee defendant can get final decree for sale though preliminary decree does not provide therefor.)

[2] A final decree for foreclosure or sale can only be passed on an application by the mortgagee. (Vol. 29) 1942 Pesh 96 (96) (Mortgagor cannot apply.) * ('18) 1913 Pun L R No. 235, P. 784 (786) (DB).

[See also ('11) 36 Mad 32 (35) (DB). (Mortgagor unable to pay mortgage-money—He himself can apply for final decree for sale).]

[3] A final decree for foreclosure cannot be passed in the case of simple mortgage. (Vol. 2) 1915 Low. Bur. 100 (101).

[4] An application for final decree should be made to the Court of first instance through the preliminary decree was modified in appeal. (1900) 23 Mad 521 (522, 523) (DB).

5. Power to enlarge time.—[1] A payment of the amount due within the time fixed entitles the mortgagor to a final decree for redemption. (Vol. 14) 1927 Bom 32 (34) : 50 Bom 780 (DB).

[2] But the time can be extended by the Court for making payment, of the amount due under this rule.

[3] Time can be extended even though the time originally fixed has expired. ('09) 6 All L Jour 537 (538) * ('01) 26 Bom 121 (126) (DB) * ('06) 2 Nag L R 137 (143).

[4] Extension cannot be granted unless good cause is shown therefore. ('97) 19 All 180 (184) (DB) * (Vol. 14) 1927 Oudh 586 (588). (Fact that mortgagee loses nothing by extension is "good cause") * ('03) 13 Mad L Jour 266 (267) (DB). (*Bona fide* mistake is "good cause".) * ('12) 34 All 388 (390) (DB) (Do.) * (Vol. 6) 1919 Oudh 381 (382). (Mortgagee losing nothing by extension is "good cause".)

[5] The mortgagor is not entitled to an extension of time as a matter of right. (Vol. 3) 1916 Mad 882 (882) : 39 Mad 882 * ('10) 7 Ind Cas 36 (38) (DB) (All).

[6] The power to extend time applies to all kinds of mortgages. (Vol. 15) 1928 All 480 (481) : 50 All 882 (DB). (Mortgage by conditional sale.)

[7] Ordinarily a mortgagor who seeks to pay the money after the time fixed must apply for extension. (Vol. 7) 1920 Upp. Bur. Rul. 43 (44) : 3 Upp Bur Rul 183.

[See also (Vol. 7) 1920 Upp. Bur. 43 (44) : 3 Upp Bur Rul 183. (There is no special form of application—Application to pay money may be treated as such).]

[8] The application must be made to the Court of first instance, even though the decree may have been confirmed on appeal. ('09) 31 All 328 (329) (DB) * (Vol. 3) 1916 Mad 694 (695) : 39 Mad 876 * (Vol. 4) 1917 All 239 (239) : 39 All 396 (DB).

[9] The power to enlarge time under this rule applies strictly to redemption suits. (Vol. 8) 1921 All 304 (306) : 43 All 25 (DB).

[See also (Vol. 14) 1927 Oudh 586 (588) (Compromise decree for redemption—Time extended under this rule.) * (Vol. 7) 1920 Mad 99 (101) : 43 Mad 357 (DB). (Suit for partition—Conditional decree for possession on payment of certain amount to an alienee Decree held in effect one for redemption—Time extended under this rule).]

[See however (Vol. 2) 1915 Oudh 226 (227) : 18 Oudh Cas 53].

[10] Even if the time is not extended, the mortgagor, can redeem the property at any time before a final decree for foreclosure is passed, or a sale of the property is confirmed by the Court under this rule.

6. Limitation.—[1] Article 181 of the Limitation Act applies to an application by the mortgagee for a final decree under this rule and time runs from the expiry of the period fixed for payment by the mortgagor. See Notes on Art. 181, Limitation Act.

a 8A. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

[Cf. Order 34 Rule 6.]

[a] This rule was *inserted* by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), Section 5.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

a 10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure sale or redemption, the Court shall, unless in the case of costs of the suit the mortgagee has been such as to disentitle him thereto, add to

O. 34 R 8 (contd.)

7. Appeal—[1] An order to extend time is appealable under O. 43, R. 1 (o). (Vol. 11) 1924 Bom 98 (98): 47 Bom 956 (DB).

[2] No appeal lies against an order granting an extension of time. (Vol. 3) 1916 Mad 694 (695): 39 Mad 876 (DB).

[3] Whether an order merely refusing to pass a final decree but leaving it open to the mortgagee to apply again for such a decree is appealable as a decree is doubtful. (Vol. 15) 1928 Lah 355 (356) (DB).

ORDER 34 RULE 8-A—Note 1.

[1] Words "the last preceding rule" refer to R. 8 as amended by Act XXI of 1929. Decree for sale passed in respect of usufructuary mortgage and sale held in pursuance of old rule 8—Sale is not "under last preceding rule" within the meaning of R. 8-A—Decree under latter rule cannot be passed. (Vol. 20) 1933 Oudh 40 (41) (DB).

ORDER 34 RULE 9—Note 1.

[1] Where mortgage has been discharged, a decree for redemption can be passed without the formality of a preliminary and final decree. (Vol. 9) 1922 All 479 (479).

[2] A mortgagee who continues in possession of the mortgaged property after the mortgage has been satisfied is liable for all the receipts from the property with interest from the time when the debt was fully paid off. (Vol. 16) 1929 Bom 337 (339) (DB).

[3] Court-fee in addition to that paid on the principal sum due need not be paid on the surplus profits decreed to a mortgagor in a redemption suit. (Vol. 13) 1931 Mad 479 (479) * (Vol. 10) 1923 All 261 (262): 45 All 154 (DB).

[4] Claim by a mortgagor to recover over-payment received by the mortgagee—Article 143—Limitation Act applies. (Vol. 9) 1922 Cal 189 (190, 191) (DB).

[5] The rule applies to an enquiry under sections 12 and 16 of the U. P. Agriculturists' Relief Act (XXVII of 1934). (Vol. 29) 1922 Oudh 391 (392): 18 Luck 183 (DB).

[6] The mortgagor can set off costs awarded to him against the mortgage-money in preference to the claim of the defendant mortgagee's attorney for his costs of the suit. ('93) 17 Bom 32 (34) * ('79) 4 Cal 742 (743, 744).

[7] A separate suit for over-payments is barred under S. 11 and O. 2 R. 9. ('89) 16 Cal 632 (631): 16 Ind App 107 (PC) * (Vol. 23) 1936 Cal 200 (202).

[8] Mesne profits accruing after the date for payment under the preliminary decree or after the date of payment under the decree, are recoverable by a separate suit. ('10) 12 Cal L Jour 620 (622) (DB) * (Vol. 7) 1920 Pat 108 (107): 5 Pat L Jour 595 (DB) * (Vol. 13) 1926 Oudh 113 (114) * (Vol. 22) 1935 All 96 (97) (DB) * (Vol. 5) 1918 Mad 284 (284) (DB) * (Vol. 25) 1938 Mad 405 (411) (DB).

[9] No separate suit can be brought for the profits accruing before the date of payment. ('05) 3 Oudh Cas 302 (303) * ('02) 26 Bom 661 (667) (DB).

[10] Deposit by mortgagor under S. 83, Transfer of Property Act, refused by mortgagee in possession—Suit for redemption—Subsequent suit for mesne profits anterior to the date of redemption suit is barred—Mortgagee does not become trespasser on refusal. (Vol. 23) 1936 Cal 200 (202).

[11] A Mohamedan mortgagee died leaving heirs. One of them X received from the mortgagor money on account of the mortgage representing that he was solely entitled to the money. This was disputed by the other heirs who sued the mortgagor, on the mortgage impleading X as a defendant. It was found that X was not solely entitled to the mortgage-money. Suit compromised between the plaintiff and the mortgagor. It was held that the Court could pass a decree in the same suit in favour of the mortgagor against X for the amount paid to X by the mortgagor in excess of his share. (Vol. 23) 1936 Oudh 242 (245): 12 Luck 82.

ORDER 34 RULE 10.

Synopsis.

1. Amendments after 1908.
2. Mortgagee is ordinarily entitled to his costs.
 3. "Such costs of the suit . . . as have been properly incurred."
4. Costs of appeal.
5. "Other costs, charges and expenses."
6. Power of executing Court to add costs.
7. Costs awarded by decree, mode of realisation.
8. Appeal.

the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

[T. P. Act, old S. 94. See Rules 2 to 8A and Section 35.]

[a] Rule 10 was substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 6, for the original Rule 10.

* 11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

O. 34 R. 10 (contd.)

1. Amendments after 1908.—[1] The rule is not retrospective and does not apply to mortgage decrees passed before the coming into force of the amending Act XXI of 1929. (Vol. 27) 1940 Mad 233 (235) (DB).

2. Mortgagee is ordinarily entitled to his costs.—[1] In a suit for sale, foreclosure or redemption, the mortgagee is ordinarily entitled to his costs unless he is disentitled to it by his conduct. (Vol. 29) 1942 Mad 592 (593) : I L R (1943) Mad 205 (DB) * (1900) 24 Mad 377 (386) : 28 Ind App 46 (PC).

[2] The practice is to make costs as between attorney and client and not as between party and party. (1881) 8 Cal L Rep 437 (438).

3. "Such costs of the suit... as have been properly incurred"—[1] The final decree cannot enhance mortgagor's liability under preliminary decree beyond the addition of costs. ('97) 19 All 186 (188) (DB).

[2] The rule refers only to costs incurred between the preliminary decree and the final decree and not to the costs incurred in execution proceedings. (Vol. 13) 1926 All 68 (69) * (Vol. 13) 1926 All 722 (722) : 48 All 682 (DB).

[But see (Vol. 17) 1930 Oudh 328 (329) (DB) (Costs incurred upto time of actual payment can be included.)]

4. Costs of appeal.—[1] Costs of appeal from preliminary decree can be added to the mortgage-money. (Vol. 6) 1919 All 297 (298, 299) : 41 All 473 (DB) * (Vol. 5) 1918 Oudh 445 (445) (DB) * (Vol. 11) 1924 All 104 (104) : 45 All 630 (DB) * (Vol. 22) 1935 Oudh 452 (453).

[See however (Vol. 21) 1934 All 89 (92) (DB) (Question is one of construction of appellate decree.) * (1913) 19 Ind Cas 729 (730) (All) (do).]

[But see ('13) 11 All L Jour 975 (977) (Costs can be recovered only personally) * (Vol. 1) 1914 All 190 (191)]

[2] Suit on mortgage against several defendants dismissed—Appellate Court granting decree to mortgagee and allowing costs to him as against contesting respondent only—Costs not forming part of final mortgage decree—Appellate decree for costs is final with respect of such respondent—Mortgagee can proceed to execute such decree without waiting for final mortgage decree. (Vol. 24) 1937 Cal 547 (548).

[3] Mortgage decree—Variation of decree on appeal as to method of computing compound interest—*Held*, it did not deprive respondent of his costs. (Vol. 22) 1935 Mad 468 (472, 473) (DB).

5. "Other costs, charges and expenses."—[1] This expression inserted by Act XXI of 1929 gives effect to the practice of adding such "costs, charges and expenses," incurred after the preliminary decree. (Vol. 6) 1919 Low Bur 136 (137, 138) * (Vol. 2) 1915 Cal 369 (370) (DB) * (Vol. 5) 1918 Cal 1039 (1040) : 44 Cal 448 (DB) * ('91) 15 Bom 625 (639) (DB).

[2] The rule contemplates the final adjustment of the amount payable to mortgagee. (Vol. 25) 1938 Mad 405 (411) (DB).

6. Power of executing Court to add costs.—[1] Costs which should have been but have not been excluded in final decree cannot be claimed in execution. (Vol. 9) 1922 All 27 (28) : 44 All 350 (DB).

7. Costs awarded by decree, mode of realisation.—[1] Costs in a mortgage suit must be added to the mortgage money except in cases coming under R. 6 where the mortgagor can be made personally liable. ('07) 30 Mad 464 (465, 466) (DB) * ('08) 35 Cal 431 (433) (DB) * ('98) 20 All 523 (523) (FB) (Overruling 1898 All WN 33) * ('99) 2 Oudh Cas 103 (109) * (Vol. 22) 1935 Mad 101 (105) : 58 Mad 418 (DB) * (Vol. 25) 1938 Lah 188 (189) : I L R (1938) Lah 148 (DB) * (Vol. 18) 1931 All 124 (125) (DB) * (Vol. 23) 1936 Pat 153 (156) (DB).

[2] Under S. 35 the Court has power to make the mortgagor personally liable for the costs even in cases not coming under R. 6. ('87) 14 Cal 185 (188) (DB) * ('07) 3 Nag L R 97 (100, 101) * ('88) 10 All 179 (181) * ('13) 19 Ind Cas 729 (730) (All) * (Vol. 25) 1938 Mad 212 (213) * (Vol. 25) 1938 Lah 188 (190) : I L R (1938) Lah 148 (DB).

8. Appeal.—[1] A mortgagee who has been deprived of his costs by the decision of a Court would be entitled to appeal in cases coming under O. 34. (Vol. 26) 1939 Mad 654 (656).

ORDER 34 RULE 11.

Synopsis.

1. Interest prior to the suit.
2. Post diem interest.
3. Interest from institution of suit to the date fixed in preliminary decree.
4. Interest from date fixed in the decree for payment till realisation.

- (ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and
- (iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum; and
- (b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—
 - (i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause; and
 - (ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

[See Section 34.]

[a] Substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 6.

Objects and Reasons.

"The Committee have inserted this rule in compliance with the suggestion of the Privy Council in *Gopi Narain Khanna v. Banshichar* (L. R. 32 I. A. 123)"—S. O. R.

O. 34 R. 11 (contd.)

1. Interest prior to the suit.—[1] No interest is recoverable unless there is an express or implied agreement to pay interest. (Vol. 8) 1921 P C 100 (102) : 23 Oudh Cas 150 (PC).

[2] The Court should decree interest at the agreed rate, however high it may be. ('96) 18 Cal 164 (180) : 17 Ind App 201 (PC) * ('97) 24 Cal 699 (703) (FB).

[3] The Court may decree what it considers a reasonable rate of interest in spite of an agreement in the following cases:

[a] Where agreed rate is penal. (Vol. 30) 1943 Mad 109 (110, 111) * (Vol. 2) 1915 Cal 796 (799) : 42 Cal 652 (DB) * (Vol. 24) 1937 Cal 654 (655) : 1 L R (1937) 1 Cal 300.

[b] Where rate of interest is excessive and the transaction is substantially unfair. (Vol. 20) 1933 All 180 (184) (DB) * (Vol. 20) 1933 Oudh 190 (190) (DB) * ('12) 34 All 126 (128) (DB).

[4] A stipulation for the payment of compound interest is not necessarily penal. (93) 20 Cal 360 (365) (DB) * ('84) 6 All 63 (64) (DB) : (Case of a money bond).

[See (Vol. 6) 1919 Oudh 228 (229) * ('81) 3 All 610 (628) (FB) * ('85) 62 Cal L J cur 7 (9) (*Held* on construction of the mortgage deed that compound interest could be awarded on default of payment of annual interest.)]

[5] Mere fact that the rate of interest is excessive does not give rise to a presumption of undue influence where it is not proved. (Vol. 11) 1924 P C 60 (65) : 51 Ind App 101 : 3 Pat 279 (PC).

[6] The Court has a discretion to refuse interest prior to suit in appropriate circumstances. (Vol. 30) 1943 Sind 59 (64) : 1 L R (1942) Kar 452 (DB).‡

[7] The interest decreed is a charge on the mortgaged property. (Vol. 8) 1921 Fat 403 (405) (DB) * (Vol. 20) 1933 Lah 289 (290) * ('90) 1890 Pun Re No. 147 Page 469 (469) (FB).

[But see ('13) 40 Cal 514 (516, 517) (DB) * (Vol. 1) 1914 Lah 350 (352) : 1914 Pun Re No. 94 (DB).]

[8] Income from property in possession of mortgagee should be applied in discharge of interest payable to him. ('02) 24 All 521 (531) : 28 Ind App 148 (PC).

[9] Mortgagee entitled to possession in lieu of interest cannot claim interest for the period for which he fails to obtain possession. ('93) 17 Bom 425 (428) (DB) * ('09) 31 All 325 (328) (DB) * ('06) 9 Oudh Cas 144 (145).

[10] Interest is payable on the "Costs and charges and expenses" properly incurred by the mortgagee in respect of the mortgage security. ('93) 1893 Pun Re. No. 67 page 297 (300) (DB).

2. Post diem interest.—[1] The cases given on this subject were decided prior to the enactment of this rule and there was no specific provision in the Code as it stood before.

[2] Intention to pay interest subsequent to the period fixed for redemption at the same rate as before might be implied in the absence of any agreement to the contrary ('97) 19 All 39 (49, 50) : 23 Ind App 138 (PC) * ('98) 20 All 171 (180) : 25 Ind App 9 (PC) * (Vol. 20) 1933 Mad 171 (171). * (Vol. 22) 1935 Oudh 213 (216) : 10 Luck 491 (DB).‡

[But see (1913) 35 All 534 (537)].

[3] Even if there was no intention to pay such interest, the Court could award it by way of damages for the breach of the contract to pay the mortgage-money at the stipulated time. ('95) 17 All 511 (517) : 22 Ind App 199 (PC) * (Vol. 20) 1933 Mad 171 (171) * (Vol. 9) 1922 Lah 254 (257) : 3 Lah 200 (FB).

[4] The contract rate of interest is ordinarily taken as the measure of damages. ('86) 8 All 466 (489) (DB) * (Vol. 20) 1933 Mad 171 (171) * ('80) 2 All 617 (619) (DB) * (Vol. 9) 1922 Lah 254 (257) : 3 Lah 200 (FB).

O. 34 R. 11 (contd.)

[5] The Court could vary measure of damages if it considered necessary. ('95) 17 All 511 (517) : 22 Ind App 199 (PC).

[6] Post diem interest at a reasonable rate might be declared under the Interest Act of 1839 even in the absence of contract to pay 'such interest. ('94) 21 Cal 274 (277, 278) (DB) * ('97) 24 Cal 699 (703) (FB) * ('95) 18 Mad 248 (250) (DB) * ('95) 18 Mad 338 n (338n) (DB).

[7] Post diem interest claimed as damages for breach of contract could be recovered only for the period prescribed by the Limitation Act for a suit for compensation for such breach ('95) 18 Mad 257 (262) (DB) * (Vol. 9) 1922 Lah 254 (257) : 3 Lah 200 (FB) * ('97) 24 Cal 699 (703) (FB).

[8] A claim for damages for breach of contract to pay in specified time would fail unless the mortgage suit was brought within the period of limitation for a suit for damages for breach of the contract. ('95) 17 All 581 (587) (FB).

[9] So long as the principal itself is not barred post diem interest could be recovered for the six years or for three years as the case may be, preceding the suit on the mortgage. ('87) 19 All 39 (47) : 23 Ind App 138 (PC).

3. Interest from institution of suit to the date fixed under the preliminary decree.—[1] Where there is a stipulated rate of interest the Court is ordinarily bound to decree interest at that rate till the date fixed for payment of the decretal amount however high it may be, unless it is penal or is excessive and the transaction is substantially unfair. (Vol. 27) 1940 Lah 333 (336) : ILR (1940) Lah 658 : (DB) * (Vol. 14) 1927 PC 1 (2) : 54 Ind App 1 : 54 Cal 161 (PC) * (1907) 34 Cal 150 (160, 161) : 34 Ind App 9 (PC) * (Vol. 12) 1925 PC 280 (287) : 52 Ind App 418 : 5 Pat 135 (PC).

[See however (Vol. 8) 1921 PC 100 (102) : 23 Oudh Cas 150 (PC) (Where the Privy Council disallowed interest after the trial Court's decree, in view of mortgagee's misconduct)].

[2] Court has discretion to award interest for the period after the institution of the suit and it is not bound to give the contractual rate even though it may not be penal, excessive or substantially unfair. (Vol. 27) 1940 FC 7 (9) : ILR (1940) Kar FC 45 : 1940 FCR 31 (FC) * (Vol. 27) 1940 FC 20 (23) : ILR (1940) Kar FC 33 : 1940 FCR 61 (FC) * (Vol. 27) 1940 FC 7 : ILR (1940) Kar FC 45 : 1940 FCR 31 (FC) referred to.)

[But see (Vol. 29) 1942 All 444 (445) : ILR (1942) All 908 (DB) * (Vol. 28) 1941 Pat 378 (382) (DB).]

[3] Under this rule the Court cannot refuse interest for the period after the institution of the suit. (Vol. 29) 1942 Pat 102 (104) : 21 Pat 167 (DB).

[But see (Vol. 29) 1942 All 444 (445) : ILR (1942) All 908 (DB).]

[4] Where the period originally fixed for payment is extended by the appellate Court or otherwise, the contract rate of interest is payable till the extended period. (Vol. 14) 1927 PC 1 (2) : 54 Ind App 1 : 54 Cal 161 (PC).

[See however (Vol. 19) 1932 Pat 332 (334) (DB) (After amendment of 1929 interest at bond rate till period of grace is discretionary).]

[5] The mortgagor is bound to pay interest for the entire period fixed even though he deposits the decretal amount before that date. (Vol. 30) 1943 Lah 275 (280) : ILR (1944) Lah 24 (FB) * ('05) 1 Nag L R 106 (107, 108) * (Vol. 6) 1919 Sind 70 (70) : 12 Sind L R 59.

[See (Vol. 20) 1933 Nag 22 (23) : 28 Nag L R 345 (DB).]

[6] Mortgagee is entitled to interest from the date of suit to date fixed for payment at contract rate only on the principal amount due under the mortgage and not on the total amount due on the date of suit. (Vol. 20) 1933 Oudh 123 (129) : 8 Luck 315 (DB) * (Vol. 22) 1935 Oudh 263 (263) : 10 Luck 687 (DB).

[But see (Vol. 24) 1937 All 114 (114) (Obiter).]

[7] Interest on interest which has become part of principal according to the terms of the mortgage deed is allowable (Vol. 21) 1937 All 442 (444) : ILR (1937) All 584 (DB).

[See (Vol. 28) 1941 Pat 378 (382) (DB).]

[See also (Vol. 21) 1934 Oudh 473 (474, 475) (DB).]

[8] Limit as to interest imposed by rule of damdupat reached before suit—No further interest from date of suit to date fixed for payment under preliminary decree in a mortgage suit can be allowed. (Vol. 33) 1916 Nag 210 (215) : ILR (1946) Nag 407 (DB).

[9] Bengal Money-lenders' Act does not abrogate the provisions of this rule. (Vol. 29) 1942 Cal 128 (130) : 1 L R (1942) Cal 414 (DB).

4. Interest from date fixed in the decree for payment till realisation.—[1] The Court can decree interest even for the period subsequent to the date fixed for payment in the decree till realisation. ('01) 23 All 181 (193) : 28 Ind App 35 (PC) * ('06) 28 All 223 (224) (PC) * ('99) 21 All 861 (873) (FB) * ('07) 34 Cal 150 (161) : 34 Ind App 9 (PC) * ('08) 35 Cal 221 (225) : 35 Ind App 28 : 4 Nag L R 1 (PC) * (Vol. 23) 1936 P C 63 (65) : 63 Ind App 114 : 15 Pat 210 (PC).

[2] The Court is not bound to award interest, after the date of judgment at the contract rate, but may award such interest at any rate that it considers reasonable. (Vol. 28) 1941 Pat 378 (382) * ('07) 34 Cal 150 (161) : 34 Ind App 9 (PC) * (1899) 26 Cal 39 : 25 Ind App 179 (PC) (explained) * ('13) 17 Cal W N 25 (36) (PC).

[3] Future interest after the date fixed for payment is to be paid on the aggregate of the principal interest and costs awarded by the decree. (Vol. 27) 1940 FC 7 (9) : ILR (1940) Kar FC 45 : 1940 FCR 31 (FC). (Interest at 6 per cent per annum granted) * ('07) 34 Cal 150 (161) : 34 Ind App 9 (PC).

[See however (Vol. 19) 1932 Oudh 255 (263) : 8 Luck 40 (DB). (Trial Court's decision to award future interest on the principal sum alone not interfered with in appeal).]

[4] The proper stage for decreeing future interest is at the time of passing the final decree. (Vol. 8) 1921 Pat 352 (352) : 5 Pat L Jour 598 (DB) * (Vol. 5) 1918 Cal 151 (153) (DB).

[See (Vol. 4) 1917 Pat 582 (583, 584) (DB). (Future interest not given by preliminary decree—Final decree awarding future interest cannot be questioned in execution).]

12. Where any property the sale of which is directed under this Order is subject to a prior sale of property subject mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

[T. P. Act, old S. 96. See Section 73 sub-section (1) clause (b)]

O. 34 R 11 (contd.)

[5] Subsequent interest not mentioned in the final decree must be taken as refused. (Vol. 8) 1921 Pat 352 (352) : 5 Pat L Jour 598 (DB).

[See (Vol. 24) 1937 Lah 894 (895) (Space for future interest left blank—Court must be presumed to have refused such interest)]

[But see (Vol. 18) 1931 Oudh 47 (48) (DB).]

[6] An agreement between the parties for the payment of future interest may be given effect to though the final decree does not provide for it. ('12) 16 Cal L Jour 404 (409) (DB) * ('04) 28 Bom 393 (397) (DB).

[7] When future interest is decreed, it must be paid till the confirmation of the sale. ('06) 53 Cal 846 (848) (DB) * (Vol. 6) 1919 All 253 (254) : 41 All 528 (528) (DB) * (Vol. 25) 1938 Nag 54 (56) : 1 L R (1938) Nag 456 * (Vol. 24) 1937 Rang 193 (194) (DB).

ORDER 34 RULE 12.

Synopsis.

1. Scope of the rule.
2. Sale of property subject to prior mortgage.
3. Sale free from prior mortgage.
4. Where a prior mortgage is a usufructuary one.
5. Sale by the Court subject to a charge.

1. Scope of the rule.—[1] R. 12 confers general power on Court which can be exercised if conditions mentioned therein are satisfied.—Rule does not require consent of plaintiff or anybody else besides prior mortgagee. (Vol. 22) 1935 Mad 453 (454).

[2] It is not necessary that a decree for sale on the puisne mortgage must have been passed before this rule can apply. (Vol. 30) 1943 Mad 455 (456).

[3] Decree on puisne mortgage passed and satisfied by mortgagor—Prior mortgagee cannot ask under this rule, for sale of property to discharge his debt. (Vol. 22) 1935 Mad 660 (663) (DB).

[4] The right to apply under this rule is not confined to the plaintiff decree-holder. The Court can exercise the power under this rule on the application of anybody or even of its own motion. (Vol. 30) 1943 Mad 455 (456) * (Vol. 22) 1935 Mad 453 (454).

[5] The rule does not contemplate an enquiry as to whether a stranger to the suit is a prior mortgagee or not. The rule contemplates the admitted existence of a prior mortgagee. (Vol. 24) 1937 Mad 554 (554, 555).

2. Sale of property subject to prior mortgage.—

[1] Prior mortgagee not being necessary party to suit on puisne mortgage, puisne mortgagee can bring mortgaged property to sale under his own decree subject to prior mortgage. ('95) 22 Cal 33 (46) (DB) *

(Vol. 21) 1934 All 73 (75) (DB) * ('96) 23 Cal 795 (798) (DB).

[See ('07) 29 All 205 (206) (DB).]

[See also (Vol. 22) 1935 Lah 218 (221) (DB).]

3. Sale free from prior mortgage.—[1] The rule clearly implies that without the prior mortgagee's consent, property cannot be sold free of his mortgage. (Vol. 7) 1920 P C 81 (83) : 47 Cal 662 : 47 Ind App 11 (PC) * (Vol. 11) 1924 All 307 (308) : 46 All 414 (DB).

[See also (Vol. 22) 1935 Mad 660 (663) (DB).]

[2] In the absence of prior mortgagee's consent, the sale under a decree on a puisne mortgage can only be subject to the prior mortgage though there may be no express reservation of the prior mortgagee's rights. (Vol. 29) 1942 Cal 138 (140) (DB) * ('06) 29 Mad 84 (86) (DB).

[3] The priority cannot be lost merely because the prior mortgagee does not establish it in puisne mortgagee's suit, if it is not impugned. (Vol. 29) 1942 Cal 138 (141) (DB) * (Vol. 7) 1920 P C 81 (83) : 47 Cal 662 : 47 Ind App 11 (PC) * (Vol. 17) 1930 Lah 1063 (1065) (DB) * (Vol. 2) 1915 Cal 570 (571) (DB) * (Vol. 16) 1929 Oudh 463 (466) : 4 Luck 250 (DB) * (Vol. 24) 1937 Cal 446 (449) (DB).

[See ('08) 31 Mad 425 (429) (DB).]

4. Where a prior mortgage is a usufructuary one.—

[1] A prior usufructuary mortgagee, with whose consent the property is sold under this rule in execution of a decree on a puisne mortgage, is entitled to the sale proceeds. ('07) 30 Mad 408 (409, 410) (DB).

[But see ('04) 26 All 14 (17) (DB).]

5. Sale by the Court subject to a charge.—[1] Sale certificate stating that sale is subject to charge—Statement is not conclusive against purchaser. ('93) 16 Mad 207 (213) (DB).

[2] Property sold subject to encumbrance recognised by Court—Property cannot be re-sold because encumbrance is found to be void. ('99) 23 Bom 759 (760, 761) (DB).

[3] Mortgages noted in the proclamation of sale as claims upon the property sold should not necessarily be entered in the certificate of sale or be computed as part of the purchase-money, unless the existence of the mortgages has been either admitted by the parties or established by a decree or declared under O. 21 R. 62, ('94) 18 Bom 175 (176, 177) (DB).

[4] When a sale is subject to encumbrances, the vendor is no longer liable for their satisfaction nor is he entitled to any benefit that the vendee might obtain therefrom. ('09) 31 All 583 (589) : 36 Ind App 203 (PC).

Application of proceeds. **13.** (1) Such proceeds shall be brought into Court and applied as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

[T. P. Act, old S. 57. Cf. S. 73, sub-s. (1), cl. (e).]

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the

Suit for sale necessary for bringing mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

[T. P. Act, Old S. 99.]

ORDER 34 RULE 13—Note. 1.

[1] Although this rule in terms applies only when the sale as ordered under R. 12, the principle of the rule applies also to cases of sales subject to a prior mortgage and even in such cases, the proceeds should first be applied towards the interest and cost of the mortgage under which the sale is held and then only towards the principal. (Vol. 28) 1941 Lah 286 (291, 292) : I L R (1941) Lah 740 (FB) * (Vol. 25) 1938 Lah 289 : I L R (1938) Lah 403 overruled ; (Vol. 15) 1928 Lah 901 approved. * (13) 25 Mad L Jour 552 (555) (DB).

[But see (Vol. 18) 1931 Rang 153 (157 158) : 9 Rang 166 (DB).]

[2] Rule applies not merely to case when property is sold with prior mortgagee's consent, but also to other cases where there is no mortgage to consider and provide for. (Vol. 32) 1945 Mad 392 (393).

[3] This rule is intended to regulate the position as between the mortgagor and the mortgagee. It does not apply to a case of suretyship. (Vol. 22) 1935 Lah 334 (335) (DB).

[4] Where a sale is held in enforcement of a prior mortgage, a puisne mortgagee receiving an amount from out of the surplus sale proceeds by virtue of his security is bound to apply them only in satisfaction of his mortgage debt, though the mortgagor may have paid the money towards other debts. ('03) 30 Cal 553 (558, 559) (DB).

[5] Each of the prior encumbrancers is entitled to interest at the contract rate up to the date of the confirmation of the sale, that being the earliest date when the money really becomes available for distribution. (1911) 15 Cal W N 783 (785) (DB).

[6] This expression includes a subsequent encumbrancer. (Vol. 13) 1926 Mad 101 (105) * ('94) 18 Bcm 684 (688) (DB).

[7] This expression does not include subsequent encumbrancer if the existence or validity of the subsequent encumbrance is challenged by the mortgagor. (Vol. 14) 1927 All 467 (468) : 49 All 636 (DB).

[8] Decree upon subsequent mortgage becoming time barred—Subsequent mortgagee is not person interested in property sold. (Vol. 12) 1925 All 6 (8) (DB).

[9] The holder of two successive mortgages on the same property, who failed to include the second mortgage in his suit on the first mortgage, can claim the surplus sale proceeds under this rule as a puisne encumbrancer. ('07) 30 Mad 353 (355) (DB). (Position. it is conceived, will be different in cases governed by S. 67, T. P. Act.)

[10] A mere unsecured creditor is not a person "interested in the property sold". But after the subsequent encumbrances are satisfied, he can proceed against the balance, if any, payable to the mortgagor. ('94) 18 Bcm 684 (687, 688) (DB).

ORDER 34 RULE 14.

Synopsis.

1. Scope and object of the rule.
2. Applicability of the rule to the enforcement of a charge
3. Applicability of the rule to the enforcement of security bond.

O. 34 R. 14 (*contd.*)

4. "Decree for the payment of money in satisfaction of a claim arising under the mortgage."
5. Effect of sale in contravention of the rule.
6. Attachment of the property is not prohibited.
7. Transferee of money decree from mortgagee, if bound by the restrictions against the mortgagee.
8. "Otherwise than by instituting a suit."
9. Sale of mortgaged property for claim unconnected with the mortgage.
10. Order 2 Rule 2.
11. Consent decree.
12. "Decree."

1. Scope and object of the rule.—[1] The object of the present rule is to prevent the mortgagee from bringing to sale the bare equity of redemption in execution of a money decree which he may obtain in respect of a claim arising under the mortgage. (Vol. 30) 1943 Pat 282 (283) : 22 Pat 207 (DB).

[2] The avoidance of evils likely to result in allowing sale of mortgaged properties in execution of a money decree, he had obtained on a claim arising under the mortgage is the purpose of the rule. ('99) 22 Mad 372 (376) (SB) * ('05) 32 Cal 296 (316) : 32 Ind App 23 (PC) * ('02) 26 Bom 88 (104, 105) (SB).

[3] A sale of mortgaged property in execution of a money decree in respect of a claim arising under the mortgage is barred as otherwise a stranger purchasing the property without notice of the mortgage will be put to great hardships. (Vol. 23) 1936 All 663 (666) (DB).

[4] Apart from the prohibition under this rule and S. 90 of Trusts Act, purchase of the mortgaged property by the mortgagee at a sale in execution of a decree on a prior mortgage or a sale for arrears of land revenue where the default was not due to him is not barred. (Vol. 30) 1943 Mad 202 (205) : I L R (1943) Mad 418 (DB).

[5] The rule is retrospective in effect and applies to decrees passed prior to its coming into force. ('11) 35 Bom 248 (252) (DB).

[6] The rule is intended for the benefit of the mortgagor. (Vol. 30) 1943 Pat 282 (283) : 22 Pat 207 (DB) * (Vol. 31) 1944 Pat 5 (7) : 22 Pat 320 (DB) * (Vol. 30) 1943 Mad 202 (204) : I L R (1943) Mad 418 (DB) (Rule protects mortgagor against the property being sold at a disadvantage.)

[7] It is open to the mortgagor to waive the benefit of the rule and when he has thus waived the benefit of the rule, it is not for third parties to object under this rule, to the sale of the properties. ('37) 41 Cal W N 1133 (1135).

[8] The rule does not preclude a suit for money in respect of a claim arising under the mortgage but only precludes the sale of the mortgaged property in execution of the decree obtained in such suit. ('86) 40 Cal W N 343 (345) (DB) * (Vol. 23) 1936 Rang 47 (48) (Mortgagee paying revenue and land tax in respect of mortgaged property—He is not bound to add such money to principal mortgage money—Suit for such money is competent.)

[9] The rule does not apply to a sale held under S. 86 of the Bombay Land Revenue Code at the instance of mortgagee. (Vol. 29) 1942 Bom 278 (279) : I L R (1942) Bom 608 (DB).

[10] The rule does not apply to the Punjab, the Transfer of Property Act not having been extended thereto. See sub-rule (2). (Vol. 22) 1935 Lah 672 (675) : 16 Lah 640 (FB).

[11] Rule does not apply to Sonthal Parganas. (Vol. 16) 1929 Pat 439 (440) (DB).

[12] Award by Registrar of Co-operative Societies, directing sale of mortgaged property does not militate against Rule 14. (Vol. 20) 1933 Nag 211 (213) (DB).

2. Applicability of the rule to the enforcement of a charge.—[1] By force of Rule 15, this rule applies to charges as well as to mortgages. (Vol. 27) 1940 Pat 283 (285) (DB) * ('05) 1 Nag L R 117 (119) * ('95) 22 Cal 859 (863) (DB) * (Vol. 7) 1920 Mad 183 (186) : 45 Mad 786 (DB) * (Vol. 7) 1920 Pat 521 (522) : 5 Pat L Jour 248 * (Vol. 5) 1918 Cal 705 (706, 707) : 45 Cal 530 (DB).

[2] Charge created by the decree itself can be enforced in execution without any fresh suit for sale being filed as this rule does not apply to such cases. (Vol. 6) 1919 Bom 56 (59) : 43 Bom 631 (DB) * (Vol. 21) 1934 All 524 (524) (DB) * (Vol. 21) 1934 Bom 241 (242) (DB) * (Vol. 21) 1934 Cal 327 (327) : 60 Cal 1467 * (Vol. 22) 1935 Nag 129 (130, 131) (DB) * (Vol. 21) 1934 Nag 147 (149) : 30 Nag L R 325 (DB) * (Vol. 33) 1946 Pat 216 (217) * (Vol. 20) 1933 Pat 306 (400, 401) : 12 Pat 559 (DB) * (Vol. 13) 1926 Mad 194 (196, 197) (DB) * (Vol. 13) 1931 Mad 603 (603) (DB) * (Vol. 15) 1928 Lah 209 (210, 212) * (Vol. 19) 1932 All 439 (440) : 54 All 763 (DB).

[But see ('97) 2 Cal W N 33 (33, 34) * ('95) 22 Cal 859 (863, 864) (DB).]

[3] Suit for maintenance by Hindu widow—Maintenance decreed and made a charge on certain property—The widow can apply for sale of the property without filing suit for sale. (Vol. 9) 1922 Cal 35 (37) (DB) * (Vol. 5) 1918 Mad 668 (668) (DB) * (Vol. 6) 1919 Mad 894 (895, 896) (DB) * ('92) 19 Cal 139 (146) (FB) * (Vol. 13) 1926 Pat 31 (31, 32) : 4 Pat 693 (DB) * (Vol. 26) 1939 All 579 (580) (DB) * (Vol. 24) 1937 Pat 654 (655) (DB).

[But see ('95) 22 Cal 903 (908) (Case decided under Section 99, Transfer of Property Act.) * ('07) 17 Mad L Jour 217 (217) (DB) (Do).]

3. Applicability of the rule to the enforcement of security bond.—[1] Surety personally making himself personally liable mortgaging property as security—Such property can be sold in execution without a suit for sale. ('88) 12 Bom 411 (414) (DB) * (Vol. 13) 1926 Bom 279 (279) : 50 Bom 339 (DB) * ('90) 13 Mad 1 (3, 4) (DB) * (Vol. 13) 1926 Mad 194 (193, 197) (DB) * (Vol. 4) 1917 Pat 596 (596) : 2 Pat L Jour 197 (DB) * (1913) 17 Cal L Jour 267 (FB). (Case decided under S. 99 of T.P. Act—On facts it was held the Section did not apply.)

[See (Vol. 4) 1917 Pat 439 (439) (DB).]

[See however (Vol. 13) 1916 Pat 61 (62) (DB). (Compromise in money suit referring to mortgage already executed—Property cannot be sold otherwise than by suit for sale).]

[But see ('05) 32 Cal 494 (496) (DB) * (Vol. 2) 1915 Cal 533 (533) (DB).]

O. 34 R. 14 (contd.)

[2] The proper procedure to enforce the security bond given to Court is by a summary order for the sale of the property covered by the bond, unless the amount of security is paid within a specified date. (Vol. 6) 1919 P C 55 (59) : 22 Oudh Cas 212 : 42 All 158 : 46 Ind App 228 (PC) * (Vol. 23) 1936 Mad 589 (591).

[3] Order for payment by instalment on execution of security bond hypothecating immovable property—Default in instalments—Property can be sold in execution without suit for sale. (Vol. 21) 1934 All 524 (524) (DB) * (Vol. 23) 1936 Pat 289 (291, 292) : 15 Pat 545 (DB).

[4] Security bond given for getting stay of execution—Property can be sold in enforcement of bond without recourse to suit for sale. (Vol. 27) 1940 All 196 (197) (DB).

4 “Decree for the payment of money in satisfaction of a claim arising under the mortgage.”—[1] The rule applies only to cases in which a money decree is obtained on a claim arising under the mortgage. (Vol. 31) 1944 Pat 5 (7) : 22 Pat 320 (DB) * (Vol. 3) 1916 Pat 252 (253) : 2 Pat L Jour 55 (DB).]

[2] The mortgage should be one existing prior to the decree and not one created by the decree itself (Vol. 16) 1929 Pat 439 (440) (DB) * (Vol. 21) 1934 All 524 (524) (DB) * (Vol. 21) 1934 Bom 241 (242) (DB) * (Vol. 22) 1935 Nag 129 (130) (DB) * (Vol. 13) 1926 Mad 194 (196, 197) (DB) * (Vol. 9) 1922 Cal 35 (37) (DB) * (’09) 3 Sind L R 120 (121) (DB) * (Vol. 23) 1936 Pat 289 (291, 292) : 15 Pat 545 (DB).

[3] Judgment-debtor hypothecating his property to decree-holder by security bond—Application for execution of money decree by sale of hypothecated property—Objection by judgment-debtor that suit on bond should be instituted first is not maintainable. (Vol. 22) 1935 All 179 (180).

[4] If the mortgage is invalid or has become unenforceable through the efflux of time or any other reason, the rule does not apply. (Vol. 20) 1942 Pat 50 (51) : 20 Pat 751 (DB) * (Vol. 8) 1921 Mad 477 (178) (DB) * (Vol. 4) 1917 All 470 (472) : 39 All 36 (DB) * (Vol. 7) 1920 Mad 319 (320) (DB) * (Vol. 17) 1930 Mad 138 (141) : 53 Mad 670 (DB) * (Vol. 23) 1936 All 8 (9) (DB).

[5] Mere statement by the mortgagee that he gives up the mortgage right will not make this rule not applicable. (Vol. 24) 1937 Mad 501 (502) * (Vol. 22) 1935 Rang 132 (133) : 13 Rang 292 (DB) * (Vol. 23) 1936 All 663 (665) (DB).

[See however (Vol. 26) 1939 Oudh 126 (128) (DB).]

[6] Where mortgagee sues for sale in respect of a part of mortgaged property and after sale of such part in execution obtains a personal decree under O. 34 R. 6 the decree can be executed by sale of the exempted part of the mortgaged property. (Vol. 25) 1938 All 341 (341, 342) : 1 L R (1938) All 466 (DB).

[7] Suit by charge holder to recover certain amount—Suit amount decreed and charged on plaintiff properties—No decree for sale—Decree held money decree. (Vol. 32) 1945 Cal 322 (324, 325) (DB).

5. Effect of sale in contravention of the rule.—[1] A sale in contravention of the rule can be prevented by objecting to it at any time before the sale. (Vol. 5)

1918 Cal 705 (706) : 45 Cal 530 (DB) * (’06) 8 Bom L R 576 (577) (DB) * (’05) 2 All L Jour 356 (357) (DB).

[2] A completed sale in contravention of the rule is not void but is voidable at the instance of the mortgagor or a person interested in the equity of redemption. (’05) 32 Cal 296 (316) : 32 Ind App 23 (PC) * (Vol. 7) 1920 Cal 363 (366) : 47 Cal 377 (FB) * (Vol. 2) 1915 All 70 (72) : 37 All 165 (FB) * (Vol. 32) 1945 Cal 322 (324, 325) (DB).

[3] The proper remedy to set aside a sale held in contravention of the rule is by an application under S. 47 of the Code and not by a separate suit. (’07) 9 Bom L R 462 (464, 466) (DB) * (’06) 30 Mad 313 (315) (DB) * (’99) 22 Mad 347 (349) (DB) * (’08) 35 Cal 61 (66, 80) (FB) * (’06) 23 All 681 (682) (DB) * (Vol. 13) 1926 Lah 490 (492) (DB) * (Vol. 8) 1921 Bom 285 (288) : 45 Bom 174 (DB) * (’05) 8 Oudh Cas 327 (337) (DB).

[4] The application should be made before the confirmation of the sale. (’08) 35 Cal 61 (80) (FB) * (Vol. 3) 1916 Lab 196 (198) : 1916 Pun R- N. 18 (DB) * (Vol. 2) 1915 All 70 (72) : 37 All 165 (FB).

(5) Where the sale is held after due notice to the judgment-debtor he cannot subsequently question its validity. (1900) 10 Mad L Jour 110 (111) (DB).

(6) Once the sale is confirmed, the purchaser gets a good title to the property and is not liable to be redeemed subsequently by the mortgagor. (Vol. 14) 1927 Mad 1135 (1135) * (Vol. 4) 1917 Mad 592 (594) (DB) * (Vol. 2) 1915 All 70 (72) : 37 All 165 (FB).

[See however (Vol. 1) 1914 All 343 (346) : 36 All 516 (DB).]

(7) The fact that the mortgagee himself has purchased the property with the leave of the Court does not make it redeemable by the mortgagor. (Vol. 13) 1926 Lah 490 (491, 492) (DB) * (’89) 16 Cal 682 (692) : 16 Ind App 107 (PC) * (Vol. 23) 1936 Bom 177 (181) (DB).

[See however (’09) 3 Sind L R 17 (30) (DB). (This case was decided before the provisions of T. P. Act were applied to Sind.) * (’10) 12 Cal Jour 574 (578) (DB) * (’99) 22 Mad 347 (349) (DB) * (’98) 22 Bom 624 (629) (DB) * (Vol. 1) 1914 All 343 (346) : 36 All 516 (DB) * (’70) 5 Rang L R 450 (459, 460). (Case before the Transfer of Property Act).]

[8] Persons who are not parties to the sale proceedings can object to the sale by a separate suit even subsequent to its confirmation. (’99) 22 Mad 372 (376, 377) (SB) * (’07) 4 All L Jour 787 (789).

[9] A sale of the mortgaged property in execution of a money decree is subject to the encumbrances covering the property at the time. (’01) 14 C P L R 17 (20) * (’80) 4 Mad 1 (38, 39) (FB) * (’75) 1 All 240 (242, 243) (FB).

6. Attachment of the property is not prohibited.—

[1] The rule does not preclude the mere attachment of the property in execution of a money decree for mortgage debt. (’18) 18 Ind Cas 201 (202) (DB) (Oudh) * (’07) 31 Bom 462 (463) (DB) * (’95) 29 Cal 813 (817) (DB) * (’98) 25 Cal 262 (269, 270) (SB) * (’08) 31 Mad 33 (35) (DB) * (’06) 8 Bcm L R 576 (577) * (’08) 32 Bom 205 (207) (DB).

7. Transferee of money decree from mortgagee if

bound by the restrictions against the mortgagee—[1] The transferee of a money decree obtained by mortgagee is bound by the restrictions imposed by this rule

O. 34 R. 14 (contd.)

against the mortgagee. ('01) 14 C P L R 35 (36) * (Vol. 7) 1920 Bom 202 (203) : 44 Bom 366 * ('07) 31 Bom 462 (463, 464) (DB) * ('08) 11 Oudh Cas 231 (233, 234) (DB) * ('08) 31 Mad 33 (34) (DB).

[See ('95) 22 Cal 313 (316) (DB).]

8. "Otherwise than by instituting a suit."—[1] A suit under this rule would not be barred despite the provisions of O. 2 R. 2 (Vol. 27) 1940 Pat 283 (285, 286) (DB) * (Vol. 18) 1931 All 65 (68) : 52 All 964 (DB) * (Vol. 22) 1935 Lah 672 (675) : 16 Lah 640 (FB) * (Vol. 7) 1920 Bom 56 (57) : 44 Bom 981 * ('87) 10 Mad 129 (130, 131) (DB) * ('98) 2 Cal W N 320 (321) * ('02) 29 Cal 537 (542) (DB) * (Vol. 22) 1935 Rang 132 (133) : 13 Rang 292 (DB) * (Vol. 23) 1936 All 663 (665) (DB) * (Vol. 24) 1937 Mad 501 (502).

[2] Mortgage bond not providing for sale—decree on it declaring lien on property covered by bond—Still it is simple money decree. (Vol. 4) 1917 Cal 82 (84) (DB) * ('05) 28 All 58 (59, 60) * (Vol. 5) 1918 Cal 705 (706, 707) : 45 Cal 530 (DB) * ('09) 6 All L Jour 731 (732) (DB).

[3] Rule 14 is no bar to the sale of the mortgaged property in execution of a decree though not drawn up in the form of one for sale but still provides for sale in case of default by mortgagor. ('97) 20 Mad 78 (79) (DB) * ('04) 31 Cal 922 (927) (DB) * ('98) 25 Cal 580 (583) (DB) * ('99) 26 Cal 166 (170, 171) (DB) * ('02) 24 All 549 (552) (DB) * (Vol. 11) 1924 Pat 20 (22) : 2 Pat 787 (DB) * (Vol. 11) 1924 Cal 645 (646) (DB).

[4] When the usufructuary mortgagee has obtained a money decree for the mortgage amount, he cannot bring the mortgaged property to sale in execution of decree but must bring a suit for sale for that purpose. ('08) 29 Mad 424 (425) (DB) * (Vol. 18) 1931 All 350 (351) (DB) * ('07) 30 Mad 408 (409) (DB) * ('99) 26 Cal 164 (165, 166) (DB).

[5] Mortgagee who has given up his rights under the mortgage can bring the property to sale in execution of the money decree for the mortgage debt. ('29) 115 Ind Cas 829 (829) (DB) (Mad) * (Vol. 18) 1926 Bom 279 (280) : 50 Bom 389 (DB) * (Vol. 26) 1939 Oudh 126 (128) (DB).

[But see ('08) 30 All 146 (148) (DB). (Case under the Transfer of Property Act).]

[6] The rule does not apply to a suit for contribution brought by a co-mortgagor who has redeemed the entire mortgage and claims a charge on the shares of the other co-sharers for the proportionate amounts due by them. (Vol. 15) 1928 Cal 191 (192) (DB).

[7] Government's lien on the subject-matter of suit for court-fee payable by pauper-plaintiff can be enforced in execution without separate suit. ('96) 18 All 419 (421) (DB) * ('06) 33 Cal 1040 (1046).

9. Sale of mortgaged property for claim unconnected with the mortgage.—[1] The rule applies only if the decree for money is in satisfaction of a claim arising under the mortgage and not to a decree on a claim unconnected with the mortgage. (Vol. 31) 1944 Pat 5 (7) : 22 Pat 320 (DB) * ('13) 7 Sind L R 11 (16) (DB) * (Vol. 2) 1915 Cal 427 (428) : 42 Cal 780 (DB) * (Vol. 3) 1916 Lah 196 (198) : 1916 Pun Re. No. 18 (DB) * (Vol. 5) 1918 Mad 668 (668) (DB) * (Vol. 10) 1923 Cal 121 (126) (DB) * (Vol. 13) 1926 Mad 194 (196, 197) (DB) * (Vol. 22) 1935 All 179 (180) * (Vol. 26) 1939 All 579 (580) (DB).

[2] There is no bar to the sale of the mortgaged property in execution of a money decree obtained by a third person or the mortgagee purchasing the property at such a sale. (Vol. 5) 1918 Cal 475 (476) (DB) * (Vol. 6) 1919 Pat 47 (50) (DB) * (Vol. 26) 1939 Mad 436 (436, 437).

[3] There is no bar to the mortgagee purchasing the mortgaged property at a sale for arrears of revenue where he has not been in any way responsible for the default in paying the revenue. (Vol. 30) 1943 Mad 202 (205) : 1 L R (1943) Mad 418 (DB).

[4] The following are cases showing what are and what are not "claims arising under the mortgage":—

(a) Where usufructuary mortgagee grants a lease of the property to the mortgagor, a claim for rent accruing under the lease is not a claim arising under the mortgage. (Vol. 7) 1920 Pat 723 (724) (DB) * (Vol. 7) 1920 Cal 363 (366) : 47 Cal 377 (FB).

[But see (Vol. 30) 1943 Pat 282 (283, 284) : 22 Pat 207 (DB). [(Vol. 7) 1920 Pat 723 held to have lost force after (Vol. 14) 1927 P C 32 : 50 Mad 180 : 54 Ind App 68 (PC) holding that mortgagee is entitled to be paid the rent due to him before he can be redeemed) * (Vol. 23) 1936 All 708 (710).]

(b) Where the lease formed part of the mortgage transaction the claim for rent accruing under the lease is a claim arising under the mortgage. (Vol. 31) 1944 Pat 5 (7, 8) : 22 Pat 320 (DB) * (Vol. 8) 1921 Bom 285 (287) : 45 Bom 174 (DB) * (Vol. 7) 1920 Bom 202 (203) : 44 Bom 366 * (Vol. 13) 1925 Mad 127 (128) * (Vol. 14) 1927 Cal 884 (885) : 55 Cal 104 (DB) * (Vol. 27) 1940 Mad 59 (60) * (Vol. 30) 1943 Pat 282 (283) (DB) : 22 Pat 207 (DB).

(c) Mortgagee holding two distinct mortgages on two different properties of the same mortgagor—Sale of one of the properties in execution of a money decree obtained on the mortgage of the other property is not barred. (Vol. 12) 1925 Bom 239 (240) : 49 Bom 208 (DB).

[See however ('09) 4 Ind Cas 1126 (1126) (DB) (Mad) (Section 99 T. P. Act, applies to cases where there is more than one mortgage).]

(d) A claim for costs awarded to a usufructuary mortgagee in a suit for possession against the mortgagor is not a claim arising under the mortgage ('13) 35 All 518 (520) (DB).

(e) Usufructuary mortgage of the right to receive offerings at temple—Subsequent agreement to pay mortgagee annual sum in lieu of mortgage—Held annual sum formed an essential part of mortgage money and decree under the bar in R. 14. (Vol. 6) 1919 All 435 (438, 439) : 41 All 399 (DB).

(f) Mortgage debt can be realised by selling the property by mortgagee who holds both mortgage-decree and money decree on an independent claim for the consolidated sum under both. ('10) 6 Nag L R 20 (26) * ('09) 31 All 114 (115) (DB).

(g) The equity of redemption can be sold in execution of a simple money decree obtained by the mortgagee for land revenue paid by him to save the property. (Vol. 22) 1935 Rang 438 (439) * (Vol. 23) 1936 Rang 47 (48).

[5] Whether usufructuary mortgage and lease back to mortgagor of the property form part of the same transaction depends on the facts of each case. (Vol. 31) 1944 Pat 5 (7, 8) : 22 Pat 320 (DB).

^a 15. All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

[Cf. T. P. Act, Old S. 96.]

[a] *Substituted* by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929) Section 7.

PROVINCIAL AMENDMENT.

OUDDH

Read the present Rule 15 as Rule 15 (1) and add as sub-rule (2), the following:

"(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realized by sale of that property in execution of that very decree."

O. 34 R. 14 (contd.)

10. Order 2 Rule 2.—[1] Order 2 R. 2 is no bar to the second suit brought under this rule for sale of the property. (Vol. 27) 1940 Pat 283 (285) (DB) * ('04) 7 Oudh Cas 314 (317) (DB) * (Vol. 21) 1934 Cal 73 (76) : 60 Cal 1197 (DB) * ('90) 3 C P L R 170 (171, 172) * (Vol. 8) 1921 Mad 183 (191) : 44 Mad 301 (DB) * (Vol. 1) 1914 All 98 (98) : 36 All 264 (DB) * (Vol. 17) 1930 Al. 286 (287) : 51 All 974 (DB) * ('21) 63 Ind Cas 303 (307, 308) (DB) (Pat) * (Vol. 24) 1937 Mad 501 (502).

[See (Vol. 15) 1928 Lah 269 (270) (DB).]

[But see (Vol. 20) 1933 Bom 51 (54, 55) : 57 Bom 346 (DB).]

[2] Even after the execution of the decree for money has become time-barred, the mortgagee can sue for sale under this rule. ('87) 9 All 23 (25, 26) (DB).

[3] Prior decree providing for sale of mortgaged property though not strictly drawn up in the form prescribed for a decree for sale, rule does not apply and second suit for sale is barred by *res judicata*. ('97) 24 Cal 473 (487, 488) (DB) * (Vol. 9) 1922 Bom 237 (237) : 46 Bom 848 (DB).

[4] If the mortgagee sues for sale but is content to take only a simple money decree he cannot subsequently sue again for sale. (Vol. 30) 1933 Rang 153 (159, 160) * ('09) 31 All 19 (20) (DB) * ('06) 33 Cal 849 (852) (DB).

[5] Mortgagee suing for sale or foreclosure—Court holding that the money claimed was not charged on the property and passing simple money decree—Decree can be executed against the mortgaged property as fresh suit for sale on mortgage would be barred by *res judicata*. (Vol. 23) 1936 All 8 (9).

[6] This rule relieves the mortgagee only from the restrictions imposed by O. 2 R. 2 on the splitting of remedies, and not as to splitting of claims. ('01) 25 Bom 161 (167, 168) (DB) * (09) 2 Ind Cas 265 (266) (DB). (a) (Principal also becoming due—Separate suit for interest and principal is barred.)

[See (Vol. 17) 1930 Lah 143 (149) (DB). (Interest alone can be claimed where the principal has not become due.)]

11. Consent decree.—[1] This rule does not apply to cases in which a decree for money is passed against the mortgagor by consent. (Vol. 12) 1925 Sind 156 (157) (DB) * ('10) 32 All 377 (380) (DB) * (Vol. 22) 1935 Nag 129 (130) (DB) * (Vol. 11) 1924 Cal 645 (646) (DB) * (Vol. 9) 1922 Cal 35 (38) (DB) * ('11) 9 Ind Cas 939 (939) (DB) (Mad).

[But see (Vol. 19) 1932 All 439 (440) : 54 All 763 (DB).]

12. "Decreee."—[1] An order directing a surety for a judgment-debtor to pay the amount secured is not a decree for the payment of money within the meaning of this rule. (Vol. 4) 1917 Pat 489 (489) (DB) * (Vol. 4) 1917 Pat 596 (596) : 2 Pat L Jour 197 (DB). (Property pledged by surety can be sold in execution.)

ORDER 34 RULE 15—Synopsis.

1. Scope.
2. Charge.
3. Priority as between rent decree and mortgage decree.
4. Invalid mortgage, if creates a charge.
5. Right of maintenance.
6. Claim for dower.
7. Charge created by decree.
8. Mortgage by deposit of title-deeds.
9. Charges enforceable by sale.
10. Charge on the surplus sale proceeds of sale for arrears of revenue or rent.

1. Scope.—[1] By force of this rule O. 34, R. 6 applies also to suits to enforce charges. (Vol. 29) 1942 Sind 83 (85) : I L R (1942) Kar 168 * (Vol. 17) 1930 Oudh 10 (11) (DB) * ('05) 2 All L Jour 379 (385) (DB) * (Vol. 19) 1932 Cal 775 (780, 781) : 59 Cal 1314 (DB).

[2] If a charge-holder first sues and obtains a money decree for a claim arising under the charge, a second suit for sale in enforcement of the charge will not be barred by O. 2, R. 2 by virtue of O. 34 R. 14. (Vol. 27) 1940 Pat 283 (285) (DB).

[3] Where a charge is declared by a decree, which in its terms is final and itself provides for the sale of the properties in case of default, no fresh final decree is necessary. (Vol. 17) 1930 Nag 17 (19).

[4] The effect of a decree on a charge is the same as that of a decree on a mortgage. (Vol. 24) 1937 Cal 129 (138) : I L R (1937) 1 Cal 203 (DB).

2. Charge.—See Notes on S. 100, Transfer of Property Act, 1882, (A. I. R. Commentaries.)

3. Priority as between rent decree and mortgage decree.—See Notes on S. 73 and S. 101, Transfer of Property Act, (A. I. R. Commentaries.)

4. Invalid mortgage, if creates a charge.—See *Ibid*, S. 100.

5. Right of maintenance.—See *Ibid*, S. 100.

6. Claim for dower.—See *Ibid* S. 100.

^a ORDER XXXV.

I N T E R P L E A D E R.

Plaint in inter-
pleader suits.

1. In every suit of interpleader the plaintiff shall, in addition to other statements necessary for plaintiffs, state—

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;
- (b) the claims made by the defendants severally; and
- (c) that there is no collusion between the plaintiff and any of the defendants.

[1882—S. 471; 1877—S. 471; R. S. C., O. 57 R. 2. See S. 88, C. P. C.]

[a] This Order does not apply to the proceedings under the U. P. Tenancy Act, 1939 (17 [XVII] of 1939); See Sch. 2, List I of that Act.

2. Where the thing claimed is capable of being paid into Court or placed in the custody of Payment of thing the Court, the plaintiff may be required to so pay or place it before he can be claimed into Court. entitled to any order in the suit.

[1882—S. 472; 1877—S. 472.]

O. 35 R 15 (contd.)

7. Charge created by decree.—[1] Where a decree orders the payment of money and also creates a charge on certain properties the effect is not to negative the right of the decree-holder to proceed against the other properties of the judgment-debtor unless such a right is expressly or by necessary implication excluded by the terms of the decree. (Vol. 29) 1942 Sind 83 (84, 85) : I L R (1942) Kar 168 * (Vol. 28) 1941 Bom 90 (92) : I L R (1941) Bom 299 (FB) (Remarks (Vol. 28) 1941 Bom 71 : I L R (1941) Bom 186, disapproved.)

[2] Simple money decree with declaration of charge—Decree amounts to personal decree and no fresh personal decree is necessary—Decree-holder not bound to proceed in first instance against properties specifically charged. (Vol. 28) 1941 Bom 90 (91) : I L R (1941) Bom 299 (FB) [(Vol. 7) 1920 Bom 95 overruled.] * (Vol. 19) 1932 Cal 775 (781) : 59 Cal 1314 (DB) * (Vol. 29) 1942 Nag 58 (59) : I L R (1942) Nag 159 * (Vol. 29) 1942 Sind 83 (84, 85) : I L R (1942) Kar 168.

[But see (Vol. 30) 1943 Bom 158 (159) : I L R (1943) Bom 292 [(Vol. 28) 1941 Bom 71 : I L R (1941) Bom 136, followed and held not overruled on this point by (Vol. 28) 1941 Bom 90 : I L R (1941) Bom 299 (FB)].

[But see (Vol. 22) 1935 Nag 129 (131) (DB).]

[3] Decree for possession in favour of vendee declaring charge for vendor's unpaid price—Decree also providing that if price was not paid within certain time vendor was to recover it by sale of the charged property—Held that the decree could not be construed as a personal decree and the vendor was not entitled to enforce it by sale of other properties unless he obtained a personal decree under Order 34 Rule 6. (Vol. 27) 1940 Bom 276 (277) : I L R (1940) Bom 640.

[4] Decree providing concurrent remedies—Charged properties need not be exhausted first. (Vol. 20) 1933 Mad 33 (33) : 56 Mad 343.

[5] Compromise decree for maintenance—Charge created on certain immovable property and decree providing that in case of default decree-holder might proceed either against the charged property or against other immovable property—Held she could not pro-

ceed against movable property. (Vol. 26) 1939 Bom 206 (207). (Distinguishing (Vol. 20) 1933 Mad 33 : 56 Mad 343.

[6] Solenamah—Decree creating charge and incorporating personal liability in case of deficiency—Fresh personal decree held not necessary. (Vol. 19) 1932 Cal 775 (781) : 59 Cal 1314 (DB).

[7] Where a decree for maintenance is passed charging several properties the Court can regulate the order in which the properties should be proceeded against. The Court has the same power in such cases as it has got in executing a mortgage decree for sale. (Vol. 31) 1944 Nag 25 (27, 28) : I L R (1944) Nag 230 (DB).

[8] As to whether a charge created by decree is one within S. 100 Transfer of Property Act, See notes thereunder.

8. Mortgage by deposit of title deeds.—See Transfer of Property Act, Ss. 58 and 96.

9. Charges enforceable by sale.—[1] The general principle that at a sale under a mortgage decree, the auction-purchaser takes the security free of the mortgage does not apply in the case of recurring charge. In such a case even though the charged property may be sold in execution of a decree for arrears already accrued, the liability in respect of future payments will ordinarily remain after the sale and the property in the hands of the auction-purchaser will be subject to the charge in respect of such payments. (Vol. 27) 1940 Cal 60 (62).

10. Charge on the surplus sale proceeds of sale for arrears of revenue or rent.—See Notes on S. 73 Transfer of Property Act.

ORDER 35 RULE 2—Note 1.

[1] Where the subject-matter of the dispute is a chose in action its disposition as the Court may direct is a sufficient compliance with the rule. (1890) 24 Q. B. D. 275 (279), Robinson v. Jenkins.

[2] Party not ready to pay or deliver the property to one of the defendants but disputing his title. Suit is not an interpleader suit. (Vol. 9) 1922 Cal 133 (139) (DB).

3. Where any of the defendants in an interpleader-suit is actually suing the plaintiff in Procedure where respect of the subject-matter of such suit, the Court in which the suit against defendant is suing the plaintiff is pending shall, on being informed by the Court in which the plaintiff interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

[1882—S. 476. Cf. R. S. C., O. 57 R. 6.]

Objects and Reasons.

"The Committee think that the institution of the interpleader suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter and they have modified section 476 [of the 1882 Code] so as to give effect to this view."—S. O. R.

Procedure at first hearing.

4. (1) At the first hearing the Court may—

- (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or
- (b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

- (a) that an issue or issues between the parties be framed and tried, and
- (b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner.

[1882—S. 473; 1877—S. 473. Cf. R. S. C., O. 57 R. 7.]

5. Nothing in this Order shall be deemed to enable agents to sue their principals, or Agents and tenants tenants to sue their landlords, for the purpose of compelling them to may not institute inter- interplead with any persons other than persons making claim through such pleader suits. principals or landlords.

O. 35 R. 2 (contd.)

[See also ('94) 18 Bom 231 (236).]

[3] Plaintiff paying amount in dispute into Court for payment to the right person—Court paying it to the wrong person. Plaintiff fully discharged from liability. (89) 2 C P L R 9 (14).

[4] Original plaintiff in suit discharged—One of rival defendants in interpleader suit made plaintiff—Money paid into court should be kept in custody of Court to be paid over to successful party—Pending suit payment should not be made even on deposit of security. The money paid into Court cannot be handed over to one of the parties pending the suit even on security after the original plaintiff is discharged and one of the rival defendants to the interpleader suit is made a plaintiff. It must be kept under the control of the Court available for payment at any time to the successful party. ('13) 24 Mad L Jour 404 (404, 405).

ORDER 35 RULE 4—Note 1.

[1] The plaintiff is entitled to apply so soon as the pleadings have been completed, for being discharged from the suit. (Vol. 25) 1938 Cal 287 (290) : 1 L R (1938) 1 Cal 53.

[2] Non-appearance of claimants—Plaintiff discharged—Court can restrain defendants by injunction

from proceeding against plaintiff. (Vol. 6) 1919 Bom 15 (16).

[3] The question whether a party to an interpleader issue shall be treated as plaintiff or defendant must be decided by the real merits of the case and not by the mere form of the issue itself. (1886) 16 Q B D 548 (553), *Rhodes v. Dawson*. (Per Lindley, L. J. Referred to in (Vol. 6) 1919 Cal 719 : 46 Cal 156.

[4] Appeal lies from the following :—

(a) Order dismissing the interpleader suit ('09) 33 Mad 220 (221) (DB).

(b) Adjudication upon the claims of the defendants. ('08) 30 All 22 (23, 24).

[5] A suit or an appeal from adjudication upon the claims of one of the defendants against another to the money held by the plaintiff each is chargeable with Court-fees under Art 17 of Sch. II and not under S. 7, Cl. (iv) (a) of the Court-fees Act VII of 1870. (Vol. 8) 1921 Pat 305 (306).

ORDER 35 RULE 5—Note 1.

[1] A railway company is not an agent of the consignor and can file an interpleader suit against the consignor and another party claiming adversely to the consignor. (Vol. 2) 1915 Bom 28 (28) (DB).

Illustrations,

(a) *A* deposits a box of jewels with *B* as his agent. *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader-suit against *A* and *C*.

(b) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for a debt due from himself to *C*. *A* afterwards alleges that *C*'s debt is satisfied, and *C* alleges the contrary. Both claim the jewels from *B*. *B* may institute an interpleader-suit against *A* and *C*.

[1882—S. 474; 1877—S. 474.]

6. Where the suit is properly instituted the Court may provide for the costs of the original Charge for plaintiff by giving him a charge on the thing claimed or in some other effectual plaintiff's costs. way.

[1882—S. 475. Cf. R. S. C., O. 57 R. 15.]

ORDER XXXVI.

SPECIAL CASE.

I. (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

- (a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or
- (b) some property, moveable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them; or
- (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

[1882—S. 527; 1877—S. 527; 1859—S. 328; R. S. C., O. 34 Rules 1, 6 and 9. See S. 90, C. P. C.]

O. 35 R. 5 (*contd.*)

[2] A tenant cannot bring a suit to compel the landlord to interplead with any person other than one making a claim through such landlord. (Vol. 28) 1941 Cal 512 (515) (DB) * (Vol. 6) 1919 Cal 913 (914) (DB).

[3] Tenant passing two *Kabuliats* in favour of two persons in respect of the same land is being threatened by suits by both of them, instituting an interpleader suit praying for declaration as to the rights of the two defendants and under whom he was tenant—*Held*, the suit was not maintainable * ('10) 37 Cal 552 (557) (DB) * ('12) 15 Cal L Jour 653 (655, 656) (DB).

[4] A leasing property to *B*—*B* cannot compel *A* to interplead with *C* who claims to have purchased the property from *A* before the grant of the lease. (Vol. 27) 1940 Bom 414 (415); I L R 1940 Bom 842 (DB). (Confirming on Letters Patent appeal (Vol. 26) 1939 Bom 249; I L R (1939) Bom 333.)

[5] A leasing certain lands to *B*—On *A*'s death two persons claiming rent from *B*, namely *A*'s heir on the one hand and a person who alleges that *A* was only a *Benamidar* for *X* whose heir he is. *Held*, *B* can file an interpleader suit to compel the claimants to interplead. ('09) 33 Mad 220 (225) (DB).

[6] Where a mortgagee does not deny an assignment by him of his rights under the bond to *X* but only contends that it is voidable one, the mortgagor may treat the assignee as entitled to the money and is not bound to bring an interpleader suit. (Vol. 1) 1914 Mad 624 (628) (DB).

ORDER 35 RULE 6—Note 1.

[1] Costs be awarded to original plaintiff will have to be deducted from the fund when it is brought to the court or be made a charge upon the fund or subject-matter. (1883) 1883 W N 176 (176); 19 Q B D 77n, *Searle v. Matthews*. * ('93) 18 Bom 231 (236). * (1863) 1 Mad H C B 360 (361) (DB).

[2] The plaintiff cannot claim costs which have been unnecessarily incurred. (1842) 1 Har 436 (444), *Crawford v. Fisher*. (1864) 9 L T 677 (678). *Scottish Union Insurance Co. v. Steele*.

ORDER 36 RULE 1—Note 1.

[1] The right to state a case for the opinion of the court is not intended to enable parties to refer to the Court any hypothetical questions or matters of mere academic interest involving no substantial interest to the parties (1910) 1910 App Cas 293 (294), *Glasgow Navigation Co. v. Iron Ore Co.* * (1876) 4 Ch D 189 (196, 197), *Bright v Tyndall*.

[2] Parties not providing in agreement for any of undertakings mentioned in rule—Court will not interfere. (Vol. 17) 1930 Bom 232 (233); 54 Bom 825 (DB).

[3] A case is not fit to be decided unless the successful party will be able either to execute the decree or to base a suit upon the decree passed in it. (Vol. 17) 1930 Bom 232 (234, 235); 54 Bom 825 (DB).

[4] Where there are special tribunals to try the question between the parties, a special case cannot be stated for the opinion of the court. Nor will a mere declaration of the rights involved in such a case be a fit point for a special case. (Vol. 17) 1930 Bom 232 (234, 235); 54 Bom 825 (DB).

2. Where the agreement is for the delivery of any property, or for the doing, or the

Where value of sub- refraining from doing, any particular act, the estimated value of the property
ject-matter must be to be delivered, or to which the act specified has reference, shall be stated in
stated. the agreement.

[1882—S. 528; 1877—S. 528; 1859—S. 328.]

3. (1) The agreement, if framed in accordance with the rules hereinbefore contained, may

Agreement to be filed be filed in the Court which would have jurisdiction to entertain a suit, the
and registered as suit. amount or value of the subject-matter of which is the same as the amount
or value of the subject-matter of the agreement.

(2) The agreement, when so filed shall be numbered and registered as a suit between one or
more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of
them as defendant or defendants; and notice shall be given to all the parties to the agreement,
other than the party or parties by whom it was presented-

[1882—S. 529; 1877—S. 529; 1859—S. 329.]

4. Where the agreement has been filed, the parties to it shall be subject to the

Parties to be subject jurisdiction of the Court and shall be bound by the statements contained
to Court's jurisdiction. therein.

[1882—S. 530; 1877—S. 530; 1859—S. 330.]

5. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner,

Hearing and dis- and the provisions of this Code shall apply to such suits so far as the same are
posal of case. applicable.

(2) Where the Court is satisfied, after examination of the parties, or after taking such
evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon
the judgment so pronounced a decree shall follow.

[1882—S. 531; 1877—S. 531; 1859—S. 331.]

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Application of Order.

1. This Order shall apply only to—

(a) the High Courts of Judicature at Fort William, Madras and Bombay;

a [* * * * *]

O. 36 R. 1 (contd.)

[5] A question which the court is not competent to
decide in an ordinary suit cannot be stated as a special
case. (1882) 9 Q B D 518 (521, 522), *Beasley Local*
Board V. West Kent Main Sewerage Board.

[See also (Vol. 17) 1930 Bom 232 (235) : 54 Bom 825
(DB)].

[6] For instances of questions that can be stated as a
special case, see ('81) 6 Bom 42 (48, 49). (The validity
of a trust deed by a Sanni Mahomedan) * ('86) 10 Bom
415 (417, 420). (Powers of shareholders of a trading
corporation to interfere with directors' discretion as to
declaration of dividend) * ('07) 31 Bom 472 (475, 477).
(Effect of a will by a Parsi upon a deed of settlement
of a subsequent date) * ('90) 17 Cal 786 (803) (DB).
(Whether subscribers to a general family pension fund
are a company, association or partnership for the
purpose of carrying on business other than that of
banking and whether they form a company under S. 4
of the Companies Act, 1882).

ORDER 36 RULE 5—Note 1.

[1] An infant born after a special case is set down
for hearing must be added as a party. (1871) 11 Eq
264 (264).

[See also (1870) 11 Eq 363 (370)].

[But see (1871) 13 Eq 250 (254, 255)].

[2] Suit pending—Parties agreeing to refer dispute
to court and abide by its decision—Decree cannot be
appealed against. ('99) 23 Bom 752 (755) (DB) * (1896)
1896 App Cas 186 (188).

ORDER 37 RULE 1—Note 1.

[1] The provisions of this order are merely rules of
procedure and do not alter in any way the nature of
the suit or jurisdiction of Courts. (Vol. 5) 1918 Low
Bur 135 (135) : 9 Low Bur Rul 69 (DB).

[2] Suits can only be filed in the Courts which have
jurisdiction to try them. ('12) 5 Sind L R 155 (166)
(DB).

(c) the Court of the Judicial Commissioner of Sind; and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

[1882—S. 533.]

[a] Clause (b) which ran “(b) the Chief Court of Lower Burma” has been *repealed* by A. O.

PROVINCIAL AMENDMENTS.

ALLAHABAD

Add the following as clause (e):

“(e) any Court in the province of Agra exercising the powers of a Small Cause Court.”

BOMBAY

Substitute in the heading of Order 37 the words “Summary Procedure” for the words “Summary Procedure on Negotiable Instruments.”

[29-9-1936.]

CALCUTTA

(i) In clause (c) the word ‘and’ shall be omitted.

(ii) After clause (c) the following clause shall be inserted, namely:

“(cc) all Civil Courts (except Courts of Small Causes) in the districts of Chittagong, Dacca, Pabna and 24 Parganas; and”

[29-11-1933.]

LAHORE

After clause (d) the word “and” and new clause (e) were added:

“and

(e) the Courts of the District Judge and Subordinate Judges of the First Class of the Delhi Province; and the Courts of the District Judges and Subordinate Judges of the First Class in the Civil Districts of Lahore and Amritsar in the Province of the Punjab.”

[5-7-1923 and 29-7-1932.]

MADRAS

Insert the following as clause (b):

“(b) The Madras City Civil Court.”

2. (1) All suits upon bills of exchange, hundies or promissory notes may, in case the Institution of summary suits upon bills of exchange, etc. plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

O. 37 R. 1 (contd.)

[3] Court not one to which provisions of this order have been applied. Suit is to be tried in ordinary manner. (12) 5 Sind L R 155 (166, 167) (DB).

[4] Small Cause Court having exclusive jurisdiction in suit but no power under this order. Suit should be filed in ordinary way in Small Cause Court. (12) 5 Sind L R 155 (166) (DB) * (Vol. 5) 1918 Low Bur 135 (135): 9 Low Bur Rul 69 (DB).

[5] Subordinate Judge exercising small cause powers cannot try suit summarily on ground of his being Subordinate Judge. (Vol. 15) 1928 Mad 517 (518): 51 Mad 491 (DB).

[6] Clause (e) added by the Lahore High Court is not *ultra vires*. (Vol. 14) 1927 Lah 174 (176): 8 Lah 156 (DB).

ORDER 37 RULE 2—Note 1.

[1] Defendant not obtaining leave under this rule: He cannot appear at hearing and ask for instalments. He can apply for instalments under O. 20 R. 11 (2) or under O. 37 R. 4. (Vol. 13) 1926 Bom 250 (251): 50 Bom 262 (DB). (or under O. 37 R. 4 of the Civil Procedure Code.)

[But see (Vol. 20) 1933 Rang 245 (246): 11 Rang 424 (DB)].

[2] Where in a summary suit against a firm under O. 30 of the Code, a partner enters appearance, he should obtain leave to defend as required by this rule. (Vol. 13) 1926 Bom 585 (588): 50 Bom 665 (DB).

[3] Suit against firm.—Leave refused to partner.—Decree may be passed against firm but not against partner.—Suit against firm and individual partners.—Partner failing to obtain leave.—Decree may be passed against him.—Decree may also be passed against firm. (Vol. 27) 1940 Sind 19 (22).

[4] Before granting a decree under this rule the Court should be satisfied that the defendant has had full opportunity to obtain leave to defend. (66) 1 Ind Jur (NS) 395.

[5] These words embody an exception to the fundamental principle that a plaintiff must prove the case with which he comes to Court and dispense with such proof in view of the special nature of the documents mentioned in the rule. (Vol. 4) 1917 Cal 269 (272, 273): 43 Cal 1001 (SB).

[6] Admissions as regards allegations in plaint does not apply to interest.—Summary suit on *hundi*—No agreement for interest—Plaintiff claiming plaint interest at rate of $\$3 \frac{1}{3}$ p. c. per annum—Interest held could not be deemed to have been admitted. (Vol. 20) 1933 Mad 299 (300): 56 Mad 398 (DB).

(2) In any case in which the plaintiff and summons are in such forms, respectively the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree—

"[(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the Court may order under section 84 of this Code; and

(c) for such sum for costs as may be prescribed;

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.]

[1882—S. 532; 1877—S. 532.]

[a] *Substituted* by the Negotiable Instruments (Interest) Act, 1926 (30 [XXX] of 1926), Section 4, for the original words.

Objects and Reasons.

The *Explanation* to section 532 of the 1882 Code ran as follows: "This section is not confined to cases in which the bill, hundi or note sued upon, together with mere lapse of time, is sufficient to establish a *prima facie* right to recover."

"The explanation to section 532 was inserted to negative the effect of the decision in I. L. R. 1 Calcutta 130, but its meaning, as it stands, is obscure. The Committee have, therefore, deleted the explanation, and added words in the body of the rule which will remove the doubts at which the explanation was aimed."—S. O. R.

PROVINCIAL AMENDMENTS

BOMBAY

(i) The following shall be *substituted* for sub-rules (1) and (2) :

"(1) All suits upon bills of exchange, hundis or promissory notes and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, or in suits in which the landlord seeks to recover possession of immovable property, with or without a claim for the rent or mesne profits against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent or against persons claiming under such tenant may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaintiff and summons are in such forms respectively, the defendant shall not defend the suit unless he enters an appearance and obtains leave from a Judge as hereinafter provided so to defend; and in default of his entering an appearance and of his obtaining such leave to defend, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for possession and/or as the case may be for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith."

[29-9-1936.]

(ii) Sub-rule (3) shall be *deleted*.

[9-8-1940]

O. 37 R 2 (*contd.*)

[7] See the following cases:—(Vol. 9) 1922 Cal 513 (514): 49 Cal 716. (No rate specified—Only six per cent. can be granted notwithstanding oral agreement to the contrary) * (Vol. 20) 1933 Mad 299 (300): 56 Mad 898 (DB). (Summary suit on hundi—Interest not mentioned—Plaintiff is not entitled to

interest asked for in plaint, but only as provided in S. 80 of the Negotiable Instruments Act) * (1903) 30 Cal 446 (448). (Plaintiff not entitled to any interest unless such interest is specified in the promissory note itself) * (1970) 6 Mad H C R 257 (257). (Plaintiff entitled to claim the interest demandable on the legal construction of the instrument).

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

[1882—S. 533; 1877—S. 533.]

PROVINCIAL AMENDMENTS

BOMBAY

The following shall be substituted for Rule 3:

"3 (1) The plaintiff shall together with the writ of summons under Rule 2 serve on the defendant a copy of the plaint and exhibits thereto, and the defendant may at any time within ten days of such service enter an appearance. The defendant may enter an appearance either in person or by an attorney. In either case an address for service shall be given in the memorandum of appearance, and, unless otherwise ordered, all summonses, notices, or other judicial process required to be served on the defendant shall be deemed to have been duly served on him if left at his address for service. On the day of entering appearance, notice of the appearance shall be given to the plaintiff's attorney (or if the plaintiff sues in person to the plaintiff himself) either by notice delivered at, or sent by prepaid letter directed to, the address of the plaintiff's attorney or of the plaintiff, as the case may be.

(2) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment returnable not less than ten clear days from the date of service supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(3) The defendant may at any time within ten days from the service of such summons for judgment by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend the suit. Leave to defend may be granted to him unconditionally or upon such terms as to the Judge appear just.

(4) At the hearing of such summons for judgment if (a) the defendant has not applied for leave to defend or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith, or if (b) the defendant be permitted to defend as to the whole or any part of the claim the Judge shall direct that on failure to complete the security (if any) or to carry out such other directions as the Judge may have given within the time limited in the order, the plaintiff shall be entitled to judgment forthwith.

(5) The provisions of sec. 5 of the Indian Limitation Act, 1908, shall apply to proceedings taken under this rule."

[9-8-1940.]

LAHORE

The following sub-rule (3) was added.—

"(3) The provisions of sec. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

[15-11-1928.]

ORDER 37 RULE 3—Note 1.

[1] The application for leave to defend must be supported by an affidavit disclosing a defence. (Vol. 6) 1919 Sind 88 (89): 12 Sind L R 70.

[2] If the affidavit discloses a triable issue leave should be granted. (Vol. 11) 1924 Mad 612 (613) (DB) * (Vol. 22) 1935 Mad 43 (44, 45): 58 Mad 116 (DB).

[3] Whether the defence is a legal or an equitable one, the leave should be granted. See ('96) 19 Mad 368 (375).

[4] Leave should not be refused even if the defence does not turn out to be a good one. ('71) 6 Beng L R App 64 (64, 65) * (Vol. 22) 1935 Mad 43 (45): 58 Mad 116 (DB).

[5] If no triable issue is disclosed by the affidavit leave should be refused. (Vol. 15) 1928 Cal 123 (124) (DB) * (Vol. 20) 1933 Lah 440 (441) (DB).

[6] Leave to defend was granted in the following cases:

(a) Where the claim was based on an endorsed promissory note and the defendant pleaded that the endorsement was forgery. (1900) 24 Bom 65 (73) * ('05) 52 Cal 799 (815).

(b) Suit against member of joint Hindu family on a hundi drawn by manager-defendant pleading that no notice of dishonour was given to the drawer. ('96) 20 Bom 488 (490) (DB).

(c) Where the defendant preferred a cross-claim for damages for wrongful arrest before judgment in the very suit instituted against him. ('94) 18 Bom 717 (720).

[7] Leave to defend was refused in the following cases:

(a) On a plea that the plaintiff was only a benamiar for another. ('08) 50 Mad 88 (91) (SB) * ('04) 28 Mad 244 (254) (DB). (Per Davies, J.)

(b) On a plea of partial failure of consideration which was not ascertainable in money without collateral enquiry. ('10) 4 Sind L R 147 (149).

4. After decree the Court may, under special circumstances, set aside the decree, and if Power to set aside necessary stay or set aside execution, and may give leave to the defendant to decree. appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

[1882—S. 534; 1877—S. 534.]

5. In any proceedings under this Order the Court may order the bill, hundi or note on Power to order bill, which the suit is founded to be forthwith deposited with an officer of the etc., to be deposited Court, and may further order that all proceedings shall be stayed until the with officer of Court. plaintiff gives security for the costs thereof.

[1882—S. 535.]

6. The holder of every dishonoured bill of exchange or promissory note shall have the Recovery of costs of same remedies for the recovery of the expenses incurred in noting the noting non-acceptance of same for non-acceptance or non-payment, or otherwise, by reason of such dishonoured bill or note. dishonour, as he has under this Order for the recovery of the amount of such bill or note.

[1882—S. 536; 1877—S. 536.]

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as Procedure in suits. the procedure in suits instituted in the ordinary manner.

[1882—S. 537.]

O. 37 R. 3 (contd.)

(c) Where the defendant pleaded that the note sued on formed part of an account of the mutual dealings between him, the plaintiff and the other parties. ('11) 9 Ind Cas 299 (300) (Sind).

(d) Plea of collateral agreement to discharge a promissory note not inconsistent with the note containing absolute promise to pay. ('96) 19 Mad 368 (375).

(e) A counter-claim for damages caused by the failure of the plaintiff to supply goods of the right sort. ('29) 120 Ind Cas 528 (528) (Sind).

[8] The Court can attach conditions to the grant of leave to defend. (Vol. 25) 1938 Lah 548 (550): 1 L R (1938) Lah 289 (DB) * (Vol. 23) 1936 Mad 246 (247) * (Vol. 23) 1936 Cal 476 (477).

[9] Where a valid defence or triable issue is disclosed, the leave should be granted unconditionally. (Vol. 22) 1935 Mad 43 (45): 58 Mad 1161 (DB) * (Vol. 22) 1935 Mad 302 (304) * (Vol. 21) 1934 Sind 191 (191).

[10] If the defence is put in only to obtain further time, conditions should be attached to the grant of the leave. (Vol. 11) 1924 Mad 612 (613, 614) * (Vol. 14) 1927 Sind 60 (61) * (Vol. 21) 1934 Sind 191 (191) * (Vol. 23) 1936 Lah 584 (585) (DB).

[11] If the defence is put in only to obtain further time, leave can be granted on the defendant depositing the money into Court. (Vol. 7) 1920 Mad 969 (970) (DB) * ('71) 6 Beng L R App 64 (65) * (Vol. 23) 1936 Lah 584 (585) (DB).

[12] Where money is deposited for obtaining leave to defend, the decretal amount will be a charge on such deposit. (Vol. 5) 1918 Mad 1158 (1158, 1159) (DB).

[See also (Vol. 7) 1920 Cal 525 (526) (DB).]

[13] Order granting leave in Chambers on a condition which the defendant is not able to comply with, is a "Judgment" within the meaning of Cl. 15 of the Letters Patent and hence appealable under that clause. (Vol. 19) 1932 Bom 163 (165): 56 Bom 268 (DB).

[See also (Vol. 17) 1930 Bom 364 (364, 365) (DB)].

[14] A conditional order granting leave under this rule is not a "Judgment" and hence not appealable. (Vol. 2) 1915 Cal 771 (771): 42 Cal 735 (DB) * (Vol. 22) 1935 Rang 245 (246): 13 Rang 239 (DB).

[15] No revision lies from an order under this rule. (Vol. 25) 1938 Lah 548 (549, 550): 1 L R (1938) Lah 289 (DB).

[16] Revision may lie if the Court exercises discretion arbitrarily or perversely. (Vol. 23) 1936 Mad 246 (247).

ORDER 37 RULE 4—Note 1.

[1] A defendant who has not obtained leave to defend will not be allowed to appear at the hearing of the suit. In such cases a decree should follow. Thereafter the remedy of the defendant is to apply under O. 20 R. 11 or to apply under this rule to set aside the decree. (Vol. 13) 1926 Bom 250 (251): 50 Bom 262 (DB) * (1900) 5 Cal W N 259 (262) * ('11) 11 Ind Cas 433 (434) (Sind).

[2] Application to set aside decree—Defendant prevented by sufficient cause from getting leave to defend—Decree can be set aside and defendant allowed to contest claim. ('11) 11 Ind Cas 133 (434) (Sind) * ('69) 3 Beng L R O C 83 (84) * ('96) 23 Cal 573 (575) * ('69) 3 Beng L R App 7 (8, 9).

ORDER 37 RULE 7—Note 1.

[1] The Court has power, under O. 6 R. 17 of the Code, to amend a plaint filed under this order, so as to connect it with an ordinary suit. (Vol. 17) 1930 Lah 559 (560).

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

ARREST BEFORE JUDGMENT.

Where defendant may be called upon to furnish security for appearance.

1. Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

- (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—
 - (i) has absconded or left the local limits of the jurisdiction of the Court, or
 - (ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or
 - (iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or
- (b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance :

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

[1882—Ss. 477, 478; 1877—Ss. 477, 478; 1859—Ss. 74, 75. See Ss. 94 and 95.]

ORDER 38 RULE 1—Note 1.

[1] The rule will not enable a creditor to take out arrest before judgment merely because it would secure easy execution of the decree. ('70) 13 Suth W R 278 (279) (DB).

[2] In order to apply clause (a), it is necessary to show that the defendant has committed or is about to commit any of the acts specified therein with intent to delay the plaintiff or to avoid the process of the Court or to obstruct or delay the execution of any decree that may be passed against him. ('70) 13 Suth W R 278 (279) (DB).

[3] No intention need be proved in cases coming under clause (b). In such cases it is only necessary to show that the circumstances under which the defendant is about to leave British India afford a *reasonable probability* that the plaintiff will be obstructed or delayed in realizing his decree. ('66) 1 Ind Jur (N S) (265) * ('66) 1 Ind Jur (N S) 294n. * ('85) 8 Mad 205 (206, 207).

[See ('87) 14 Cal 695 (702).]

[4] Before the Court can act under this rule, it must have reason to believe, on adequate materials that, unless the jurisdiction is exercised, there is a real danger that the defendant will remove himself or his property from the ambit of the powers of the Court. (Vol. 13) 1926 Mad 584 (584): 50 Mad 27 * ('69) 1 N W P H C R 91 (93) (DB) * ('70) 13 Suth W R 278 (279) (DB) * (1864) 2 Hyde 181 (181).

[5] Where there was reason to believe that the defendants were removing goods and selling them at less than cost price, and that they were evading arrest without furnishing any security, it was held that the rule was properly applied to the case. (Vol. 11) 1924 Rang 361 (361, 362): 2 Rang 362 (DB).

[6] Defendant leaving his place of residence for attendance in criminal Court—Held, order under this rule should not be passed. ('22) 4 Lan L Jour 423 (424).

[7] Before exercising the powers conferred by this rule a Court should be satisfied that the plaintiff's suit is *bona fide*. ('66) Ind Jur (NS) 294n * ('87) 14 Cal 695 (702).

[8] Where the plaintiff is indisputably entitled to a part of his claim the mere circumstance of the rest of the claim being of disputable character does not render the suit *mala fide*. (Vol. 13) 1926 Mad 584 (584): 50 Mad 27 (DB).

[9] Power can be exercised only when plaintiff's claim is unimpeachable. ('87) 14 Cal 695 (702).

[10] The "cause" must be either that he is not going to leave the jurisdiction of the Court, or not for so long a time as will obstruct or tend to obstruct the plaintiff, should he succeed, or that the suit is not a *bona fide* one, or that even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart, in order to embarrass or coerce him. ('66) 1 Ind Jur (N S) 294.

2. (1) Where the defendant fails to show such cause the Court shall order him either to Security. deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

[1882—S. 479; 1877—S. 479; 1859—S. 76. See S. 145.]

3. (1) A surety for the appearance of a defendant may at any time apply to the Procedure on application Court in which he became such surety to be discharged from his by surety to be discharged. obligation.

(2) On such application being made, the Court shall summon the defendant to appear or if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

[1882—S. 480; 1877—S. 480; 1861—S. 24; 1859—S. 78.]

ORDER 38 RULE 2—Note 1.

[1] Court should limit the security to be given as per terms of notice in the warrant for arrest and not order securing for amount claimed in suit, where the warrant directs the demand for a smaller sum. (Vol. 16) 1929 Cal 732 (733) 56 Cal 700 (DB).

[2] Money deposited by defendant arrested before judgment is subject to the lien of the plaintiff in the event of his success and where the defendant becomes insolvent the official receiver cannot appropriate it. But security for appearance of defendant is not so exempt. (Vol. 6) 1919 Mad 607 (609); 41 Mad 1053 (DP).

[3] Judgment-debtor released on furnishing security for his appearance—Surety executing bond for due performance of decree—Held, bond was not in accordance with Court's order and that surety was discharged on the appearance of judgment-debtor on the specified day. (Vol. 1) 1914 Low Bur 54 (55).

[4] Plaintiff applying for arrest of defendant—Defendant's pleader standing surety—Defendant not arrested—Held that surety could not contend that security was illegal because defendant was not arrested. ('68) 1868 Pan Re No. 77 p. 196 (201) (DB).

[5] The fact that the surety bond goes beyond the terms of this rule and provides for the payment of the amount claimed in the suit in the event of a decree being passed against the defendant, will not render the bond unenforceable. ('29) 115 Ind Cas 244 (244) (Mad);

[6] A surety for the appearance of the defendant cannot be relieved of his obligation merely because the decree is a compromise decree. (Vol. 7) 1920 Mad 355 (357); 43 Mad 272 (DB).

[7] Surety bond given for appearance of defendant—Plaint returned for want of jurisdiction—Bond does not cover the suit that is started on the representation of the plaintiff. (Vol. 26) 1939 Mad 933 (934).

[8] The enforcement of the bond should only be made on the application of the judgment-creditor and

then only to the extent of the sum of money found payable under the decree. (Vol. 1) 1914 Sind 144 (144); 8 Sind L R 270 (DB).

ORDER 38 RULE 3—Note 1.

[1] In order that a surety may be discharged under this rule it is essential that the defendant should appear before the Court either voluntarily or in pursuance of a summons or warrant of arrest issued against him under sub-rule (2). (Vol. 7) 1920 Mad 355 (356); 43 Mad 272 (DB) * (Vol. 1) 1914 Low Bur 54 (55).

[2] If the defendant is present in Court under circumstances which exempt him from arrest, the surety will not be entitled to be discharged from his obligation under this rule. (Vol. 7) 1920 Mad 355 (356, 357); 43 Mad 272 (DB).

[3] Appearance of defendant under protection order from insolvency Court is not sufficient to discharge surety. (Vol. 10) 1923 Rang 98 (99).

[But see (Vol. 21) 1934 Mad 24 (25).]

[4] Insolvency of defendant does not release surety from his obligation. (Vol. 15) 1928 Rang 184 (185); 6 Rang 241.

[5] Order under O. 38 R. 3 directing detention of defendant without calling upon him to find fresh security is illegal—Defendant leaving Court in defiance of order is not punishable under S. 225-B Penal Code. (Vol. 16) 1929 Lah 163 (164) (DB).

[6] Arrest before judgment—Surety discharged after passing of decree—Procedure under O. 38 still applies and defendant must be ordered to furnish security. (Vol. 30) 1943 Mad 366 (367).

[7] A surety for the due performance of any decree that may be passed against the defendant cannot apply under this rule for being discharged from his obligation. (Vol. 16) 1929 Lah 435 (436).

[8] Surety enabling judgment-debtor to escape processes by executing surety bond—Only way for discharge of surety is by application under this rule. (Vol. 16) 1929 Bom 190 (192) (DB).

4. Where the defendant fails to comply with any order under rule 2 or rule 3, the Court

Procedure where defendant may commit him to the civil prison until the decision of the suit or, fails to furnish security or where a decree is passed against the defendant, until the decree has been satisfied :

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

[1882—S. 481; 1877—S. 481; 1859—S. 78.]

ATTACHMENT BEFORE JUDGMENT.

Where defendant may be called upon to furnish security for production of property.

5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

[1882—Ss. 483, 484; 1877—Ss. 483, 484; 1859—Ss. 81 to 83. See Ss. 94, 95 and 145. Cf. R. S. C., O. 50 R. 9.]

Objects and Reasons.

"The Committee have omitted the words 'property within the jurisdiction of the Court,' as they have caused a conflict of decisions: and they think, as a matter of policy, there should not be the restriction these words suggest."—S. O. R.

ORDER 38 RULE 4—Note 1.

[1] It is only in the event of a failure to comply with any order under R. 2 or R. 3, *i. e.*, in the event of failure to furnish security or to make a sufficient deposit that the defendant can be committed to custody under this rule. ('70) 13 Suth W R 278 (279) (DB). * (Vol. 11) 1924 Rang 361 (362): 2 Rang 362 (DB).

[2] The whole period of detention before and after decree should not exceed six months. ('83) 7 Bom 431 (436, 437) (SB).

ORDER 38 RULE 5—Synopsis.

Scope, object and applicability.

2. Mortgage suits.
3. Divorce proceedings.
4. Application for leave to sue in forma pauperis.
5. Power of Insolvency Court to attach properties.
6. "Where . . . the Court is satisfied."
7. "Is about to dispose of the whole or any part of his property."
8. "With intent to obstruct or delay."

9. Security for producing property in Court.

10. Extent of surety's liability.
11. Power of Court to extend time for furnishing security.
12. Property situated outside jurisdiction.
13. Effect of attachment.
14. Money deposited into Court in pursuance of the attachment, if liable to rateable distribution.
15. Vesting order in insolvency, how affects attachment before judgment.
16. Right of survivorship, if defeated by attachment.
17. Liability for wrongful attachment.
18. Conditional attachment.
19. Appeal.
20. Forms.

1. Scope, object and applicability.—[1] The object of the provisions for arrest and attachment before judgment is to *prevent* any attempt on the part of the defendant to defeat the realisation of the decree that may be passed against him. (Vol. 28) 1941 Sind 178 (182, 183): 1 L R (1941) Kar 362 * ('70) 13

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Sath W R 9 (11) (FB) * (Vol. 23) 1936 Cal 143 (145).

[2] The rule applies only where the defendant is *about* to dispose of, or remove from the local limits of the jurisdiction of the Court, his properties, and not to cases where he has *already* disposed of them. (Vol. 25) 1938 Pat 161 (162) : 17 Pat 89 (DB) * (Vol. 15) 1923 Lah 772 (772).

[3] This rule may be applied to proceedings other than suits by virtue of S. 141 of the Code, and that therefore a Liquidation Court dealing with proceedings under the Companies Act can make an order under this rule for attachment before judgment. (Vol. 15) 1928 Lah 376 (377).

[But see ('10) 37 Cal 613 (616). (Attachment before judgment being a matter of relief and not procedure, S. 141 cannot be invoked).]

[4] An application under this rule should specify the property to be attached and the estimated value thereof; an application generally for security being taken for the satisfaction of any decree that may be passed, without specifying any property, is not one falling within the scope of the rule. (Vol. 15) 1928 Lah 772 (772).

[5] Attachment before judgment of debt without specifying even approximately its value—Execution against garnishee held improper—Fact that garnishee did not object at the time is no reason for sustaining the irregular execution. (Vol. 29) 1942 Sind 87 (88) : I L R (1942) Kar 173 (DB).

[6] Application for injunction to restrain defendant from withdrawing amounts standing to his credit. Issue of injunction really amounts to attachment before judgment. (Vol. 16) 1929 Rang 94 (94).

[7] Court cannot at once order attachment before judgment. Court must first order security to be given for production of the property or require the defendant to show causes why security should not be given—It is only on the failure of the defendant to give such security or show cause that an attachment can be ordered. (Vol. 29) 1942 Pesh 17 (18) * (Vol. 23) 1936 All 408 (408, 409) : 58 All 884 (DB).

[8] Property attached before judgment—Procedure prescribed by rule not followed—Attachment is not void but merely irregular—Irregularity is cured acquiescence of party adversely affected. (Vol. 32) 1945 Nag 97 (100, 101).

2. Mortgage suits.—[1] Rule applies to mortgage suits. Probability of mortgaged property being insufficient to discharge mortgage debt—Mortgagee entitled to personal decree—Attachment before judgment of other properties of defendant can be ordered. (Vol. 29) 1942 Pesh 17 (17) * (Vol. 18) 1931 Bom 329 (329) * ('94) 16 All 186 (188) (DB). (Court should act with extreme caution in such cases) * (Vol. 19) 1932 Cal 790 (790) (DB) * ('12) 15 Ind Cas 604 (604) (DB) (Cal) * (Vol. 16) 1929 Lah 402 (403) * (Vol. 12) 1925 Pat 291 (291) : 3 Pat 966 (DB) * (Vol. 11) 1924 Rang 361 (362) : 2 Rang 362 (DB). (*Obiter*) * (Vol. 23) 1936 All 408 (408, 409) : 58 All 884 (DB).

[2] Preliminary mortgage decree passed—Plaintiff can apply for attachment under O. 38 R. 5—But a decree in a mortgage suit under S. 15-B of D. Kkhan Agriculturists' Relief Act terminates the suit and

hence thereafter an application for attachment before judgment is not maintainable. (Vol. 30) 1943 Bom 24 (25) (DB).

[3] Application for final decree pending—Application under this rule is maintainable. (Vol. 20) 1933 All 191 (192) : 55 All 179 (DB).

3. Divorce proceedings.—[1] Divorce proceeding under Divorce Act 1869—Court cannot order attachment before judgment—Matter is governed by S. 7 and not S. 45 of that Act. ('10) 37 Cal 613 (616).

4. Application for leave to sue in forma pauperis.—

[1] An application to sue in *forma pauperis* does not become a "suit" until the same has been granted. Court has no jurisdiction to make an order for attachment before judgment under this rule. (Vol. 4) 1917 Cal 852 (853) (DB).

5. Power of Insolvency Court to attach properties.—

[1] Under S. 21, cl. (2) of the Provincial Insolvency Act, 1920, the Insolvency Court can attach the property of the debtor under circumstances similar to those specified in this rule. (Vol. 1) 1914 All 264 (265) : 36 All 65 (DB). (Case under S. 13 (3) of the Insolvency Act, 1907).

6. "Where the Court is satisfied."—[1]

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and should be exercised sparingly and strictly in accordance with the procedure prescribed by the Code. (Vol. 15) 1928 Lah 376 (378) * (Vol. 21) 1934 All 165 (166) * (Vol. 23) 1936 All 408 (409) : 58 All 884 (DB) * (Vol. 23) 1936 Lah 33 (34, 35).

[2] Before a Court can act under this rule there must be definite evidence of present intention to dispose of property with a view to or delay execution of decree—Mere vague allegations are not sufficient. (Vol. 21) 1934 Cal 694 (697) : 61 Cal 814 * (Vol. 9) 1922 Bom 276 (276) : 46 Bom 431 (DB) * (Vol. 11) 1924 Pat 312 (314) (DB) * (Vol. 6) 1919 Mad 20 (20) (DB) * (Vol. 23) 1936 Lah 33 (35) * (Vol. 25) 1938 Pat 161 (162) : 17 Pat 89 (DB).

[3] Court is not restricted to examining attempts at alienations made after the commencement of the action; it is open to it to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances. (Vol. 28) 1941 Sind 178 (182, 184) : I L R (1941) Kar 362 (DB) * ('10) 11 Cal L Jour 19 * ('92) 2 Upp Bur Rul 274 * (Vol. 25) 1938 Pat 161 (162) : 17 Pat 89 (DB).

7. "Is about to dispose of the whole or any part of his property."—[1] Before exercising jurisdiction

under this rule and passing orders for the attachment of properties before judgment, the Court should satisfy itself of the practical certainty of the plaintiff's success and of the existence of a grave danger and of a real fear that a dishonest defendant, undoubtedly liable, is making away with the probable fruits of the judgment. (Vol. 13) 1926 All 406 (408) : 48 All 510. (*Note*—Overruled in (Vol. 18) 1931 All 567 : 54 All 263 (FB) on another point.) * (Vol. 21) 1934 Cal 694 (697) : 61 Cal 814 (DB).

[See also (Vol. 21) 1934 Lah 594 (595) * (Vol. 24) 1937 Rang 292 (293) : 1937 Rang L R 108.]

[2] Mere allegation that defendant is likely to dispose of property is not enough. (Vol. 15) 1928 Lah 376 (378) * (Vol. 20) 1933 All 191 (192) : 55 All 179 (DB).

O. 38 R. 5 (contd.)

[3] Statement that defendant is about to dispose of his property is not sufficient—Sources of such information must be disclosed. (Vol. 13) 1926 Cal 855 (855) (DB).

[4] The fact that a defendant is about to dispose of his property may be established not only by completed transactions of disposal prior to the application but by evidence of intention expressed by the defendant, disposals not completed (but being negotiated), unsuccessful attempts at disposal, etc. (Vol. 28) 1941 Sind 178 (184): 1 L R (1941) Kar 362 (DB).

[5] The word "property" includes property of every description, whether movable or immovable, and whether in the possession of the defendant or some other person on his behalf. ('95) 17 All 82 (85) (DB) * (Vol. 12) 1925 Cal 561 (563) (DB) (Includes debt) * ('01) 3 Bom L R 462 (463) (DB). (Includes Chose in action.)

[6] Attachment of debt—Debt must be one that is accruing or has accrued—it need not be ascertained. (Vol. 12) 1925 Cal 561 (563) (DB).

[7] Word "property" must mean property already in existence, belonging to and at disposal of defendant—Salary not earned or paid cannot be disposed of until at least it becomes payable—It is illegal to attach before judgment moiety of salary of public servant or any employee until it has accrued. (Vol. 24) 1937 Rang 292 (293): 1937 Rang L R 108.

[8] Joint property belonging to a partnership of which the judgment-debtor is a member is not the property of the judgment-debtor and cannot be attached before judgment under this rule. ('07) 9 Bom L R 540 (541) (DB).

8. "With intent to obstruct or delay."—[1] Court must be satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to *obstruct or delay* execution. (Vol. 25) 1938 Pat 161 (162): 17 Pat 89 (DB) * (Vol. 11) 1924 Pat 312 (314) (DB) * (Vol. 2) 1915 All 277 (278): 37 All 423 (DB) * ('97) 21 Bom 278 (278) (DB) * (Vol. 13) 1926 Lah 330 (331, 332) * (Vol. 21) 1934 Nag 169 (171) * (Vol. 21) 1934 Cal 694 (697): 61 Cal 814 (DB). (There must be a present intention) * (Vol. 13) 1926 Cal 855 (855) (DB).

[See also (Vol. 21) 1934 Ondh 429 (430) (DB).]

[2] Intention to obstruct or delay execution cannot be inferred merely from:—

[a] Agreement to sell portion of property. (Vol. 8) 1921 Bom 69 (69): 45 Bom 1256.

[b] The fact that defendant has allowed his properties to be sold in execution or for arrears of revenue. (Vol. 19) 1932 Cal 790 (791) (DB).

[c] The fact that he is running into debts or is executing a mortgage in respect of debt already incurred. (Vol. 14) 1927 Cal 354 (356) (DB).

[3] Attachment cannot be ordered merely because defendant has failed to give undertaking not to transfer property before disposal of suit. (Vol. 15) 1928 Pat 172 (173) (DB). (An undertaking not to transfer the property before disposal of suit.)

9. Security for producing property in Court.—

[1] Security contemplated by this rule has reference only to such property as is capable of being produced in Court. ('95) 17 All 82 (84, 85) (DB).

[2] This rule only contemplates an order for security for producing the property in Court. It does not contemplate the deposit in Court of the property itself or its equivalent in money. (Vol. 28) 1941 Sind 178 (180): 1 L R (1941) Kar 362 (DB).

10. **Extent of surety's liability.**—[1] The surety is liable whether the decree is passed on a compromise or on an award. ('94) 1894 Bom P J 25 (26) (DB). (Compromise) * (Vol. 5) 1918 Sind 53 (54): 11 Sind L R 122 (DB). (Award.)

[See however (Vol. 17) 1930 Bom 122 (124): 54 Bom 118 (DB) (Compromise prejudicial to surety's rights—Surety is discharged.)]

[2] Release of attachment before judgment—Surety not put in possession of property released—Surety is not liable even if decree is passed subsequently. (Vol. 6) 1919 Low Bur 127 (127).

[3] Mere giving of notice by surety that he intends not to be surety any longer will not enable him to withdraw from the guarantee at any time. (Vol. 4) 1917 Cal 699 (699) (DB).

[4] Death of defendant does not operate as discharge of surety. (Vol. 11) 1924 Lah 423 (429) * (Vol. 3) 1916 Bom 55 (56): 41 Bom 402 (DB).

[5] Suit dismissed for default but immediately restored—Surety remains liable. (Vol. 12) 1925 Oudh 592 (592).

[6] Application for attachment before judgment—Court taking security for prospective decretal amount Action is irregular—Surety cannot raise objection as to illegality of bond in execution proceedings. (Vol. 23) 1936 Cal 143 (145).

11. **Power of Court to extend time for furnishing security.**—[1] Court has power to extend the time for furnishing the security. (Vol. 10) 1923 Cal 639 (641): 50 Cal 215 (DB).

12. **Property situated outside jurisdiction**—[1] Court can order the attachment of properties whether situated within or without its jurisdiction. (Vol. 13) 1926 Lah 330 (331) * ('11) 10 Ind Cas 794 (795) (Low Bur) * (Vol. 15) 1928 Lah 376 (377) * (Vol. 18) 1931 Rang 279 (280): 9 Rang 561 (DB).

[But see (Vol. 1) 1914 Upp Bur 17 (18): 2 Upp Bur Rul 16 * (Vol. 5) 1918 Cal 911 (912) (DB). (Attachment of debt not payable within jurisdiction from person beyond jurisdiction.)]

[2] Attachment of property situate outside jurisdiction of Court—Proper procedure is to transmit order of attachment to the District Court in whose jurisdiction the property is situate. (Vol. 28) 1941 All 212 (214). (Order of attachment cannot be sent directly to any other Court—Attachment under order so sent is invalid—Procedure of sending precept under S. 46 is not applicable) * (Vol. 13) 1926 Bom 278 (278) (DB).

[3] Court cannot order attachment of properties outside British India. (Vol. 18) 1931 Lah 723 (724): 13 Lah 206 (DB) * (Vol. 12) 1925 Mad 1100 (1101) (DB).

O. 38 R. 5 (contd.)

13. Effect of attachment.—[1] Attachment of property—Debtor collecting profits of such property is not liable to account for them. ('69) 12 Suth W R 391 (392, 393) (DB).

[2] The attachment of a debt does not prevent the creditor from *swinging* for the debt. ('92) 14 All 162 (168) (DB) * ('95) 17 All 198 (211): 22 Ind App 81 (PC) * (Vol. 5) 1918 Cal 631 (632) (DB).

[3] An attachment before judgment without complying with the provisions of R. 5 is *ultra vires* and does not come in the way of an alienation pending such attachment. (Vol. 9) 1922 Nag 238 (239).

[But see (Vol. 25) 1938 Lah 49 (51, 52): I L R (1937) Lah 756 (DB). (Order is mere irregularity and not nullity—Third party cannot ignore it and enforce mortgage against claims under attachment.)]

[4] Attachment before judgment does not create right or interest in land attached. (Vol. 28) 1941 Bom 1 (2): I L R (1941) Bom 34 (DB).

[5] Attachment does not operate as a charge. (Vol. 21) 1934 All 165 (168).

14. Money deposited into Court in pursuance of the attachment, if liable to rateable distribution.—[1] Attachment before judgment of money and movables by several creditors—Money realised before passing of decrees—Money stands to credit of all suits—Creditors obtaining decrees before any of them apply for payment are entitled to rateable distribution. (Vol. 9) 1922 Mad 236 (236) * ('09) 13 Cal W N 1177 (1179) (DB) * ('69) 4 Ben L R 63 (72) (FB).

[2] Attachment before judgment does not give plaintiff any priority over another who attaches in execution and may be defeated by a decree-holder who attaches in execution and applies for payment. ('06) 33 Cal 639 (643) * (Vol. 2) 1915 All 275 (276): 37 All 578 (DB) * (Vol. 10) 1923 Mad 505 (509): 46 Mad 506 (SB) * ('88) 12 Bom 400 (406, 407).

[3] Money paid by a surety after the decree-holder takes out execution is also liable to rateable distribution. (Vol. 9) 1922 Cal 19 (20, 21).

[4] Attachment before judgment released on security of some of the items attached—Decree passed—Plaintiff is entitled to preferential right and can execute decree against security. (Vol. 7) 1920 Mad 409 (409, 410) (DB).

15. Vesting order in insolvency, how affects attachment before judgment.—[1] Attachment before judgment prior to insolvency of defendant does not give plaintiff priority over the Official Receiver. ('66) 1 Ind Jur (NS) 325 (373) * (Vol. 20) 1933 Cal 625 (626) (DB). (*Obiter*) * ('66) 2 Bom H C R 146 (159) (DB) * (Vol. 17) 1930 Sind 127 (128) (DB).

[2] Defendant paying money into Court for raising attachment—Subsequent insolvency of defendant does not give plaintiff charge over money as against Official Receiver. (Vol. 4) 1917 Mad 743 (744): 39 Mad 903 (DB) * (Vol. 3) 1916 Cal 531 (532) (DB).

16. Right of survivorship, if defeated by attachment.—[1] Death of judgment-debtor after attachment before judgment but before it is converted into one in execution—Right of survivorship of other members prevails over attachment. (Vol. 1) 1914 Bom 256 (257): 38 Bom 105 (DB) * (Vol. 11) 1924 Pat 465 (467): 3 Pat 250 (DB).

[But see (Vol. 13) 1926 Mad 72 (77) (DB). (Right of survivorship is defeated as soon as decree is passed) * (Vol. 1) 1914 Mad 118 (118). (Do.)]

[2] Death of judgment-debtor before decree—Attachment before judgment will not defeat right of survivorship. (Vol. 30) 1943 Mad 149 (149, 150): I L R (1943) Mad W N 1015 (1016) * (Vol. 11) 1924 Pat 465 (467): 3 Pat 250 (DB).

17. Liability for wrongful attachment.—[1] A suit is maintainable for damages for wrongful arrest or attachment. ('95) 1895 Pun Re. No. 86, p. 407 (DB).

[2] Suit for damages for wrongful attachment—Plaintiff must show that attachment was withdrawn in his favour. (Vol. 19) 1932 Cal 821 (822): 59 Cal 1073 (DB).

[3] General and special damages may be awarded according to the circumstances of the case. ('09) 32 Mad 170 (DB).

[4] Suit for wrongful attachment—Cause of action accrues on date of wrongful seizure and not on date when seizure is declared wrongful. (Vol. 17) 1930 Mad 635 (637): 53 Mad 621 (DB).

[5] Application for compensation cannot be entertained unless the order of attachment is set aside. (Vol. 21) 1934 Mad 638 (639).

18. Conditional attachment.—[1] "Conditional attachment" means an immediate attachment of a provisional kind conditioned to become plenary if security is not furnished or cause shown according to the terms of the order. ('81) 5 Bom 643 (644) (DB).

[2] Power given by this rule to make an alternative order directing defendant within a specified time to furnish security or to appear and show cause carries with it the power to confirm the order that security be furnished. (Vol. 10) 1923 Cal 629 (641): 50 Cal 215 (DB).

[3] A conditional order of attachment cannot be made without at the same time making an order directing the defendant to furnish security or to show cause why he should not furnish security; without such an order the order of attachment will be invalid. (Vol. 7) 1920 Cal 526 (527) (DB) * (Vol. 21) 1934 All 165 (167) (DB). (No notice of application to debtor defendant—Defendant not called upon to furnish security—Attachment is *ultra vires* and plaintiff cannot claim benefit of it) * (Vol. 20) 1933 All 759 (761): 55 All 985 (DB).

[See (Vol. 23) 1936 Lah 33 (35).]

[See also (Vol. 24) 1937 Lah 780 (780).]

[4] A conditional order of attachment pending the disposal of an application for the appointment of a guardian cannot be said to be invalid merely because the guardian proposed subsequently comes and states that he is unwilling to act. (Vol. 15) 1923 Mad 1 (2) (DB).

[5] Suit transferred to another Court after conditional order of attachment—Transferee Court can pass further orders. ('10) 23 Mad L Jour 980 (981) (DB).

19. Appeal.—[1] An order under this rule is not a "judgment" and is not appealable as such under the Letters Patent. (Vol. 12) 1925 Rang 267 (268): 3 Rang 307 (DB) * ('67) 7 Suth W R 508 (508) (DB) * ('98) 1898 All W N 18 (19) (DB).

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails

Attachment where to furnish the security required, within the time fixed by the Court, the cause not shown or Court may order that the property specified, or such portion thereof as security not furnished. appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

[1882—S. 485; 1877—S. 485; 1859—S. 84.]

O. 38 R. 5 (contd.)

[2] An order granting an application for attachment before judgment without issuing notice to the defendant under sub-rule (1) of this rule can be deemed to be one under R. 6 and is therefore appealable under O. 43 R. 1 Cl. (q). (Vol. 23) 1936 Lah 33 (35).

[3] Defendant depositing in Court the value of the property sought to be attached—Court directing the money to remain as security—The order was held in the circumstances of the case to be an order for attachment under R. 6 and as such appealable. (Vol. 23) 1941 Sind 178 (180); I L R (1941) Kar 362 (DB).

[4] Notice under R. 5—No order of attachment—Order after hearing parties that no action is necessary is not appealable. (Vol. 31) 1944 Nag 30 (31); I L R (1943) Nag 794.

20. Forms.—[1] Where, on an application under this rule before judgment, the Court instead of issuing a notice in form No. 5, Appendix F, issues a notice to show cause in the general form, the provisions of this rule are not complied with and the Court's action amounts to an irregularity. (Vol. 21) 1934 All 456 (457) (DB).

[2] For form of security, see Appendix F, Form No. 6.

ORDER 38 RULE 6—Note 1.

[1] A conditional order of attachment passed under R. 5 has effect only until the defendant furnishes security or appears to show cause. (Vol. 1) 1914 All 511 (511); 36 All 181 (DB).

[See (Vol. 26) 1939 Bom 492 (492).]

[2] An unconditional order of attachment under this rule can be passed only if the defendant fails to show cause why he should not furnish security or on his failure to furnish the security required. (Vol. 14) 1927 Cal 354 (355) (DB) * (Vol. 7) 1920 Cal 526 (527) (DB) * ('12) 15 Ind Cas 804 (605) (Cal) (DB) * (Vol. 1) 1914 All 511 (511); 36 All 181 (DB).

[3] The question whether there has been a failure to show cause or furnish security is one that must be judicially determined before drawing up the writ of attachment. (Vol. 14) 1927 Cal 354 (355) (DB).

[4] Where a conditional order of attachment before judgment has been issued under R. 5 it is not necessary to issue or serve a fresh warrant of attachment after the conditional order has been made absolute. (Vol. 21) 1934 Cal 251 (252) (DB).

[5] Where in order to avert an attachment, security is furnished, the Court has got power under this rule to cancel the security on cause being shown why the security should not be furnished. ('81) 5 Bom 634 (644, 646) (DB).

[6] An attachment actually made after judgment cannot be deemed in law to be made before judgment simply because it happens that the application for such attachment was made before the judgment was passed. (Vol. 23) 1936 Mad 651 (652) * (Vol. 24) 1937 Mad 84 (90) (DB).

[7] The mere fact that the Court does not pass an order making a conditional attachment made under R. 5 absolute, does not make such attachment ineffectual. (Vol. 25) 1938 Cal 236 (237).

[8] An order under this rule is appealable under O. 43 R. 1 Cl. (q). (Vol. 12) 1925 Rang 267 (268); 3 Rang 307 (DB) * ('99) 21 All 291 (292) (DB) * (Vol. 19) 1932 All 269 (270) (DB) * ('97) 21 Bom 273 (278) (DB) * (Vol. 10) 1923 Cal 639 (640); 50 Cal 215 (DB) * (Vol. 15) 1923 Lah 445 (445) * (Vol. 23) 1936 Lah 33 (35).

[9] Order for security and order for attachment combined if such order leads to doubt as to competency of appeal, benefit of doubt goes to appellant. (Vol. 14) 1927 Cal 354 (356) (DB).

[10] Interim attachment under R. 5 ordered—Defendant showing cause—Order rejecting application for attachment is appealable. (Vol. 30) 1943 Bom 24 (25) (DB).

[11] Order directing security to be furnished is not appealable. (Vol. 10) 1923 Cal 639 (640); 50 Cal 215 (DB) * (Vol. 21) 1934 Lah 594 (594).

[12] Notice under R. 5—No Order of attachment—Order after hearing parties that no action is necessary is not appealable. (Vol. 31) 1944 Nag 30 (31); I L R (1943) Nag 794 (DB) * (Vol. 3) 1916 Cal 367 (288) (DB) * (Vol. 20) 1933 All 557 (553) (DB) * (Vol. 22) 1935 Pat 219 (220); 14 Pat 1 (DB).

[13] Defendant appearing in answer to notice and giving undertaking not to alienate property—Order closing petition is appealable. ('28) 1928 Mad W N 125 (127).

[14] Objection to attachment raised by third person—Order disposing of objection is not appealable. (Vol. 25) 1938 Nag 321 (322); I L R (1940) Nag 509.

[15] The question whether a certain property can be attached, having regard to the provisions of S. 60 can be raised in the appeal. (Vol. 20) 1933 Cal 757 (757); 60 Cal 1351 (DB).

[16] Fact that appellate Court might have taken view different from that of lower Court is no ground for interference in appeal. (Vol. 21) 1934 Cal 694 (697); 61 Cal 814 (DB).

[17] Appeal does not become infructuous because of passing of decree in plaintiff's favour. (Vol. 30) 1933 Cal 757 (757); 60 Cal 1351 (DB).

[18] A security bond executed by a defendant under this rule can be enforced in execution. A suit under S. 67 of the Transfer of Property Act is not necessary to enforce it. (Vol. 21) 1934 Cal 64 (67); 60 Cal 1298 (DB).

Mode of making
attachment.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

[1882—S. 486; 1877—S. 486; 1859—S. 85.]

8. Where any claim is preferred to property attached before judgment, such claim shall be

Investigation of claim to investigated in the manner hereinbefore provided for the investigation of property attached before claims to property attached in execution of a decree for the payment of money.

[1882—S. 487; 1877—S. 487; 1859—S. 86. See O. 21 R. 58.]

9. Where an order is made for attachment before judgment, the Court shall order the

Removal of attachment attachment to be withdrawn when the defendant furnishes the security when security furnished required, together with security for the costs of the attachment, or when or suit dismissed. the suit is dismissed.

[1882—S. 488; 1877—S. 488; 1859—S. 87.]

ORDER 38 RULE 7—Note 1.

[1] Attachment before judgment is to be made in manner provided for attachment in execution, i.e., in manner provided in O. 21. (Vol. 21) 1934 Cal 251 (252) (DB) * (Vol. 26) 1939 Bom 508 (511) * (Vol. 24) 1937 Cal 375 (375) * (Vol. 22) 1935 All 490 (491).

[2] An attachment before judgment of immovable property must be effected in the manner provided by O. 21 R. 54 by a prohibitory order. (Vol. 14) 1927 Cal 885 (886); 55 Cal 545 (DB) * (Vol. 26) 1939 Bom 508 (511) * (Vol. 26) 1939 Pat 81 (83) (DB).

[See (Vol. 28) 1941 All 41 (41): I L R (1941) All 39 (DB)].

[See also (Vol. 24) 1937 Cal 375 (376)].

[3] Attachment before judgment of debt must be made in manner provided by O. 21 R. 46 Court cannot enquire into truth or genuineness of debt. (Vol. 19) 1932 Mad 169 (169).

[See (Vol. 20) 1933 All 481 (482) (DB)].

[4] Where there is no positive evidence that the attachment was not effected in accordance with law, the Court gives effect to the presumption regarding the regularity of official acts. (Vol. 18) 1931 Cal 763 (766); 58 Cal 598.

[See (Vol. 24) 1937 Cal 375 (376)].

[5] Mere order for attachment is not enough—Prescribed for malities must be actually gone through. (Vol. 26) 1939 Bom 508 (511).

[See also (Vol. 24) 1937 Mad 84 (90) (DB)].

[See however (Vol. 6) 1919 Mad 752 (753): 42 Mad 1 (DB)].

[6] The rule only refers to the manner of effecting the actual attachment. It does not refer to the authority of ordering the attachment. (Vol. 28) 1941 All 212 (215).

ORDER 38 RULE 8—Note 1.

[1] Investigation of claims to property attached before judgment—Procedure provided by O. 21 R. 58 to 63 should be followed. ('67) 2 Agra 141 (141) (DB) * (Vol. 20) 1933 Nag 297 (298) * ('68) 3 Agra 272 (272) (DB) * (Vol. 24) 1937 All 635 (636) (DB).

[See also (Vol. 1) 1914 All 264 (265): 36 All 65 (DB)].

[2] Claimant must show that at date of attachment he had some interest in or was possessed of property attached. (Vol. 18) 1931 Cal 162 (162).

[3] Court investigating claim can go into question of title, if necessary. (Vol. 16) 1929 Pat 747 (748) * (Vol. 14) 1927 Sind 114 (115).

[4] Orders passed on claim under this rule are governed by O 21 R 63 of the Code (Vol. 18) 1931 Rang 279 (280): 9 Rang 561 * (Vol. 2) 1915 All 275 (277): 37 All 575 (DB) * (Vol. 24) 1937 All 635 (636) (DB).

[5] Objections raised by a defendant also may be investigated under this rule. (Vol. 24) 1937 All 635 (636) (DB).

[6] Official Assignee of defendant's property can prefer claim under this rule. ('95) 20 Bom 403 (406, 407) (DB).

[7] Assignee of decree attached before judgment is competent to prefer claim. ('09) 33 Mad 62 (65) (DB).

[8] Attachment before judgment of debt—Objection to such attachment that debt did not exist is not one under R. 8. (Vol. 20) 1933 All 481 (481).

[9] Order refusing to release property attached before judgment—No revision lies. ('93) 15 All 405 (407).

ORDER 38 RULE 9—Note 1.

[1] An order for attachment before judgment falls with the suit when it is dismissed and is not revived by the subsequent restoration of the suit or by the dismissal being reversed in appeal. (Vol. 17) 1930 Mad 514 (520): 53 Mad 334 (FB) (overruling (Vol. 15) 1928 Mad 940) * ('88) 10 All 508 (511, 513) (DB) * (Vol. 5) 1918 Cal 39 (40): 45 Cal 780 (784) (DB) * ('70) 14 Suth W R 384 (384) (DB) * (Vol. 12) 1925 Cal 1147 (1148) (DB) * (Vol. 14) 1927 Rang 310 (310, 311): 5 Rang 492 (DB) * (Vol. 18) 1931 Rang 281 (282, 283): 9 Rang 472 * (Vol. 24) 1937 All 682 (683) * (Vol. 26) 1939 Mad 167 (168) * (Vol. 22) 1935 Nag 222 (223): 31 Nag L R 426.

[See (Vol. 16) 1929 Rang 94 (94)].

[See also (Vol. 21) 1934 Nag 169 (170)].

[See however (Vol. 22) 1935 Mad 335 (366, 367): 58 Mad 721 (FB). (Attachment revives on restoration of suit dismissed for default) * (Vol. 12) 1925 Oudh 592 (592) (Do) * (Vol. 30) 1943 Mad 515 (516, 517) (Attachment revives on suit being restored in review)].

[2] Attachment ceases on the abatement of the suit and is not revived by the setting aside of abatement. (Vol. 15) 1928 Cal 234 (235) (DB).

Attachment before judgment not to affect rights of strangers nor bar decree-holder from applying for sale.

10. Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

[1882—S. 489; 1877—S. 489; 1859—S. 89.]

11. Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

[1882—S. 490; 1877—S. 490.]

O. 38 R. 9 (contd.)

[3] The raising of attachment on the success of claim petition is only provisional and the attachment revives on the claim suit by creditor being decreed in his favour. (Vol. 31) 1944 Mad 126 (127, 128).

[4] Claim against attachment before judgment dismissed—Suit subsequently dismissed but decreed in appeal—Second claim by the same person against attachment in execution of appellate decree dismissed—Claim suit can be filed within one year from such dismissal. (Vol. 12) 1925 Cal 1147 (1148) (DB).

[5] A claim suit under O. 21 R. 63 does not abate by the dismissal of the suit in which the attachment was effected before judgment. (Vol. 3) 1916 Mad 295 (296) (DB).

[6] The rule is not exhaustive as to the circumstances under which an attachment before judgment will come to an end. (Vol. 28) 1941 Sind 13 (14): I L R (1940) Kar 454 (DB).

ORDER 38 RULE 10—Note 1.

[1] A stranger to whom the property has been transferred before attachment is not affected by the attachment. (Vol. 15) 1928 Bom 545 (546) (DB) * (Vol. 18) 1931 Rang 49 (50): 8 Rang 494 (DB).

[2] A receiver of the property who is not a party to the suit is not affected by the attachment. (Vol. 16) 1929 Bom 279 (281) (DB).

[3] Agreement for sale of a property entered into before attachment—Right of the purchaser to have the conveyance executed is not affected by the attachment. (Vol. 30) 1943 Bom 27 (30) * (Vol. 28) 1941 Bom 198 (199, 200): I L R (1941) Bom 290 (DB) * (Vol. 15) 1928 Pat 199 (200) (DB) * (Vol. 3) 1916 Cal 927 (928) (DB) * (Vol. 23) 1936 Nag 163 (165): I L R (1936) Nag 172.

[See also (Vol. 24) 1937 Nag 143 (145): I L R (1939) Nag 266.]

[4] A puisne mortgagee is not affected in respect of surplus sale proceeds of the property in Court after satisfying prior mortgage by an attachment before judgment effected subsequent to the mortgage. (Vol. 4) 1917 Mad 692 (692).

[5] An attachment does not confer any title, charge, lien or priority in the property in favour of the person attaching it. (Vol. 28) 1941 Bom 198 (199): I L R (1941) Bom 290 (DB) * (Vol. 21) 1934 Pat 413 (417): 13 Pat 735 (DB) * (Vol. 2) 1915 All 275 (276): 37 All 575 (DB).

[6] The property can be attached and sold in execution of any other decree against the same judgment-debtor. (Vol. 21) 1934 Cal (426) (DB) * (Vol. 8) 1921 Bom 219 (219): 45 Bom 360 (DB) * (Vol. 3) 1916 Cal

371 (372) (DB) * (Vol. 30) 1943 Bom 145 (145, 146) * ('70) 6 Mad H C R 135 (136) (DB) * (Vol. 8) 1921 Pat 409 (409) (DB) * (Vol. 13) 1926 Rang 85 (87).

[7] Attachment made before the money is actually deposited in Court will not entitle the person attaching to apply to Court for payment to him. (Vol. 13) 1926 Mad 1104 (1105).

[8] The rule applies also where the property attached is cash and no question of sale of the property can arise. (Vol. 27) 1940 Oudh 80 (80): 15 Luck 287.

ORDER 38 RULE 11—Note 1.

[1] An attachment before judgment remains in force till a specific order by Court raises it. (Vol. 15) 1928 Bom 444 (446) (DB) * (Vol. 20) 1933 Cal 757 (757): 60 Cal 1351 (DB) * (Vol. 12) 1925 Mad 1047 (1043) * (Vol. 6) 1919 Pat 454 (463) (DB) * ('99) 26 Cal 531 (534).

[2] Where there is attachment before judgment re-attachment is not necessary to execute the decree. ('69) 1 N W P H C R 172 (186) (DB) * (Vol. 15) 1929 Bom 321 (323): 53 Bom 543 * (Vol. 15) 1928 Bom 545 (547) (DB) * (Vol. 14) 1927 Cal 240 (242) (DB) * ('02) 29 Cal 773 (777) (DB) * ('09) 31 All 527 (528) (DB) * (Vol. 8) 1921 Mad 163 (167): 44 Mad 902 (FB) * (Vol. 8) 1921 Pat 140 (141): 6 Pat L Jour 532 (DB) * (Vol. 11) 1924 Mad 210 (211): 47 Mad 176 (DB) * (Vol. 6) 1919 Pat 454 (463) (DB) * (Vol. 24) 1937 Lah 368 (368).

[3] The attachment before judgment becomes one in execution as soon as the decree-holder applies for execution without Court's order. (Vol. 23) 1936 Mad 91 (93): 59 Mad 303 (DB).

[See also (Vol. 24) 1937 Mad 84 (89) (DB). (It is impossible to say in view of observation in (Vol. 11) 1924 Mad 494: 47 Mad 433 (FB) that the mere passing of a decree converts an attachment before judgment into one in execution.)]

[4] An attachment before judgment will not entitle attaching party to rateable distribution unless he applied for execution after getting his decree. (Vol. 28) 1941 Mad 125 (126).

[5] Plaintiff cannot be said to have abandoned an attachment before judgment by the mere act of his reattaching the properties after judgment. (Vol. 16) 1929 Cal 465 (467): 56 Cal 416 (DB) * (Vol. 2) 1915 Mad 336 (336) (DB) * ('12) 16 Ind Cas 387 (387) Mad (DB) * (Vol. 6) 1919 Pat 454 (463) (DB).

[6] Objection on the ground that property proposed to be attached is exempt from attachment need not be taken at the time of attachment before judgment but can be raised at the time of execution of the decree. (1911) 38 Cal 449 (452) (DB) * (Vol. 24) 1937 Pat 245 (245) (DB) * (Vol. 22) 1935 Nag 222 (223, 224): 31 Nag L R 426.

12. Nothing in this Order shall be deemed to authorise the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Small Cause Court
not to attach im-
movable property.

a 13. Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property.

[a] Inserted by the Small Cause Courts (Attachment of Immovable Property) Act, 1926 (1 [I] of 1926), Section 4.

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

TEMPORARY INJUNCTIONS.

Cases in which temporary
injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

[1882—S. 492; 1877—Ss. 492, 503, 504; 1859—S. 92. See Ss. 94 and 95 of this Code and S. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 and R. S. C., O. 50 R. 6.]

O. 38 R. 11 (contd.)

[7] Attachment before judgment—No execution application within the three years of decree—Decree holder loses his remedy—Case is governed not by Art. 181 but by Art. 182, Limitation Act. (Vol. 31) 1944 Mad 561 (564); I L R (1945) Mad 80 (FB) (Overruling (Vol. 11) 1924 Mad 210; 47 Mad 176).

ORDER 38 RULE 12—Note 1.

[1] The word 'agriculturists' in this rule must be interpreted in the same sense in which it is used in Ss. 60 and 61 of the Code and means a tiller of the soil who is unable to maintain himself otherwise. (Vol. 25) 1938 Mad 922 (923).

ORDER 38 RULE 13—Note 1.

[1] Act I of 1926 operates retrospectively and an order for conditional attachment before judgment made before the Act came into force cannot be confirmed and made absolute after the Act came into force. (Vol. 15) 1928 Mad 1173 (1174).

ORDER 39 RULE 1—Synopsis.

1. Injunctions, temporary and perpetual.
2. Scope and principle of the rule.
3. Applicability of the rule to applications for probate or letters of administration.
4. "Any property in dispute in a suit".
5. "In danger of being wasted, damaged or alienated by any party to the suit".
6. Injunction in respect of judicial proceedings.
7. Injunction in respect of elections.
8. Right to worship.
9. Religious office.
10. "Wrongfully sold in execution of a decree".
11. Execution of a decree of a Revenue Court.

12. Disposal of property in fraud of creditors.

13. Against whom injunction can be granted.

14. Who can apply for injunction.

15. Injunctions will be granted only in suit.

16. Injunction in suit for declaration only.

17. Duration of temporary injunction.

18. Effect of temporary injunction.

19. Breach of injunction.

20. Injunction to restrain marriage.

21. Appeal.

22. Revision.

23. Power of High Court—General.

24. Power to restrain party from proceeding with suit in another Court.

25. Power to stay proceedings pending in Subordinate Court.

26. Damages for obtaining injunction without reasonable and probable cause.

1. Injunctions, temporary and perpetual.—[1] An injunction is a judicial process whereby a party is required to do so, or to refrain from doing, any particular act.

[See (Vol. 10) 1923 Lah 48 (53). (An order to a defendant to prepare an inventory and to keep accounts is an order under this rule)].

[2] Preservation of the subject-matter of suit in *status quo* for the time being is the main purpose of injunction. (Vol. 16) 1923 Sind 182 (190); 24 Sind L R 182 (DB) * (1919) Pun L R No. 107 p. 233 (236).

[See (1928) 110 Ind Cas 621 (622) (Nag) (DB).]

[3] A perpetual injunction restrains a party for ever from doing the act specified and is regulated by Ss. 56 to 57 of the Specific Relief Act, I of 1877; perpetual

PROVINCIAL AMENDMENTS.

CALCUTTA

Re-number Rule 1 as Rule 1 (1) and *add* the following as sub-rules (2) and (3) :

"(2) In case of disobedience, or of breach of the terms of such temporary injunction or order, the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold and, out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto."

[5-2-1933.]

QUDH

Delete the words "or wrongfully sold in execution of a decree" in clause (a), and *delete* the word "sale" after the words "damaging, alienation," and *add* the following proviso to the rule :

"Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

PATNA

Substitute the word "the" for the word "a" in line 1 of clause (a) and *add* the following provisos after Rule 1 :

"Provided that no such temporary injunction shall be granted if it would contravene the provisions of Section 56 of the Specific Relief Act (Act I of 1877) :

Provided further that an injunction to restrain a sale, or confirmation of a sale, or to restrain delivery of possession, shall not be granted except in a case where the applicant cannot lawfully prefer, and could not lawfully have preferred, a claim to the property, or objection to the sale, or to the attachment preceding it, before the Court executing the decree."

[8-10-1937.]

SIND

Re-number Rule 1 as Rule 1 (1) and *add* the following as sub-rules (2) and (3) :

"(2) In case of disobedience, or of breach of the terms of such temporary injunction or order, the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold, and out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto."

O. 39 R. 1 (contd.)

injunction can be granted only by a decree after hearing the suit on merits. (Vol. 12) 1925 Cal 233 (235).

[See also (Vol. 19) 1932 Cal 542 (543, 544) : 59 Cal 363].

[4] A temporary injunction ensures only until the disposal of the suit or until the further orders of Court. (Vol. 26) 1939 Rang 321 (327) : 1939 Rang L R 403 (FB).

[5] Granting of temporary injunctions is regulated by O 139 of the Code and can be granted on an interlocutory application at any stage of the suit. (Vol. 12) 1925 Cal 233 (235).

[6] The general principles governing the grant of temporary injunctions are the same as those governing the grant of perpetual injunctions. ('82) 6 Bom 266 (279) * (Vol. 20) 1933 Lah 203 (205) : 14 Lah 330.

[But see (Vol. 21) 1934 All 876 (876) * (Vol. 20) 1933 All 86 (88) (DB) * ('03) 26 Mad 163 (175) (DB) (6 Bom 266 doubted).]

[7] A mofussil Court has power to issue a temporary injunction in a mandatory form. (Vol. 1)

1914 Bom 195 (196, 197) (DB) * (Vol. 13) 1926 Sind 201 (202).

[See also (Vol. 22) 1955 All 460 (481) : 57 All 858 (DB). (Following (Vol. 21) 1934 Cal 402 : 61 Cal 148).]

2. Scope and principle of the rule.—[1] This rule lays down the circumstances under which a temporary injunction can be granted. ('28) 110 Ind Cas 621 (622) (Nag) (DB) * (Vol. 21) 1934 Mad 199 (200, 201) : 57 Mad 635.

[2] Unless the circumstances laid down by the rule exist, a Court has no jurisdiction to grant a temporary injunction. (Vol. 6) 1919 Lah 144 (145) * ('08) 13 Mad Law Jour 302 (304) * (Vol. 3) 1916 Pat 17 (18) : 1 Pat L Jour 560 (DB) * (Vol. 25) 1938 Lah 220 (221) * (Vol. 23) 1936 Mad 276 (277) : 59 Mad 744 (DB).

[3] The granting of an injunction under the rule is purely within the discretion of the Court even where the circumstances laid down by the rule are present. (Vol. 12) 1925 Sind 347 (348) : 21 Sind LR 170 (DB) * (Vol. 21) 1934 Cal 694 (697) : 61 Cal 814 (DB) * (Vol. 23) 1936 Sind 119 (121) : 30 Sind LR 157 (DB).-

O. 39 R. 1 (contd.)

[4] The discretion to grant temporary injunction should be exercised in accordance with reason and on sound judicial principles. ('08) 26 Mad 168 (174) (DB) * (Vol. 9) 1922 Lah 356 (356) * (Vol. 20) 1933 All 86 (90) (DB) * (Vol. 20) 1933 Lah 203 (205, 208) : 14 Lah 330 (That suit would become infructuous if injunction is not given is no reason in law).

[5] A person who seeks a temporary injunction must satisfy the Court that there is a *prima facie* case for him, that the Court's interference is necessary to protect him from irreparable injury, and also that the mischief or inconvenience likely to issue from withholding the injunction is likely to be more than from granting it. (Vol. 17) 1930 Sind 237 (288) : 25 Sind LR 142 (DB) * (Vol. 31) 1944 Sind 107 (109) : ILR (1943) Kar 504 * (Vol. 23) 1936 Pesh 11 (11).

[6] The *prima facie* existence of a right and its infringement are the first condition for the grant of a temporary injunction. ('05) 7 Bom LR 925 (927) * (Vol. 10) 1923 Lah 227 (228) (DB) * (Vol. 20) 1933 Lah 621 (623) * ('85) 7 All 550 (552, 553) (DB) * ('04) 1 All L Jour 527 (528) (DB) * (Vol. 7) 1920 Cal 276 (280) : 46 Cal 1001 (DB) * ('12) 23 Mad L Jour 316 (318) * (Vol. 12) 1925 Sind 347 (348) : 21 Sind LR 170 (DB) * (Vol. 12) 1925 Pat 337 (338, 339) (DB) * (Vol. 18) 1931 Nag 106 (107) (DB) * (Vol. 7) 1920 Cal 540 (541) (DB) * (Vol. 23) 1936 Pat 226 (229) : 15 Pat 404 (DB) * (Vol. 22) 1935 Sind 128 (129) (DB) * (Vol. 26) 1939 Mad 750 (750).

[See however (Vol. 12) 1925 Mad 896 (896) (DB).]

[7] The applicant should also show that irreparable injury will accrue to him if the injunction is not granted. (Vol. 23) 1941 All 76 (77) : ILR (1941) All 69 (DB) * (Vol. 27) 1940 Lah 39 (40) * (Vol. 21) 1934 Cal 694 (697) : 61 Cal 814 (DB) * (Vol. 20) 1933 Lah 621 (623) * (Vol. 7) 1920 Cal 276 (282) : 46 Cal 1001 (DB) * (Vol. 13) 1926 Mad 132 (132) * (Vol. 12) 1925 Sind 347 (348, 349) : 21 Sind LR 170 (DB).

[8] The applicant should also prove that he has no other remedy to protect himself from the consequences of the apprehended injury. (Vol. 7) 1920 Lah 436 (438) (DB) * (Vol. 7) 1920 Lah 97 (98) * (Vol. 8) 1921 Nag 90 (91) (DB) * (Vol. 24) 1937 Nag 137 (138) : ILR (1937) Nag 313.

[9] If the object of the application for injunction is to avoid having to sue for possession and having to pay court-fee accordingly, injunction will be refused. (Vol. 15) 1928 Nag 222 (223).

[10] "Irreparable injury" means one that cannot be adequately compensated for in damages. (Vol. 7) 1920 Cal 276 (282) : 46 Cal 1001 (DB) * (Vol. 24) 1937 Nag 137 (138) : ILR (1937) Nag 313. * ('12) 23 Mad L Jour 316. (It does not mean mere annoyance to a class of people) * (Vol. 33) 1946 Sind 177 * ('02) 24 All 499 (500) (No injunction will be refused merely because it offends the religious feelings of individuals).

[11] Injunction will be granted where injury will inevitably follow. (Vol. 20) 1933 Rang 18 (20) : 11 Rang 47 (DB).

[12] The "balance of convenience" should demand it before injunction can be granted. (Vol. 20) 1933 Nag 153 (154) : 30 Nag LR 306 * (Vol. 17) 1930 Lah 108 (109) * (Vol. 9) 1922 Lah 356 (356) * (Vol. 23) 1936 Pesh 184 (185).

[13] In considering the balance of convenience in the case the Court should weigh the substantial mischief likely to be caused by withholding the injunction with what may result by granting it. (Vol. 21) 1934 Cal 694 (697) : 61 Cal 814 (DB) * (Vol. 1) 1914 Cal 362 (363, 364) : 41 Cal 436 (DB) * ('04) 1 All L Jour 527 (528) (DB) * (Vol. 9) 1922 Lah 356 (356) * ('08) 26 Mad 168 (175) (DB) * (Vol. 11) 1924 Pat 526 (527) (DB) * (Vol. 20) 1933 Sind 26 (26) : 26 Sind LR 335 * ('22) 66 Ind Cas 599 (600) (Lah) * (Vol. 21) 1934 Sind 194 (194, 195) * (Vol. 23) 1936 Mad 202 (203).

[14] Where the Court thinks that pending suit, the subject-matter should be maintained in *status quo* an injunction should be issued (Vol. 15) 1928 Sind 82 (83, 84, 85) : 21 Sind LR 368 * (Vol. 1) 1914 Cal 362 (364) : 41 Cal 436 (DB) * (Vol. 3) 1916 Cal 782 (783) (DB) * (Vol. 9) 1922 Lah 356 (356) * (Vol. 13) 1926 Mad 166 (167) * ('19) 1919 Pun LR. No. 107 p. 233 (236) * (Vol. 14) 1927 Mad 188 (189).

[15] A temporary injunction should not be granted on the balance of convenience alone without there also being a *prima facie* case in favour of the applicant. (Vol. 14) 1927 Mad 188 (189).

[16] An interim injunction should not be granted merely because the defendant against whom it is asked for would be no worse off for it. (Vol. 23) 1936 Pat 226 (229) : 15 Pat 404 (DB).

[17] In the following cases it was held that temporary injunction may be refused.

(a) Delay. (Vol. 20) 1933 Lah 203 (205, 206) : 14 Lah 330 * (Vol. 3) 1916 Cal 782 (783) (DB) * ('98) 20 All 345 (348) * (Vol. 7) 1920 Cal 276 (280, 281) : 46 Cal 1001 (DB) * (Vol. 20) 1933 Sind 26 (26) : 26 Sind LR 335.

[See ('85) 7 All 550 (552, 553) (DB).]

(b) An order over the execution of which the Court cannot watch and which they cannot enforce. (Vol. 12) 1925 Sind 347 (348) : 21 Sind LR 170 (DB).

(c) Restriction on the rights of a person who by virtue of his employment is entitled to exercise it. (Vol. 6) 1919 Mad 240 (240) (DB).

[18] Suit for the issue of a perpetual injunction is not necessary to grant temporary injunction. (Vol. 25) 1938 Pesh 67 (67).

[19] A temporary injunction in a suit for perpetual injunction ought not to be refused where such refusal would defeat the object of the suit. (Vol. 5) 1918 Cal 495 (495) (DB).

[20] The possibility of a perpetual injunction being refused is no ground for refusing a temporary injunction. (Vol. 12) 1925 Lah 628 (629) (DB) * (Vol. 19) 1932 Cal 353 (356) (DB) * (Vol. 32) 1945 Cal 44 (47) : ILR (1944) 1 Cal 181.

[21] Where there is no chance at all of a perpetual injunction being granted, a temporary injunction may be refused. (Vol. 10) 1923 Pat 133 (133, 134) (DB) * (Vol. 20) 1933 Lah 203 (205) : 14 Lah 330.

[See (Vol. 19) 1932 Bom 166 (167) : 56 Bom 254 (DB).]

[22] An Appellate Court can grant temporary injunctions in regard to appeals pending before it. ('88) 10 All 80 (82, 83) * ('88) 1888 All WN 46 (46).

[See ('87) 1887 All WN 197 (198).]

O. 39 R. 1 (contd.)

[23] The provisions of O. 39 apply also to proceedings in liquidation. (Vol. 13) 1926 Lah 525 (527) (DB).

[24] Refusal by one judge does not bar his successor from granting temporary injunction when warranted by a change in circumstances. (Vol. 27) 1940 Lah 39 (40).

[25] High Courts have inherent jurisdiction to grant temporary injunctions independently of the Code. ('09) 33 Bcm 469 (474) * (Vol. 19) 1932 Mad 180 (181) * ('09) 2 Ind Cas 266 (267) Cal (DB) * (Vol. 26) 1939 Cal 642 (644).

[26] Subordinate Courts have jurisdiction to grant injunction in exercise of their inherent powers. (Vol. 27) 1940 All 241 (241, 242); ILR (1940) All 232 (DB) * (Vol. 27) 1940 All 185 (186, 187); ILR (1940) All 201 (DB) * (Vol. 24) 1937 Sind 315 (316) (DB) (Can grant injunction even in execution proceedings).

[But see (Vol. 9) 1932 Mad 180 (181) * (Vol. 21) 1934 Lah 79 (80) * (Vol. 25) 1938 Mad 190 (191, 192) * (Vol. 32) 1945 Pat 483 (484, 485): 24 Pat 496.]

[27] An order staying proceeding of a decree-holder and directing him to prove his claim in the administration suit is not an injunction in the strict sense of the word. (Vol. 26) 1939 Mad 204 (207).

3. Applicability of the rule to applications for probate or letters of administration.—[1] The rule does not apply to probate proceedings. (1900) 2 Bom LR 797 (798) (DB).

[2] Even if O. 39 applies to probate proceedings no injunction can be granted under this rule as no property is in dispute in such proceedings. (Vol. 2) 1915 Cal 565 (566, 537) (DB) * (Vol. 26) 1939 Cal 642 (644).

4. "Any property in dispute in a suit".—[1] The rule applies where property in dispute in a suit is in danger of being wasted, damaged, etc. ('05) 2 All L Jour 601 (601) (DB) * (Vol. 6) 1919 Lah 144 (145).

[2] "Property in dispute in the suit" means only such property as is the subject-matter of the suit. (Vol. 12) 1925 Lah 628 (629) (DB) * ('02) 5 Oudh Cas 65 (67, 68) (DB) * (Vol. 2) 1915 All 277 (278): 37 All 423 (DB).

[3] In cases of suits for partition of joint estates, the whole estate is the subject of the suit. ('90) 17 Cal 614 (618) (DB).

[See ('66) 6 Suth W R Miso. 1 (2) (DB). (Injunction can issue in respect of defendant's share only).]

5. "In danger of being wasted, damaged or alienated by any party to the suit".—[1] An injunction can be granted only if there is real danger of waste or damage to property in suit from a party to the suit. ('06) 33 Cal 203 (218): 32 Ind App 185 (FC).

[2] Where there is no allegation of danger of such waste or damage, the application should be rejected. ('08) 18 Mad L Jour 302 (304) * (Vol. 12) 1925 Oudh 698 (698) (DB).

[3] The rule does not apply to the mere act of taking possession in execution of a decree. (Vol. 25) 1938 Mad 190 (191).

[4] There must be proof of actual or reasonably apprehended danger of waste or damage, before an

injunction can be granted. ('70) 14 Suth W R 409 (409) (DB) * ('02) 5 Oudh Cas 65 (68, 69) (DB) * (Vol. 6) 1919 Mad 157 (158) * (Vol. 12) 1925 Mad 896 (896) (DB).

[5] In order to show that property is in danger of being alienated, some overt act towards the alienation of the property should be alleged and proved. (Vol. 21) 1934 Cal 694 (696): 61 Cal 814 (DB).

[6] In the following cases it was held that, that there was ground for granting temporary injunction.

(a) Danger to estate by extravagant alienation by the life holder, apparent. (Vol. 12) 1925 Lah 628 (628, 629) (DB).

(b) Nearest reversioner entering into compromise decree with Hindu Widow—Suit by remote reversioner to set it aside. (1884) 10 Cal 225 (231).

(c) Suit for specific sum of money—Defendant admitting his intention to invest in trade. (1870) 13 Suth W R 95 (96) (DB).

(d) Suit for redemption of English mortgage—Sale by defendant under his power of sale. (1877-78) 2 Bom 252 (255, 256) (DB).

[7] In the following cases no injunction has granted under the rules.

(a) Where the property was enjoyed by a person entitled to it. (Vol. 21) 1934 All 772 (774) (DB).

(b) Appointment of co-mutawalli by first mutawalli the grantor of the wakt. (Vol. 3) 1916 All 68 (73, 74) (DB).

(c) Apprehended interference with the collection of rent and breach of peace by the defendant. (Vol. 13) 1926 Cal 604 (605) (DB).

(d) Enforcement of a mortgage against the property. (Vol. 26) 1939 All 643 (645): 1 L R (1939) All 825.

[8] The words "by any party" in cl (a) include the plaintiff. (Vol. 26) 1939 Mad 495 (496).

6. Injunction in respect of judicial proceedings—

[1] An injunction against proceeding with any judicial proceedings can be granted only to avoid multiplicity of proceedings and not otherwise. ('95) 18 Mad 338 (341) (DB) * ('75) 14 Beng L R 352 (358, 359) (DB).

[But see (Vol. 8) 1921 Pat 92 (93): 6 Pat L Jour 268 (DB)].

[2] A Court can issue injunction in respect of proceedings pending in a foreign Court, against a party residing within its jurisdiction. ('09) 36 Cal 233 (237) * (Vol. 7) 1920 Cal 798 (798).

[See however (Vol. 15) 1928 Mad 491 (492) (DB) (Only the High Court has such powers)].

[3] A Civil Court in the mofussil cannot issue an injunction restraining proceedings in a Criminal Court. ('09) 2 Ind Cas 266 (268) Cal (DB) * ('07) 30 Mad 400 (401) (DB).

[4] The High Court can restrain criminal proceedings in proper cases. ('96) 23 Cal 610 (617) (DB) * ('04) 31 Cal 858 (861, 862) (DB).

[5] High Court in exercise of its equity jurisdiction can restrain party from executing a decree even in a case of Co-ordinate jurisdiction. ('80) 5 Cal 86 (96) (S B). (On review from 4 Cal 380).

[See (Vol. 25) 1938 Oudh 87 (88): 14 Luok (DB). (In this case the Oudh Chief Court thought it would

O. 39 R. 1 (contd.)

not be justified in staying proceedings in execution in a Court situated in another Province.]

[6] Courts should be careful to prevent their machinery being used to delay a decree-holder in another suit in obtaining the fruits of his decree. ('88) 10 All : 80 (82).

[7] An injunction in respect of a judicial proceedings should not be issued except in strong cases or unless the facts fall within the express provisions of Order 39. ('74) 92 Satb W R 506 (507) (DB) * (Vol. 1) 1914 Bom 148 (149) (DB). (See under O. 21 R. 10: Injunction restraining delivery of possession should not be granted.) * (Vol. 9) 1922 Bom 385 (386) : 46 Bom 939 (DB).

[8] Under the provisions of the Specific Relief Act a permanent injunction restraining a party from executing a decree in another Court can be granted. ('91) 14 Mar 167 (168) (DB) * (Vol. 11) 1924 Nag 413 (414, 415) * ('91) 14 Mad 425 (429, 430) (DB).

7. Injunction in respect of elections.—[1] Except under exceptional circumstances a candidate for election to a local board ought not to be allowed to get the help of Civil Courts to stop an election. (Vol. 20) 1933 Mad 103 (103).

8. Right to worship.—[1] Owner of property which is under religious use of others cannot prevent such others from exercising their worship on it subject to the restriction he can do what he likes with it. (Vol. 10) 1923 Pat 209 (211, 212) (DB).

[2] Where the act or user for religious purposes amounts to an actionable wrong, it can be restrained by an injunction. (Vol. 15) 1928 Sind 82 (84, 85) : 21 Sind L R 368.

9. Religious office.—[1] Obstruction to performance of religious duty can be restrained by an injunction. ('97) 21 Bom 821 (822) (DB) (3 Bom 232 distinguished) * ('88) 11 Mad 450 (452) (DB).

[2] An injunction restraining the employment of a priest or forcing the services of such priest upon a section of a community cannot be passed. ('79) 3 Bom 252 (253) (DB) * (Vol. 14) 1927 Mad 1070 (1070).

[3] Unjustifiable changes by a trustee altering the character of temple can be restrained. ('07) 30 Mad 158 (162, 165, 166) (DB).

[4] Use of new seal of religious office extending the rights which were available under the old one be restrained. ('99) 22 Mad 189 (193) (DB).

10. "Wrongfully sold in execution of a decree."—[1] Pending a suit to declare a decree passed is not binding no injunction restraining execution under the decree can be granted. (Vol. 13) 1926 Mad 258 (258) * ('11) 9 Ind Cas 227 (227, 228) Cal (DB) * (Vol. 23) 1936 Mad 276 (277, 278) : 59 Mad 744 (DB) * (Vol. 1) 1914 Bom 148 (149) (DB) (Plaintiff defeated under O. 21 R. 99 and suing under R. 103. Not entitled to injunction against taking of possession) * (Vol. 20) 1933 Sind 118 (119) (DB).

[See however (Vol. 23) 1936 Pat 442 (443)].

[2] A party whose property has been wrongfully attached in execution of a decree against another can obtain injunction restraining the sale pending his suit to declare his rights. (Vol. 1) 1914 Oudh 206 (207, DB) * (Vol. 12) 1925 Cal 233 (235) * ('88) 10 All 80 (81 to 83) (Do.) * ('10) 33 All 79 (82) (FB) (Do.) (26 All 311 must be taken to be overruled) * (Vol. 17) 1930 Lah 108 (109) * (Vol. 25) 1938 Cal 371 (372) (DB) * (Vol. 25) 1938 Pesh 67 (67) * (Vol. 21)

1934 Lah 26 (27, 28). (Suit by decree-holder against successful objector decreed—Objector appealed—Temporary injunction was granted by Appellate Court, staying sale without security from appellant).

[See however (Vol. 25) 1938 Pat 606 (606) * (Vol. 25) 1938 Pat 228 (229) : 16 Pat 738 (DB)].

[3] Where a case comes order this rule, an application for injunction is the proper remedy, and not an application to the executing Court for stay of execution. ('86) 12 Cal 515 (517, 519) (DB) * ('84) 8 Bom 532 (533) (DB).

[4] Where the sale has already taken place, no injunction will be granted restraining such sale. (Vol. 7) 1929 Nag 12 (13, 14) (DB).

[5] Injunction restraining the delivery of possession can be granted where the sale has already taken place. (Vol. 17) 1930 Lah 850 (851).

[See however (Vol. 25) 1938 Mad 190 (191) * (Vol. 26) 1939 Pat 509 (511)].

[6] In granting injunction restraining sales in execution the discretion should be so used as to prevent abuse of the process for fraudulent purposes. ('11) 9 Ind Cas 227 (228) (Cal) (DB) * (Vol. 25) 1938 Cal 371 (372) (DB).

[7] An inferior Court can restrain execution proceedings even in superior Court, in cases covered by R. 1 and 2 ('96) 23 Cal 351 (355, 356) (DB) * (Vol. 12) 1925 Cal 233 (235).

[See however (Vol. 25) 1938 Pat 606 (606)].

11. Execution of a decree of Revenue Court.—[1] Sale in execution of a decree of a Revenue Court cannot be restrained by an injunction. ('94) 16 All 496 (497, 498) (DB).

[See however ('09) 38 Cal 252 (254) (DB) (Decree of Revenue Court executed by Civil Court—Execution can be restrained.) * ('12) 16 Cal L Jour 555 (556) (DB) (Do.).

12. Disposal of property in fraud of creditors.—

[1] Threatened disposal of property in fraud of creditors whether the property is movable or immovable can be restrained. ('94) 16 All 186 (187) (DB).

[2] The threat or intention to remove or dispose of property to defraud creditors must be proved by definite evidence. (Vol. 11) 1924 Lah 718 (718, 719) * (Vol. 4) 1917 All 137 (140).

13. Against whom injunction can be granted. [1]

Injunction cannot be granted against a Court. ('05) 2 All L Jour 601 (601) (DB) * ('85) 11 Cal 146 (149) (DB) * (Vol. 25) 1938 Pat 606 (606, 607) * (Vol. 25) 1938 Lah 220 (221) * (Vol. 23) 1936 Pesh 184 (185) * (Vol. 22) 1935 Pesh 182 (184) (DB).

[See also (Vol. 8) 1921 Pat 92 (93) : 6 Pat L Jour 268 (DB)].

[But see (Vol. 19) 1932 Lah 515 (516)].

[2] Injunction cannot be granted against a stranger to the suit. (Vol. 5) 1918 Pat 582 (582) (DB) * (Vol. 5) 1918 Pat 214 (215) : 3 Pat L Jour 456 (DB) * (Vol. 6) 1919 Lah 144 (145) * (Vol. 13) 1926 Lah 284 (284) * ('98) 2 Cal W N 521 (523, 524) (DB) (But in a proceeding under the Guardians and Wards Act an injunction can be issued to a person who is not a party).

[See also ('11) 36 Mad 414 (417) (Representative suit—Injunction is not binding on those who are not actually parties on record)].

O. 39 R. 1 (contd.)

[3] Where the remedy will be effective, Court can restrain persons within its jurisdiction from doing acts outside its jurisdiction. (Vol. 19) 1932 Mad 705 (706): 55 Mad 966 (DB).

[4] In proper cases, an injunction may be issued even against a person outside the jurisdiction of the Court. (Vol. 30) 1943 Cal 93 (99): 1 L R (1942) 2 Cal 203 * (Vol. 18) 1931 Cal 279 (279, 280): 57 Cal 1280 * (Vol. 27) 1940 All 241 (242): 1 L R (1940) All 232 (DB) * (Vol. 24) 1937 Cal 172 (173). (36 Cal 233 and 38 Cal 405 held impliedly overruled in (Vol. 18) 1931 Cal 279: 57 Cal 1280) * (Vol. 16) 1929 Lah 12 (14) * (Vol. 15) 1928 Bom 175 (176) (DB) * (Vol. 13) 1926 Mad 1126 (1127) * (Vol. 9) 1922 Pat 84 (35): 1 Pat 356 (DB) * (Vol. 13) 1926 Pat 171 (173): 6 Pat 540 (DB).

[See however (Vol. 10) 1923 Pat 209 (210) (DB) * (Vol. 25) 1938 Oudh 87 (88): 14 Luck 1 (DB).

[But see (Vol. 30) 1943 Cal 89 (90): (34 Cal 101; 33 Cal 405 and 36 Cal 233 relied on; (Vol. 18) 1931 Cal 279: 57 Cal 1280; (Vol. 28) 1941 Cal 434: 1 L R (1941) 1 Cal 373 and (Vol. 28) 1941 Cal 670: 1 L R (1941) 1 Cal 490 not followed)].

[5] No injunction will ordinarily be issued against Government officers *bona fide* exercising rights or alleged rights in the course of their duty. (75) 12 Bom H C R 199 (203).

[6] Public bodies cannot be restrained from the *bona fide* exercise of their rights in the exercise of their duty. (75) 3 Mad 201 (211, 212) (DB).

[See (09) 36 Cal 671 (674).]

[7] Where it would amount to a manifest injury to refuse to restrain the public officer or public body from exercising a right the Court can grant injunction. (08) 32 Bom 460 (466) (DB) * (09) 33 Bom 334 (362, 363).

[8] An injunction does not run with the land and cannot, avail against property in the hands of a purchaser. (02) 26 Bom 140 (141) (DB).

[9] An injunction issued against a defendant can be enforced against his legal representatives after his death. (02) 26 Bom 283 (287, 288) (DB).

[10] A co-owner or a co-sharer in possession can be restrained from using the property in a manner which will change the nature of the property. (Vol. 1) 1914 Cal 362 (363, 364): 41 Cal 436 * (Vol. 2) 1915 Cal 29 (30) (DB).

[11] Great caution should be exercised in restraining a co-owner or co-sharer from using property in a particular fashion. (Vol. 15) 1928 Cal 293 (294) (DB).

14. Who can apply for injunction.—[1] A defendant can apply for an injunction against the plaintiff in respect of any act covered by clause (a) of this rule. (Vol. 26) 1939 Mad 495 (496).

15. Injunction will be granted only in suit.—[1] Before an injunction can be granted under this rule.

(a) No injunction can be granted if the suit has not yet been filed or if the suit has been disposed of. (94) 21 Cal 561 (566) * (Vol. 11) 1924 Oudh 345 (347) * (10) 7 Ind Cas 183 (189) (All) (DB) * (85) 11 Cal 146 (149) (DB).

(b) The suit must be pending on the file of the Court granting the injunction. (1864) 2 Bom H C R 98 (100) (SB).

[2] The grant of an interlocutory injunction does not depend on the validity of the suit in which the application is made. (Vol. 24) 1937 Cal 172 (173).

[See however (Vol. 23) 1936 Pesh 184 (185).]

[3] The Court has inherent power to grant a temporary injunction at the instance of a person who has applied for leave to sue as a pauper though there is no regular suit before the Court. (Vol. 27) 1940 All 185 (187): 1 L R (1940) All 201 (DB).

16. Injunction in suit for declaration only.—[1] A temporary injunction can be granted even in a suit for a mere declaration. (Vol. 13) 1926 Lah 523 (523). ((Vol. 9) 1922 Lah 356 followed) * (Vol. 23) 1936 Pat 442 (443).

[2] Injunction cannot be granted in a declaratory suit where the successful plaintiff will have to bring another suit for enforcing the right. (Vol. 13) 1926 Lah 504 (504) (DB).

[3] It is not proper, in a suit for a mere declaration, to grant an injunction staying another suit pending in another Court. (Vol. 12) 1925 Lah 242 (243).

[4] An injunction should not be granted in a suit for declaration where there is no claim for consequential relief or permanent injunction. (Vol. 21) 1934 Cal 694 (696): 61 Cal 814 (DB) * (Vol. 13) 1926 Pat 318 (320) (DB).

[But see (Vol. 25) 1938 Pesh 67 (67).]

17. Duration of temporary injunction.—[1] An order of temporary injunction takes effect only from the time when it is communicated to the party. (Vol. 13) 1926 All 457 (458) (DB) * (Vol. 7) 1920 Nag 12 (13) (DB) * (02) 26 Mad 260 (262) (DB) * (Vol. 6) 1919 All 20 (22): 42 All 98 (DB).

[2] An order for injunction terminates with the suit. (88) 10 All 506 (511) (DB) * (Vol. 22) 1935 Lah 718 (719) (DB) * (Vol. 2) 1915 Cal 173 (175): 42 Cal 550 (DB) * (Vol. 8) 1921 All 99 (101): 43 All 383 (DB). * (Vol. 12) 1925 Lah 258 (258).

[3] Even where the order states its duration to be "until further orders" it terminates with the suit. (Vol. 11) 1924 Mad 178 (179) (DB) * (Vol. 17) 1930 All 387 (388).

18. Effect of temporary injunction.—[1] An alienation made contrary to an order of injunction is not void. (87) 9 All 497 (500) (DB) * (03) 25 All 431 (433) (DB) * (Vol. 1) 1914 Lah 356 (357) (DB) * (Vol. 6) 1919 Mad 772 (773) (DB) * (Vol. 12) 1925 Lah 644 (645): 6 Lah 380 (DB) * (Vol. 16) 1929 Oudh 235 (236, 237): 4 Luck 635 (DB) * (Vol. 17) 1930 All 387 (388) * (Vol. 7) 1920 Nag 12 (13) (DB).

[But see (Vol. 12) 1925 Oudh 424 (424, 425) (DB).]

[2] The party guilty of the breach will be liable for contempt of Court or damages. (Vol. 15) 1928 Lah 639 (639).

[3] An order granting or refusing an injunction under this Order is not a final order within the meaning of clause 30 of the Letters Patent of the Allahabad High Court. (Vol. 28) 1941 All 367 (369): 1 L R (1941) All 666 (DB).

19. Breach of injunction—[1] An injunction must be obeyed while it lasts. (Vol. 2) 1915 P C 106 (110) (PC).

[See however (12) 15 Cal L Jour 147 (150) (DB) (An injunction in matters beyond the jurisdiction of a Court is void and need not be obeyed).]

O. 39 R. 1 (contd.)

[2] Party guilty of disobedience can be proceeded against for contempt under the provisions of R. 2 Cl. (3). (1862) 1 Bom HCR 143 (156) * (Vol. 6) 1919 All 20 (22): 42 All 98 (DB) * (Vol. 21) 1934 Cal 818 (820): 61 Cal 971 (DB) * (Vol. 22) 1935 Pat 274 (275) * (89) 12 Mad 356 (365) (DB) * (Vol. 3) 1916 Cal 340 (340): 42 Cal 1169 (SB) * (Vol. 5) 1918 Mad 340 (341) * (Vol. 17) 1930 All 387 (388).

[But see (Vol. 28) 1941 All 140 (141, 142): I L R (1941) All 295 (DB). (Note.—Sub-rules (3) and (4) have now been repealed by the Allahabad High Court and R. 2-A newly added under which the power of punishment applied to injunctions issued both under R. 1 and R. 2 * (Vol. 32) 1945 Nag 134 (137, 138): I L R (1945) Nag 336.]

[3] The mere act of taking possession in execution of a decree after the Court's order merely stating "notice and interim stay" will not amount to a disobedience of an injunction punishable under O. 39. (Vol. 25) 1938 Mad 190 (192).

[4] A completed execution sale in contravention of an injunction under this rule is not a nullity. (Vol. 25) 1938 Lah 220 (221).

[5] The Court which granted the injunction will be the Court competent to punish disobedience. (Vol. 1) 1914 Cal 815 (816) (DB).

[But see (Vol. 28) 1941 All 140 (143): I L R (1941) All 295 (DB).]

[6] Proceedings against the person disobeying must be set in motion by the aggrieved party and the court cannot act *suo motu* in the matter. ('02) 26 Mad 494 (495) (DB).

[7] Proceedings to enforce injunction cannot be termed as proceedings for contempt. (Vol. 28) 1941 All 140 (141): I L R (1941) All 295 (DB).

[8] The High Court have the power of enforcing obedience of their orders by committing the delinquent for contempt under their Letters Patent. ('83) 7 Bom 1 (4) * ('83) 7 Bom 5 (12, 13) (DB).

20 Injunction to restrain marriage.—[1] The marriage of a bride for a second time to another husband can be prevented by injunction. ('91) 14 Mad 316 (317, 324) (DB).

[2] A Mahomedan bride of age or her relatives cannot be restrained against her second marriage where she has ceased to be the wife of the former husband. (Vol. 6) 1919 All 11 (12): 42 All 134 (DB).

[3] A Hindu woman cannot be restrained from marrying her minor daughter to a third party pending a suit for specific performance of a contract to marry. ('76) 1 Cal 74 (78) (DB).

[4] In a suit by father for injunction restraining his wife from marrying the daughter a temporary injunction pending suit can be granted. ('88) 12 Bom 110 (121, 122).

[See also (Vol. 20) 1933 Nag 62 (64, 66): 23 Nag L R 332 (Injunction against a minor's marriage under S. 12 of the Guardians and Wards Act deemed as one under this Order and breach punished under R. 2, sub-rule (3).]

21. Appeal.—[1] Appeal lies from an order granting or refusing a temporary injunction under this rule. (Vol. 11) 1924 Pat 713 (714) (DB) * (Vol. 20) 1933 Lah 282 (283) * ('13) 18 Cal L Jour 39 (42) (DB). ('13) 35 All 425 (426) (DB) * (Vol. 20) 1933 All 86 (86) (DB).

[2] Appeal lies even against an order made without jurisdiction if purported to have been made under this rule. (Vol. 20) 1933 Lah 73 (74) * (Vol. 21) 1934 Lah 79 (80).

[3] No appeal lies against an order passed under the inherent powers of Court. (1900) 23 Mad 517 (521) (DB).

[4] The appellant should show that the Lower Court acted wrongly in the exercise of its discretion. (Vol. 1) 1914 Cal 531 (532) (DB).

[See (Vol. 20) 1933 Nag 153 (154). (Discretion judicially exercised—Order granting interim injunction should not be disturbed in appeal.

[5] The mere fact that the Appellate Court might have come to a different conclusion is not enough. (Vol. 17) 1930 Sind 287 (288): 25 Sind L R 142 (DB) * (Vol. 21) 1934 Cal 694 (697): 61 Cal 814 (DB) * (Vol. 23) 1936 Pesh 11 (12) * (Vol. 20) 1933 Nag 153 (154).

[6] No second appeal lies from an order under this rule. ('70) 4 Bom L R 138 (139) (DB) * ('01) 24 Mad 447 (449) (DB).

[7] No appeal will lie under O. 43 R. 1 or under the Letters Patent from an order of a single Judge of a High Court, refusing to grant a temporary injunction. (Vol. 7) 1920 Bom 309 (311): 44 Bom 272 (DB).

[But see (Vol. 21) 1934 Cal 713 (714) (DB)].

[8] Order for security and submission of periodical accounts or notice to the opposite party on an application for temporary injunction is not an order under O. 39 R. 1 and is not appealable. ('13) 17 Ind Cas 361 (362) (Cal) (DB) * ('89) 12 Mad 186 (187) (DB). (No orders passed before notice—Does not amount to refusal).

22. Revision.—[1] Revision will not lie on the mere ground of an error in the exercise of jurisdiction. (Vol. 9) 1922 All 441 (441) * (Vol. 20) 1933 All 86 (88, 90) (DB).

[2] An order passed under the inherent powers of the Court is revisable. (Vol. 20) 1933 Lah 73 (74, 75) * (Vol. 21) 1934 Lah 79 (80) * (Vol. 25) 1938 Pat 228 (229): 16 Pat 738 (DB).

[3] Temporary injunction granted in the absence of a *prima facie* case is vitiated by material irregularity and is revisable by the High Court. (Vol. 26) 1939 Mad 750 (750).

[4] Revision lies against an appellate order renewing temporary injunction. (Vol. 2) 1915 Bom 269 (270): 40 Bom 86 (DB).

23. Power of High Court—General.—[1] The High Courts have jurisdiction outside the Code to grant temporary injunctions in suitable cases. ('07) 34 Cal 101 (103) * ('95) 22 Cal 717 (726) * ('09) 33 Bcm 469 (474) * (Vol. 12) 1925 Lah 242 (243) * (Vol. 18) 1931 Cal 279 (281): 57 Cal 1280 * (Vol. 15) 1928 Mad 491 (492) (DB) * (Vol. 19) 1932 Mad 180 (181) * (Vol. 19) 1932 Cal 553 (556) (DB).

[See however (Vol. 20) 1933 Mad 500 (501)—56 Mad 563 (High Court acting in appellate or revisional capacity cannot grant injunctions in cases falling outside the scope of O. 39)].

[2] Where the High Court grants injunction the order will be directed to a party and not to a Court. (Vol. 2) 1915 Bom 146 (148, 149): 39 Bom 604 (FB) * (Vol. 12) 1925 Pat 710 (711) (DB) * ('11) 38 Cal 405 (407).

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, Injunction to restrain the plaintiff may, at any time after the commencement of the suit, and either repetition or continuance of breach. before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

[1882—S. 493; 1877—Ss. 493, 496; 1859—S. 93; R. S. C., O. 50 R. 12.]

PROVINCIAL AMENDMENTS.

ALLAHABAD: *Delete* sub-rules (3) and (4).

[27-9-1941]

Rule 2-A—ALLAHABAD

Add the following as Rule 2A:—

"R. 2A. (1) In the case of disobedience to an injunction issued under Rule 1 or Rule 2, sub-rule (2) or of breach of any terms of any such injunction, the Court in which the suit is proceeding may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months unless in the meantime the Court directs his release,

(2) No attachment under this rule shall remain in force for more than one year at the end of which time, if the disobedience or breach continues the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit and shall pay the balance, if any, to the party entitled thereto."

[27-9-1941.]

O. 39 R. 1 (contd.)

24. Power to restrain party from proceeding with suit in another Court.—[1] High Courts can in equity restrain a party before them from proceeding with a suit in another Court. (Vol. 30) 1943 Cal 93 (94): I L R (1942) 2 Cal 203 * (Vol. 26) 1939 All 643 (646): I L R (1939) All 825 * ('05) 9 Cal W N 748 (749) * (Vol. 2) 1915 Bom 146 (148, 149): 39 Bom 604 (FB) * (Vol. 18) 1931 Lah 65 (66).

[See also (Vol. 27) 1940 All 241 (241, 242): I L R (1940) All 232 (DB). (A and B agreeing to bring suit at particular place—Suit by B at other place—Later A instituting suit at place agreed—Court has power to issue injunction restraining B from proceeding with his suit)].

[See however ('03) 27 Bom 357 (361)].

[2] High Courts have power to restrain a party from proceeding with a suit in a foreign Court, though the power should be exercised with caution. (Vol. 14) 1927 Bom 135 (137, 138) (DB).

[3] An order in restraint of proceeding with a suit in a foreign Court does not prevent the party from doing so, but he can be committed for contempt if he comes within the jurisdiction of the Court ordering the injunction. (Vol. 8) 1921 Bom 128 (129): 45 Bom 550 (DB).

25. Power to stay proceedings pending in subordinate Court.—[1] If sufficient grounds are made out, a High Court has also power to stay proceedings in a Court subordinate to it. ('84) 1884 All W N 352 (353) (DB) * (Vol. 12) 1925 Lah 242 (243) * ('02) 26 Bom 785 (790) (DB) * ('94) 18 Bom 581 (584) (LB) * ('07) 30 Mad 226 (227) (DB) * ('08) 31 Mad 510 (511) (DB).

[2] Even on sufficient cause High Court cannot stay proceedings in a Court not subordinate to it. (Vol. 18) 1931 All 57 (58): 53 All 180.

26. Damages for obtaining injunction without reasonable and probable cause.—[1] The question of reasonable or probable cause is one of fact. (Vol. 20) 1933 Lah 263 (264): 14 Lah 46.

ORDER 39 RULE 2—SYNOPSIS.

1. Scope and principle of the rule.
2. Injunction to restrain breach of contract.
3. "Or other injury of any kind."
4. Grant of injunction on terms.
5. Disobedience of injunction—Effect.
6. Power to grant temporary injunction in mandatory form.
7. Appeal and revision.

O. 39 R. 2 (contd.)

1. **Scope and principle of the rule.**—[1] Where there is no apprehended breach of contract or other injury of any kind, this rule will not apply. (Vol. 17) 1930 Cal 753 (753, 754). (Injunction cannot be granted restraining person from pursuing remedy in the Criminal Court under Cr P C S 488) * (Vol. 20) 1933 Lah 73 (74).

[2] Grant of injunction—Court should be satisfied that plaintiff has *prima facie* case. (Vol. 13) 1926 Lah 589 (590) * (Vol. 20) 1933 Lah 203 (205): 14 Lah 330 * (Vol. 22) 1935 Sind 128 (129) (DB) * (Vol. 21) 1934 Sind 136 (136) * (Vol. 19) 1932 Sind 84 (86): 26 Sind L R 51 * (Vol. 26) 1939 Sind 256 (257) * (Vol. 26) 1939 Sind 17 (19) * (Vol. 31) 1944 Sind 107 (109): I L R (1943) Kar 504.

[3] To grant injunction under this rule, court's interference must be necessary to protect plaintiff from irreparable loss or at least serious injury. (Vol. 7) 1920 Lah 97 (98) * ('88) 12 Bom 110 (117, 122) * (Vol. 20) 1933 Lah 448 (449) * (Vol. 20) 1933 Lah 1046 (1047) (DB) * (Vol. 21) 1934 Sind 136 (136) * ('37) I L R (1937) 1 Cal 882 (886, 889).

[4] Before granting injunction court should be satisfied that balance of convenience is in applicant's favour. (Vol. 21) 1934 Sind 180 (182): 28 Sind L R 161 * (Vol. 20) 1933 Lah 1046 (1047) (DB) * (Vol. 26) 1939 Sind 256 (257) * (Vol. 26) 1939 Sind 17 (21) * (Vol. 23) 1936 Pesh 184 (185) * (Vol. 33) 1946 Oudh 42 (43, 45, 46) * (Vol. 31) 1944 Sind 107 (109): I L R (1943) Kar 504.

[5] Injunction under this rule will be granted if there is no other sufficient remedy open to plaintiff to protect himself. (Vol. 7) 1920 Lah 97 (98, 99) * (Vol. 20) 1933 Lah 592 (592).

[6] Perpetual injunction not asked for—Temporary injunction will be refused. ('12) 16 Cal L Jour 555 (556) (DB).

[7] No chance of perpetual injunction or specific performance being granted—Temporary injunction will not be granted. ('77) 1 Bom 550 (554) * ('82) 6 Bom 5 (7) * ('82) 6 Bom 266 (279, 283) * ('39) 13 Bom 56 (57) * (Vol. 21) 1934 All 876 (876).

[See (Vol. 27) 1940 Cal 446 (469): I L R (1940) 2 Cal 53].

[8] Delay in bringing suit or applying for injunction—Injunction will be refused. ('93) 20 All 345 (348) * (Vol. 20) 1933 Lah 203 (205, 208): 14 Lah 330 * (Vol. 22) 1935 All 106 (110) (DB) * (Vol. 1) 1914 Cal 152 (154): 41 Cal 334 * (Vol. 20) 1933 Sind 26 (26): 26 Sind L R 335.

[9] An injunction under this rule can be issued only against the defendant in the suit and none else. (Vol. 10) 1923 Lah 47 (48) * (Vol. 5) 1918 Pat 532 (532) (DB).

[10] It is not necessary that the defendant should be living within the Court's jurisdiction. (Vol. 18) 1931 Cal 279 (280): 57 Cal 1280.

[11] Generally speaking, Courts will not issue an injunction restraining a candidate from partaking in an election. (Vol. 10) 1923 Lah 47 (48) * (Vol. 13) 1926 Mad 1147 (1147) * (Vol. 21) 1934 Sind 136 (137).

[See also (Vol. 20) 1933 Mad 103 (103).]

[12] A Court holding an enquiry into the validity of an election under the Madras District Municipalities

Act has no jurisdiction to grant an injunction restraining the candidate from taking his seat. (Vol. 11) 1924 Mad 797 (799): 47 Mad 700.

[13] The rule extends to proceedings under the Guardians and Wards Act. (Vol. 1) 1914 Lah 180 (180).

2. **Injunction to restrain breach of contract.**—

[1] The Court can under this rule grant an injunction restraining the commission of any act which will involve a breach of the contract. ('13) 17 Cal L Jour 427 (430) (DB) * (Vol. 13) 1926 Mad 1126 (1127).

[2] Before injunction is granted, the applicant must satisfy the Court that there is a completed contract under which he has acquired a right. ('82) 6 Bom 5 (7) * ('77) 1 Bom 550 (554).

[3] Applicant must show that irreparable injury will be sustained by him unless the injunction is granted. (Vol. 27) 1940 Cal 466 (471): I L R (1940) 2 Cal 53 * (Vol. 7) 1920 Lah 436 (438) (DB).

[4] No Injunction will be granted to restrain marriage or adoption in breach of an agreement to marry or adopt respectively. ('76) 1 Cal 74 (78) (DB) (Marriage). * ('88) 13 Bom 53 (57) (Adoption).

[5] Contract to supply goods exclusively to promisee—Injunction can be granted to restrain breach of contract. ('02) 26 Mad 168 (175) (DB).

[6] Contract to serve promisee exclusively for certain period—Injunction can be granted to restrain its breach. ('91) 14 Mad 18 (22) * ('94) 18 Bom 702 (711) * ('99) 23 Bom 103 (113, 118) (DB).

[7] Contract to buy whole of one's requirements of certain article from plaintiff—Breach can be restrained by temporary injunction. (Vol. 27) 1940 Cal 466 (469): I L R (1940) 2 Cal 53 (36 Cal 354 Relied on).

[8] No injunction will be granted which will have the effect of compelling the employment of any person, in matters requiring services of a personal nature. ('82) 6 Bom 266 (282) * (Vol. 20) 1933 Lah 203 (207): 14 Lah 330.

[9] No injunction will be given where the circumstances under which the contract was made are such as to give the plaintiff an unfair advantage over the defendant. ('94) 18 Bom 702 (715, 716).

[10] No injunction will be given where money compensation will afford an adequate relief for the non-performance of the contract. (Vol. 20) 1933 Sind 26 (26): 26 Sind L R 335.

[See also (Vol. 20) 1933 Lah 73 (75).]

[11] Defendant alleging breach of contract and referring matter to arbitration as provided by contract—Suit by plaintiff attacking contract—Injunction will be granted if contract is attacked on equitable grounds like fraud or misrepresentation and not otherwise. (Vol. 6) 1919 Cal 1042 (1042) (DB) * (Vol. 6) 1919 Cal 89 (90) * (Vol. 6) 1919 Cal 826 (827, 828) (DB) * (Vol. 7) 1920 Lah 97 (99) * (Vol. 7) 1920 Cal 906 (908) (SB) * (Vol. 14) 1927 Sind 182 (186): 21 Sind L R 306.

[12] Where parties have agreed that a suit relating to a certain matter must be brought in the Court at a particular place an injunction can be issued restraining a party from bringing a suit at some other place in breach of such agreement. (Vol. 27) 1940 All 241

O. 39 R 2 (contd.)

(242): ILR (1940) All 282 * (Vol. 19) 1932 Sind 111 (118): 26 Snd LR 497 * (Vol. 18) 1931 Cal 279 (280): 57 Cal 1280 * (Vol. 15) 1928 Bom 175 (176) * (Vol. 13) 1926 Mad 1126 (1127) * (Vol. 11) 1924 Bom 381 (382).

[See also (Vol. 22) 1935 Bom 198 (199).]

3. "Or other injury of any kind".—[1] The word "injury" connotes an act or omission contrary to law, resulting in an infringement of a right vested in a person. (Vol. 7) 1920 Lah 436 (437) (DB) * (Vol. 20) 1933 All 344 (345): 55 All 399 (DB) * (Vol. 20) 1933 Nag 62 (65, 66): 28 Nag LR 332 * (Vol. 14) 1927 Sind 182 (186): 21 Sind LR 306 * ('04) 28 Bom 298 (304) (DB).

[2] The following are instances of injury in respect of which injunction may be granted under this rule:

(a) Infringement of trade-mark. ('93) 17 Bom 584 (597, 600) (DB) * (1900) 25 Bom 433 (462) * ('13) 40 Cal 570 (581) * (Vol. 19) 1932 Sind 84 (86): 26 Sind LR 51.

[See also (Vol. 23) 1936 Pesh 11 (12). (Trade name, infringement of—injunction granted). * (Vol. 25) 1938 Cal 458 (458).]

(b) Infringement of copyright. ('08) 35 Cal 463 (468) * (Vol. 22) 1935 Lah 282 (283).

(c) Obstruction to right of easement. ('97) 19 All 259 (260) (DB) * ('84) 8 Bom 95 (98) (DB) * ('71) 8 Bom HCROC 181 (186) * ('04) 29 Bom 157 (161) (DB) * ('07) 31 Mad 171 (173, 174) (DB) * ('04) 28 Mad 15 (16, 17) (DB) * ('06) 4 Cal L Jour 370 (374, 388) (DB) * (1900) 24 Bom 188 (192) (DB) * ('04) 31 Cal 944 (950) (DB).

[See also (Vol. 22) 1935 Lah 937 (939).]

(d) Obstruction to exercise of rights of property. ('90) 12 All 436 (437, 438) (FB) * (Vol. 1) 1914 Cal 362 (363): 41 Cal 436 (DB) * ('93) 16 Mad 407 (409, 410) (DB) * ('03) 31 Cal 174 (177, 178) (DB) * ('87) 14 Cal 236 (239) (DB) * ('91) 18 Cal 10 (21, 22): 17 Ind App 110 (PC) * ('02) 29 Cal 500 (502) (DB) * ('97) 24 Cal 260 (264) (DB) * ('83) 9 Cal 75 (79) (DB) * ('99) 23 Bom 144 (145) (DB) * (1868) 1 Mad HC R 341 (348) (DB) * (Vol. 31) 1944 Mad 254 (255).

(e) Obstruction of right of public worship. ('91) 18 Cal 448 (462): 18 Ind App 59 (PC).

(f) Commission of waste or nuisance. ('83) 5 All 369 (371) (DB) * ('05) 32 Cal 697 (709) (DB) * ('03) 31 Cal 214 (221) (DB) * ('02) 25 Mad 118 (137) (DB).

[3] The lawful exercise of a right vested in a person cannot furnish a ground for granting an injunction restraining such person from exercising it. (Vol. 9) 1922 Bom 385 (386): 46 Bom 939 (DB) * (Vol. 10) 1923 Lah 47 (48) * (Vol. 13) 1926 Sind 295 (296) * (Vol. 13) 1926 Mad 1147 (1147) * (Vol. 13) 1926 Mad 132 (132) * ('02) 25 Mad 118 (137) (DB) * ('04) 28 Bom 424 (431) (DB) * (Vol. 26) 1939 All 643 (645): ILR (1939) All 825 (DB) * (Vol. 19) 1932 Bom 166 (167): 56 Bom 254 (DB).

[4] It is not necessary that the injury should have been actually suffered, though it is essential that the Court should be satisfied that there is a real or reasonable apprehension of such injury. (Vol. 7) 1920 Lah 436 (438) (DB) * ('07) 32 Bom 146 (148, 149) * (Vol. 10) 1923 Bom 281 (283) (DB).

[5] An injunction will be refused if the applicant has acquiesced in the act or omission complained of. ('83) 9 Cal 609 (612) (DB) * ('06) 29 Mad 497 (498, 499) (DB).

4. Grant of injunction on terms.—[1] Under sub-Rule (2) Court may call for undertaking from plaintiff to abide by any order which Court may make as to damages. ('02) 6 Cal WN 308 (310) (DB).

[2] Plaintiff, foreign firm, not carrying on any business in British India—Plaintiff should be put on terms. (Vol. 19) 1932 Sind 84 (87): 26 Sind LR 51.

5. Disobedience of Injunction—Effect.—[1] Injunction order issued—Aggrieved party must obey till it is set aside by court issuing it or suspended by another Court. (Vol. 33) 1946 Pat 47 (50) (DB).

[2] A disobedience of an order of injunction is a contempt of Court. Sub-rule (3) confers on Courts the power to punish such contempt and, further, prescribes the punishment to be awarded therefore. ('01) 23 All 465 (466) (DB) * (Vol. 2) 1915 PC 106 (110) (PC) * (Vol. 25) 1938 Lah 220 (221).

[3] While the High Courts as Courts of Record have inherent jurisdiction to commit for contempt, other courts have no such power apart from the provisions of this rule. (Vol. 28) 1941 All 140 (141): ILR (1941) All 295 (DB) * ('02) 26 Mad 494 (495) (DB).

[4] The provisions of sub-rule (3) apply not only to disobedience of an order issued under cls (1) and (2) of R. 2 but apply equally to disobedience of all injunctions issued under section 94 of the Code. (Vol. 13) 1926 Mad 574 (575) (DB) * (Vol. 22) 1935 Pat 274 (275) * (Vol. 5) 1918 Mad 340 (341) * (Vol. 15) 1928 Cal 462 (463): 55 Cal 777 (DB) * (Vol. 20) 1933 Nag 62 (64, 66): 28 Nag LR 332 * (Vol. 23) 1936 Pat 23 (25): 15 Pat 320 (DB) * (Vol. 33) 1946 Pat 47 (49) (DB): 24 Pat 606.

[But see (Vol. 28) 1941 All 140 (142, 143): ILR (1941) All 295 (DB) * (Vol. 32) 1945 Nag 134 (137): ILR (1945) Nag 336 (DB).]

[5] Court which orders injunction can alone punish disobedience—Order of injunction by particular court—Subsequent transfer of suit to another Court—Latter court cannot punish disobedience. (Vol. 1) 1914 Cal 815 (816) (DB).

[6] Application to punish for contempt under sub-rule (3) cannot be transferred to another Court. ('11) 21 Mad L Jour 829 (831) (DB).

[7] A Court, to which the business of the Court granting the injunction has been transferred, can, under S. 150, exercise the power of punishment under this sub-rule. (Vol. 10) 1923 Mad 92 (94): 46 Mad 83 (DB). (Impliedly overruled on another point by (Vol. 19) 1932 Mad 418: 55 Mad 801 (FB)).

[8] The Appellate Court has the same power to order punishment as the original Court. (Vol. 3) 1916 Mad 446 (447) (DB) * (Vol. 18) 1931 Lah 201 (202).

[9] In taking action under this sub-rule, the Court cannot act *suo motu* but can act only on the application of the aggrieved party. (Vol. 27) 1940 Nag 203 (205): ILR (1942) Nag 45 * ('02) 26 Mad 494 (494, 495) (DB).

[10] Sub-rule (3) should be strictly construed and that it cannot be read as providing any penalty other than that specifically mentioned in it. ('87) 9 All 497 (500) (DB).

[11] The disobedience will not render any transaction void. (Vol. 6) 1919 Mad 772 (773) (DB).

[12] Separate suit for damages cannot be filed for non-compliance with order of injunction. ('91) 13 All 98 (100) (DB).

Before granting injunction, Court to direct notice to opposite party.

given to the opposite party.

[1882—S. 494; 1877—S. 494; 1859—S. 95.]

Order for injunction may be discharged, varied or set aside.

3. The Court shall in all cases, except, where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

[1882—S. 496; 1877—Ss. 493, 496; 1859—S. 93.]

O. 39 R. 2 (contd.)

[13] The six months' period of detention prescribed in the sub-rule cannot even indirectly be added to. ('94) 19 Bom 152 (153).

[14] Two modes of punishment prescribed are only alternative, and it is not necessary that attachment should be effected before imprisonment is ordered. (Vol. 3) 1916 Mad 446 (443) (DB) * (Vol. 1) 1914 Mad 141 (142). * (Vol. 4) 1917 Mad 448 (449, 451): 39 Mad 907 (SB) * (Vol. 14) 1927 Cal 598 (600) (DB).

[15] Temporary injunction against person not to get girl married—Person not responsible for promoting marriage but not doing all to prevent it—He does not actually disobey order as passed. (Vol. 16) 1929 Nag 273 (274).

[16] Company restrained from holding meeting—Share-holders not restrained from voting—Meeting held in private house—Share-holders voting—Share-holders held not liable for disobedience. (Vol. 12) 1925 Cal 817 (818): 52 Cal 518 (DB).

[17] Although there might be a breach of an injunction in the literal sense, yet, if the party acted in good faith and without any intention to violate the order, he will not be liable for punishment. 10 Green 84 (Amer), *Frass v. Bailement*. (Vol. 19) 1932 Cal 719 (720) (DB).

[18] Where an injunction has been disobeyed the fact that the injunction has been subsequently dissolved will not exempt the party from punishment. (Vol. 2) 1915 P C 106 (110) (PC).

[19] Although an injunction takes effect from the date of the service of the order, yet, if the order had been passed in the presence of the counsel for both sides, it is no excuse to say that the order was not communicated to the party personally. (Vol. 6) 1919 All 20 (22): 42 All 98 (DB).

[20] Person against whom no injunction has been ordered cannot be punished under this sub-rule on the ground that he abetted the disobedience of the order. (Vol. 27) 1940 Nag 203 (206): I L R (1942) Nag 45 * (Vol. 14) 1927 Cal 598 (600) (DB) * (Vol. 3) 1916 Cal 340 (340): 42 Cal 1169 (1179) (SB).

[21] Injunction of High Court disobeyed—Person abetting disobedience can be proceeded against for contempt. (Vol. 25) 1933 P C 295 (298, 300): 17 Pat 770: I L R (1939) Kar P C 43 (PC).

[22] Undertaking not to alienate, duly recorded in Court's order, amounts to injunction breach of which is punishable. (Vol. 18) 1931 Bom 509 (510): 33 Bom L R 1109 (1112) * (Vol. 23) 1936 Mad 651 (652).

[23] Application under sub-rule (3) withdrawn in pursuance of agreement with defendant—Second application in respect of same breach disallowed. (Vol. 23) 1941 Lah 334 (336).

6. Power to grant temporary injunction in mandatory form.—[1] Court has power to grant temporary injunction in mandatory form. (Vol. 1) 1914 Bom

195 (197) (DB) * (Vol. 5) 1918 Mad 588 (589): 41 Mad 208 (DB) * (Vol. 14) 1927 Mad 210 (211, 212) * ('19) 1919 Pun L R No. 107 page 232 (235) * ('01) 26 Bom 136 (139) (DB).

[But see (Vol. 1) 1914 Bom 42 (45): 38 Bom 381 (DB).]

7. Appeal and revision.—[1] An order granting or refusing to grant a temporary injunction is appealable. (Vol. 24) 1937 Rang 150 (150).

[2] An appeal lies from an order under this rule whether the order is one inflicting punishment or one refusing to take action. (Vol. 16) 1929 Nag 273 (273) * (Vol. 3) 1916 Mad 446 (447) * (Vol. 1) 1914 Mad 141 (142) * (Vol. 4) 1917 Mad 448 (449): 39 Mad 907 (SB) * (Vol. 9) 1922 Lah 347 (348) * (Vol. 18) 1931 Bom 509 (510).

[3] An order refusing to discharge an injunction issued under this rule is also appealable. (Vol. 20) 1933 Lah 203 (205): 14 Lah 330.

[4] No second appeal lies against an order passed on appeal from an order under this rule. ('01) 24 Mad 447 (449) (DB).

[5] Proceedings for temporary injunction are 'a case' and revision lies. (Vol. 20) 1933 Lah 1046 (1047) (DB).

ORDER 39 RULE 3—Note 1.

[1] An injunction *ex parte* should not be granted without strong and grave reasons. ('97) 1 Cal W N 429 (431) (DB).

[See (Vol. 27) 1940 Nag 45 (46): I L R (1941) Nag 578 (DB).]

[2] Except where the delay involved in the issue of notice will defeat the object of the injunction, notice should be ordered to the party before injunction is ordered against him. ('08) 27 Bom 424 (451) (DB) * ('03) 2 Low Bur Rul 222 (223) (DB) * (Vol. 7) 1920 Low Bur 149 (150).

[3] An injunction granted in violation of the rule is irregular. ('85) 7 All 550 (552) (DB).

[4] Order granting an *ad interim* injunction—Appellate Court can by *ex parte* order stay operation of the order. (Vol. 19) 1932 All 223 (224) (DB).

[5] Order directing notice before granting injunction is not appealable. ('89) 12 Mad 186 (187) (DB) * (Vol. 11) 1924 Mad 857 (857, 858) (DB).

ORDER 39 RULE 4—Note 1.

[1] This rule applies where an urgent order *ex parte* has been made under Rule 3 and where an injunction order has become unduly harsh or unnecessary or unworkable. (Vol. 16) 1929 Mad 803 (804) (DB).

[2] Order for injunction passed after hearing both the parties cannot be dissolved except on new grounds not available when the original order was passed. (Vol. 16) 1929 Mad 803 (805).

Injunction to corporation binding on its officers.

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

[1882—S. 495.]

INTERLOCUTORY ORDERS.

6. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

[1882—S. 498; 1877—S. 498; R. S. C., O. 50 R. 2.]

Objects and Reasons.

"Words have been added to section 498 [of the 1882 Code] so as to empower the Court to order a sale of securities where the state of market requires such a course."—S. C. R.

Detention, preservation, inspection, etc., of subject-matter of suit.

7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit.—

- (a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;
- (b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and
- (c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

O. 39 R. 4 (contd.)

[3] Dissolution of injunction under this rule is no bar to another application for injunction supported by sufficient cause. ('77) 2 Bom 252 (256) (DB).

[4] An order under this rule is appealable under O. 43 R. 1 (r). ('98) 15 All 8 (9) (DB) * (Vol. 16) 1929 Mad 803 (804) (DB).

[5] An order refusing to discharge an injunction is an order under this rule and is appealable. (Vol. 27) 1940 Nag 45 (45); I L R (1941) Nag 578 (DB).

ORDER 39 RULE 5—Note 1.

[1] An individual cannot be protected by way of injunction against the act of a corporation. ('76) 1 Bom 132 (142).

ORDER 39 RULE 6—Note 1.

[1] This rule will apply only if the property is either the subject matter of the suit or has been attached before judgment in the suit. (Vol. 19) 1932 Lah 51 (52).

[2] The Court cannot appoint a commissioner to sell any crop on the property attached. (Vol. 17) 1930 Mad 224 (224).

ORDER 39 RULE 7—Note 1.

[1] The rule covers cases where the articles are in the possession or custody of the party against whom the order is made. (Vol. 6) 1919 Cal 312 (314) (DB).

[2] Application for grant of letters of Administration—Under order of District Judge nazir took possession of property belonging to deceased—*Held* rule had

no application to such a case, as the property of the deceased was not subject matter of proceedings pending before District Judge. ('05) 1905 All W N 127 (128) (DB).

[3] An order under this rule can be passed on an application for leave to sue as a pauper, even before the leave has been granted. (Vol. 30) 1943 Bom 143 (144); I L R (1943) Bom 138 * (Vol. 26) 1939 Mad 80 (80); I L R (1938) Mad 1080.

[4] An order staying sale of property in execution of a decree is not an order for the "preservation" of the property. (Vol. 25) 1938 Oudh 87 (88); 14 Luck 1 (DB).

[5] The word "property" in cl. (a) of sub-r. (1) does not include a debt which is the subject matter of the suit. (Vol. 25) 1938 Oudh 87 (88); 14 Luck 1 (DB).

[6] A Court has power to direct a Commissioner to dig up property such as ornaments alleged to be buried in land. (Vol. 30) 1943 Bom 143 (145); I L R (1943) Bom 138 (DB).

[7] Plaintiff suing defendant for damages caused by latter's construction in his premises—Court can order inspection to ascertain extent of injury. ('97) 24 Cal 117 (121, 122) * ('10) 12 Cal L Jour 519 (523, 524) (DB).

[8] Where the question to be decided is whether certain structures are old or new, the proper procedure is to issue a commission under this rule. (Vol. 20) 1933 Cal 475 (476).

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorised to enter under this rule.

[1882—S. 499 ; 1877—S. 499 ; R. S. C., O. 50 R. 3.]

8. (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made Application for such after notice to the defendant at any time after institution of the orders to be after notice. suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

[1882—S. 500 ; 1859—S. 91.]

9. Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure ;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

[1882—S. 501 ; 1877—S. 501 ; 1859—S. 91.]

10. Where the subject-matter of a suit is money or some other thing capable of delivery Deposit of money, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

[1882—S. 502 ; 1877—S. 502 ; 1859—Ss. 95 and 243.]

O. 39 R. 7 (contd.)

[9] In ordering inspection, the Court should take care to impose as little inconvenience as possible on those against whom the order is made. (1910) 12 Cal L Jour 519 (525) (DB) * ('08) 2 Sind L R 22 (24).

[10] The power to order injunction implies a power to order the preparation of an inventory, if necessary. ('10) 12 Cal L Jour 519 (523) (DB).

[11] Inventory not so essential. It should not be ordered. (Vol. 6) 1919 Cal 429 (430) (DB).

[12] An application for an order under this rule can only be made after notice to parties concerned. ('84) 7 Mad 241 (242) (DB).

[13] The Court can always appoint a receiver or grant an injunction *ex parte* even without a notice to the other party to prevent the property from being made away with by the defendant. (Vol. 30) 1943 Bcm 143 (144) : I L R (1943) Bom 138 (DB).

[14] Money paid into Court claimed both by plaintiff and defendant. Court cannot allow one of them alone to draw the amount pending the decision of the case even on his furnishing security for restitution. ('13) 24 Mad L Jour 404 (404).

ORDER 39 RULE 9—Note 1.

[1] An adjustment of accounts under this rule need not be sought in a separate suit and can be worked

out in execution where the decree is silent about and it is also shown to be incomplete without it. ('02) 6 Cal W N 710 (712) (DB).

[2] The party paying the revenue under this rule is entitled to a charge on the property for the amount. ('03) 26 Mad 686 (692) (FB).

[3] An order under this rule can be passed in a mortgage suit even after the final decree has been passed and even after the sale of the property provided the sale has not been confirmed yet. (Vol. 30) 1943 Cal 160 (161) : I L R (1942) 2 Cal 546 (DB).

[4] A party put in possession of the property in suit can collect its rents and profits. (Vol. 30) 1943 Cal 160 (162) : I L R (1942) 2 Cal 546 (DB).

ORDER 39 RULE 10—Note 1

[1] The rule does not apply unless the admission of the party is an admission sufficient under O 23 R 6. (Vol. 14) 1927 Sind 25 (27).

[2] The rule does not apply unless the party making the admission "holds" the property or other thing capable of delivery. ('08) 27 Mad 168 (172) (SB).

[3] Party refusing to pay as ordered under this rule liable for interest from the date of the order. ('71) 16 Suth W R 297 (298) (DB).

[4] The rule applies to proceedings under the Guardians and Wards Act. ('11) 36 Bom 20 (27).

ORDER XL.

APPOINTMENT OF RECEIVERS.

Appointment
of receivers.

1. (1) Where it appears to the Court to be just and convenient, the Court may by order—

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver; and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

[1832—S. 503; 1877—S. 503; 1859—S. 243. See Ss. 51 (d), 94 and 95.]

LOCAL AMENDMENT.

ALLAHABAD.

In sub rule (2), after the words "any person" *insert a comma and the words "not being a party to the suit."* [10-7-1943]. no indent

ORDER 40 RULE 1—SYNOPSIS.

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|---|--|
| <ul style="list-style-type: none"> 1. Scope and object of the rule. 2. Receiver if can be appointed in proceedings other than suits. 3. Receiver in mortgage suits. 4. Receiver of future earnings of judgment-debtor, if can be appointed. 5. Testamentary suit. 6. Suits under S. 92 of the Code. 7. Partnership suits. 8. Maintenance suits. 9. Suits under S. 9 of the Specific Relief Act. 10. Who may be appointed receiver. 11. What Court may appoint or remove a receiver. 12. When a receiver may be appointed. 13. "Just and convenient." 14. Partition suits. 15. Executor in possession, 16. Receiver, if can be appointed for company. 17. Appointment, if can be made after reference to arbitration. 18. Receiver in execution proceedings. 19. Receiver after decree. 20. Receiver of property in the hands of a common manager. 21. Powers of receiver. 22. "All such powers, as to bringing and defending suits . . . as the owner himself has." 23. Realization of property. 24. "Collection of the rents and profits thereof." 25. Power as to the execution of documents as the owner himself has. | <ul style="list-style-type: none"> 26. Delegation of duty by receiver. 27. The receiver is an officer of the Court. 28. Possession of receiver enures for the benefit of the true owner. 29. Attachment of properties in the hands of receiver. 30. Suits by or against receiver—Leave of Court. 31. Debts incurred by receiver in the course of business. 32. Loss caused by receiver's default. 33. Agreement with receiver—Contempt of Court. 34. Remuneration of receiver. 35. Liability of receiver. 36. Liability to account. 37. Debts incurred by receiver and those incurred by executor or trustee—Comparison. 38. Liability to criminal prosecution. 39. When appointment takes effect. 40. Receiver's lien. 41. Remedy of third part aggrieved by receiver's action. 42. Receiver, if and when a necessary party to a suit. 43. Notice to opposite party, if necessary, before appointment. 44. Appointment of new receiver in place of old receiver. 45. Joint receivers. 46. Duration of office of receivership. 47. "Court may remove any person from the possession or custody of the property." |
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170 A. M.

170a A. M.

O. 40 R. 1 (contd.)

48. Summary jurisdiction.
49. Appeal.
50. Letters Patent appeal.
51. Revision.
52. Practice.

1. **Scope and object of the rule.**—[1] The object and the purpose of the appointment of a receiver may generally be stated to be the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto. ('07) 34 Cal 305 (316) (DB) * (Vol. 32) 1945 Cal 387 (392) (DB) * ('13) 16 Oudh Cas 238 (241) (DB) * (Vol. 26) 1939 Rang 321 (380) : 1938 Rang L R 635 (FB) * (Vol. 32) 1945 Pat 404 (412) : 24 Pat 282 (DB).

[2] The Court does not, at the time of appointment of a receiver, arrive at any final decision on the merits of the case, its aim being merely to preserve the *status quo ante* during the litigation. (Vol. 2) 1915 Cal 35 (36) (DB) * (Vol. 11) 1924 Cal 456 (459) (DB) * ('05) 32 Cal 741 (745) (DB).

[3] When the Court appoints a person as the "Manager" of the suit property, it really appoints a receiver. (Vol. 11) 1924 Mad 614 (614) (DB) * (Vol. 19) 1932 Cal 275 (281, 282) : 59 Cal 961 (DB) (Reversed in (Vol. 21) 1934 P C 96 : 61 Cal 470 : 61 Ind App 171 (P C) on another point).

[4] A sapurdar to whom moveable property attached in execution is handed over for safe custody is not a receiver. (Vol. 11) 1924 Lah 667 (668).

[5] Power of Court to appoint receiver is discretionary. ('13) 16 Oudh Cas 238 (243) (DB) * (Vol. 20) 1933 Rang 94 (95) (DB) * (Vol. 25) 1938 All 3 (6) : I L R (1938) All 35 (DB). (Rule is not mandatory.)

[See ('21) 61 Ind Cas 112 (112) (DB) (All) (Costs in the application also discretionary)].

[6] A receiver can be appointed even of property which is not the subject-matter of the suit. (Vol. 22) 1935 Rang 398 (399).

[7] In appointing receivers, the Court cannot act outside this rule. (Vol. 23) 1936 All 495 (502) : 58 All 949 (FB).

2. **Receiver, if can be appointed in proceedings other than suits.**—[1] A receiver can be appointed in proceedings other than suits. (Vol. 3) 1916 Cal 427 (427) : 48 Cal 986 (DB) * (Vol. 32) 1945 All 261 (264) : I L R (1945) All 818 (FB) * (Vol. 20) 1933 Lah 437 (439) : 14 Lah 68 * (Vol. 24) 1937 Bom 124 (127) (DB).

[2] A receiver may be appointed in proceedings for the appointment of a guardian under the Guardians and Wards Act. (Vol. 12) 1925 Lah 489 (489, 490) * (Vol. 16) 1929 Nag 119 (119) * ('11) 86 Bom 20 (27).

[3] Receiver cannot be appointed in proceedings under S 74, Trusts Act. (Vol. 14) 1927 Sind 237 (238) : 22 Sind L R 146 (DB).

3. **Receiver in mortgage suits.**—[1] Order 40 is not inapplicable to mortgage suits and a receiver can be appointed even if the mortgage is a simple mortgage. (Vol. 29) 1942 Nag 1 (2) : I L R (1942) Nag 118 (DB) * (Vol. 27) 1940 Lah 325 (328) : I L R (1941) Lah 590 (DB) * ('90) 14 Bom 431 (434, 435) (DB) * (Vol. 22) 1935 Lah 17 (20) : 16 Lah 366

(DB) * (Vol. 21) 1934 Rang 321 (322) : 12 Rang 437 (DB) * (Vol. 7) 1920 Cal 545 (546) : 47 Cal 418 (DB) * (Vol. 20) 1933 Mad 570 (576, 581) : 56 Mad 915 (FB) * (Vol. 16) 1929 Mad 138 (141) : 52 Mad 979 * (Vol. 32) 1945 Pat 404 (411) : 24 Pat 282 (DB) * (Vol. 14) 1927 Sind 230 (230, 231) : 23 Sind L R 49 * (Vol. 25) 1938 Mad 325 (325) * (Vol. 26) 1939 Bom 54 (55) : I L R (1939) Bom 82 (DB). (Court can appoint receiver in case of simple mortgage whether before or after preliminary decree) * (Vol. 26) 1939 Rang 321 (324) : 1939 Rang L R 403 (FB) * (Vol. 20) 1923 Nag 294 (295).

[See (Vol. 25) 1938 Cal 93 (95). (Receiver can be appointed in execution in the case of English mortgage).]

[But see ('77) 3 Cal 335 (336) (DB) * (Vol. 20) 1933 Lah 687 (688) : 14 Lah 457 * (Vol. 14) 1927 All 419 (420) (DB) * (Vol. 6) 1918 All 240 (240) (DB) * (Vol. 21) 1934 All 772 (774) (DB) * (Vol. 23) 1936 All 495 (507) : 58 All 949 (FB) * (Vol. 25) 1938 All 80 (82) (DB) * (Vol. 19) 1932 Pat 360 (363) (DB)].

[2] The test to be applied in mortgage suits, is, as in the case of other suits to consider whether it will be just and convenient to appoint a receiver. (Vol. 27) 1940 Lah 325 (328) : I L R (1941) Lah 590 (DB) * (Vol. 19) 1932 Cal 194 (195) (DB) * (Vol. 26) 1939 Rang 321 (324, 325) : 1939 Rang L R 403 (FB) (Vol. 15) 1928 Rang 176 : 6 Rang 261 overruled) * (Vol. 23) 1936 Rang 296 (297) : 14 Rang 308 (S B) * (Vol. 23) 1936 Rang 246 (247) (DB).

[See also (Vol. 19) 1932 Pat 360 (363) (DB)]. (Vol. 22) 1935 Mad. 875 (877)].

[3] A receiver cannot be appointed merely because it is convenient to the mortgagee to do so. ('13) 16 Oudh Cas 238 (241) (DB).

[4] That sale by receiver will fetch higher price than Court sale is no ground for appointing receiver. ('96) 23 Cal 517 (521) (DB).

[5] Receiver cannot be appointed merely because mortgagor's reversioners support appointment. (Vol. 3) 1916 Cal 515 (516) (DB).

[6] A receiver can be appointed even when the right to a personal decree is not subsisting. (Vol. 20) 1933 Mad 570 (576, 581, 582) : 56 Mad 915 (FB) (Reversing (Vol. 20) 1933 Mad 447) * (Vol. 23) 1936 Rang 290 (292) : 14 Rang 292 (DB).

[But see ('11) 14 Cal L Jour 526 (529) (DB)].

[7] A receiver cannot be appointed of the other properties of the mortgagor where there is no likelihood of a personal decree being passed against him. (Vol. 13) 1926 Mad 797 (797, 798) (DB).

[8] Receiver appointed at instance of mortgagee—Rents and profits realized by receiver must be treated as additional security for amount due on mortgage—Mortgagee has prior claim to be paid out of rents and profits. (Vol. 18) 1931 Mad 626 (627, 628) : 54 Mad 565 * (Vol. 22) 1935 Mad 410 (411) (DB) * (Vol. 19) 1932 Sind 82 (84) : 26 Sind L R 61 (DB) * (Vol. 16) 1929 Sind 114 (114, 115) : 23 Sind L R 200 * (Vol. 7) 1920 Cal 545 (546) : 47 Cal 418 (DB) * ('13) 17 Cal W N 16 (20, 21) (DB) * (Vol. 23) 1936 Rang 290 (293) : 14 Rang 292 (DB).

[See also (Vol. 20) 1933 Mad 293 (294) : 56 Mad 546 (DB) * (Vol. 21) 1934 Rang 321 (323) : 12 Rang 437 (DB).]

[But see (Vol. 27) 1940 Mad 703 (704) * (Vol. 22) 1935 Mad 146 (149)].

O. 40 R. 1 (contd.)

[9] Mortgage void—Mortgagee obtaining simple money decree—Mortgagee cannot apply for appointment of receiver of mortgagor's property. (Vol. 17) 1930 Rang 271 (272) (DB).

[But see ('70) 13 Suth W R 453 (454) (DB)].

[10] Court cannot appoint a receiver pending a suit for the specific performance of a contract to execute a mortgage. (Vol. 13) 1926 Mad 155 (156) (DB).

[11] In the circumstances of the following cases, it has been held that a receiver may properly be appointed:

(a) Where the interest due on the mortgage is in arrears or the sale proceeds of the property are likely to be insufficient to satisfy the mortgage. (1912) 16 Cal W N 997 (1000) (DB) * (Vol. 7) 1920 Cal 545 (547) : 47 Cal 418 (DB) * (Vol. 22) 1935 Lah 17 (20) : 16 Lah 366 (DB) * (Vol. 14) 1927 Sind 230 (231) : 23 Sind L R 49 * (Vol. 13) 1926 Cal 1006 (1008) (DB) * (Vol. 26) 1939 Rang 321 (324, 325) : 1939 Rang L R 403 (FB) * (Vol. 24) 1937 Rang 399 (400) (DB) * (Vol. 21) 1934 Lah 717 (718) : 15 Lah 875 * (Vol. 26) 1939 Bom 54 (56) : I L R (1939) Bom 82 (DB) * (Vol. 23) 1936 Rang 296 (297) : 14 Rang 308 (SB) ((Vol. 22) 1935 Rang 525 : 14 Rang 16 overruled) * (Vol. 32) 1945 Pat 404 (411) : 24 Pat 232 (DB).

(b) Where the mortgage is by the karta of a joint Hindu family and it is found that such a mortgage is binding on the family. (Vol. 12) 1925 Cal 664 (666) (DB).

(c) Where the suit is to enforce a floating charge on the goodwill and the stock-in-trade of a business under a mortgage containing a proviso that the mortgagor should not permit the stock-in-trade to fall below a certain value. (Vol. 6) 1919 Cal 860 (861) (DB).

(d) Where the mortgagor who is in possession on behalf of the mortgagee becomes insolvent. (Vol. 3) 1916 Mad 1128 (1129) (DB).

(e) Where the mortgagee is entitled to enter into possession on default of payment of the mortgage-money. ('90) 14 Bom 431 (435) (DB).

(f) Where the mortgagor transfers his properties with the mortgagee's consent to trustees who undertake to liquidate his debts by periodical payments but the arrangement fails. ('11) 13 Cal L Jour 495 (497, 499) (DB).

[12] A receiver can be appointed in a mortgage suit for sale even though a receiver has already been appointed in a prior partition suit comprising such property ('11) 14 Cal L Jour 526 (528) (DB).

[13] Appointment can be made even after the final decree in the mortgage suit is passed and at any time before the mortgage is fully satisfied. (Vol. 13) 1926 Cal 978 (979) (DB) * (Vol. 13) 1926 Cal 1006 (1008) (DB) * (Vol. 22) 1935 Oudh 497 (498) : 11 Luck 562 (DB).

[See also (Vol. 29) 1942 Nag 1 (2) : I L R (1942) Nag 118 (DB) * (Vol. 25) 1938 Cal 93 (95)].

[14] Mortgagor declared insolvent—Receiver in respect of mortgaged property appointed in insolvency proceedings—No receiver should be appointed in suit on mortgage. (Vol. 23) 1936 Pat 357 (358) (DB).

[15] Mortgage suit—Receiver appointed—Mortgagee in possession must give up possession to receive even though he applies income of mortgaged property to dis-

charge debt under arrangement. (Vol. 8) 1921 Pat 43 (44) : 6 Pat L Jour 37 (DB).

[See also (Vol. 25) 1938 Mad 325 (326).]

[16] Receiver appointed in execution of mortgage decree—Appointment is no bar to sale of property in execution of money decree subsequently passed subject to mortgagee's rights. ('42) 1942 Pat W N 55 (58) (DB).

4. Receiver of future earnings of judgment-debtor, if can be appointed.—[1] Apart from any charge given by the debtor, the Court has no power to appoint a receiver of the future earnings of the judgment-debtor. (1893) 1 Q B 551 (555, 559, 560), *Holmes v. Millage* * (1894) 3 Ch D 338 (341) *Cadogan v. Lyric Theatre* * (1898) 2 I R 551, *Re Johnson*.

[See however (Vol. 23) 1936 Lah 239 (240)].

(2) A receiver cannot be appointed to receive maintenance allowance or pension payable to the judgment-debtor. ('12) 16 Cal L Jour 854 (860) (DB) * (Vol. 4) 1917 Mad 79 (81) : 40 Mad 302 (DB) * ('09) 12 Oudh Cas 323 (331) (DB).

[But see (Vol. 29) 1942 Oudh 410 (412) : 18 Luck 147 (DB)].

(3) Judgment-debtor given certain lands for his maintenance—Receiver can be appointed to collect rents and profits of lands. (Vol. 12) 1925 P O 176 (176) : 47 All 335 : 52 Ind App 262 (PC) * (Vol. 2) 1915 Nag 98 (99) : 11 Nag L R 113 * (Vol. 23) 1936 Nag 288 (289) : I L R (1937) Nag 534.

5. Testamentary suit.—[1] A receiver can be appointed in a testamentary suit. ('93) 17 Bom 388 (391).

6. Suits under section 92 of the Code.—[1] The Court can appoint a receiver in a suit under S 92 of the Code. ('13) 24 Mad L Jour 658 (659) (DB) * ('10) 20 Mad L Jour 638 (639) (DB) * (Vol. 10) 1923 Mad 224 (224) (DB) * (Vol. 7) 1920 Pat 175 (176) (DB) * (Vol. 12) 1925 Mad 820 (821, 822) (DB).

[See also (Vol. 24) 1937 Cal 740 (741) (DB)].

[2] Court cannot appoint receiver in a suit under the Religious Endowment Act except under S. 5 of that Act. ('03) 8 W N 404 (407) (DB).

[3] Suit by some members of community against other members—Joint property of community—Prayer for appointment refused. ('09) 19 Mad L Jour 669 (670) (DB).

[4] Suit for scheme and removal or trustee for misconduct—Death of trustee—Abatement—In appeal from abatement, application for appointment of receiver refused. ('25) 91 Ind Cas 106 (108) (DB) (Mad).

[5] Appointment of receiver by District Judge as *persona designata* under scheme framed in suit under S 92 is not *ultra vires*. (Vol. 24) 1937 Bom 124 (127) (DB).

7. Partnership suits.—[1] Partners on bad terms—Dissolution of partnership inevitable—Usual way of guarding partner's interests is by appointing receiver. (Vol. 1) 1914 Low Bur 209 (210) : 8 Low Bur Rul 332 (DB) * (Vol. 21) 1934 Cal 444 (446) (DB) * (Vol. 12) 1925 Rang 287 (287) : 3 Rang 196 (DB).

[2] No receiver can be appointed to manage a partnership business where all the partners are not parties to the suit. (Vol. 5) 1918 Sind 61 (62) : 11 Sind L R 115 (DB) * (Vol. 21) 1934 Cal 444 (446) (DB).

O. 40 R. 1 (contd.)

[3] Death of partner—Appointment of receiver is not necessary in every case. (Vol. 7) 1920 Lah 125 (126, 127).

8. Maintenance suits.—[4] Decree for maintenance creating charge on defendant's property—Decree should itself appoint receiver to avoid further litigation. ('99) 26 Cal 441 (448, 449).

[See also (Vol. 20) 1933 Lah 826 (827)].

9. Suit under Section 9 of the Specific Relief Act.—

[1] In a suit for possession under S. 9 of the Specific Relief Act, it is not competent to the Court to appoint a receiver. (Vol. 24) 1937 Sind 161 (161); 31 Sind L R 28 (DB)].

10. Who may be appointed receiver.—[1] As a general rule, absolute disinterestedness is an indispensable qualification for a receiver. (Vol. 13) 1926 Cal 593 (596) : 53 Cal 319 (DB) * (Vol. 11) 1924 Cal 456 (460) (DB) * (Vol. 7) 1920 Cal 724 (725) (DB).

[See (Vol. 28) 1941 Cal 144 (146) : I L R (1940) 2 Cal 102].

[See also (Vol. 21) 1934 Cal 444 (447) (DB)].

[See however (Vol. 29) 1942 Rang 12 (13) (DB)].

[2] A party to the litigation should not be appointed a receiver except under very special circumstances or with the consent of the other parties. (Vol. 29) 1942 Rang 12 (13) (DB) * ('40) 42 Pun L R 475 (477) (DB) * (Vol. 13) 1926 Sind 37 (38) : 20 Sind L R 201 (DB) * (Vol. 21) 1934 Cal 444 (446, 447) (DB) * (Vol. 1) 1914 Cal 439 (441) (DB) * (Vol. 12) 1925 Pat 293 (294) : 3 Pat 964 (DB) * (Vol. 2) 1915 Mad 336 (336) * ('13) 17 Cal W N 974 (975) (DB) * (Vol. 16) 1929 Lah 780 (780).

[3] In the case of partnership and partition suits, a party is more readily appointed a receiver than in other cases. (Vol. 12) 1925 Pat 293 (294) : 3 Pat 964 (DB).

[4] There is nothing to prevent a Hindu from being appointed receiver of the properties of a Mahomedan wakf where his duties do not include the performance of religious ceremonies. (Vol. 7) 1920 Cal 724 (725) (DB).

[5] The appointment of the guardian of a minor as receiver of his properties is not illegal. (Vol. 4) 1917 Mad 1009 (1010) * (Vol. 3) 1916 Mad 924 (924) (DB).

[6] The attorney of a party to the litigation cannot be appointed receiver. (Vol. 14) 1927 Cal 714 (717) : 55 Cal 113 (DB).

[7] A limited liability company should not be appointed as a receiver. (Vol. 29) 1942 Nag 64 (65) : I L R (1942) Nag 671 (DB).

[8] The judgment-debtor's business rival should not be appointed receiver. (Vol. 29) 1942 Nag 64 (65) : I L R (1942) Nag 671 (DB).

[9] The fact that the receiver lives far away from the properties is a disqualification which, though not absolute, should be taken into consideration in making the appointment. ('13) 17 Cal W N 974 (976) (DB).

11. What Court may appoint or remove a receiver.—

[1] The appointment can be made only by the Court before which the suit wherein the receiver is sought to be appointed is pending, or where the decree has been appealed against by the Appellate Court. ('70) 14 Buth W R 384 (385) (DB) * (Vol. 24) 1937 Mad 163 (165) * (Vol. 32) 1945 Oudh 25 (26) (DB).

[2] A Court can appoint a receiver even of property situated beyond its local jurisdiction. (Vol. 13) 1921 Mad. 119 (120) (DB) * (Vol. 17) 1930 Cal 502 (505) : 57 Cal 984 (DB) * ('36) 40 Cal W N 1065 (1066) * (Vol. 25) 1938 Lah 93 (94) : I L R (1938) Lah 305.

[But see ('12) 17 Ind Cas 16 (16) (DB) (Mad) * (Vol. 20) 1933 Sind 231 (232)].

[3] A receiver can be appointed even before deciding the question of jurisdiction if such a question is raised. (Vol. 12) 1925 Rang 287 (288) : 3 Rang 196 (DB).

[4] A Civil Court in the Punjab can appoint a receiver to collect the rent of agricultural lands. (Vol. 10) 1923 Lah 623 (625).

[5] A Special Judge exercising jurisdiction under the U.P. Encumbered Estates Act has no power to appoint a receiver under this rule. (Vol. 25) 1938 All 80 (81) (DB).

[6] Where a receiver of certain property has already been appointed by the Court, it is inexpedient that another Court should appoint another receiver for the same property. (Vol. 11) 1924 Pat 491 (494) : 3 Pat 357 (DB).

[7] It is only the Court that appointed the receiver, that can remove him or give him any directions in the matter. (Vol. 12) 1925 Lah 309 (310) * (Vol. 18) 1931 All 72 (73) (DB) * ('89) 1889 Pun Re No. 74 page 281 (284) * ('08) 18 Mad L Jour 589 (589, 530) (DB).

12. When a receiver may be appointed.—[1] A plaintiff applying for the appointment of a receiver must show *prima facie* that he has a strong case and good title to the property. (Vol. 15) 1928 Mad 813 (814) (DB) * (Vol. 9) 1922 Pat 493 (494) (DB) * (Vol. 10) 1923 Lah 48 (51) * ('08) (1908) Upp Bur Rul 2nd quarter, Civil Procedure Code (17) * (1900) 5 Cal W N 365 (367) * (Vol. 12) 1925 Cal 970 (972) (DB) * (1900) 27 Cal 279 (282) (DB) * (1936) 1936 Oudh W N 466 (468) * (Vol. 26) 1939 Oudh 61 (62) (DB).

[See (Vol. 23) 1936 Lah 102 (103)].

[2] A plaintiff applying for the appointment of a receiver must show a special equity in his favour that the property in hands of the defendant is in danger of being wasted. (Vol. 9) 1922 Pat 318 (319, 320) : 6 Pat L Jour 366 (DB) * (Vol. 13) 1926 Sind 37 (38) : 20 Sind L R 201 (DB) * (Vol. 20) 1933 Nag 294 (295) * (Vol. 13) 1926 Sind 83 (84) * (Vol. 7) 1920 Bom 321 (321) (DB) * ('11) 12 Ind Cas 198 (198, 199) (Upp Bur) * (Vol. 18) 1931 Lah 688 (688) * ('89) 1889 Bom P J 184 (184) (DB).

[See also (Vol. 20) 1933 Sind 364 (365) (DB)].

[3] It is enough to show in an application for injunction that the plaintiff has a fair question to raise as to the existence of the right alleged, but this is not enough for the appointment of a receiver : a good *prima facie* title has to be made out. ('11) 21 Mad L Jour 821 (823) (DB) * (Vol. 6) 1919 Mad 157 (158) * ('95) 22 Cal 459 (465) (DB) * (Vol. 26) 1939 Oudh 61 (62) (DB).

[4] The mere fact that the plaintiff in his plaint makes violent and wholesale charges of malversation against the defendant in possession is no ground for the appointment of a receiver. ('38) 5 All 556 (561) (DB) * ('08) 1908 Pun Re No. 107 page 494 (497) * (Vol. 23) 1938 Mad 966 (966) (DB).

O. 40 R. 1 (contd.)

[5] A mere future apprehension of misappropriation or mismanagement is not a sufficient ground for the appointment. ('10) 1910 Pun Re No. 36 * (Vol. 13) 1926 Cal 1092 (1096) (DB) * (Vol. 23) 1936 Lah 102 (103).

[6] Vague charges against the person in possession are not enough: the charges must be specific. (Vol. 13) 1926 Cal 1092 (1093) (DB).

[See also ('10) 1910 Pun Re No. 36].

[7] Persons in possession under a legal claim must not be removed on the strength of mere suspicion. ('11) 11 Ind Cas 703 (705) (DB) (All).

[8] Suit for possession and mesne profits—Defendant claiming to hold property as trustee—No allegation of misappropriation or waste—Mere fact that defendant is poor is no ground for appointing receiver. (Vol. 8) 1921 All 91 (92): 43 All 311 (DB) * (Vol. 2) 1915 Mad 926 (928, 929) (DB) * (Vol. 18) 1931 Lah 688 (689).

[9] Insolvency of person in possession held to be good ground for appointment of receiver. (Vol. 5) 1918 Low Bur 29 (30). * (Vol. 3) 1916 Mad 1128 (1129) (DB).

[10] A receiver cannot be appointed for the purpose of ascertaining the real income of a property so that the Court may have correct data for fixing the rate of maintenance payable to a widow. (Vol. 12) 1925 Mad 1245 (1246) (DB).

[11] The allegation against a defendant, a trustee, that since his acceptance of office, he has not paid allowances to the beneficiaries, without any allegation of waste or mismanagement, etc., is no ground for appointing a receiver in his place. (Vol. 3) 1916 Cal 882 (882) (DB).

[See also (Vol. 23) 1936 Mad 817 (818).

[12] A receiver should not be appointed merely because the relations between the parties are strained. (Vol. 10) 1923 Lah 48 (51).

[13] Manager of defendant's estate producing accounts and documents late—No ground for appointment of receiver. ('12) (1912) Mad W N 904 (906) (DB).

[14] Defendant under suspicious circumstances removing large amount of property during pendency of suit—Title to such a property to be determined in suit—Receiver should be appointed. (1900) 27 Cal 279 (282, 284) (DB) * (1900) 5 Cal W N 365 (367).

[15] Hindu widow in possession of husband's estate wasting property—Receiver should be appointed. (Vol. 27) 1940 Sind 117 (123): I L R (1940) Kar 208 * ('10) 1910 Mad W N 347 (351) * ('68) 1 Beng L R A C 27 (27, 28) (DB).

[16] Receiver may be appointed where a life-tenant intends to transfer the estate to a stranger. (Vol. 7) 1920 Bom 145 (146): 44 Bom 727 (DB).

[See (Vol. 17) 1930 Bom 545 (552, 554): 54 Bom 837 (DB).]

[17] Suit for possession—Estate grossly mismanaged and wasted—Receiver should be appointed. (Vol. 2) 1915 Cal 35 (36).

[18] It is not necessarily improper that a receiver should be appointed to deal with the rents and profits of land assigned to a Hindu widow for her maintenance even if she has no other source of income.

(Vol. 2) 1915 Nag 98 (100): 11 Nag L R 113. (Even a simple decree for money may be executed by appointing a receiver.)

[19] The mere fact that the party in possession is a Mahomedan widow claiming a lien for her dower debt, is no bar to the appointment of a receiver if there are good grounds for such appointment. (Vol. 10) 1923 Nag 21 (21, 22) (DB).

[20] A receiver may be appointed in a suit for a declaration. (Vol. 10) 1923 Lah 623 (624, 625). * (Vol. 9) 1922 Lah 444 (446) (DB) * (Vol. 14) 1927 Lah 65 (65) * (Vol. 24) 1937 Mad 163 (164).

[But see ('09) 3 Sind L R 118 (119).]

[21] Suit for money—Receiver may be appointed (Vol. 16) 1929 Mad 184 (186): 52 Mad 988. * (Vol. 2) 1915 Nag 98 (99): 11 Nag L R 113. * (Vol. 22) 1935 Rang 398 (399).

[See also ('07) 30 Mad 225 (264) (DB) * (Vol. 25) 1938 Lah 12 (14).]

[But see ('12) 17 Ind Cas 16 (16) (DB) (Mad) * (Vol. 17) 1930 Cal 610 (611) (DB) * (Vol. 19) 1932 Cal 189 (192): 59 Cal 205 (DB)].

[22] Suit for money or for declaration—Creditor must establish special equity in his favour for getting receiver appointed. (Vol. 9) 1922 Pat 318 (319, 320): 6 Pat L Jour 366 (DB).

[See (Vol. 23) 1936 Lah 102 (104).]

[23] A receiver can be appointed to collect the rents and profits of an estate which is itself not liable to attachment. ('01) 28 Cal 483 (485) (DB) * (Vol. 20) 1933 Nag 266 (267) * (Vol. 11) 1924 Pat 269 (270): 3 Pat 339 (DB) * (Vol. 2) 1915 Nag 98 (99): 11 Nag L R 113 * ('12) 39 Cal 1010 (1015) (DB) * (Vol. 23) 1936 Nag 288 (289): I L R (1937) Nag 534.

[24] The mere facts that the acts alleged against the defendant constitute a crime for which he may be prosecuted is no bar to the appointment. ('95) 18 Mad 23 (24) (DB).

[25] Delay in making application for appointment of receiver is a circumstance unfavourable to such appointment. (Vol. 13) 1926 Cal. 1092 (1092) (DB).

[26] An application for the appointment of a receiver should not be dismissed summarily. The matter should be considered judicially in all its aspects before being disposed of. (Vol. 23) 1936 Mad 966 (966) (DB).

[27] The dismissal of an application at a prior stage when the suit itself was dismissed, does not prevent a subsequent application when the suit has been restored and the proceedings re-opened. (Vol. 10) 1923 Nag 21 (22) (DB).

[See (Vol. 22) 1935 Mad 875 (877).]

[28] Where an application for the appointment of a receiver is withdrawn because the opposite party undertakes to observe certain conditions, a subsequent application for the same purpose when such conditions have not been observed is not barred. (Vol. 29) 1942 Nag 1 (3): I L R (1942) Nag 118 (DB). (Vol. 11) 1924 P C 202 distinguished.)

13. "Just and convenient."—[1] Courts in India have the fullest jurisdiction to appoint or remove a receiver in the exercise of their judicial discretion. (1910) 14 Cal W N 252 (253) (DB) * (Vol. 19) 1932 Mad 193 (195) (DB) * (Vol. 23) 1936 Oudh 337 (338) 12 Luck 635 (DB).

O. 40 R. 1 (contd.)

[2] Rival claims—Likelihood of waste—Claimants not in possession—Receiver should be appointed. (Vol. 28) 1941 Oudh 328 (331) (DB).

[3] Property *in medio*—Court should appoint receiver to prevent scramble. (Vol. 11) 1924 Cal 456 (459) (DB) * (Vol. 10) 1923 Lah 239 (241) * (Vol. 14) 1927 Pat 220 (221) (DB) * (Vol. 12) 1925 Cal 970 (972) (DB) * ('13) 17 Cal W N 531 (533, 534) (DB) * (Vol. 11) 1924 Lah 421 (422) * (Vol. 2) 1915 Mad 926 (929) (DB) * (Vol. 31) 1944 Oudh 225 (227) (DB).

[4] The principles followed by the English Courts of Equity should be adopted as safe guides by the Courts in India in these matters. ('90) 14 Bom 431 (434) (DB) * ('88) 15 Cal 818 (822) (DB) * ('85) 22 Cal 459 (464, 465) (DB) * (Vol. 5) 1918 Sind 61 (63) : 11 Sind L R 115 (DB).

[5] The discretion conferred by this rule should therefore not be exercised in an arbitrary or unregulated manner but cautiously, judicially and according to legal principles. ('10) 8 Ind Cas 1191 (1193) (DB) (L & W Bur.) * (Vol. 10) 1923 Lah 239 (241) * (Vol. 13) 1926 Cal 1092 (1096) (DB) * (Vol. 3) 1916 Cal 882 (882) (DB) * (Vol. 15) 1928 P C 49 (50) : 55 Ind App 131 : 55 Cal 720 (PC). * (Vol. 18) 1931 Lah 688 (688) * (Vol. 26) 1939 Oudh 61 (62) (DB).

[6] Discretion should be exercised after a consideration of the whole of the circumstances of the case (Vol. 12) 1925 Lah 349 (351, 352) : 6 Lah 74 (DB) * (Vol. 7) 1920 Lah 125 (127) * ('13) 17 Cal W N 974 (975) (DB) * ('11) 21 Mad L Jour 821 (822) (DB) * (Vol. 11) 1924 Cal 456 (459) (DB) * (Vol. 13) 1926 Cal 456 (459) (DB) * ('83) 5 All 556 (561, 562) (DB) ('88) 15 Cal 818 (822) (DB) * (Vol. 19) 1932 Lah 82 (83).

[See ('90) 13 Mad 390 (394) (PC).]

[7] A receiver cannot be appointed merely because it is expedient or convenient to one of the parties to do so. (Vol. 3) 1916 Cal 882 (882) (DB) * (Vol. 11) 1924 Cal 456 (459) (DB) * (Vol. 12) 1925 Lah 349 (351) : 6 Lah 74 (DB) * (Vol. 7) 1920 Cal 610 (611) (DB) * ('90) 1890 Pun Re No. 136 p. 437 (438, 439) (DB) * ('13) 16 Oudh Cas 238 (243) (DB).

[See also (Vol. 32) 1945 Pat 404 (412) : 24 Pat 232 (DB).]

[8] A receiver should not be appointed merely because it will do no harm to do so. ('83) 5 All 556 (561) (DB) * (Vol. 11) 1924 Mad 482 (483) (DB) (Vol. 11) 1924 Cal 456 (459) (DB).

[9] The *bona fide* possessor of the property in dispute should not be disturbed by the appointment of a receiver unless there is some substantial ground for such interference. (Vol. 30) 1945 All 1 (2) (FB) * (Vol. 14) 1927 Rang 179 (179) : 5 Rang 70 (DB) * (Vol. 11) 1924 Cal 456 (459) (DB) * ('83) 5 All 556 (561) (DB) * (1911) 1911 Pun W R 62 p. 168 (169) * (Vol. 5) 1918 Low Bar 10 (10) (DB) * (Vol. 5) 1918 Sind 61 (63) : 11 Sind L R 115 (DB) * (Vol. 13) 1926 Cal 1092 (1097) (DB) * (Vol. 11) 1924 Mad 482 (483) (DB) * ('02) 1902 Pun Re No. 73 p. 265 (268) (DB) * (Vol. 26) 1939 Oudh 61 (62) (DB) * (Vol. 24) 1937 Oudh 280 (282) (DB) * (Vol. 22) 1935 Mad 875 (877) * (Vol. 26) 1939 Oudh 229 (230) : 14 Luck 666 (DB).

[10] Well-founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection—Receiver may be appointed. (Vol. 15) 1928 P C 49 (50) : 55 Ind App 131 : 55 Cal 720 (PC).

[11] Where there has been a decision on the merits deciding the rights of the parties in the property concerned, the property cannot be said to be *in medio*, and the unsuccessful party while appealing against such decision cannot rely on the above principle in asking for the appointment of a receiver. (Vol. 26) 1939 Oudh 94 (95) (DB) * (Vol. 26) 1939 Oudh 229 (230) : 14 Luck 666 (DB).

[12] A receiver under this rule cannot be appointed merely because it is just to do so, unless it will also be convenient to do so. (Vol. 28) 1941 Sind 112 (114).

[13] Neither party in possession—Receiver appointed—*Prima facie* title of parties established by trial Court's decree—Appeal—Appointment of receiver by appellate Court held not just and convenient. (Vol. 31) 1944 Oudh 225 (227, 228) (DB).

14. Partition suits.—[1] Sub-rule (2) is no bar to the appointment of a receiver in a suit for partition. (Vol. 29) 1942 Sind 60 (62) : I L R (1941) Kar 563 (570) (DB) * (Vol. 16) 1929 Nag 233 (284) * (Vol. 13) 1926 Sind 37 (38) : 20 Sind L R 201 (DB) * ('90) 17 Cal 614 (618, 619) (DB) * (Vol. 19) 1932 Mad 542 (544).

[2] A receiver will not be appointed in a partition suit in the absence of special circumstances necessitating interference by the Court. (Vol. 29) 1942 Sind 60 (62) : I L R (1941) Kar 563 (DB) * (Vol. 7) 1920 Bom 321 (321) (DB) * (Vol. 22) 1935 Mad 402 (404) * (Vol. 25) 1938 Lah 10 (12) * (Vol. 25) 1938 Mad 730 (731).

[3] The mere fact that there is dispute as to the share to which the plaintiff is entitled is no ground for appointing a receiver. (Vol. 14) 1927 Rang 179 (179) : 5 Rang 70 (DB).

[4] Relations between parties strained—This is no ground for appointment of receiver. (Vol. 10) Rang 1923 Lah 48 (51).

[5] Mere apprehension of future waste is not sufficient for appointing receiver. ('10) 1910 Pun Re No. 36.

[6] There should be some specific act of misappropriation, malversation, or mismanagement shown; and this principle is practically to be applied in the case of partition of Hindu joint family property in the hands of the eldest brother who is the manager of the property. ('10) 1910 Pun Re No. 36 * (Vol. 22) 1935 Mad 402 (404). * ('95) 18 Mad 23 (24).

[7] One co-owner occupying whole property to exclusion of others—Receiver may be appointed though no malversation or waste is proved. (1911) 14 Cal L Jour 215 (218) (DB) * (Vol. 16) 1929 Lah 497 (497) * (Vol. 1) 1914 Cal 439 (441) (DB) * (Vol. 25) 1938 Mad 730 (731).

[8] A receiver may be appointed in a partition suit at the instance of the creditors of the coparceners. (Vol. 16) 1929 Nag 233 (284, 285).

[9] A receiver in a partition suit is entitled to require payment of rent from the party who is in possession of an important item of the family property in suit. (Vol. 7) 1920 Cal 319 (319) (DB).

[10] Where in a partition suit the plaintiff's share has been specified but undivided, the Court can appoint a receiver of the whole property pending the actual partition. (Vol. 29) 1942 Sind 60 (62) : I L R (1941) Kar 563 (DB).

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15. Executor in possession.—(1) Properties in possession of widow who is also executrix under will executed by husband—Mere claim to such property by alleged daughter is no ground for appointment of receiver. (Vol. 21) 1934 Rang 153 (154) (DB).

[2] Executor directed to act in consultation with other heirs—Condition becoming impossible is a circumstance sufficient to justify appointment of receiver. (Vol. 15) 1928 Cal 256 (259) : 55 Cal 249 (DB).

[3] Appointment of executor questioned and his title in dispute—Receiver appointed. (Vol. 20) 1933 Bom 352 (346).

[4] Executor failing to file inventory required by law—Four years' income not accounted for—Receiver should be appointed. (Vol. 14) 1927 Rang 135 (135) (DB).

[5] Will by Mahomedan—Receiver can more readily be appointed in displacement of executor than in case of executor of will by non-Mahomedan. (Vol. 14) 1927 Rang 135 (135) (DB) * ('95) 19 Bom 83 (85).

16. Receiver, if can be appointed for a company.—

[1] A Court cannot appoint a receiver of a company except in a debenture-holders' action when the business and assets of the company are charged with payment of the claims of the debenture-holders. If it is necessary to protect the assets of a company, the appropriate action must be taken under the provisions of the Companies Act. (Vol. 12) 1925 Cal 817 (819) : 52 Cal 513 (DB).]

[2] Judge exercising jurisdiction under S. 38, Companies Act, has no jurisdiction to appoint receiver to take over management of Company—O. 40, R. 1 (i) does not apply.

[But see (Vol. 33) 1946 Lah 193 (195, 196) (DB).]

17. Appointment, if can be made after reference to arbitration.—[1] A receiver can be appointed after a suit has been referred to arbitration unless the Court finds that the reference included also the question of interim management. (Vol. 15) 1928 Cal 256 (258, 259) : 55 Cal 249 (DB) * (Vol. 12) 1925 Sind 102 (102) : 18 Sind LR 303.

[2] A receiver can be appointed even in the interval between the submission of an award and the final acceptance or rejection of it. (Vol. 12) 1925 Sind 102 (103) : 18 Sind LR 303.

18. Receiver in execution proceedings.—[1] Section 51 prescribes appointment of receiver as mode of execution—This rule prescribes conditions and limitations of such appointment. (Vol. 24) 1937 All 389 (390) : I L R (1937) All 542 (DB).

[2] The Court can appoint a receiver in execution proceedings when it considers it just and convenient to do so. (Vol. 29) 1942 Oudh 205 (205) (DB) * (Vol. 20) 1933 Sind 231 (232) * (Vol. 19) 1932 Cal 194 (195) (DB) * (Vol. 24) 1937 Oudh 232 (233) (DB) * (Vol. 23) 1936 Lah 239 (240) * (Vol. 25) 1938 All 3 (5) : I L R (1938) All 35 (DB) * (Vol. 24) 1937 Lah 738 (739) * (Vol. 25) 1938 Pesh 30 (30, 31) (DB) * (Vol. 30) 1945 Pesh 52 (54) (DB).

[3] The decree-holder cannot as of right and as a matter of course apply for execution by the appointment of a receiver. (Vol. 29) 1942 Pat 455 (456) (DB) * (Vol. 19) 1932 Cal 189 (192) : 59 Cal 205 (DB) * (Vol. 16) 1929 Mad 20 (21) (DB) * (Vol. 24) 1937 Oudh 232 (233) (DB).

[See also (Vol. 27) 1940 Lah 345 (348) * (Vol. 20) 1933 Sind 231 (232).]

[4] The person seeking equitable execution by appointment of receiver must show that he was met with difficulties arising from the nature of the property which prevented his obtaining relief by the usual modes of execution and that it is necessary and advantageous to appoint a receiver. (Vol. 29) 1942 Pat 455 (456) (DB) * (Vol. 17) 1930 Cal 502 (504, 506, 507) : 57 Cal 964 (DB) * (Vol. 25) 1938 Cal 93 (96) * (Vol. 24) 1937 Lah 433 (434) : 18 Lah 486 (DB).

[See also (Vol. 23) 1936 Cal 428 (430) : I L R (1399) 1 Cal 523 (DB) * (Vol. 24) 1937 Lah 738 (739).]

[But see (Vol. 27) 1940 Lah 325 (328) : I L R (1941) Lah 590 (DB).]

[5] The mere fact that the defendants belong to an old family and that, unless the Court steps in and saves them from the consequences of their debts they may be ruined, is not, in itself, a sufficient ground for such appointment. ('96) 23 Cal 517 (520) (DB) * (Vol. 3) 1916 Cal 540 (540) (DB) * (Vol. 18) 1931 Oudh 307 (301) : 7 Luck 203 (DB).

[See also ('78) 2 Cal 58 (73) (DB).]

[But see ('69) 12 Suth W R 66 (67) (DB).]

[6] A receiver should not be appointed where it would unduly delay the realization of the decree debt. ('69) 5 Mad H C R 272 (273) (DB) * ('71) 15 Suth W R 322 (323) (DB) * ('78) 25 Suth W R 33 (34) (DB) * ('74) 22 Suth W R 220 (220) (DB) * ('69) 11 Suth W R 505 (506) (DB).

[See also ('75) 23 Suth W R 237 (238) (DB).]

[7] In execution of a decree against a legal representative of a judgment-debtor, a receiver cannot be appointed of properties which do not form part of the assets of the deceased. ('97) 19 All 235 (236, 237) (DB).

[8] Appointment of receiver having effect of depriving one of legal representatives of the entire profits from portion of estate in his hands leaving other representatives scot-free. (Vol. 15) 1928 Oudh 40 (41) : 2 Luck 408 (DB).]

[9] The appointment of a receiver can be made where the interests of both the decree-holder and the judgment-debtor can be safeguarded and where such appointment appears to be the only way in which the decree-holder can hope to realize any appreciable part of his dues. (Vol. 2) 1915 Nag 98 (100) : 11 Nag L R 113 * (Vol. 19) 1932 Cal 189 (193) : 59 Cal 1205 (DB) * (Vol. 26) 1937 Lah 433 (434) : I L R (1937) Lah 486 * (Vol. 14) 1927 P C 131 (135) : 50 Mad 497 : 54 Ind App 228 (PC) * (Vol. 12) 1925 Rang 318 (319) : 3 Rang 235 (DB) * ('08) 30 All 393 (394) (DB) * (Vol. 27) 1940 Lah 125 (126) * (Vol. 17) 1930 Cal 502 (504, 505, 506, 507) : 57 Cal 964 (DB) * (Vol. 20) 1933 Lah 687 (688) : 14 Lah 457.

[10] A receiver can be appointed for the preservation of a property after its sale in execution and before its confirmation. ('10) 5 Ind Cas 758 (758) (DB) (Mad).

[11] The mere fact that the decree-holder consented to the appointment does not estop him from subsequently seeking to enforce his decree by execution. (Vol. 8) 1921 Pat 131 (132) : 6 Pat L Jour 208 (DB).

[12] Even a decree for the payment of money may be ordered to be executed by the appointment of a

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receiver where it is just and convenient to do so. (Vol. 27) 1940 Lah 325 (328) : I L R (1941) Lah 590 (DB) * (Vol. 26) 1939 Oudh 116 (118) : 14 Luck 588 (DB).

[13] Judgment-debtor furnishing security—Execution stayed—Application to appoint receiver on ground that stay order did not apply to decrees for costs which he wanted to execute—Judgment-debtor's possession held could not be disturbed in view of sub-rule (2). (Vol. 23) 1936 Oudh 370 (370) (DB).

[14] Where execution proceedings are to be transferred to the Collector no receiver can be appointed in respect of the property which will go under the Collector's control. (Vol. 27) 1940 Lah 345 (348).

19. Receiver after decrees.—[1] The words "whether before or after decrees" make it clear that a receiver can be appointed even after a decree has been passed in the suit. (Vol. 28) 1941 Bom 395 (397) : I L R (1941) Bom 652. * (Vol. 27) 1940 Lah 125 (126) * (Vol. 13) 1926 Cal 1006 (1008) (DB) * (Vol. 13) 1926 Cal 978 (979) (DB) * (Vol. 22) 1935 Oudh 497 (498) : 11 Luck 562 (DB).

[2] A receiver can be appointed even after the grant of leave to appeal to Privy Council. ('11) 12 Ind Cas 198 (198, 199) (Upp Bur).

[3] No litigation pending before Court—Receiver cannot be appointed. (Vol. 7) 1920 Pat 501 (502) : 5 Pat L Jour 513 (DB).

[4] No receiver can be appointed after dismissal of suit. ('70) 14 Suth W R 384 (384) (DB).

[5] Decree—Satisfied—Receiver cannot be appointed. (Vol. 13) 1926 Cal 978 (979) (DB).

20. Receiver of property in the hands of a common manager. [1] Under this rule a receiver can be appointed for property in the hands of a common manager under S. 95 of the Bengal Tenancy Act. ('11) 13 Cal L Jour 487 (491) (DB).

[2] A receiver can also be appointed pending proceedings for the appointment of a common manager. (Vol. 3) 1918 Cal 427 (427) : 43 Cal 986 (DB) * (Vol. 4) 1917 Cal 815 (815) (DB) * ('13) 17 Cal W N 581 (582) (DB).

21. Powers of receiver.—[1] A receiver has no powers except what have been conferred on him expressly or impliedly by the Court. (Vol. 27) 1940 Pat 516 (532, 533) : 19 Pat 433 (DB) * (Vol. 12) 1925 Mad 318 (319) (DB).

[See also (Vol. 29) 1942 Cal 394 (399) (DB) * (Vol. 29) 1942 Lah 126 (128) : I L R (1943) Lah 179 (DB).]

[2] A receiver's powers are conditioned by the terms of his appointment subject to any subsequent modification by the Court. (Vol. 4) 1917 Mad 746 (747) (DB) * (Vol. 23) 1936 Cal 639 (640) (DB).

[3] In the absence of any provision, express or implied, as to the powers conferred on him, there is no presumption that all the powers mentioned in clause (d) or the rule are conferred on him. (Vol. 2) 1915 Low Bur 139 (140) * (Vol. 13) 1926 Mad 357 (358).

[But see (Vol. 11) 1924 Nag 136 (137).]

[4] A receiver cannot deal with the property of which he is the receiver, in any way without the consent of the Court. (Vol. 15) 1928 Cal 402 (405) (DB) * (Vol. 16) 1929 Cal 828 (828) (DB).

[5] Even if full powers are conferred on the receiver, he should take the directions of the Court in all important matters if he wishes to have complete protection for himself. ('12) 14 Cal L Jour 445 (455, 465) (DB) * ('94) 19 Bom 660 (662) (DB).

[See also (Vol. 27) 1940 Pat 516 (533) : 19 Pat 433 (DB).]

[6] The Court can confer the receiver upon the powers mentioned in clause (d) although he has not been put in possession of the property. (Vol. 24) 1937 Mad 589 (590).

[7] Receiver given all powers under cl. (d)—He has impliedly discretionary power of sale. (Vol. 11) 1924 P C 202 (204) (PC).

[8] Power under cl. (d) includes power to give notice to quit or to sue for compensation for use and occupation without leave of Court. (Vol. 4) 1917 Low Bur 9 (9).

[See also ('91) 18 Cal 477 (480) (DB).]

[See however ('87) 14 Cal 323 (340, 341) (DB).]

[9] A *bona fide* acknowledgment of a debt by the receiver is an acknowledgment by an authorised person which will extend the period of limitation under S. 19 of the Limitation Act. (Vol. 6) 1919 Mad 816 (817) (DB).

[But see ('06) 10 Cal W N 959 (961) (DB).]

[10] A receiver can have, at the most, only such powers and rights over the property as the parties to the suit are found to possess when their rights are finally determined. ('73) 19 Suth W R 37 (39) (DB) * (Vol. 25) 1938 Pat 613 (617) : 17 Pat 594 (DB).

[11] Any misrepresentation or concealment of material facts from the Court in connexion with a proposed transaction by the receiver will vitiate the authority conferred on the receiver. (Vol. 16) 1929 Cal 828 (828, 829) (DB).

[12] Property sold by receiver in auction under Court's directions—Sale is Court sale—Sale not complete till confirmed by the Court. (Vol. 12) 1925 Mad 318 (319).

[See however ('12) 16 Cal W N 394 (395).]

[13] Auction sale by receiver cannot be attacked by parties collaterally. ('07) 6 Cal L Jour 404 (408) (DB).

[14] Private sale by receiver—Right of pre-emption can be exercised. ('05) 27 All 670 (677, 678) (DB).

[15] A receiver has power to settle claims and compromise actions with the sanction of the Court. (Vol. 33) 1946 Cal 304 (305) (DB).

[16] A Court has no power to confer on the receiver any fresh power such as liberty to sell after the suit has been dismissed. ('07) 34 Cal 336 (339) (SB).

[17] No Court other than that by which the receiver was appointed can make or give supplementary directions to the receiver. ('08) 4 Mad L Tim 268 (269) (DB) * (Vol. 22) 1935 Mad 1046 (1047) (DB).

[18] A mortgage by the receiver under the Court's order directing that it should be entitled to priority over the pre-existing charges, takes precedence over such mortgages as a salvage lien. ('07) 34 Cal 427 (442) (SB).

[See however (Vol. 28) 1941 Cal 163 (167) : I L R (1941) 1 Cal 155 (DB).]

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22. "All such powers as to bringing and defending suits....as the owner himself has."—[1] A right to sue is not necessarily incidental to the general powers of a receiver and does not exist unless it has been conferred on him expressly or by necessary implication. ('18) 17 Ind Cas 751 (751) (DB): 1913 Pun Re No. 56.

[2] A right to sue depends solely on the order of the Court and not on the wishes of the parties. ('08) 30 Cal 699 (705).

[3] A Court can expressly authorise the receiver to sue in his own name. ('98) 25 Cal 642 (646) * (Vol. 24) 1937 Bom 244 (250, 251) (DB).

[See also ('04) 30 Bom 250 (255).]

[4] A receiver who is given the same powers of suing and defending suits as the owner himself has, is entitled to sue in his own name though not expressly authorised to do so. ('84) 10 Cal 713 (733) (DB) * (Vol. 16) 1929 Cal 110 (111): 55 Cal 1216 (DB) * ('07) 34 Cal 305 (313) (DB).

[5] After a receiver has been appointed for an estate the landlord cannot sue for rent. ('12) 15 Cal L Jour 339 (342) (DB).

[See ('10) 14 Cal W N 653 (656, 658) (DB).]

[6] A receiver is entitled to sue for possession if he is given by the Court all the requisite powers. (Vol. 3) 1916 Cal 51 (53, 54) (DB).

[7] Suit brought by receiver within his authority—Defendant cannot question validity of his appointment. (Vol. 6) 1919 Cal 533 (534): 46 Cal 70 (DB).

[8] Property sold to third person after appointment of receiver—Sale certificate issued—Auction-purchaser and not receiver can sue for possession. (Vol. 19) 1932 Rang 11 (12): 9 Rang 565 (DB).

[9] A receiver's discretion to spend money in litigation ought not to be interfered with by the Appellate Court—The Court of first instance will, if necessary, take security from him for restitution of such expenses in certain events. (Vol. 2) 1915 Mad 355 (356) (DB).

[10] Receiver of a zamindari held entitled to sue for sums spent by the zamindar at the defendant's request before the appointment of the receiver as it was found that the claim arising out of such expenditure was one annexed to the estate. ('86) 9 Mad 334 (337, 338, 340) (DB).

[11] Administration suit—Receiver appointed—Suit against receiver on money claim by creditor of estate—Application by receiver for leave to defend and future instructions as to his conduct in creditor's suit—Application for leave to defend held should be made renewable—Receiver held entitled to guidance of Court. (Vol. 28) 1941 Cal 267 (269): ILR (1940) 2 Cal 208.

23. Realization of property.—[1] A receiver appointed to get in and realise the estate of a deceased person and to pay debts has a power of sale also. ('04) 6 Bom LR 1140 (1143).

[2] A receiver empowered to collect outstandings and do all things necessary for the realization and preservation of the assets of a firm has no power to mortgage the property of the firm. (Vol. 10) 1923 P C 50 (52): 50 Ind App 77: 1 Rang 66: 50 Cal 338 (PC).

[3] A receiver of debts due to a judgment-debtor can take legal proceedings by way of suit or execution proceedings to collect the outstandings. (Vol. 25)

1938 Bom 458 (458) (DB) * ('74) 22 Suth W R 36 (37) (DB) * ('74) 21 Suth W R 419 (419) (DB).

[See also (Vol. 28) 1941 Cal 579 (581): ILR (1941) 2 Cal 221. (Being an officer of the Court he does not require succession certificate to recover the debts.)]

[4] A receiver cannot recover property sold away by the judgment-debtor, on the ground of the sale being voidable under S. 53 of the Transfer of Property Act. ('12) 35 Mad 578 (581) (DB).

[5] Rent accrued due to the estate prior to the appointment of the receiver is not part of the estate in his hands and therefore a payment to the proprietor on account of such liability is a sufficient discharge of the debt. (Vol. 3) 1916 Pat 133 (133) (DB).

[6] Administration suit—Receiver appointed—Payment of debt by debtor to deceased creditor without receiver's consent is not binding on receiver. (Vol. 28) 1941 Cal 579 (581): ILR (1941) 2 Cal 221.

24. "Collection of the rents and profits thereof."—[1] A receiver appointed to collect the rents of land cannot raise the rent. ('82) 8 Cal 719 (720) (DB).

[2] Landlord reducing rate of rent subsequent to attachment but before appointment of receiver—Receiver is entitled to recover rent at original rate. ('85) 8 Mad 413 (420) (DB).

[3] Receiver appointed in execution to collect rents and profits—Lessee paying rent to judgment-debtor's mortgagee—Receiver is entitled to follow rent in mortgagee's hands. (Vol. 21) 1934 Rang 84 (84) (DB). (Reversing (Vol. 20) 1933 Rang 357).

[4] Receiver over lease-hold property—He is bound to discharge head-rent out-goings payable to lessor out of sub-rents—But parties can get this responsibility of receiver modified by consent order. (Vol. 30) 1943 P C 185 (188): ILR (1944) Kar (PC) 157 (PC).

25. Power as to the execution of documents as the owner himself has.—[1] When a receiver sells a property under the orders of the Court, he should be a party to the deed of conveyance. ('71) 6 Beng LR 492n (493n).

[2] A receiver in an administration suit cannot sell in satisfaction of a mortgage executed by one of the claimants of the estate before the administration is complete. ('01) 5 Cal W N 408 (410).

[3] A conveyance of the property by a receiver acting within his authority binds all the persons entitled to share in the estate including minors. (Vol. 28) 1941 Cal 103 (166): ILR (1941) 1 Cal 155 (DB) * (Vol. 3) 1916 Cal 319 (320): 43 Cal 124 * ('94) 21 Cal 479 (481).

[See (Vol. 29) 1942 Cal 394 (400) (DB)].

26. Delegation of duty by receiver.—[1] A receiver is not entitled to delegate to another any of the duties entrusted to him by the Court. ('95) 19 Bom 660 (662) (DB).

[2] A receiver cannot assign to another for valuable consideration any of his rights as receiver. ('10) 5 Low Bur Rul 213 (215) (FB).

27. The receiver is an officer of the Court.—[1] A receiver is an officer of the Court. He is also "a public officer" within the meaning of S. 2, cl. (17). (Vol. 29) 1942 Cal 483 (485): ILR (1942) 1 Cal 577 * (Vol. 33) 1946 Cal 357 (362) * (Vol. 27) 1940 Pat 516 (531): 19 Pat 438 (DB) * (Vol. 18) 1931 Cal 503 (503): 58 Cal 850 (DB) * (Vol. 27) 1940 Cal 1 (3) (DB).

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[2] A receiver is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject-matter of the suit *pendente lite*. ('71) 6 Beng LR 486 (487) * ('08) 30 Cal 598 (598) (DB) * ('95) 22 Cal 1011 (1015) : 22 Ind App 208 (PO).

[3] A receiver is a representative of the Court and not of any of the parties to the suit, though he holds the property for the benefit of those ultimately found to be rightful owners. ('10) 37 Cal 754 (757, 758) (DB) * (Vol. 15) 1928 Cal 402 (408, 405) (DB) * (Vol. 8) 1921 Cal 516 (516) (DB) * ('08) 30 Cal 721 (724) (DB) * (Vol. 16) 1929 Cal 659 (660) (DB) * (Vol. 25) 1988 Bom 458 (458) (DB).

[See (Vol. 16) 1929 Bom 279 (282) (DB) * (Vol. 32) 1945 Cal 887 (892) (DB)].

[4] A receiver in execution proceedings is not the agent of the judgment-creditor and moneys realized by the receiver do not become *ipso facto* moneys belonging to the judgment-creditor. (Vol. 17) 1980 Mad 4 (8, 9) * (Vol. 22) 1985 Mad 1046 (1047) (DB).

[5] A receiver's possession being that of the Court, no one is entitled to interfere with it. (Vol. 16) 1929 Mad 184 (186) : 52 Mad 988.

[6] A sale of property by the receiver has the same effect as a sale by the Court, and the purchaser is entitled to the assistance of the Court in obtaining possession of the property so purchased. ('94) 21 Cal 479 (483).

[See ('05) 83 Cal 1175 (1176, 1177)].

[7] Receivers selling immovable property on the direction of the Court should give not less than thirty days' notice of the sale unless the parties agree to a lesser period. (Vol. 26) 1939 Mad 519 (520) : ILR (1988) Mad 597 (DB).

[8] A receiver is not a judicial officer. (Vol. 27) 1940 Rang 151 (151) (DB).

[9] A Court has no power to delegate to a receiver the duty of enquiring into the claims of rival claimants to the property. (Vol. 16) 1929 Bom 478 (479) (DB) * (Vol. 8) 1921 Cal 298 (299) (DB).

[10] A receiver should not be allowed to purchase the property of which he is the receiver. ('01) 5 Cal WN 91 (104) (DB).

[See also (Vol. 19) 1982 Cal 672 (673) : 59 Cal 956 (DB)].

[11] Receiver purchasing property of which he is receiver—Sale is voidable and can be set aside under S. 47. (Vol. 19) 1982 Cal 672 (673, 674) : 59 Cal 956 (DB).

28. Possession of receiver enures for the benefit of the true owner.—[1] The possession of the receiver is the possession of the Court. (Vol. 30) 1948 Bom 278 (275, 276) * (Vol. 20) 1938 Lah 671 (673) : 14 Lah 779 * ('71) 6 Beng LR 486 (487) * (Vol. 28) 1936 Pat 572 (576) (DB).

[2] The receiver holds the property for the benefit of those ultimately found to be the true owners. (Vol. 29) 1942 Cal 488 (488) : ILR (1942) 1 Cal 577 * (Vol. 38) 1946 Cal 357 (362) * (Vol. 29) 1942 Mad 602 (602) (DB) * (Vol. 29) 1942 Mad 670 (672) : ILR (1942) Mad 983 (DB) * (Vol. 11) 1924 Cal 600 (610) (DB) * (Vol. 21) 1984 Rang 321 (321, 322) : 12 Rang 437 (DB) * (Vol. 13) 1926 Cal 885 (392) : 52 Cal 914 (DB) * (Vol. 15) 1928 Cal 402 (403, 405) (DB) * ('07) 34 Cal 805 (816, 817) (DB) * ('99) 26

Cal 625 (629, 630) (DB) * (Vol. 28) 1936 Pat 572 (576) (DB).

[See also (Vol. 28) 1936 All 495 (501) : 58 All 949 (FB) * (Vol. 20) 1938 Cal 625 (627) (DB)].

[3] By the appointment of a receiver, the Court takes upon itself the management of the property during the continuance of the litigation. But the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed by it. (Vol. 30) 1948 Bom 278 (277) * (Vol. 29) 1942 Cal 556 (558) (DB) * (Vol. 29) 1942 Cal 894 (400) (DB) * (Vol. 29) 1942 Mad 602 (602) (DB) * (Vol. 16) 1929 Cal 110 (112) : 55 Cal 1216 (DB) * (Vol. 8) 1916 Lah 78 (80) : 1917 Pun Re No. 91 * (Vol. 12) 1925 All 72 (72) : 46 All 924 (DB) * (Vol. 28) 1936 Pat 572 (576) (DB).

[4] The appointment of a receiver in a partition suit does not operate as a charge in favour of the plaintiff on the suit property. (Vol. 29) 1942 Mad 670 (672) : ILR (1942) Mad 983 (DB).

[5] The owner of the property can deal with it without reference to the Court provided that such dealing does not interfere with the receiver's possession. (Vol. 28) 1941 Cal 168 (166) : ILR (1941) 1 Cal 155 (DB).

[6] None of the parties to an action can claim to be in adverse possession during the continuance of the receiver's possession against the party ultimately found entitled to the property. (Vol. 3) 1916 Cal 751 (752) (DB) * ('05) 2 Cal L Jour 602 (610, 611) (DB).

[See (Vol. 8) 1921 Mad 528 (529) (DB) * (Vol. 5) 1918 Mad 974 (978) (DB)].

[7] The receiver cannot during the continuance of the receivership set up a title in himself adverse to that of the parties. Even if the receiver is discharged he would still hold the property on behalf of the rightful owner. (Vol. 6) 1919 Mad 8 (10) (DB) * ('85) 11 Cal 496 (498) (DB).

[8] A payment made by a receiver out of the funds of an estate is equivalent to a payment made by the owner of the estate and where he would be entitled to get reimbursement from a third person if he had made the payment himself, he would be equally entitled to such reimbursement if the payment is made by the receiver. (Vol. 18) 1926 Cal 385 (392) : 52 Cal 914 (DB).

[9] If despite the appointment of the receiver the defendant continues in possession, he can be sued by the true owner for the profits misappropriated by him. (Vol. 10) 1928 Nag 70 (72, 73).

[10] The appointment of a receiver does not supersede a prior attachment of the property. ('70) 18 Suth W R 423 (425) (DB).

[11] Owner of property appointed receiver—He does not lose rights of dealing with property as proprietor. (Vol. 16) 1929 Cal 110 (112) : 55 Cal 1216 (DB).

29. Attachment of properties in the hands of receiver.—[1] Leave of Court is necessary for execution of a decree by attachment and sale of property in the hands of the receiver. (Vol. 10) 1928 Mad 144 (146) : 47 Mad 47 * ('98) 26 Cal 127 (129) * ('92) 16 Bom 577 (579, 580) * ('94) 21 Cal 85 (91) * ('76) 1 Cal 403 (405, 406) * ('11) 14 Cal L Jour 55 (59) (DB) * (Vol. 18) 1921 Pat 204 (204) (DB) * (Vol. 28) 1936 Pat 572 (576) (DB).

[See also ('05) 1905 All W N 110 (111) (DB) * (Vol. 22) 1935 Mad 697 (699) (DB) * (Vol. 17) 1980 Mad 4 (11) (DB)].

[But see (Vol. 21) 1934 Rang 174 (176) (DB)].

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[2] Court's leave is necessary even where the property is sought to be proceeded against in execution of a mortgage decree, although no attachment is necessary for sale in such a case. (Vol. 10) 1923 Mad 144 (146): 47 Mad 47 * (Vol. 22) 1935 Mad 624 (625).

[But see ('99) 26 Cal 127 (128, 129).]

[3] A purchaser in Court-auction, at a sale held without the previous permission of the Court, buys at his peril, as the sale may be cancelled. (Vol. 12) 1925 Mad 51 (51) (DB) * (Vol. 10) 1923 Mad 144 (146): 47 Mad 47 * ('10) 11 Cal L Jour 489 (494) (DB).

[4] Permission is necessary even for an application for rateable distribution against the receiver. ('11) 14 Cal L Jour 55 (58) (DB).

[5] A sale of property in the hands of a receiver without the leave of the Court is not void but is only voidable. (Vol. 30) 1943 Bom 272 (277) * (Vol. 31) 1944 Mad 372 (374): ILR (1944) Mad 717 (DB) * (Vol. 32) 1945 Mad 13 (15) (DB).

[6] Court appointing receiver and Court selling property in execution same—Leave may be implied. (Vol. 31) 1944 Mad 372 (374): ILR (1944) Mad 717 (DB).

[7] Leave of Court obtained before confirmation of sale—Sale is valid. (Vol. 32) 1945 Mad 13 (15) (DB) * (Vol. 31) 1944 8 Mad 372 (374): ILR (1944) Mad 717 (DB).

[8] If the persons interested do not impeach the sale, it is not open to others to do so. (Vol. 10) 1923 Cal 121 (180) (DB) * (Vol. 6) 1919 Cal 263 (270) (DB) * (Vol. 28) 1936 Pat 572 (575) (DB).

[9] Sale without Court's leave—Sale cannot be set aside if person seeking to set it aside is not prejudiced thereby. (Vol. 11) 1921 Cal 1055 (1055) (DB).

[10] Where a decree obtained by a receiver is attached without the Court's permission and is then transferred by the receiver to a third person who takes the assignment in good faith and without knowledge of the attachment, the attachment cannot be allowed to prevail over the rights of the assignee. (Vol. 10) 1923 Mad 567 (568) (DB).

[11] Though a receiver of a property may have been appointed, yet, until he actually takes possession of the property, a stranger decree-holder is not precluded from executing his decree against the property without obtaining the leave of the Court. (Vol. 30) 1943 Bom 273 (277) * (Vol. 30) 1943 Pat 297 (299, 300): 22 Pat 256 (DB) * (Vol. 10) 1923 Cal 121 (129, 130) (DB) * (Vol. 22) 1935 Mad 624 (624) * (Vol. 6) 1919 Cal 269 (270) (DB) * ('37) ILR (1937) 2 Cal 440 (446) * (Vol. 26) 1939 Mad 433 (440).

[12] Where a receiver has been appointed in regard to the debts due to the estate of a deceased person, a notice given by the receiver to a debtor along with the admission of his claim by the debtor amounts to taking possession of the debt by the receiver. (Vol. 28) 1941 Cal 579 (581): ILR (1941) 2 Cal 221.

[13] The proper Court to permit the attachment of property in the hands of a receiver is the Court by which the receiver has been appointed. (Vol. 16) 1929 Lah 147 (148).

[See also (Vol. 30) 1943 Bom 273 (277).]

30. Suits by, or against receiver—Leave of Court.—[1] A receiver can neither sue nor be sued without the leave of the Court. ('84) 10 Cal 1014 (1017).

(DB) * (Vol. 31) 1944 All 220 (221): ILR (1944) All 255 (DB) * ('08) 30 Cal 593 (598) (DB) * ('03) 30 Cal 724 (724) (DB) * (Vol. 15) 1923 Rang 175 (175)) 6 Rang 268 * (Vol. 10) 1923 Rang 208 (209): 1 Rang 138 * (Vol. 12) 1925 Cal 681 (683) * (Vol. 11) 1924 All 40 (43): 46 All 16 * ('08) 26 Mad 492 (493) (DB) * ('10) 14 Cal W N 653 (656, 657) (DB) * (Vol. 23) 1936 Sind 132 (132) * (Vol. 25) 1938 Pat 437 (439) (DB) * (Vol. 33) 1946 Cal 127 (128, 129) (DB).

[2] There is no statutory provision which requires a party to take the leave of the Court to sue a Receiver. The institution of suits designed to disturb the possession of the Court is in the eye of the law a contempt of the authority of the Court and therefore the party contemplating such a suit, is required to take the leave of the Court so as to absolve himself from that charge. The grant of such leave is made in exercise of the inherent power. (Vol. 5) 1918 Pat 100 (103): 4 Pat L Jour 20 (DB) * (Vol. 24) 1937 Pat 523 (524).

[See (Vol. 20) 1933 Mad 340 (341) * (Vol. 8) 1921 Bom 427 (428): 45 Bom 99 (DB) * (Vol. 1) 1914 Cal 587 (588) (DB).]

[3] A Court will, however, readily grant leave to sue the receiver if it is satisfied that there is a case to be tried so that the claim of the third party may be tried in the presence of the receiver. (Vol. 27) 1940 Rang 59 (59, 60) (DB) * (Vol. 11) 1924 Pat 491 (495): 3 Pat 357 (DB) * (Vol. 14) 1927 Pat 397 (398) * (Vol. 5) 1918 Pat 100 (101): 4 Pat L Jour 20 (DB) * (Vol. 24) 1937 Cal 671 (672) (DB).

[See (Vol. 24) 1937 Pat 523 (524).]

[4] The omission to obtain the sanction of the Court prior to the institution of the suit can be rectified by leave granted subsequent to the institution of the suit. (Vol. 8) 1921 Mad 624 (626) (DB) * (Vol. 10) 1923 Mad 567 (567) (DB) * (Vol. 7) 1920 Bom 11 (11): 44 Bom 903 * (Vol. 7) 1920 Mad 709 (710): 43 Mad 793 (DB) * ('11) 14 Cal L Jour 50 (59) (DB) * ('11) 15 Cal W N 54 (56) (DB) * ('11) 14 Cal L Jour 55 (60, 61) (DB) * (Vol. 13) 1926 Cal 1040 (1041) (DB) * ('07) 34 Cal 305 (312) (DB) * (Vol. 6) 1919 Cal 426 (428, 429): 46 Cal 352. (Suit by receiver.) * (Vol. 7) 1920 Cal 778 (778) * ('21) 61 Ind Cas 888 (889) (DB) (All).

[See also (Vol. 28) 1936 Cal 289 (290).]

[But see (Vol. 1) 1914 Mad 66 (67) * ('05) 32 Cal 270 (271, 272)].

[5] A suit against a receiver without the leave of the Court is liable to be dismissed. (Vol. 1) 1914 Cal 587 (588) (DB).

[6] Suit against receiver without Court's leave—Decree if passed can be set aside. ('12) 17 Ind Cas 916 (916) (Low Bur).

[7] The absence of an objection by the receiver, that no leave was obtained, will not entitle the Court to pass a decree against a receiver. (Vol. 13) 1926 Cal 1040 (1041) (DB).

[8] Receiver discharged—Objection that suit against receiver was instituted without Court's leave will not stand. (Vol. 18) 1931 Pat 293 (300): 10 Pat 379 (DB).

[9] Receiver replaced by heirs of one of parties—Objection as to want of leave will not be entertained. (Vol. 8) 1921 Mad 624 (626) (DB).

[10] Court appointing receiver and not Court trying suit has to grant leave. (Vol. 11) 1924 Bom 89 (90): 43 Bom 200 * (Vol. 6) 1919 Pat 554 (555, 556) (DB).

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[11] Grant of leave is not tantamount to relinquishment of possession by Court granting it to Court trying suit. (Vol. 11) 1924 Pat 491 (495); 3 Pat 357 (DB) * (Vol. 15) 1928 Pat 321 (323); 7 Pat 684 (DB).

[12] The Court trying suit cannot issue an injunction against the receiver restraining him from dealing with the property as it would lead to a conflict of jurisdiction. (Vol. 15) 1928 Pat 321 (323); 7 Pat 684 (DB) * (Vol. 12) 1925 Cal 1174 (1175) (DB).

[See also (Vol. 20) 1933 Bom 51 (52, 53, 57): 57 Bom 346 (DB).]

[13] Nor can a Court other than the appointing Court issue a rukbar to the latter Court requesting it to restrain the receiver from taking possession of a part of the property in respect of which the receiver has been appointed. (Vol. 8) 1921 Pat 92 (93); 6 Pat L Jour 268 (DB).

[14] The proper course for a person who has obtained a decree against the receiver is to apply to the Court, by which he has been appointed, to direct the receiver to act according to the decree. (Vol. 15) 1928 Pat 321 (323); 7 Pat 684 (DB) * (Vol. 12) 1925 Cal 1174 (1175) (DB).

[15] Magistrate acting under S. 145 Cr. P. C. cannot interfere with receiver's possession without permission of Court appointing him. ('03) 30 Cal 593 (598) (DB).

[16] The owner of an estate cannot sue for accounts a tahsildar appointed by the receiver. (Vol. 8) 1921 Cal 516 (516) (DB).

[17] A present receiver cannot sue a former receiver of the estate for breach of duty committed by him as receiver in respect of money alleged to be due to the estate. (Vol. 1) 1914 Cal 744 (745); 41 Cal 92.

[18] A suit for declaration of title to the property in the hands of the receiver is not a suit "against" the receiver within the meaning of S. 80. (Vol. 27) 1940 Cal 1 (5) (DB).

[See also (Vol. 29) 1942 Cal 894 (899) (DB).]

[19] Simply because a receiver is authorised to defend suits, it does not entitle a third party to bring a suit against the receiver alone ignoring the persons who are in law necessary parties to such suit. (Vol. 33) 1946 Cal 127 (128) (DB).

31. Debts incurred by receiver in the course of business.—[1] A receiver is personally liable in respect of debts incurred or contracts entered into by him in the course of his management of the estate, but he is entitled to indemnity from the estate for such debts. (Vol. 12) 1925 Pat 602 (604, 605) (DB) * (Vol. 18) 1931 Cal 491 (492, 493); 58 Cal 174 * ('03) 30 Cal 937 (943, 944) * (Vol. 26) 1939 Rang 12 (13, 14, 16): 1938 Rang LR 611.

[2] The creditors can also proceed against the estate for the recovery of such debts in priority to other creditors of the estate. ('03) 30 Cal 937 (943, 944) (DB).

[See also (Vol. 29) 1942 Cal 894 (400) (DB).]

[See however (Vol. 26) 1939 Rang 12 (16): 1938 Rang LR 611.]

[3] Unless a creditor has obtained a charge on the estate in respect of his advance, his remedy as against the estate will be limited to the amount to which the receiver is entitled to indemnity from the estate. (Vol. 23) 1941 Mad 593 (596): ILR (1941) Mad 875 (DB).

[4] The ordinary rule that the creditors who have advanced money to a receiver for the management of the estate can proceed against him personally does not apply where the advance has been expressly made on the condition that the estate alone should be liable. (Vol. 12) 1925 Pat 602 (604) (DB).

32. Loss caused by receiver's default.—[1] If loss arises from the default of the receiver, such loss, subject to the receiver's liability for his default, must be borne by the estate and not by the party at whose instance he was appointed receiver. ('97) 20 Mad 224 (226, 229) (FB) (Affirming 17 Mad 501 on appeal.)

[See also (Vol. 17) 1930 Mad 4 (8).]

[See however (Vol. 16) 1929 Oudh 231 (233): 5 Luck 80 (FB).]

33. Agreement with receiver—Contempt of Court.—[1] It is a contempt of Court for any one to enter into an agreement with the receiver restricting and controlling his powers. ('95) 22 Cal 648 (656).

[2] A promise by party to pay remuneration to a receiver is against law and not enforceable. ('03) 30 Cal 696 (698) (DB).

[See also (Vol. 26) 1939 Rang 217 (219): 1940 Rang LR 129.]

[3] A receiver can apply for process for contempt of Court against any one interfering with his possession. (Vol. 27) 1940 Cal 437 (438) (DB) * ('01) 28 Cal 790 (798) (DB).

34. Remuneration of receiver.—[1] The Court has a discretion to allow the receiver remuneration at a fixed rate. (Vol. 10) 1923 Cal 516 (517) (DB) * (Vol. 18) 1931 Mad 500 (501).

[2] The receiver is entitled to all reasonable expenses of management. ('95) 19 Bom 660 (662) (DB) * (Vol. 23) 1926 Mad 321 (322).

[3] The receiver is entitled to fees of counsel whom he may have to engage. ('11) 14 Cal L Jour 445 (459) (DB).

[4] The receiver's remuneration must come out of the estate and the parties are not personally liable for it. (Vol. 10) 1923 Cal 516 (517) (DB) * (Vol. 25) 1938 Rang 357 (358) (DB).

[5] The managing partner of a firm by consenting to act without remuneration as receiver during the dissolution of the partnership, does not forgo his rights to such remuneration as he would be entitled to as managing partner. (Vol. 13) 1926 Cal 380 (380) (DB).

[6] The receiver of mortgaged property is entitled to priority over the mortgagee in respect of his remuneration and the expenses properly incurred by him in the course of his management. (Vol. 12) 1925 Mad 571 (572, 573) (DB).

[7] The priority does not extend to the wages that have become due to a servant of the estate before the appointment of the receiver. ('82) 6 Mad 138 (139) (DB).

35. Liability of receiver.—[1] A receiver disregarding the Court's orders is liable to be removed. (Vol. 28) 1941 Cal 144 (146): ILR (1940) 2 Cal 102 * (Vol. 12) 1925 Lah 309 (312).

[2] Receiver appointed by High Court disregarding orders of Court—He can be committed for contempt. (Vol. 19) 1932 Bom 638 (642).

[3] It is the duty of the receiver to preserve the property by paying public demands, such as land revenue. (Vol. 28) 1941 Cal 305 (306) (DB).

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36. Liability to account.—[1] Money laid out by receiver without previous order of Court—Transaction proved to be beneficial to parties interested—Receiver is entitled to be allowed credit in his accounts for amount thus expended. ('11) 14 Cal L Jour 445 (456) (DB).

[2] A receiver must produce vouchers for all payments. (Vol. 11) 1924 Cal 1063 (1063) (DB) * ('95) 19 Bom 660 (662) (DB).

[3] Vouchers, when produced, they will be evidence of the payment of the sums therein specified. (Vol. 11) 1924 Cal 1063 (1063) (DB).

[4] A receiver can be required to submit his accounts for scrutiny even after the suit has been dismissed and even after his discharge. (Vol. 7) 1920 Pat 501 (502): 5 Pat L Jour 513 (DB) * ('95) 22 Cal 1011 (1015, 1016): 22 Ind App 203 (PC) * (Vol. 8) 1921 Cal 516 (516) (DB) * ('11) 14 Cal L Jour 445 (463) (DB).

[5] A receiver is responsible not only for sums actually received by him but also for all such sums which he might have received but for his default or negligence. ('01) 5 Cal WN 223 (223).

[See also (Vol. 30) 1943 Cal 244 (247) (DB)].

[6] A party appointed receiver is liable to account in the same way as a stranger so appointed. (Vol. 12) 1925 PC 257 (259) (PC).

[7] It is not right to go into the question of the liability to account for periods other than the period covered by the account itself. (Vol. 7) 1920 Pat 703 (704): 5 Pat L Jour 97.

[8] The question of bad management by the receiver does not arise when he submits his accounts for being passed. (Vol. 11) 1924 Cal 1063 (1064) (DB).

[9] The accounts of the receiver can be examined only by the Court appointing him. (Vol. 7) 1920 Pat 220 (222): 4 Pat L Jour 636 (DB).

[10] Where Court has overruled the objections of a party impugning the accounts and passed them, a suit will not lie against the receiver for damages, for negligence etc., based on allegations which have already been considered and overruled by the Court. (Vol. 8) 1921 Bom 427 (429): 45 Bom 99 (DB) * (Vol. 25) 1938 Cal 597 (600) (DB).

37. Debts incurred by receiver and those incurred by executor or trustee—Comparison—

[1] A creditor is entitled to proceed against the representative of an estate for the recovery of a debt incurred by the receiver during his management of the estate. In this respect, a receiver occupies a position towards the estate in his hands different from that of an executor or trustee. An executor or trustee not acting through or under directions of the Court does not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors. ('08) 30 Cal 937 (943, 944).

38. Liability to criminal prosecution.—[1]

Receiver of property cannot be prosecuted for any offence committed by him in that capacity. (Vol. 6) 1919 Cal 647 (649): 46 Cal 432 (DB) * ('12) 13 Cr L Jour 489 (490) (DB) (Cal).

[2] Offence committed having no connection with office held by receiver—Court's sanction is not necessary for his prosecution. ('12) 13 Cr L Jour 491 (491) (Cal).

39. When appointment takes effect.—[1] Order appointing receiver conditional on security being given—Appointment is not complete till security is given. ('11) 14 Cal L Jour 489 (499) (DB).

[But see (Vol. 11) 1924 Nag 136 (137).]

[2] Where there is no direction as to security, the order appointing the receiver takes effect immediately. ('11) 14 Cal L Jour 489 (499) (DB) * (Vol. 6) 1919 Cal 533 (534): 46 Cal 70 * ('02) 1902 Pun L R No. 61, p.232 (234) (DB).

[3] The transfer of the property to the receiver's possession, actual or constructive and the conferment of special powers on him require specific orders under clauses (b), (c) and (d) of the rule. (Vol. 10) 1923 Nag 6 (6).

40. Receiver's lien.—[1] A receiver has a lien on the estate for all his just claims and allowances. ('76) 2 Cal 53 (70) (DB) * ('95) 22 Cal 960 (973) * ('92) 15 Mad 233 (234) (DB) * (Vol. 25) 1938 Rang 357 (357) (DB).

[See also (Vol. 22) 1935 Mad 594 (596) * (Vol. 23) 1936 Mad 321 (322).]

[2] Where a receiver is sued for acts done by him as receiver for the benefit of the estate, he is entitled to indemnity from the estate for the loss caused to him thereby. ('08) 30 Cal 937 (944).

[3] A Court will not compel a receiver who has been discharged, to make over the property in his possession until his lien has been satisfied or provided for by a sufficient indemnity. ('95) 22 Cal 960 (973).

41. Remedy of third party aggrieved by receiver's action.—[1] Third party aggrieved by receiver's action—He should apply to court in very suit in which receiver has been appointed for summary order against receiver—If no question of title is involved court will decide matter—Otherwise it will refer third party to file separate suit against receiver. (Vol. 28) 1941 Rang 236 (238): 1941 Rang LR 300 * (Vol. 10) 1923 Rang 208 (208, 209): 1 Rang 138 * (Vol. 10) 1923 Mad 804 (805, 806) * ('03) 26 Mad 492 (493) (DB) * (Vol. 12) 1925 Cal 681 (683) * (Vol. 13) 1926 Cal 885 (894): 52 Cal 914 (DB) * (Vol. 10) 1923 Mad 129 (130) (DB) * (Vol. 14) 1927 Pat 297 (298, 299) (DB) * ('90) 17 Cal 285 (287) (DB).

[See also (Vol. 12) 1925 Cal 750 (752).]

[But see ('71) 15 Suth WR 347 (348) (DB).]

[2] Debatable questions involved at time of passing receiver's accounts—Court will decline to go into them in summary proceeding. (Vol. 13) 1926 Cal 335 (394): 52 Cal 914 (DB).

42. Receiver, if and when a necessary party to a suit.—[1] Receiver in possession of deceased's estate—Suit for money against deceased's representatives—Receiver is not necessary party. (Vol. 12) 1925 Bom 523 (523, 524) (DB).

[2] Receiver is not necessary party in every suit concerning property of which he is receiver. ('11) 10 Ind Cas 673 (674) (Mad) * (1893-1900) 1893-1900 Low Bur Rul 432 * (Vol. 10) 1923 Pat 86 (87) (DB).

[See also (Vol. 20) 1933 Sind 232 (234).]

[3] Suit between third parties for declaration of title to and possession of property in receiver's Charge—Latter is not necessary party. ('02) 6 Cal WN 829 (829) * ('01) 5 Cal WN 27 (28).

[4] Decree in suit to which receiver is not party—Plaintiff can enforce decree against property in

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receivers' hands after obtaining leave of executing Court. ('11) 10 Ind Cas 678 (674) (Mad) * (Vol. 12) 1925 Bom 528 (524) (DB).

[5] Where the property in the hands of the receiver is intended to be affected by the result of the suit and the possession of the receiver or the jurisdiction of the Court is intended to be interfered with, leave of the Court must be obtained and the receiver made a party. ('10) 14 Cal W N 653 (655) (DB) * ('11) 15 Cal W N 54 (56) (DB) * ('10) 12 Cal L Jour 368 (371) (DB) * (Vol. 10) 1923 Pat 86 (87) (DB) * (Vol. 24) 1987 Cal 671 (672) (DB) * (Vol. 33) 1946 Cal 127 (128, 129) (DB).

[See (Vol. 25) 1938 Pat 487 (489) (DB).]

[6] The receiver is a proper party to proceedings for the sale of property in the receiver's hands in execution of a decree for sale on a mortgage. (Vol. 10) 1923 Mad 144 (146, 147) : 47 Mad 47.

[7] The receiver is not the legal representative of a party and so cannot be brought on the record of a proceeding started by such party. (Vol. 25) 1938 Bom 458 (458) (DB).

[8] A receiver cannot be added as a party to proceedings under S. 145 of the Criminal Procedure Code. ('08) 30 Cal 593 (598) (DB).

[9] Failure to make receiver party to execution proceedings does not render such proceedings void. (Vol. 32) 1945 Cal 887 (893) (DB).

43. Notice to opposite party, if necessary, before appointment.—[1] The very object of appointing a receiver may be defeated in many cases if notice were insisted on. (Vol. 10) 1923 Lah 239 (241).

[2] In emergent cases a receiver may be appointed without notice to the opposite side. (Vol. 3) 1916 Cal 427 (427, 428) : 43 Cal 986 (DB).

[3] Except for very special reasons notice should not be excused before an order is made for such appointment. ('03) 2 Low Bur Rul 222 (223) (DB) * ('83) 1888 Bom P J 160 (160) (DB).

44. Appointment of new receiver in place of old receiver.—[1] Where a receiver ceases to hold the office of receiver pending a suit filed by him, the suit does not abate but may be continued by his successor in office. ('05) 28 Mad 157 (159, 160) (DB).

[See ('21) 61 Ind Cas 888 (889) (DB) (All).]

45. Joint receivers.—[1] The retirement or resignation of one of the receivers does not put an end to the order appointing a receiver. (Vol. 3) 1916 Cal 824 (825) (DB).

[2] Partition suit—Plaintiff ordered to remain in charge of portion of property and defendant in charge of remaining property—Order held not *ultra vires*. (Vol. 1) 1914 All 4 (5) : 36 All 19 (DB).

[3] Ordinarily, it is not open to a Court to appoint a receiver when a receiver has already been appointed in respect of the same property by another Court. (Vol. 11) 1924 Pat 491 (494) : 3 Pat 357 (DB) * (Vol. 20) 1933 Lah 671 (673) : 14 Lah 779.

[4] A receiver can be appointed in a mortgage suit where the decree is for sale although a receiver has already been appointed in respect of the same property in a prior partition suit. ('11) 14 Cal L Jour 526 (528) (DB).

46. Duration of office of receivership.—[1] A Court appointing a receiver may order that the office

should continue permanently or for such period as is deemed necessary. ('96) 19 Mad 120 (127) : 29 Ind App 28 (PO).

[See also (Vol. 81) 1944 Nag 82 (88) : ILR (1944) Nag 166 (DB) * (Vol. 32) 1945 All 261 (264) : ILR (1945) All 818 (FB).]

[2] It can also cancel the order of appointment at any time, if it considers it necessary. ('08) 4 Low Bur Rul 356 (358).

[3] Appointment of receiver with consent of parties—Still Court has inherent power to discharge or remove him. (Vol. 8) 1921 Mad 234 (234) (DB) * ('12) 1912 Mad W N 1208 (1209, 1210).

[4] Until otherwise ordered by the Court, the receiver will continue in office though the suit in which he has been appointed has come to an end but the purpose of his appointment has not been achieved. (Vol. 12) 1925 Lah 445 (446) : 6 Lah 442 (DB) * (Vol. 11) 1924 Mad 557 (558) (DB) * (Vol. 4) 1917 Mad 806 (807) * (Vol. 11) 1924 Mad 557 (558) (DB) * (Vol. 17) 1930 Mad 67 (68) : 52 Mad 967 (DB) * (Vol. 16) 1929 Bom 279 (280) (DB) * (Vol. 32) 1945 Sind 75 (79, 80) : ILR (1944) Kar 896.

[5] A receiver in a partition suit is not discharged merely by the passing of a preliminary decree in the suit. (Vol. 12) 1925 Lah 445 (446) : 6 Lah 442 (DB).

[6] A receiver in an administration suit cannot ordinarily be discharged before the completion of the administration. ('01) 5 Cal W N 417 (419) * ('01) 5 Cal W N 261 (268).

[7] Where it was ordered that the receiver would be discharged according to the arbitrator's award on his payment of all rents and revenues due in respect of the properties in his possession and all pressing debts and on his submission of proper accounts, it was held that the authority of the receiver continued even after this order till he performed all the acts he was required by it to perform. (Vol. 29) 1942 Cal 894 (399) (DB).

[8] Application for discharge of receiver does not lie to executing Court. (Vol. 32) 1945 Sind 75 (81) : ILR (1944) Kar 896.

[9] A consent order of appointment of a receiver does not prevent a party from impugning the administration thereunder which is of such a character as to amount to a malfeasance or to be, in substance, so protracted and imperfect as to be futile. (Vol. 11) 1924 P C 202 (206) (P O).

[10] A receiver should not be dismissed summarily merely at the instance of one of the parties. ('78) 19 Suth W R 66 (67) (DB).

[11] The burden of proving the circumstances justifying the removal is on the party applying for such removal. (Vol. 3) 1916 Mad 924 (925) (DB).

[12] Where incapacity on the part of the receiver is alleged it should be clearly proved. (Vol. 16) 1929 Pat 114 (115) (DB).

[13] A receiver may be removed for partiality. (Vol. 13) 1926 Cal 598 (596) : 53 Cal 319 (DB).

[14] A Court which appoints a receiver has authority to pass orders necessary to wind up his charge even after the suit has been disposed of. (Vol. 11) 1924 Lah 588 (584).

[15] It can examine the receiver's accounts and pass all necessary orders. ('95) 22 Cal 1011 (1015, 1016) : 32 Ind App 203 (PO) * ('01) 28 Cal 790 (794) (DB).

[16] Where the receivership is put an end to pending a suit filed by the receiver, the party

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ascertained to be the true owner can continue the suit. ('06) 80 Bom 250 (257, 258).

[17] Where a claim for restitution is made on the cancellation of an order of appointment of a receiver, the Court will not, in ordering restitution consider the fact that the receiver's appointment was to the applicant's advantage. (Vol. 11) 1924 Rang 181 (181): 1 Rang 770 (DB).

[18] Where any property in the receiver's possession is duly sold away to another, the receiver cannot be allowed to continue in possession. (Vol. 2) 1915 Mad 924 (925) (DB).

47. "Court may ... remove any person from the possession or custody of the property."—[1] The rule empowers the Court to remove any person from the possession of property in respect of which a receiver has been appointed. (Vol. 23) 1936 All 495 (501, 502): 58 All 949 (FB).

[2] The only case in which the receiver's possession can be resisted is that provided for by sub-rule (2). ('12) 85 Mad 578 (580) (DB) * (Vol. 7) 1920 Mad 986 (989) (DB) * (Vol. 26) 1939 Bom 54 (55): ILR (1939) Bom 82 (DB) * (Vol. 5) 1918 Pat 668 (670) (DB) * (Vol. 14) 1927 Pat 397 (398) * (Vol. 22) 1985 Rang 898 (899).

[See also (Vol. 24) 1937 Lah 818 (814) * (Vol. 26) 1939 Sind 388 (384, 385): ILR (1940) Kar 105 (DB) * (Vol. 25) 1938 Rang 387 (389): 1938 Rang L R 586 (DB).]

[3] Third person in possession—Objection to deliver possession to receiver—Court must make inquiry into his claim. ('09) 36 Cal 713 (721) (DB) * (Vol. 8) 1921 Cal 298 (299) (DB) * (Vol. 10) 1923 Mad 129 (130) (DB) * ('07) 4 Low Bur Rul 356 (359).

[4] Person in possession cannot interfere with receiver but should apply to Court for redress. (Vol. 1) 1914 Cal 550 (553).

[See however (Vol. 5) 1918 Pat 364 (365) (DB)].

[5] Sub-rule (2) applies only to third person in possession of the property and is no bar to the removal of any party to the suit, from possession. (Vol. 29) 1942 Nag 1 (2): ILR (1942) Nag 118 (DB) * (Vol. 29) 1942 Pat 240 (242) * ('13) 24 Mad L Jour 658 (659) (DB) * (Vol. 2) 1915 Cal 85 (86) (DB) * (Vol. 9) 1922 Lah 444 (446) (DB) * (Vol. 12) 1925 Lah 590 (591). * (Vol. 14) 1927 Sind 280 (280): 23 Sind L R 49 * (Vol. 16) 1929 Nag 283 (284) * (Vol. 19) 1932 Mad 193 (195) (DB) * (Vol. 26) 1939 Rang 321 (328): 1939 Rang L R 403 (FB) * (Vol. 26) 1939 Oudh 116 (118): 14 Luck 598 (DB) * (Vol. 26) 1939 Bom 54 (55): ILR (1939) Bom 82 (DB) * (Vol. 11) 1924 P C 206 (207) (PC) (Affirming (Vol. 8) 1921 Pat 43: 6 Pat L Jour 37) * (Vol. 32) 1945 Cal 298 (299): ILR (1944) 2 Cal 194 (DB) * (Vol. 32) 1945 Oudh 25 (28) (DB) * (Vol. 33) 1946 Lah 193 (197) (DB).

[But see (Vol. 7) 1920 Mad 986 (989) (DB) * (Vol. 28) 1936 Oudh 870 (870) (DB).]

[6] In a suit against a person in his private capacity he cannot be dispossessed of wakf property of which he is in possession as mutwalli. (Vol. 29) 1942 Oudh 205 (206) (DB).

[7] The rule does not empower a Court to authorise a receiver to enter upon immovable property in the possession of another person without his consent to take an inventory of such property. ('91) 1891 Pan Re No. 69, page 331 (335) (DB).

[8] The Court instead of actually evicting the party in possession, may order him to pay the

receiver a certain occupation rent. ('68) 10 Suth W R 430 (431) (DB).

[9] Sub-rule (1), cl. (b) refers to the removal of persons other than the receiver. Hence an order removing a receiver does not fall under that clause. (Vol. 11) 1924 Mad 614 (614) (DB) * (Vol. 13) 1926 Cal 593 (594): 53 Cal 319 (DB).

48. Summary jurisdiction.—[1] A Court has power to enforce summarily a contract made by the receiver. ('88) 15 Cal 253 (258) (Case of lease).

[2] Lease by receiver—Lessee put in possession—Lease cannot be set aside in summary proceedings. ('00) 86 Cal 52 (56).

[3] The lease can be set aside summarily when it has been granted by the receiver in consequence of misrepresentation or fraud practised upon the Court. (Vol. 20) 1933 Mad 67 (69) * (Vol. 16) 1929 Cal 828 (829).

[4] Judgment-debtor taking money from receiver and refusing to pay it back—Court can order repayment—Order can be enforced as decree. ('12) 15 Cal L Jour 254 (255, 256) (DB).

[5] There is nothing in law to prevent the receiver from applying for process for contempt. ('01) 28 Cal 790 (793) (DB).

[See also (Vol. 22) 1935 Cal 684 (686) (DB).]

49. Appeal.—An order under R. 1 may be one either appointing a receiver or may be one refusing to appoint a receiver. In either case the order will be appealable. ('98) 1 Oudh Cas 168 (169) * (Vol. 19) 1932 Pat 360 (361) (DB) * (Vol. 12) 1925 Lah 489 (490) * (Vol. 16) 1929 Nag 119 (120) * (1900) 24 Bom 38 (42) (DB) * ('90) 17 Cal 680 (682) (DB) * ('04) 31 Cal 495 (498) (DB) * ('10) 6 Ind Cas 659 (659) 1910 Pan Re No. 36. * (Vol. 2) 1915 Bom 137 (138) (DB) * (Vol. 8) 1916 All 338 (339) (DB) * (Vol. 13) 1926 Cal 1006 (1008) (DB) * ('86) 10 Mad 179 (184) (FB) * (Vol. 28) 1936 Oudh 837 (837): 12 Luck 635 (DB) * (Vol. 24) 1937 Sind 161 (162): 31 Sind L R 28 (DB) * (Vol. 25) 1938 All 3 (4) ILR (1938) All 35 (DB).

[See (Vol. 24) 1937 Bom 124 (127) (DB).]

[2] Order removing or refusing to remove a receiver is not appealable. (Vol. 1) 1914 Cal 786 (787) (DB) * (Vol. 3) 1916 Cal 824 (824) (DB) * (Vol. 11) 1924 Mad 614 (614) (DB) * (Vol. 18) 1931 All 72 (73) (DB) * ('03) 1903 All W N 67 (68) (DB).

[But see (Vol. 25) 1938 Rang 387 (388): 1938 Rang L R 586 (DB) * (Vol. 13) 1926 Cal 593 (594): 53 Cal 319 (DB) * (Vol. 20) 1933 Cal 52 (53, 54): 60 Cal 162 (DB) * (Vol. 32) 1945 All 371 (374): ILR (1945) All 506 (DB).]

[3] On resignation of receiver another appointed—Order is appealable. (Vol. 32) 1945 Pat 467 (469): 24 Pat 457 (DB).

[4] An order appointing or refusing to appoint a receiver in execution proceedings falls under O. 40, R. 1, and therefore is appealable as an appealable order and not as a decree. (Vol. 14) 1927 Lah 190 (190) * (Vol. 16) 1929 Mad 20 (21) (DB). (Dissenting from 1928 Mad WN 890). * ('11) 14 Cal L Jour 489 (494, 495) (DB) * (Vol. 19) 1932 Cal 189 (192, 193): 59 Cal 205 (DB) * (Vol. 25) 1938 All 3 (4): ILR (1938) All 85 (DB).

[But see ('81) 5 Bom 45 (48) (DB).]

[5] Where an ex parte order is confirmed by a second order, an appeal lies only from the latter order. ('13) 40 Cal 862 (869) (DB).

[But see (Vol. 28) 1936 Lah 102 (103).]

O. 40 R. 1 (contd.)

[6] An order appointing a receiver subject to his furnishing security is not complete or final till the security is given and is not appealable till then. ('11) 14 Cal L Jour 489 (499) (DB) * (Vol. 14) 1927 Cal 253 (255) (DB) * (Vol. 9) 1922 Pat 577 (579): 1 Pat 625 (DB) * (Vol. 19) 1932 Pat 360 (361) (DB).

[7] Order that receiver should be appointed—Case adjourned to future date—Receiver not appointed actually—Order is not appealable. (Vol. 2) 1915 All 129 (129) (DB) * (Vol. 11) 1924 All 876 (877): 46 All 372 (DB) * (Vol. 7) 1920 All 149 (150): 42 All 227 (DB) * ('38) 67 Cal L Jour 107 (108) (DB) * ('11) 13 Cal L Jour 157 (158) (DB) * ('09) 3 Ind Cas 430 (430) (DB) (Cal) * (Vol. 2) 1915 Bom 41 (41, 42) (DB) * (Vol. 21) 1934 Nag 64 (64) * (Vol. 25) 1938 Nag 540 (541, 548): ILR (1938) Nag 174 (DB) * (Vol. 14) 1927 Sind 202 (202, 204) (DB).

[But see (Vol. 5) 1918 Mad 1146 (1150): 40 Mad 18 (FB) * (Vol. 10) 1923 Lah 48 (50) * (Vol. 21) 1934 Lah 129 (130) (DB) * (Vol. 25) 1938 Lah 10 (11).

[8] Where the effect of an order of appointment of a receiver and the directions given to him, is to remove any third person from the possession or custody of any property, it is an order under cl. (b) of this rule and is open to appeal by such third party. (Vol. 11) 1924 Nag 165 (166) * (Vol. 10) 1923 Mad 129 (130) (DB) * ('09) 86 Cal 713 (720) (DB) * (Vol. 5) 1918 Pat 301 (302, 302): 8 Pat L Jour 573 (DB) * (Vol. 5) 1918 Pat 668 (671) (DB).

[But see (Vol. 28) 1941 Rang 286 (238): 1941 Rang LR 300 * (Vol. 5) 1918 Pat 364 (365) (DB).

[9] A third party who is not in possession or custody of any property has no right of appeal against an order dismissing his objection to the appointment of a receiver. (Vol. 15) 1928 Oudh 295 (296) (DB).

[See also (Vol. 28) 1941 Rang 286 (238): 1941 Rang L R 300.]

[10] An order under Cl. (d) of the rule giving directions as to the disposal of the income of the property is appealable, under O. 43 R. 1 Cl. (s). (Vol. 27) 1940 Mad 703 (703) * ('10) 11 Cal W N 183 (185) (DB) * ('13) 17 Cal W N 16 (18) (DB) * ('12) 14 Ind. Cas 277 (278) (DB) (Mad).

[But see (Vol. 10) 1923 Lah 239 (240)* ('95) 1895 Pun Re No. 107 page 500 (501)* (Vol. 20) 1933 Lah 216 (216, 217).]

[11] There is no right of appeal from the following orders.

(a) An order giving directions to receiver in passing his accounts. ('11) 14 Cal L Jour 445 (461) (DB) * ('08) 35 Cal 568 (570) (DB).

(b) An order construing an order of appointment of a receiver. (Vol. 7) 1920 Pat 703 (704): 5 Pat L Jour 97.

(c) An order for the examination of the receiver's accounts. ('11) 13 Cal L Jour 459 (462) (DB).

(d) An order granting leave to sue the receiver. (Vol. 8) 1921 Bom 427 (428): 45 Bom 99 (DB).

(e) An order directing a party to pay the receiver's remuneration or raising the receiver's remuneration. (Vol. 17) 1930 Lah 352 (353) * (Vol. 2) 1915 Cal 74 (75) (DB).

[See however (Vol. 29) 1942 Nag 64 (65): ILR (1942) Nag 671 (DB).]

[12] An appeal lies under Clause 15 of the Letters Patent against the judgment of a single Judge of the High Court passed on an appeal preferred to it under

Order 43 Rule 1, clause (s). (Vol. 20) 1933 Mad 570 (572, 577): 56 Mad 915 (FB).

[13] There is no right of appeal to the Privy Council from an order refusing to appoint a receiver. ('95) 22 Cal 928 (930) (DB) * (Vol. 20) 1933 Pat 723 (DB).

[14] Appeal from order appointing or refusing to appoint receiver—Appellable Court will not lightly interfere with lower Court's discretion. (Vol. 28) 1941 Oudh 328 (331) (DB) * (Vol. 14) 1927 Rang 135 (135) (DB) * (Vol. 20) 1933 Rang 94 (94, 95) (DB) * (Vol. 10) 1923 Lah 623 (625) * (Vol. 14) 1927 Lah 65 (65) * ('10) 1910 Pun Re No. 36, P. 99 * (Vol. 7) 1920 Lah 125 (127) * ('13) 17 Cal W N 974 (975) (DB) * ('05) 32 Cal 741 (745) (DB).

[See ('84) 10 Cal 713 (737) (DB).]

[15] Appeal from order under this rule—Objection in point of propriety or principle—Appellate Court will interfere. (Vol. 27) 1940 Lah 825 (329): ILR (1941) Lah 590 (DB)* (Vol. 11) 1924 Lah 421 (422) * ('13) 17 Cal W N 581 (584) (DB) * (Vol. 16) 1929 Pat 114 (114) (DB) * (Vol. 9) 1922 Lah 444 (446) (DB).

[16] Appellate Court will interfere if lower Court has proceeded on wrong view of facts. (Vol. 2) 1915 Mad 926 (929) (DB).

[17] Appellate Court will interfere if lower Court has not exercised discretion according to legal principles. (Vol. 5) 1918 Sind 61 (63): 11 Sind LR 115 (DB) * (Vol. 4) 1917 Mad 1009 (1010) (DB) * (Vol. 15) 1928 PC 49 (50): 55 Ind App 131: 55 Cal 720 (PC) * (Vol. 19) 1932 Lah 82 (83) * (Vol. 26) 1939 Oudh 61 (61) (DB).

[See (Vol. 19) 1932 Cal 194 (195) (DB).]

[18] The burden of showing that interference is necessary, is on the appellant. ('10) 7 Ind Cas 311 (346) (DB) (All) * ('90) 12 All 436 (438) (FB) * (Vol. 24) 1937 Oudh 280 (281) (DB).

[19] Pending an appeal from an order appointing a receiver, the Appellate Court can direct the receiver through the lower Court not to take any steps in pursuance of his appointment. (Vol. 7) 1920 Pat 567 (568): 4 Pat L Jour 642 (DB).

[20] Only those persons who are materially prejudiced by the appointment of the receiver need be made parties to the appeal. Third persons not in possession of the property are not necessary parties thereto. (Vol. 11) 1924 Cal 456 (458) (DB).

[21] A party who suggests names for the receivership is not thereby estopped from objecting to the appointment of a receiver in appeal. (Vol. 8) 1921 All 91 (92): 43 All 311.

50. Letters Patent Appeal.—[1] An order appointing a receiver under Rule 1 is a "judgment" and is appealable under the Letters Patent. (Vol. 14) 1927 Rang 139 (139): 5 Rang 99 (DB).

[2] An order directing a receiver to advance money to a guardian *ad litem* to conduct the defence on behalf of a minor defendant is not a "judgment" within the meaning of the Letters Patent and no appeal lies from the order. ('01) 24 Mad 511 (513) (DB).

51. Revision.—[1] An order appointing a receiver in a case in which the Court has no jurisdiction to appoint a receiver. (Vol. 11) 1924 All 876 (378): 46 All 872 (DB).

[2] Third party in possession objecting to appointment of receiver—Objection dismissed—There is no right of appeal but revision lies. (Vol. 5) 1918 Pat 364 (365) (DB).

Remuneration. 2. The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.
[1882—S. 503, Cl. (d); 1877—S. 503.]

Duties. 3. Every receiver so appointed shall—
(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;
(b) submit his accounts at such periods and in such form as the Court directs;
(c) pay the amount due from him as the Court directs; and
(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.
[1882—S. 503, cls. (e) to (h); 1877—S. 503, cls. (e) to (h); 1859—S. 243.]

O. 40 R. 1 (contd.)

[3] Sale proceedings in execution of mortgage decree—Refusal of Court to join receiver to proceedings is material irregularity—Revision lies. (Vol. 10) 1928 Mad 144 (147).

52. Practice.—[1] Application for the appointment of receivers should be made in the ordinary way by notice of motion in open Court and not in Chambers. (Vol. 14) 1927 Bom 256 (256) (DB) * ('01) 28 Cal 250 (250).

ORDER 40 RULE 2—Note 1.

[1] An agreement without leave of the Court by a party to pay remuneration to the receiver is contrary to law and is not enforceable. ('03) 30 Cal 696 (698) (DB).

[2] Where the managing partner of a partnership business consents to act as a receiver without remuneration he does not, by such consent, forgo his right to remuneration for managing and carrying on the business. (Vol. 13) 1926 Cal 880 (880, 881) (DB).

[3] Where certain Government securities in deposit with a bank are converted under the authority of the Court, by the bank itself, into other securities issued by the Government, no commission can be claimed by the receiver. (Vol. 18) 1931 Mad 36 (36).

[4] Receiver ordered to retain five per cent of gross sale "proceeds"—He cannot take commission on "trade discounts." (Vol. 18) 1931 Mad 500 (501).

[5] A party dismissed from an action—Receiver-ship of his property cancelled consequently—Court can order plaintiff to refund to such party the commission and charges paid by him to the receiver. (Vol. 11) 1924 Rang 181 (181): 1 Rang 770 (DB).

[6] The order fixing the remuneration of a receiver though passed subsequently must be regarded as part of the order of appointment. (Vol. 29) 1942 Nag 64 (65): ILR (1942) Nag 671 (DB).

ORDER 40 RULE 3—Note 1.

[1] Rule provides for the duties of the receiver. (Vol. 18) 1931 Mad 760 (762) (DB).

[2] A receiver without security should be appointed only in the most exceptional circumstances. (Vol. 19) 1932 P C 191 (193): 59 Ind App 311: 7 Luck 382 (PO).

[3] Appellate Court directing lower Court to appoint receiver with security—Lower Court appointing receiver without security—Appointment not without jurisdiction. (Vol. 6) 1919 Cal 533 (534): 46 Cal 70 (DB).

[4] Surety satisfying claim against receiver—Surety can reimburse himself from sums ordered to be paid to the receiver. (Vol. 2) 1915 Cal 331 (334) (DB).

[5] A receiver is liable for all unauthorised expenditure incurred by him. (Vol. 2) 1915 Cal 146 (148) (DB).

[6] Litigation expenses incurred by receiver—Receiver must show details of expenditure. (Vol. 11) 1924 Cal 1063 (1064) (DB) * (Vol. 2) 1915 Cal 146 (148) (DB).

[7] Court can enquire into question of loss caused by mismanagement or negligence at time of passing accounts, but it is a matter of convenience and practice that such enquiry is relegated to a separate suit. (Vol. 29) 1942 Cal 483 (486): ILR (1942) 1 Cal 577 (DB).

[See (Vol. 31) 1944 Mad 392 (392, 393): ILR (1945) Mad 47. (Application against receiver alleging fraudulent conversion by him—Matter should be referred to a regular suit.) * ('01) 5 Cal W N 223 (228).]

[8] Interest on excess deposit to meet receiver's improper claim is payable by receiver—Where party was compelled to borrow at a higher rate than usual his claims for such higher rate should be decided in a separate suit. (Vol. 2) 1915 Cal 146 (151) (DB).

[9] No order can be passed against the receiver to make good the loss to the estate due to his gross negligence, till the passing of the accounts. ('09) 86 Cal 52 (57).

[10] Where a receiver delegates his duties to another person and the latter misappropriates the funds collected by him; the receiver will be liable for the loss. ('95) 19 Bom 660 (662) (DB).

[11] Loss from default of receiver devolves on estate and not on decree-holder at whose instance he may have been appointed. ('94) 17 Mad 501 (504).

[12] A receiver is not entitled to recover the costs of proceedings, initiated by him through mistake. ('12) 22 Mad L Jour 258 (257) (DB).

[13] A succeeding receiver cannot sue a former receiver for funds which he should have realised and accounted for. (Vol. 1) 1914 Cal 744 (745): 41 Cal 92.

[14] Creditor advancing money to receiver for management of estate—Receiver's personal liability may be expressly excluded by agreement. (Vol. 12) 1925 Pat 602 (604) (DB).

[15] A receiver's liability on account of his wilful default or neglect can more appropriately be investigated in a separate suit against him. (Vol. 14) 1927 Cal 175 (175): 53 Cal 881 (DB).

[16] An order of the Court giving directions to the receiver in passing his accounts is not open to appeal. ('08) 35 Cal 568 (570) (DB). * (Vol. 13) 1931 Mad 760 (762) (DB).

[17] An order in execution, directing the receiver who was also a defendant in the suit to pay into

Enforcement of receiver's duties.

4. Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs, or
 - (b) fails to pay the amount due from him as the Court directs, or
 - (c) occasions loss to the property by his wilful default or gross negligence,
- the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

[Cf. R. S. C., O. 50 R. 18.]

OBJECTS AND REASONS

"We have redrafted this rule on the lines of section 18 (4) of the Provincial Insolvency Act, 1907. We think that the power to imprison receiver is too wide and should be omitted."—S. C. R.

PROVINCIAL AMENDMENT

MADRAS

Substitute the following for Rule 4 :

"(1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs the Court may order his property to be attached until he duly submits his accounts in the form ordered.

O. 40 R. 3 (contd.)

Court the amount collected by him prior to his appointment is appealable. (Vol. 22) 1935 Mad 464 (465) (DB).

[See however (Vol. 29) 1942 Sind 144 (145) : ILR (1942) Kar 343 (DB). (Order directing receiver to pay certain amount according to terms of decree either to party to suit or third person—Order not appealable).]

[18] No appeal lies against an order construing an order of appointment of receiver. (Vol. 7) 1920 Pat 703 (704) : 5 Pat L Jour 97.

[19] Receiver appointed on condition of his furnishing security. Till security is given there is no right of appeal. (Vol. 14) 1927 Cal 253 (253) (DB).

[20] An order under this rule is open to revision. (Vol. 11) 1924 Sind 35 (36) : 18 Sind L R 385 (DB).

ORDER 40 RULE 4—SYNOPSIS

1. Scope and applicability of the rule.
2. Loss to property by wilful default or gross neglect.
3. "Court may direct his property to be attached."
4. Removal of a receiver.
5. Appeal.
6. Local amendment (Madras).

1. **Scope and applicability of the rule.**—[1] The rule provides for coercive steps against the receiver who fails to carry out his duties as laid down in R. 3. The Court has a discretion to take action or not under this rule as against the receiver. (Vol. 21) 1934 All 907 (907) (DB).

[2] When the receiver is guilty of a wilful default or gross negligence the only provision for taking action against him, apart from proceeding against the security, is attachment of his property; arrest and imprisonment are not to be the methods of enforcement. (Vol. 18) 1931 Mad 760 (763) (DB).

[3] The word "Court" in this rule, as in all other rules of this order, means the Court which appointed the receiver. (Vol. 30) 1943 Cal 244 (246) : ILR (1943) 2 Cal 204 (DB).

2. **Loss to property by wilful default or gross neglect.**—[1] "Property" includes not only the Corpus of the property entrusted to the receiver but also the income derived from it. (Vol. 3) 1916 Mad 521 (522) : 39 Mad 584 (DB).

[2] The rule is residuary provision and covers a case of misappropriation also. (Vol. 3) 1916 Mad 521 (522) : 39 Mad 584 (DB).

[3] Even a partner appointed receiver of partnership assets will be guilty of gross misconduct if he appropriates to his own use any of the partnership assets. (Vol. 12) 1925 P O 257 (259) (PO).

[4] A separate suit is the proper proceeding against a receiver on the basis of a wilful default and neglect. (Vol. 14) 1927 Cal 175 (175) : 53 Cal 881 (DB). (5 Cal W N 223, followed.) * (Vol. 8) 1921 Cal 516 (516) (DB). (Separate suit may be filed against receiver even after receiver's discharge if it transpires that he has in his hands moneys belonging to the estate.)

[5] In the undermentioned cases it was held that the Court can deal with allegations of wilful default and neglect against the receiver in a summary proceeding under this rule. (Vol. 30) 1943 Cal 244 (246, 247) : ILR (1943) 2 Cal 204 (DB). (Such an enquiry need not be confined to the account of those years only which have not yet been passed by the Court but may extend to matters covered by the accounts of the previous years which had already been passed by it.) * (Vol. 14) 1927 Rang 334 (334).

[6] Receiver alleged to be guilty of fraud and misappropriation—Reference to Commissioner if wrong—Parties should be referred to a suit. (Vol. 31) 1944 Mad 392 (392) : ILR (1945) Mad 47 (DB).

[7] If money paid by a receiver does not reach the proper destination, he must make good the loss, unless he can show that he acted with perfect regularity and has used such a degree of prudence as would be expected from an ordinary individual in his own affairs. (Vol. 17) 1930 Pat 232 (234) (DB). (Receiver was held to have exercised requisite degree of care.)

[8] Receiver appointed—Decree in favour of estate about eleven years old—After his appointment receiver applying for arrest of debtor but not for attachment of his properties on ground that it was very much encumbered—Receiver is not guilty of any negligence unless it is shown that attachment of debtor's property would have been profitable to the estate. (Vol. 18) 1931 Mad 760 (764, 765) (DB).

3. **"Court may direct his property to be attached."**—[1] Where a receiver dies, his property in the hands of his legal representatives may be

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence, and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety, if any, for the receiver, but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs:

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub-rule (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under Rule 3, or by attachment and sale of his property, or, if his property has been attached under sub-rule (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver."

[P. Dis. No. 60 of 1933.]

5. Where the property is land paying revenue to the Government, or land of which

When Collector may the revenue has been assigned or redeemed, and the Court considers be appointed receiver. that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

[1882—S. 504; 1877—S. 504; 1859—S. 92.]

Rule 6—MADRAS

PROVINCIAL AMENDMENT.

Add the following as Rule 6:

"R. 6. Where the property belongs to a co-operative society registered under the Madras Co-operative Societies Act or to a member of such co-operative society, and the Court considers that the interest of those concerned will be promoted by the management of an officer of the co-operative department, the Court may, with the consent of the officer, appoint him to be receiver of such property."

O. 40 R. 4 (contd.)

attached. (Vol. 30) 1943 Cal 244 (247): ILR (1943) 2 Cal 204 (DB). (Legal representatives cannot be made personally liable.) * (Vol. 3) 1916 Mad 521 (522): 39 Mad 584 (DB).

[2] Before directing attachment of property under this rule, Court must first determine the exact amount for which receiver is liable after due enquiry under Rule 3, and give him opportunity to pay the same. (Vol. 10) 1923 Mad 85 (86) (DB).

4. Removal of a receiver.—[1] The Court has inherent power in the exercise of its discretion, to remove a receiver appointed by it. ('12) 1912 Mad W N 1208 (1209, 1210). * (Vol. 18) 1981 All 72 (78) (DB). * ('90) 18 Mad 390 (394) (PO).

[See however (Vol. 3) 1916 Mad 924 (925) (DB).]

[2] A receiver who has not complied with the Court's orders to keep proper accounts should be removed from office. (Vol. 28) 1941 Cal 144 (146): ILR (1940) 2 Cal 102 (105, 106). * (Vol. 12) 1925 Lah 309 (312).

[3] A receiver can be removed only by the Court appointing him. (Vol. 12) 1925 Lah 309 (310).

5. Appeal.—[1] An order under this rule is appealable under O. 43, R. 1, cl. (b). No appeal lies from the following orders.

(a) An order which merely declares that the receiver is liable to the estate for a certain sum of money and which is not accompanied by any order for the attachment of his property. (Vol. 18) (1981 Mad 760 (763, 768) (DB). (Order of realization out of receiver's security—Appeal lies.)

(b) An order fixing the period for which an account is to be filed. (Vol. 7) 1920 Pat 703 (704): 5 Pat L Jour 97.

(c) An order removing a receiver from office. (Vol. 20) 1933 Cal 52 (54): 60 Cal 162 (DB). (Receiver cannot appeal from such order—Otherwise the order is appealable).

(d) An order for refund of losses to the estate due to the receiver's neglect. (Vol. 9) 1922 Lah 224 (224) (DB).

(e) An order directing the receiver to pay a certain sum of money into Court without any order for the attachment of his property. (Vol. 9) 1922 Mad 234 (235) (DB).

[See also (Vol. 18) 1981 Mad 760 (764) (DB).]

(f) An order directing the receiver to pay a certain sum of money by way of damages. (Vol. 12) 1925 Rang 266 (266): 3 Rang 818 (DB).

[2] In an appeal from an order for attachment under Rule 4, the propriety of an order under Rule 3 requiring the receiver to pay a certain sum of money to the estate can be attacked. (Vol. 7) 1920 Pat 220 (221): 4 Pat L Jour 636 (DB). * (Vol. 10) 1923 Mad 85 (86) (DB). * (Vol. 11) 1924 Sind 35 (36): 18 Sind L R 385 (DB).

[3] An order passing a receiver's account is appealable inasmuch as it is really an order refusing relief against the receiver under this rule. (Vol. 8) 1921 Bom 427 (428): 45 Bom 99 (DB).

[But see (Vol. 30) 1943 Cal 244 (245): ILR (1943) 2 Cal 204 (DB). (Order refusing to re-open receiver's account for previous years which have already been passed does not come under this rule and is not appealable). * 14 Cal L Jour 445 relied on; (Vol. 8) 1921 Bom 427: 45 Bom 99 not followed].

6. Local amendment (Madras).—[1] Courts in Madras are bound to deal with receiver directly and not direct parties to separate suit—Proceedings under O. 40 R. 4, C.P.C.—Proper occasion for making allegations against receiver is when his accounts are passed. (Vol. 23) 1936 Mad 321 (323).

ORDER 40 RULE 5—Note 1.

[1] When attached property is seized and retained by a Collector acting as a receiver, his acts cannot be disputed by way of motion to discharge the attachment. ('71) 15 Suth W R 347 (348) (DB).

ORDER XLI.

APPEALS FROM ORIGINAL DECREES.

1. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

[1882—S. 541; 1877—S. 541; 1859—Ss. 333, 335. See S. 96 to 99, 107 and 108.]

ORDER 41 RULE 1—SYNOPSIS.

1. Memorandum of appeal to be signed by appellant or his pleader.
2. Presentation of memorandum of appeal.
3. Presentation with defective vakalatnama.
4. Memorandum must be accompanied by copies of judgment and decree.
5. Date of presentation for purposes of limitation.
6. Omission to file copy of decree in rival appeal.
7. Two decrees in two cross-appeals or two cross-suits.
8. Limitation for appeal.
9. Misdescription in the memorandum of appeal.
10. Grounds of objection.
11. Grounds that may be taken in the memorandum of appeal for the first time.
12. When appellate Court may not interfere with findings of fact.
13. Competency of appeal.
14. Consolidation of appeals.
15. Stamp on memorandum of appeal.
16. Refund where memorandum is over-stamped.
17. Applicability of the order to other proceedings.

1. Memorandum of appeal to be signed by appellant or his pleader.—[1] By virtue of the provisions of O. 3 R. 1, an agent of the appellant, duly authorized, can sign the memorandum of appeal. (Vol. 10) 1923 Lah 484 (485) (DB).

[2] Appeal filed on behalf of a company by one of its officers not duly authorized to do so—Defect can be cured by putting in a power of attorney duly authorizing him to file the appeal. ('10) 34 Bom 1 (11) (DB).

[3] Memorandum of appeal signed by pleader—Vakalat not signed by party—Defect can be subsequently rectified by the party signing it. (Vol. 7) 1920 Lah 212 (213). * (1913) 11 All L. Jour 779 (783).

[4] Appeal signed by appellant—He need not write memorandum of appeal himself. (Vol. 10) 1923 Lah 484 (485) (DB).

[5] Appeal consisted of two documents one containing names of the parties and the other containing the grounds of appeal—Latter not signed by party—Defect is not fatal to the appeal. (Vol. 7) 1920 Lah 814 (814).

2. Presentation of memorandum of appeal.—

[1] O. 3 R. 1 applies to presentation of a memorandum of appeal. (Vol. 28) 1941 Oudh 169 (170).

[2] Presentation of memorandum of appeal by pleader holding a power of attorney from the party expressly authorizing him to present it—Power not filed with appeal—Presentation is valid. (Vol. 12) 1925 Lah 831 (832). * ('94) 1894 All W N 181 (181) (DB). * (Vol. 26) 1989 Rang 1 (6):1930 Rang L.R. 106 (DB).

[But see (1900) 22 All 831 (832) (DB).]

[3] Appellant minor—Memorandum of appeal may be presented by appellant's guardian *ad litem*. (Vol. 17) 1930 All 456 (457): 52 All 494 (DB).

[4] Presentation by an unauthorized agent is no presentation in the eye of the law. (Vol. 17) 1930 All 112 (112) (DB). * (Vol. 26) 1939 Lah 41 (42).

[5] A presentation to the Judge at his private residence after Court hours on the last day of limitation, is sufficient compliance with the law. ('12) 34 All 482 (486): 14 Ind Cas 744 (744) (FB). * (Vol. 18) 1931 Lah 671 (672).

[6] A presentation during the vacation or even on a Sunday is valid. (Vol. 10) 1923 Pat 150 (151): 2 Pat 264.

[7] Memorandum of appeal deposited in the box put up by the Appellate Court for the purpose—It is validly presented. ('08) 1908 Pun W R No. 71 * (37) 39 Pun L. R. 456 (457).

[8] Presentation to an officer of the Court other than the one appointed by the Court or by placing the memorandum on the table of the appointed officer in his absence is not valid. ('71) 3 N. W. P. H. C. R. 342 (342) (DB) * (Vol. 10) 1923 Pat 150 (151): 2 Pat 264.

[9] Sending of a memorandum by post is not a valid presentation. ('94) 8 C. P. L. R. 93 (93).

[10] A debtor in civil jail is entitled to present an appeal without the assistance of a pleader. ('70) 6 Mad H. C. R. App 38 (39) (DB).

[11] Omission to join the necessary parties to an appeal—Appeal is invalid. ('13) 18 Ind Cas 37 * ('39) 1913 Pun Re No. 59 (DB).

3. Presentation with defective vakalatnama.—

[1] The presentation of a memorandum of appeal by a vakil without any authority from the party is not valid. (Vol. 7) 1920 Pat 581 (582) (DB). * (Vol. 8) 1921 Nag 27 (27, 28). * (1911) 18 Cal E Jour 544 (DB). * (Vol. 28) 1936 Lah 195 (196). * (Vol. 26) 1989 Lah 41 (42).

[2] Party omitting by oversight to sign vakalatnama—Appeal not invalid. (Vol. 7) 1920 Lah 212 (213). * (1913) 11 All L. Jour 779 (783).

PROVINCIAL AMENDMENTS

LAHORE

Add the following proviso to sub-rule (1):

"Provided that when two or more cases are tried together and decided by the same judgment, and two or more appeals are filed against the decrees, whether by the same or different appellants, the officer appointed in this behalf may, if satisfied that the questions for decisions are analogous in each appeal, dispense with the production of more than one copy of the judgment." [7-12-1932.]

MADRAS

(1) Add the following sentence and proviso to sub-rule (1):

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for, for the purpose of appeal." [3-5-1917.]

"Provided that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court." [Dis. No. 2135 of 1918.]

(2) Add the following sentence to sub-rule (2):

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court-fees Act." [Dis. No. 2057 of 1917.]

O. 41 R. 1 (contd.)

[8] Vakalatnama not filed with the memorandum of appeal—Appeal not invalidated. (Vol. 18) 1926 Bom 886 (886) (DB).

[See *however* (1911) 18 Cal L. Jour 544 (546) (DB).]

[4] Where an appellant executes a vakalatnama in favour of two persons, but one of them alone accepts it, the presentation of the appeal by the latter is a valid presentation. (193) 16 Mad 285 (286) (DB).

[5] Name of vakil presenting memorandum of appeal omitted in the vakalatnama—Presentation is not invalid—Defect can be cured. (Vol. 5) 1918 Cal 482 (482, 483) (DB). * (Vol. 19) 1932 Lah 134 (135). * (Vol. 24) 1937 Lah 719 (720). * (Vol. 19) 1932 Pat 3 (4) (DB). * (Vol. 10) 1923 Nag 182 (185); 19 Nag L. R. 86. (Distinguishing (Vol. 3) 1916 Nag 10; 12 Nag L. R. 189). * (Vol. 10) 1923 Nag 281 (281).

[But see (Vol. 18) 1931 All 767 (768) (DB). * (Vol. 1) 1914 All 586 (587); 36 All 46 (DB).]

[6] Appeal filed without vakalatnama—Advocate *bona fide* believing that same was filed in trial Court—Mistake corrected after limitation—Irregularity is not fatal and appeal should not be dismissed. (Vol. 32) 1945 Oudh 200 (202); 20 Luck 356 (DB).

[7] Appellant engaging pleader—Pleader signing power and memo. of appeal—Pleader being busy memo. presented by another pleader on verbal instructions of pleader engaged—Pleader engaged subsequently appearing on several dates—Appeal held properly presented and irregularity if any cured or condoned. (Vol. 31) 1944 Lah 131 (132, 134); L.L.R. (1945) Lah 274.

4. Memorandum must be accompanied by copies of judgment and decree.—[1] A memorandum of appeal must be accompanied by a copy of the decree appealed from. (Vol. 10) 1923 Mad 482 (483). * (1912) 15 Cal L. Jour 498 (499) (DB). * (Vol. 23) 1936 Lah 293 (294). * (Vol. 25) 1938 Nag 233 (234).

[See (Vol. 20) 1933 Lah 938 (939) (DB).]

[2] A memorandum of appeal not accompanied by a copy of decree is not a valid appeal even if the decree has not yet been prepared or the appellant is under an erroneous impression that it has not yet been prepared. (Vol. 30) 1943 Mad 185 (186); L.L.R. (1943) Mad 297 (DB). * (Vol. 32) 1945 Oudh 96 (100). * (194) 16 All 77 (78). * (Vol. 7) 1920 Pat 280 (281). * (Vol. 12) 1925 Nag 52 (53). * (Vol. 11) 1924 Nag 271

(273, 274); 20 Nag L. R. 131. * (Vol. 8) 1921 Upp Bur 15 (15); 4 Upp Bur 75. * (187) 1887 Pun Ro No. 53, p. 110 (110) (DB). * (Vol. 19) 1932 Cal 589 (595); 59 Cal 781 (DB). * (Vol. 24) 1937 Oudh 513 (517); 13 Luck 597 (DB). * (Vol. 9) 1922 Lah 191 (192); 3 Lah 74. * (Vol. 9) 1922 Lah 170 (171) (DB). * (1912) 16 Cal L. Jour. 116 (118) (DB). * (1912) 16 Cal L. Jour 133 (134) (DB).

[8] Copy of decree filed after expiry of the period of limitation—Court can excuse delay under S. 5 of the Limitation Act. (Vol. 10) 1923 Mad 482 (483). * (Vol. 9) 1922 Lah 170 (171) (DB).

[See (Vol. 24) 1937 Oudh 65 (66); 12 Luck 472 (DB).]

[4] Copy of the decree already filed in another proceeding—No sufficient reason for not filing copy. (Vol. 14) 1927 Lah 423 (424).

[5] Appeal in land acquisition case—Copy of the award should be filed along with the memorandum of appeal. (Vol. 15) 1928 Lah 263 (264) (DB). * (Vol. 14) 1927 Lah 49 (49, 50); 7 Lah 539 (DB).

[6] Probate case—Copy of decree should accompany memorandum of appeal. (1912) 16 Cal L. Jour 116 (118) (DB). * (Vol. 25) 1938 Sind 36 (37) (FB).

[7] Order rejecting a plaint—Appeal—No separate decree sheet is necessary. (Vol. 23) 1936 Pesh 155 (156) (DB).

[8] Decree consisting of two distinct parts—Appeal in respect of one of them—It is sufficient to file a copy of that part of the decree which is being challenged. (Vol. 23) 1936 Cal 751 (752); L. L. R. (1937) 1 Cal 578 (DB).

[See *however* (Vol. 30) 1943 Mad 185 (186); L.L.R. (1943) Mad 297 (DB).]

[9] A memorandum of appeal should also be accompanied by a copy of the judgment appealed from. A copy of the *final* judgment is sufficient. *Interim* orders and judgments disposing of preliminary issues in the case need not be filed. (Vol. 16) 1929 Lah 481 (483); 10 Lah 587 (FB) (Vol. 13) 1926 Lah 638; (Vol. 14) 1927 Lah 449; (Vol. 14) 1927 Lah 451; (Vol. 15) 1928 Lah 46 and (Vol. 15) 1928 Lah 60 overruled. * (Vol. 19) 1932 Lah 136 (137) (DB). * (Vol. 32) 1945 Oudh 194 (195).

[10] The Court has no power to dispense with a copy of the *decree*. (Vol. 14) 1927 Lah 49 (50); 7 Lah 539 (DB). * (1918) 17 Cal L. Jour 66 (68, 69)

(3). *Add the following as a new sub-rule (3):*

"(3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under Rule 11 of this order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act IX of 1908 have been heard." [27-1-1927.]

N.-W. F. P.*Add the following as proviso to sub-rule (1):*

"Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees by the same appellant or appellants it shall not be necessary to produce more than one copy of the judgment." [12-11-1942.]

PATNA*Add the following proviso to sub-rule (1):*

"Provided that when the decree appealed from is a final decree in a partition suit and embodies the allotment papers, the appellate Court may accept a copy of the decree containing only a portion of the allotment papers; provided further that the appellate Court may, subsequently, on the application of the respondent require a copy of the remaining or any further portion of the allotment papers to be filed by the appellant." [12-2-1935.]

O. 41 R. 1 (contd.)

(DB). * ('11) 7 Nag L. R. 67 (72). * (Vol. 17) 1930 Rang 182 (188). * (Vol. 12) 1925 Lah 438 (439): 6 Lah 218 (DB).

[11] Court can dispense with the copy of the judgment—(Vol. 31) 1944 Mad 90 (90, 91): L. L. R. (1944) Mad 681.

[12] Unless dispensed with, a memorandum of appeal unaccompanied by a copy of the judgment is not valid. (Vol. 2) 1915 Mad 493 (493, 494) (DB). * (Vol. 15) 1928 Nag 181 (182). * (Vol. 14) 1927 Lah 449 (451) (DB). (Overruled in (Vol. 16) 1929 Lah 481: 10 Lah 587 (FB) on another point.) * (Vol. 17) 1930 Lah 935 (936) (DB). * (Vol. 25) 1938 Nag 233 (235).

[13] Appeal admitted without a copy of the judgment—The order admitting appeal amounts to an order dispensing with such copy. (Vol. 13) 1926 Nag 57 (60) (DB). * (Vol. 14) 1927 Lah 451 (452) (DB).

[See also (Vol. 26) 1939 Cal 711 (712).]

[14] The power to dispense with the copy of the judgment should ordinarily be exercised at the first hearing. (Vol. 15) 1928 Lah 60 (61) (DB). (Overruled in (Vol. 16) 1929 Lah 481: 10 Lah 587 (FB) on different point.)

[15] Copy of the judgment filed in another proceeding—This is no sufficient ground for dispensing with the copy. (Vol. 14) 1927 Lah 721 (722) (DB).

[16] A memorandum of appeal from an order should be accompanied by a copy of the order appealed from. (Vol. 29) 1942 Oudh 349 (349) (DB). * (Vol. 10) 1923 Bom 177 (181): 47 Bom 349 (DB).

[See (Vol. 25) 1938 Lah 350 (351).]

[But see (Vol. 11) 1924 Oudh 229 (229).]

[17] Formal order not drawn up or formal order being an exact copy of the concluding portion of the judgment—Failure to file a copy of such order does not invalidate the appeal. (Vol. 20) 1933 All 762 (763, 764): 56 All 27 (DB). * (1912) 14 Ind Cas 1006 (1006): 15 Cal L Jour 498 (DB). * (Vol. 10) 1928 All 579 (579) (DB).

[18] Where appeal from an order under S. 47 is not accompanied by a copy of the formal order which is filed beyond limitation, appeal is incompetent. (Vol. 27) 1940 Oudh 351 (352): 15 Luck 669 (DB).

[19] Appeals by same party and against same respondent—Copy of order filed in one appeal only—*Id.*, sufficient. (Vol. 27) 1940 Pat 176 (176).

[20] Appeal from order under S. 47—Judgment and decree must be filed. (Vol. 5) 1918 All 394 (395): 40 All 12 (DB).

[21] Decree amended—Appeal must be accompanied by a copy of the amended decree. ('11) 11 Ind Cas 8 (8) (Cal).

[See also (Vol. 30) 1943 Mad 185 (186): L. L. R. (1943) Mad 297 (DB).]

[22] Decree amended after filing of appeal—Appellate Court may permit a copy of the amended decree to be attached to the memorandum of appeal—Appeal is then against the amended decree. (Vol. 5) 1918 Cal 530 (531) (DB).

[23] Amendment of decree only for making its meaning clear—No. copy of the amended decree need be filed—Appeal already filed is competent. (Vol. 13) 1926 Cal 1166 (1167) (DB).

[See (Vol. 25) 1938 Lah 76 (78) (DB).]

[24] "Copy" means a certified copy. (Vol. 16) 1929 Lah 771 (772) (DB).

[See however (Vol. 13) 1926 Lah 404 (404).]

[25] Copy of the translation of decree not enough. (Vol. 8) 1921 Lah 266 (267) (DB). * (1930) 12 Lah L Jour. 305 (306).

[26] Printed copy of the judgment is not required to be filed. (Vol. 3) 1916 Mad 1165 (1166, 1167) (DB).

[27] The copy need not be obtained by the appellant himself. (Vol. 7) 1920 Mad 159 (160): 43 Mad 683 (DB).

[28] A copy of the trial Court's decree need not be filed along with a memorandum of second appeal. ('07) 32 Bom 14 (24) (FB). * ('82) 4 Mad 419 (420) (FB).

5. Date of presentation for purposes of limitation.—[1] Memorandum of appeal filed within the period of limitation—Copies of the decree and judgment not filed till after the expiry of the period of limitation—Appeal is barred. ('08) 32 Bom 14 (22, 23) (FB). * ('89) 16 Cal 250 (251) (DB). * ('90) 12 All 139 (138, 139) (FB). * (Vol. 7) 1920 Pat 280 (281). * (Vol. 2) 1915 Cal 666 (667): 42 Cal 433 (DB). * ('11) 1911 Pun W. R. No. 8 * (Vol. 4) 1917 Lah 436 (437): 1917 Pun Re No. 67 (DB).

O. 41 R. 1 (contd.)

[2] Appeal filed but copy of the decree insufficiently stamped—Appeal returned for making up deficiency in court-fee—Appeal is filed for purposes of limitation only on the date when it is filed again after making up deficiency. (Vol. 22) 1935 Lah 124 (125). * ('37) 39 Pun L. R. 502 (503).

[3] Appeal filed against a minor respondent—Name of guardian *ad litem* not brought on record till after the period of limitation. Appeal not barred by limitation. ('08) 30 All 55 (56) (DB). * (Vol. 28) 1936 Pat 153 (156) (DB).

6. Omission to file copy of decree in rival appeal.—[1] Several appeals from one judgment by different appellants—Copy of the judgment and of the decree should be filed in *each* appeal. (Vol. 9) 1922 Pat 580 (581) : 1 Pat 570 (DB). * (Vol. 12) 1925 Lah 438 (439) : 6 Lah 218 (DB). * (Vol. 15) 1928 Lah 216 (217, 218) : 9 Lah 76 (DB).

[2] Same appellant filing different appeals from the same judgment—Filing of a copy of the judgment in one of the appeals only is sufficient. (Vol. 2) 1915 Mad 493 (494) (DB).

[See (Vol. 9) 1922 Pat 580 (581) : 1 Pat 670 (DB). * (Vol. 2) 1915 Cal 666 (666, 667) : 42 Cal 433 (DB).

[See also (Vol. 19) 1932 Pat 340 (349) : 12 Pat 36 (DB).]

7. Two decrees in two cross-appeals or two cross-suits.—[1] The following cases hold that where an appeal and a cross-appeal are heard together and disposed of by a single judgment but two separate decrees are drawn up in an appeal against the judgment, filing a copy of one of the decrees only is valid. (Vol. 9) 1916 Lah 166 (167) : 1916 Pun Re No. 84 (DB). * (Vol. 13) 1926 Lah 458 (458) : 7 Lah 447 (DB). * (Vol. 18) 1926 Lah 540 (541).

[2] The following cases hold contrary. (Vol. 6) 1919 Lah 42 (43) : 1 Lah 83. * (Vol. 9) 1922 Lah 890 (891) : 8 Lah 257 (DB). * (1926) 13 Oudh L. Jour. 609 (611). * (Vol. 5) 1918 Pat 219 (220) : 3 Pat L. Jour. 96.

[3] Cross-suits involving same issue—Appeal must be filed against decisions in both—Appeal in one is not competent. (Vol. 28) 1936 Rang 401 (402) (DB).

8. Limitation for appeal.—[1] The High Court of Madras has added sub-rule (3) to this rule under which when an appeal is presented out of time, the question whether the delay in filing the appeal should be excused or not must be decided before the memorandum of appeal is admitted. (Vol. 21) 1934 Mad 303 (304) : 57 Mad 741.

9. Misdescription in the memorandum of appeal.—[1] Appeal described as being from an order instead of being as one from a decree—Misdescription will not invalidate the appeal. ('92) 14 All 221 (222). (12 All 61 (FB) explained and not followed.)

[See also (1910) 8 Mad L. Tim. 199 (199) (DB).]

[But see ('08) 5 All L. Jour. 545 (546). (12 All 61 (FB) followed.)]

[2] Mistake in the description of the respondents does not entail the dismissal of the appeal when the defect is formal. (Vol. 24) 1937 Lah 60 (61).

[3] A appealing on his own behalf and on behalf of idols as manager—A naming himself in grounds of appeal but idols not mentioned nor A mentioned as appealing on behalf of idols—Case held one of misdescription and memorandum of appeal could be

amended. (Vol. 31) 1944 Oudh 162 (190) : 20 Luck 108.

10. Grounds of objection.—[1] Onus is on the appellant to show that the Lower Court's judgment is wrong. (Vol. 27) 1940 All 467 (476) (DB). * (Vol. 9) 1922 P C 39 (40) (PC). * (Vol. 8) 1921 P. C. 55 (56) : 17 Nag L. R. 72 (PC). * ('66) 11 Moo Ind App 177 (181) (PC). * (Vol. 5) 1918 Cal 363 (368, 386) (SB). * (Vol. 4) 1917 Lah 297 (300) : 1917 Pun Re No. 106 (DB). * ('13) 1913 Pun L. R. No. 241 page 804 (808) (DB). * (Vol. 12) 1925 Oudh 224 (224) * (Vol. 20) 1933 Oudh 142 (146) (DB). * ('87) 1937 All L. Jour. 1027 (1029) (PC).

[2] The memorandum of appeal should state the grounds of objection on which the decree is attacked. ('82) 6 Bom 304 (306) (DB). * (Vol. 22) 1935 Mad 282 (283, 284) : 58 Mad 771 (DB).

[3] Grounds of objection should not be vague but must raise specific issues. ('95) 8 C.P.L.R. 81 (82). * (Vol. 10) 1923 Oudh 113 (113).

[4] The appellant can set up any circumstance showing that the Judge of the Lower Court was disqualified to try the case. ('99) 22 Mad 155 (159) (DB).

[See ('79) 3 Cal L. Rep 23 (24) (DB).]

[5] Order appealed against discretionary—Appellate Court should not interfere unless satisfied that the discretion was not judicially exercised. (Vol. 21) 1934 Cal 694 (697) : 61 Cal 814 (DB).

11. Grounds that may be taken in the memorandum of appeal for the first time.—[1] Appellant cannot be allowed to raise in his memorandum of appeal a new case. (Vol. 32) 1945 Bom 137 (138, 139) : I. L. R. (1945) Bom 82. * (Vol. 30) 1943 Cal 1 (9) : I. L. R. (1942) 2 Cal 263 (DB). * (Vol. 80) 1943 Cal 455 (456) : I. L. R. (1943) 1 Cal 59 (DB). * (Vol. 80) 1943 Lah 109 (113) : I. L. R. (1944) Lah 47 (DB). * (Vol. 30) 1943 Lah 166 (168). * (Vol. 30) 1943 Mad 288 (290) : I. L. R. (1943) Mad 509 (DB). * (Vol. 80) 1943 Oudh 140 (146) : 19 Luck 95 (DB). * (Vol. 30) 1943 Oudh 360 (361). * (Vol. 80) 1943 Pat 285 (287) : 22 Pat 108 (DB). * (Vol. 30) 1943 Pesh 37 (40) (DB). * (Vol. 29) 1942 All 326 (328) : I. L. R. (1942) All 368 (DB). * (Vol. 29) 1942 All 361 (365) : I. L. R. (1942) All 498 (DB). * (Vol. 29) 1942 Lah 243 (247) (DB). * (Vol. 29) 1942 Mad 129 (130, 131). * (Vol. 28) 1941 Sind 73 (78) (DB). * (Vol. 27) 1940 Rang 136 (138). * (Vol. 19) 1932 P C 95 (97) (PC). * ('84) 10 Cal 777 (785) : 11 Ind App 109 : 1 Low Bur. Rep 253 (PC). * ('06) 3 Cal L. Jour. 560 (567, 568) (PC). * ('18) 6 Sind L. R. 135 (138) (DB). * ('86) 10 Bom 461 (467, 468) : 13 Ind App 66 (PC). * (Vol. 23) 1936 Bom 19 (21) : 60 Bom 42 (DB). * (Vol. 23) 1936 Bom 227 (241) : 60 Bom 516 (DB). * ('85) 18 Nag L. Jour. 110 (115) (DB). * (Vol. 24) 1937 Nag 227 (230) : I. L. R. (1938) Nag 364 (DB). * (Vol. 24) 1937 Pat 546 (548) : 16 Pat 230 (DB). * (Vol. 24) 1937 Pesh 97 (99) (DB). * (Vol. 20) 1933 Rang 385 (386) (DB).

[See also (Vol. 29) 1942 Mad 97 (98, 99) (DB).]

[2] Plea abandoned in trial Court cannot be raised in memorandum of appeal. (Vol. 30) 1943 Oudh 83 (85) : 18 Luck 632. * (Vol. 29) 1942 Cal 536 (537) : I. L. R. (1943) 1 Cal 128 (DB). * (Vol. 8) 1921 All 197 (197) (DB). * (Vol. 20) 1933 All 104 (106) (DB). * (Vol. 4) 1917 Lah 211 (212) : * (Vol. 13) 1926 Mad 1167 (1168) : 50 Mad 10 (DB). * (Vol. 18) 1926 Nag 160 (161). * (Vol. 8) 1921 Oudh 41 (42) : 24 Oudh Cas 181. * (Vol. 23) 1936 Lah 290 (291) (DB).

[3] Case inconsistent with that alleged by him in the Lower Court, especially when the opponent is

O. 41 R. 1 (contd.)

thereby placed at a disadvantage cannot be raised by appellant in memorandum of appeal. * (Vol. 28) 1941 Lah 347 (351) (DB). * (Vol. 8) 1921 P C 27 (28, 29) (PC). * (Vol. 18) 1926 P C 18 (20): 53 Ind App 64: 49 Mad 249 (PC). * (1904) 26 All 331 (334) (DB). * (Vol. 8) 1921 All 154 (155) (DB). * ('11) 35 Bom 231 (236) (DB). * (Vol. 16) 1929 Bom 114 (115). * ('92) 19 Cal 507 (512): 19 Ind App 90 (PC) * (Vol. 12) 1925 Cal 541 (544) (DB). * (Vol. 18) 1926 Cal 589 (590) (DB). * (Vol. 8) 1921 Lah 201 (202) (DB). * ('92) 15 Mad 503 (511): 19 Ind App 179 (P C). * (Vol. 2) 1915 Mad 74 (75) (DB). * (Vol. 15) 1928 Mad 962 (968). * ('18) 9 Nag L. R. 38 (39). * (Vol. 9) 1916 Pat 857 (858, 360) (DB). * (Vol. 2) 1915 Low Bur 36 (37). * (Vol. 28) 1936 Pat 309 (310). * (Vol. 28) 1936 Oudh 196 (200) (DB). * (Vol. 21) 1934 Oudh 47 (48) (DB).

[See (Vol. 29) 1936 Pesh 133 (134) (DB).]

[4] Objections as to joinder of parties or causes of action which might have been cured by amendment even in the trial Court cannot be raised for the first time in the memorandum of appeal. ('93) 20 Cal 1 (6): 19 Ind App 221 (PC).

[5] Objections such as those relating to the place of suing, or the valuation of the suit cannot be allowed to be raised for the first time in the memorandum of appeal. ('40) 42 Pun L. R. 374 (376). * ('79) 5 Cal 489 (493) (DB). * ('18) 1913 Pun L. R. No. 45 p. 173 (175). (Objection as to place of suing cannot be allowed unless there is a consequent failure of justice). * ('12) 16 Ind Cas 46 (47) (DB). (Cal.) (Case turning on S. 11 of the Suits Valuation Act.) * ('97) 19 All 165 (168) (DB). (Case turning on S. 12 of the Court-fees Act.) * (Vol. 3) 1916 Upp Bur 2 (3). (Objection as to stamp.) * ('87) 11 Bom 320 (324) (DB). (Reception of inadmissible document in evidence.) * ('10) 1910 Pun W. R. No. 78 p. 189 (191) (DB). * (1907-'09) Upp Bur Rul p. 3.

[6] Objection that a declaratory decree cannot be passed with respect to a future right cannot be raised for the first time in the memorandum of appeal. ('98) 17 Bom 197 (220, 221) (DB). * ('91) 15 Bom 697 (701) (DB).

[7] Plea that a suit for injunction is not maintainable on the ground that the plaintiff was out of possession on the date of filing the plaint not raised in trial Court—Plea depending on facts—It cannot be raised for the first time in appeal. (Vol. 28) 1936 Pat 372 (380): 15 Pat 460 (DB). * (Vol. 25) 1938 P C 20 (21, 22): 65 Ind App 45: 17 Pat 69: 32 Sind L. R. 276 (PC).

[8] The following pleas can be raised for the first time in the memorandum of appeal.

[a] Objections as to jurisdiction apparent on the face of the record. (Vol. 28) 1941 Mad 287 (287). * (1864) 2 Bom H C R 40 (45) (DB). * (Vol. 21) 1934 Oudh 55 (55): 9 Luck 365 (DB). * ('80) 5 Cal 489 (492) (DB). * (Vol. 11) 1924 Cal 233 (233): 50 Cal 948 (DB). * (Vol. 9) 1922 Mad 416 (416). * (Vol. 23) 1936 Oudh 64 (64) (DB). * (Vol. 23) 1936 Pat 260 (264): 15 Pat 272 (DB). * (Vol. 21) 1934 Sind 123 (129): 28 Sind L. R. 54 (DB). * (Vol. 26) 1939 All 22 (23).

[See however ('35) 62 Cal 1088 (1089) (DB).]

[b] Pleas going to the root of the case and obvious on the face of the record. (Vol. 2) 1915 Lah 179 (181) (DB). * (Vol. 28) 1936 Bom 412 (415) (DB).

[See (Vol. 29) 1936 Pesh 97 (100).]

[See also (Vol. 29) 1942 All 104 (108).]

[c] Non-joinder of essential parties. ('96) 18 All 109 (110, 112) (DB).

[See however (Vol. 22) 1935 Rang 23 (23).]

[d] Want of notice to quit. ('94) 18 Bom 110 (113) (DB). * ('89) 12 Mad 353 (354) (DB).

[e] Insufficiency of notice in suits for foreclosure. ('85) 11 Cal 111 (118): 11 Ind App 186 (PC).

[f] Questions of law. (Vol. 30) 1943 Pat 320 (322): 22 Pat 280 (283) (DB). * (Vol. 30) 1943 Pesh 37 (39) (DB). * (Vol. 29) 1942 All 365 (375): I. L. R. (1942) All 708 (DB). * (Vol. 29) 1942 Mad 634 (637): I. L. R. (1942) Mad 775 (DB). * (Vol. 27) 1940 Lah 252 (253). * (Vol. 1) 1914 Cal 484 (485) (DB). * (Vol. 23) 1936 All 723 (725): 58 All 1069 (DB). * (Vol. 20) 1933 Bom 413 (413): 57 Bom 678 (DB). * (Vol. 25) 1938 Bom 228 (230): I. L. R. (1938) Bom 155 (DB). * (Vol. 23) 1936 Cal 774 (779) (DB). * (Vol. 25) 1938 Lah 558 (559). * (Vol. 25) 1938 Mad 405 (410) (DB). * (Vol. 23) 1936 Oudh 64 (64). * (Vol. 28) 1936 Oudh 198 (200) (DB). * (Vol. 22) 1935 Pesh 113 (114). * (Vol. 24) 1937 Pat 73 (76): 16 Pat 84 (DB). * (Vol. 26) 1939 Rang 42 (44) (DB).

[See also (Vol. 30) 1943 Mad 749 (750): I. L. R. (1944) Mad 276 (DB).]

[g] Question of limitation which can be substantiated on the facts already on the record. (Vol. 28) 1941 Sind 158 (159): I. L. R. (1941) Kar 124 (DB). * (Vol. 27) 1940 Cal 113 (114): I. L. R. (1939) 2 Cal 358 (DB). * (Vol. 27) 1940 Lah 475 (485): I. L. R. (1941) Lah 848 (DB). * ('87) 14 Cal 592 (596, 597) (DB). * ('66) 3 Mad H C R 258 (259) (DB). * (Vol. 12) 1925 Rang 313 (313) (DB). * (Vol. 26) 1939 Rang 42 (44) (DB). * (Vol. 26) 1939 Pat 421 (425) (DB). * (Vol. 26) 1939 Bom 425 (425): I. L. R. (1939) Bom 564 (DB).

[See (Vol. 30) 1943 Lah 129 (137) (DB).]

[See also (Vol. 20) 1933 Pat 224 (227): 12 Pat 261 (DB).]

[But see ('77) 2 Bom 120 (131) (SB). * ('88) 9 Cal 635 (637) (DB). * ('80) 6 Cal L. Rep. 267 (269) (DB). * ('07) 17 Mad L. Jour. 281 (282) (DB).]

[h] Question of *res judicata*. (Vol. 27) 1940 Rang 136 (136). * (Vol. 2) 1915 Lah 179 (181) (DB). * ('90) 21 All 446 (448) (DB). * (Vol. 20) 1943 Oudh 104 (106) (DB). * ('37) 20 Nag L. Jour. 159 (162) (DB). * (Vol. 23) 1936 P C 258 (259) (PC).

[See however (Vol. 28) 1941 Mad 815 (816).]

[9] A question of law depending on questions of facts for its determination cannot be raised for the first time in appeal. (Vol. 29) 1942 All 36 (38) (DB). * (Vol. 27) 1940 All 500 (503): I. L. R. (1940) All 681 (DB).

[10] An Appellate Court can ignore inadmissible evidence although no objection to its admissibility was taken in the lower Court. (Vol. 21) 1934 All 400 (413): 56 All 766 (FB).

[11] Certified copy of a registered document admitted in evidence without objection in trial Court—Appellate Court cannot reject the document either on the ground that no foundation has been laid for the admission of secondary evidence or on the ground that there is no evidence to prove the execution of the document. (Vol. 30) 1943 P C 88 (87): I. L. R. (1943) Kar P C 69 (PC).

O. 41 R. 1 (contd.)

[12] No real prejudice to opposite party—No evidence necessary on the point—Appellate Court can allow new point to be raised. (Vol. 29) 1942 Sind 165 (166): I L R (1942) Kar 346 (DB) * (Vol. 23) 1936 Mad 700 (701).

12. When appellate Court may not interfere with findings of fact.—[1] Generally speaking it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. (Vol. 2) 1915 P C 1 (2): 39 Bom 386: 42 Ind App 110 (PC).

[See also (Vol. 30) 1943 P C 159 (161): I L R (1944) Kar (PC) 109 (PC) * (Vol. 28) 1941 Bom 129 (137): I L R (1941) Bom 211 * (Vol. 27) 1940 Pat 187 (190) (DB) * (Vol. 25) 1938 Rang 248 (249) (DB) * (Vol. 3) 1916 P C 256 (261): 43 Cal 707: 43 Ind App 73 (PC) * (Vol. 5) 1918 Cal 618 (622): 45 Cal 60 (DB).]

[2] Two conflicting view-points have to be reconciled, namely, the undoubted duty of the Court of Appeal to review the recorded evidence and to draw its own inferences and conclusions, and the unquestionable weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manner. (Vol. 9) 1922 Cal 260 (267): 49 Cal 132 (DB).

[See also (Vol. 29) 1942 Bom 161 (170): I L R (1942) Bom 357 (DB).]

[3] Case in the trial Court decided by a Judge who did not see or hear the witnesses—Appellate Court is in as good a position as the trial Court to deal with the evidence and is entitled to do so irrespective of the opinion of the trial Judge as to the veracity or otherwise of the several witnesses. ('34) 38 Cal W N 861 (877, 878) (DB) * (Vol. 23) 1936 Oudh 280 (287): 12 Luck 185 (DB).

[See also (Vol. 27) 1940 P C 93 (97): I L R (1940) Kar P C 235 (PC).]

13. Competency of appeal.—[1] Leave to appeal to be obtained before preferring an appeal—The memorandum of appeal should be accompanied by a petition for such leave. (Vol. 3) 1916 All 349 (350) (DB).

[2] An objection as to the maintainability of the appeal should be considered by the Court, though it was not raised in the first instance by respondent's pleader. ('91) 18 Cal 469 (472) (DB).

[3] Failure to comply with the decree of the lower Court does not necessarily bar the hearing of appeal. (Vol. 4) 1917 Lah 28 (28): 1916 Pun Re No. 99 (DB).

14. Consolidation of appeals.—[1] A Court has inherent power to consolidate appeals in proper cases. (Vol. 17) 1930 Mad 376 (379): 53 Mad 248 (FB) * (Vol. 16) 1929 Nag 229 (230, 231): 25 Nag L R 183 (FB).

[2] Several appeals disposed of by one judgment—They cannot be consolidated so as to enable the appellant to pay court-fee on the value of the consoli-

dated appeals and file only one *vakalat*. (Vol. 17) 1930 Mad 376 (381): 53 Mad 248 (FB).

[3] One decree passed in two appeals preferred by two sets of defendants against decree of trial Court—One second appeal is enough. (Vol. 19) 1932 Mad 639 (691) (DB).

15. Stamp on memorandum of appeal.—[1] A memorandum of appeal which does not bear the proper stamp-fee prescribed therefor is not validly presented, unless the Court allows the fee to be paid subsequently. (1913) 18 Cal L Jour 133 (136) (DB) (Overruled in (Vol. 16) 1929 Cal 121 on different point.) * (Vol. 19) 1932 Cal 482 (484, 485): 59 Cal 388 (DB) * ('90) 12 All 129 (142) (FB) * (Vol. 25) 1938 Mad 316 (317) (DB) * (Vol. 22) 1935 Oudh 231 (232): 10 Luck 569 (DB) * (Vol. 22) 1935 Pat 201 (201).

[See (Vol. 26) 1939 Pat 83 (85): 17 Pat 687 (DB).]

[See also (Vol. 29) 1942 Oudh 209 (210): 17 Luck 502 (DB) * ('06) 28 All 270 (272) (FB) * (Vol. 20) 1933 All 572 (573, 574) (DB).]

[2] Copies of judgment and decree accompanying the memorandum of appeal not properly stamped till after the expiry of period of limitation—Appeal is time-barred. ('87) 39 Pun L R 502 (503) * (Vol. 22) 1935 Lah 124 (125).

[3] Decision of Taxing Officer under S. 5 of the Court-fees Act, 1870 as to the court-fee required not given—The respondent can raise the question at the time of the hearing of the appeal. ('98) 21 Mad 269 (270) (DB).

[See however ('93) 15 All 117 (118) (SB).]

[4] In order to see which part of the decree is the subject of appeal before it, the Appellate Court must look at the memorandum of appeal and not at the stamp-fee affixed thereon. ('88) 11 All 85 (38).

[5] Memorandum of appeal insufficiently stamped—Court cannot grant relief proportionate to the stamp affixed. ('68) 10 Suth W R 242 (243) (DB).

[See however ('03) 30 Cal 501 (502) (DB).]

16. Refund where memorandum is over-stamped.—[1] The Court has inherent jurisdiction in a fit case to order the refund of excess court-fee paid on the memorandum of appeal. (Vol. 5) 1918 Pat 496 (496): 3 Pat L Jour 452 (DB) * (Vol. 19) 1932 Mad 438 (439): 55 Mad 641 (DB) * (Vol. 20) 1933 Oudh 170 (170): 7 Luck 588.

[See also ('70) 14 Suth W R 47 (47) (DB). * (Vol. 24) 1937 All 284 (285) * (Vol. 23) 1936 Lah 301 (304).]

[2] Court can only grant a certificate to the appellant authorising him to receive back excess court-fee. The appellant should thereafter apply to the Collector for refund. (Vol. 7) 1920 All 54 (55) (DB) * (Vol. 19) 1932 Mad 438 (439): 55 Mad 641 (DB).

17. Applicability of the order to other proceedings.—[1] Provisions of this order apply to *Original Side* appeals. (Vol. 13) 1926 Mad 316 (319): 49 Mad 291 (FB) (Overruling (Vol. 12) 1925 Mad 725: 48 Mad 631.)

[2] Appeals under S. 476-B of the Code of Criminal procedure are regulated by the provisions of this order. (Vol. 14) 1927 Cal 284 (285): 54 Cal 355 (DB) * (Vol. 13) 1931 Cal 604 (605): 59 Cal 68 (DB).

2. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken
- Grounds which may be taken in appeal.

ORDER 41 RULE 2—SYNOPSIS

1. Point not set forth in the memorandum of appeal.
2. Leave of Court to raise new point.
3. Point of limitation.
4. Point of jurisdiction.
5. "Appellate Court...shall not be confined... by leave of the Court."
6. Party affected must have had an opportunity of contesting the case.

1. Point not set forth in the memorandum of appeal.—[1] The appellant will not be entitled as of right to urge an objection at the hearing of the appeal which he has not taken in the grounds of appeal. (Vol. 30) 1948 Mad 288 (290): ILR (1948) Mad 509 (DB) * ('48) 1948 Oudh W N 180 (181) * (Vol. 28) 1941 Bom 350 (355) (DB) * (Vol. 27) 1940 Mad 722 (728) (DB) * ('96) 18 All 19 (22) (FB) * (Vol. 11) 1924 All 149 (149) (DB) * (Vol. 13) 1926 Lah 11 (12) (DB) * (Vol. 18) 1926 Nag 147 (148) * ('12) 15 Ind Cas 270 (272) (Oudh) * ('15) 80 Ind Cas 874 (875) (UPBR) * (Vol. 7) 1920 Cal 106 (107) (DB) * (Vol. 7) 1920 Sind 11 (11): 14 Sind L R 224 (DB) * ('90) 17 Cal 57 (64) (DB) * (Vol. 19) 1932 Mad 440 (442): 55 Mad 856 (DB) * (Vol. 22) 1935 Rang 58 (54): 12 Rang 625 (DB) * (Vol. 22) 1935 Nag 185 (189) * (Vol. 19) 1932 Lah 444 (446): 13 Lah 820 (DB).

[2] An appellant can with the permission of the Court, raise a point at the hearing though he has not included it in the memorandum of appeal. (Vol. 2) 1915 Lah 449 (450) * (Vol. 8) 1921 All 337 (339): 48 All 198 (SB) * (1900-02) 1 Low Bur Rul 184 (185) * ('94) 8 C P L R 81 (82).

[3] A point which was not raised in the trial Court, but taken in grounds of appeal and subsequently abandoned was not allowed to be raised in argument. (Vol. 22) 1935 Pat 306 (340): 14 Pat 70 (DB).

[4] Defendant in suit not admitting valuation of suit by plaintiff, but not pressing the point—Same valuation put in appeal by defendants—Defendants subsequently seeking to reduce valuation—They are not barred by rules of estoppel or *res judicata* from raising the point. (Vol. 28) 1936 Oudh. 179 (180): 12 Luck 68 (DB).

2. Leave of Court to raise new point.—[1] The Court has discretion to permit a new point, not raised in the memorandum of appeal, to be raised and argued at the hearing. (Vol. 29) 1942 All 361 (365): ILR (1942) All 498 (DB) * (Vol. 28) 1941 Mad 129 (135) (DB) * (Vol. 28) 1941 Oudh 72 (74). * (Vol. 20) 1933 Lah 788 (739) * (Vol. 28) 1936 Mad 865 (868) (DB) * (Vol. 27) 1940 Pat 33 (35) * (Vol. 21) 1934 Nag 1 (4): 30 Nag L R 62 (DB) * (Vol. 21) 1934 Pesh 3 (4) * (Vol. 22) 1935 Pesh 44 (47) (DB).

[See also (Vol. 10) 1923 Lah 115 (116): 3 Lah 382 (DB).]

[2] The leave may be express or implied. (Vol. 18) 1931 Rang 314 (315).

[3] Unless permission is taken, the Court will not allow such a point to be argued at the hearing. (Vol. 19) 1932 All 174 (176) (DB) * (Vol. 20) 1933 Lah 447 (447) * ('81) 5 Bom 621 (627) (DB) * (Vol. 1)

1914 Lah 402 (403): 1914 Pun Re No. 49 (DB) * ('22) 64 Ind Cas 182 (183) (Cal) * (Vol. 5) 1918 Oudh 113 (114) * (Vol. 9) 1922 Oudh 236 (246): 25 Oudh Cas 189 (DB) * (Vol. 8) 1921 Nag 53 (53): 17 Nag L R 126 * (Vol. 5) 1918 Cal 507 (507) (DB) * (Vol. 11) 1924 All 918 (919) * (Vol. 14) 1927 All 231 (232): 49 All 55 (DB).

[4] That the respondent has had notice of the fact that the appellant intends to raise a new point at the hearing cannot dispense with the Court's permission under this rule. (Vol. 12) 1925 Pat 57 (59): 3 Pat 818 (DB).

[5] Where permitting the new point would amount to setting up a new appeal it will not be allowed where the period of limitation for appeal has expired. (Vol. 3) 1916 Lah 452 (453): 1916 Pun Re No. 7 (DB).

[See also (Vol. 19) 1932 Lah 444 (446): 13 Lah 820 (DB).]

[6] Point not raised in the memorandum of appeal, although the appellant had sufficient time to do so will not be allowed to be raised at the hearing. (Vol. 33) 1946 Nag 135 (137).

[7] In the following cases it was held that the point may be permitted even after the period of limitation for appeal has expired:—

[a] Proper point is involved in the points already raised. (Vol. 10) 1923 Oudh 147 (148): 25 Oudh Cas 388.

[b] Question of law depending on facts already on record. (Vol. 29) 1942 All 365 (375): ILR (1942) All 708 (DB) * ('82) 4 All 69 (70) (FB) * (Vol. 2) 1915 Cal 373 (374) (DB) * (Vol. 23) 1936 Bom 412 (415) (DB).

[See (Vol. 28) 1941 Bom 350 (355) (DB) * (Vol. 19) 1932 Cal 405 (408) (DB).]

[But see (Vol. 33) 1946 Pat 338 (341): 25 Pat 103 (DB) (Ground that finding is not based upon evidence if not taken in the grounds of appeal cannot be urged at hearing)].

[c] Point to which there can be no legitimate objection from the other side on the ground of surprise. (Vol. 28) 1941 Mad 129 (135) (DB) * ('10) 8 Ind Cas 990 (991) (Low Bur) * (Vol. 18) 1931 Lah 390 (391) (DB).

[8] Permission to raise new point in arguments should be given only on terms as would compensate the opposite party. ('11) 38 Cal 629 (637): 6 Low Bur Rul 18 (PO).

[9] A mixed question of law and fact cannot be disputed at the stage of argument in appeal. (Vol. 33) 1946 Bom 407 (415).

3. Point of limitation.—[1] The point that suit or appeal in the lower Court was barred by limitation will not be considered by the appellate Court unless specifically raised. ('84) 8 Bom 535 (537) (DB).

[2] Unless a plea that the suit or appeal in the lower Court was barred by limitation is taken in the memorandum of appeal it cannot be urged at the hearing of the appeal without the leave. ('02) 25 Mad 367 (378): 29 Ind App 76 (PC) * ('98) 15 All 123 (128) (SB).

by leave of the Court under this rule :

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

[1882—S. 542; 1877—S. 542; 1859—S. 334. Cf. S. 100, O. 6 R. 7 and O. 8, Rules 8 and 9.]

3. (1) Where the memorandum of appeal is not drawn up in the manner herein

Rejection or amend- before prescribed, it may be rejected, or be returned to the appellant
ment of memorandum. for the purpose of being amended within a time to be fixed by the

O. 41 R. 2 (contd.)

[3] The Appellate Court will permit a point of limitation though not raised in the memorandum of appeal, to be raised at the hearing of the appeal, where it is apparent on the face of the proceedings and does not involve any new question of fact. ('90) 12 All 461 (464) (FB) * ('07) 34 Cal 941 (946) (SB) * (Vol. 7) 1920 Cal 846 (848) (DB) * ('12) 8 Nag L R 174 (176) * (Vol. 13) 1936 Pat 192 (194): 5 Pat 441 (DB) * (Vol. 8) 1921 Bom 381 (383): 45 Bom 920 (DB).

[See ('11) 13 Ind Cas 792 (794): 1911 Pun Re No. 84 (DB).]

[See also (Vol. 21) 1984 Rang 329 (380): 13 Rang 43.]

[4] Where the plea that the suit or appeal in the lower Court was barred by limitation involves an investigation of further facts the Court will not permit it to be raised at the hearing. ('02) 25 Mad 367 (368): 29 Ind App 76 (PC).

4. **Point of jurisdiction.**—[1] A point of jurisdiction not involving an investigation into facts other than those on the record will be allowed to be raised at the hearing of an appeal. (Vol. 5) 1918 Cal 336 (387) (DB).

[2] In the following cases point of jurisdiction not raised in the grounds of appeal was allowed to be raised at the hearing :

[a] Jurisdiction of Court to refer to arbitration. (Vol. 7) 1920 Cal 289 (289, 240): 47 Cal 738 (DB) * (Vol. 20) 1938 All 392 (393).

[b] Objection to territorial jurisdiction of Courts to entertain application for filing an award neither raised in trial Court nor mentioned in grounds of appeal.—In view of large stakes involved and possibility of case proceeding further it was proper that objection be dealt with on merits. (Vol. 28) 1941 Mad 129 (135) (DB).

[c] Competency of Court to grant the relief claimed. ('91) 1891 All W N 10 (11).

[d] Plea of *res judicata*. ('99) 21 All 341 (345) (FB) * ('80) 2 All 884 (887) (SB).

[But see ('69) 11 Suth W R 350 (351) (DB) (Such a plea does not raise a question of jurisdiction).]

[e] Plea that suit is bad for want of sanction under section 92 or 93 of the Code.

[See (Vol. 23) 1936 Bom 412 (415) (DB).]

5. **"Appellate Court.....shall not be confinedby leave of the Court."**—[1] An appellate Court is entitled to base its decision on grounds neither set forth in the memorandum of appeal nor taken with the leave of the Court. (Vol. 23) 1942 Oudh 217 (218): 17 Luck 341 * ('95) 17 All 280 (281) * (Vol. 28) 1941 Cal 85 (86). (Case raised in plaint and not denied in written statement can be considered though not agitated in trial Court.)

[2] The appellate Court can *suo motu* raise a point of limitation apparent on record and decide the appeal on that point. ('68) 10 Suth W R 71 (71, 72) (DB).

[See (Vol. 5) 1918 Oudh 269 (270).]

[3] Appellate Court can of its own motion raise a point of jurisdiction apparent on the face of the record and decide the appeal on that point. ('91) 13 All 575 (576) (DB) * ('78) 3 Cal 612 (615, 616) (DB).

[But see ('75) 23 Suth W R 408 (403) (DB).]

[4] Where there are grounds in appeal the Court can go into admitted questions and give a finding against the appellant. (Vol. 8) 1921 Lah 201 (203) (DB).

[5] A party cannot as of right compel the Court to exercise the power given under this rule. ('91) 13 All 381 (382, 383).

[6] Appellate Court under this rule cannot make out a new case for either party and grant relief on that basis. (Vol. 29) 1942 Mad 129 (130, 131) * (Vol. 27) 1940 Lah 193 (193) * ('05) 29 Bom 1 (12): 81 Ind App 154 (PC) * ('86) 12 Cal 239 (245): 12 Ind App 166 (PC) * (Vol. 26) 1939 Pat 323 (328) * (Vol. 24) 1937 Mad 122 (123) * (Vol. 22) 1935 Mad 125 (126) * (Vol. 23) 1936 Cal 176 (177).

[See however (Vol. 22) 1935 Pesh 121 (122). Appellate Court can raise question of public policy for first time. * (Vol. 22) 1935 Pesh 113 (114). (Question of law can be raised by a Court for the first time in appeal).]

[7] An appellate Court can go behind a finding of fact which is accepted by the appellant. (Vol. 8) 1921 Lah 182 (183) * ('71) 16 Suth W R 300 (301) (DB).

[8] In order to take up a new point the Court should be satisfied that all evidence on the point has been given or that it is a pure question of law and that a decision on the point is necessary in the interests of justice. (Vol. 7) 1920 Mad 88 (91) (DB) * (Vol. 5) 1918 Lah 88 (88): 1918 Pun Re No. 31.

[9] An appellant can give up any of the grounds of appeal at the hearing. (Vol. 2) 1915 Oudh 193 (194) (DB).

[10] Appellate Court is bound to give decision only on those pleas which are urged and argued. (Vol. 8) 1921 Lah 229 (231).

[See however ('69) 6 Bom H C R A C 9 (11, 12).]

6. **Party affected must have had an opportunity of contesting the case.**—[1] The Court cannot decide an appeal on a ground not raised in memorandum of appeal or raised with permission at the hearing without giving an opportunity to the party affected thereby, to contest the case on that point. (Vol. 5) 1918 Nag 114 (115): 15 Nag L R 192 * (Vol. 27) 1940 Pat 33 (35) * (Vol. 25) 1938 Mad 357 (359): ILR (1938) Mad 829 (FB).

ORDER 41 RULE 3—SYNOPSIS.

1. "May be rejected."

Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

[1882—S. 543 ; 1877—S. 543. 1859—S. 336 Cf. O. 7 Rules 10 to 13.]

PROVINCIAL AMENDMENTS.

ALLAHABAD

Substitute the following for sub-rule (1):

"8. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore proscribed, or accompanied by the copies mentioned in Rule 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner proscribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

ODDH

For sub-rule (1), substitute the following:

"8. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore proscribed, or accompanied by the copies mentioned in Rule 1, sub-rule (1), it may be rejected, or where the memorandum of appeal is not drawn up in the manner proscribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

Rule 3A—BOMBAY

After Rule 8, the following rule shall be inserted, namely:

"R. 3A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under Rule 18." [8-7-1921.]

O. 41 R. 3 (contd.)

2. "Or be returned to the appellant for the purpose of being amended."
3. Defect of parties.
4. Scandalous matters.
5. Reasons for rejection.
6. Appeal.
7. Second appeal.

1. "May be rejected."—[1] The Court cannot reject a memorandum of appeal under this rule on the ground that it is insufficiently stamped. (Vol. 1) 1914 Bom 249 (250): 38 Bom 41 * (Vol. 10) 1923 All 349 (349) (DB).

[2] A memorandum of appeal cannot be rejected under this rule on the ground that it is barred by limitation. (Vol. 7) 1920 Pat 818 (820) * (Vol. 24) 1937 Cal 732 (735).

[3] No duty is cast on the Appellate Court to examine the memorandum of appeal on presentation, and add proper parties if the appellant neglects to do so. ('13) 18 Ind Cas 37 (39): 1913 Pun Re No. 59 (DB).

[4] The Court can reject a memorandum of appeal under this rule at any stage. ('85) 7 All 79 (85) (FB) * ('69) 18 Suth W R 351 (352) (DB).

[5] As a general rule, the proper time to reject the memorandum would be the time of its presentation and not after it has been admitted. ('67) 8 Suth W R 141 (143) (SB) * ('64) 1864 Suth W R Gap 135 (135) (DB).

2. "Or be returned to the appellant for the purpose of being amended."—[1] Memorandum of appeal consisting of two documents one containing names of parties and signed by appellant and the other containing the grounds not signed—*Held* defect could be remedied by an amendment. (Vol. 7) 1920 Lah 814 (814).

[2] Appeal on behalf of the appellant and also on behalf of idol—Memorandum not containing idol's

name or the fact of appellant suing also on behalf of idol—*Held* the defect could be rectified by amendment. (Vol. 31) 1944 Oudh 162 (190): 20 Luck 108 (DB).

[3] A memorandum of appeal stating that the proceedings of the lower Court are irregular and contrary to law is too vague and general and should be amended before the appeal can be heard. ('66) 11 Moo Ind App 1 (2) (PC).

[4] The memorandum of appeal may be returned for amendment at any time and at any stage of the proceedings. ('84) 7 All 79 (85) (FB).

[5] Whenever a memorandum of appeal is returned for amendment the Court should fix a time for its representation. ('76) 1 All 260 (261) (DB) * ('80) 2 All 875 (876) (DB).

[6] The time that the Court allows for re-presentation of a memorandum of appeal cannot be demanded as a matter of right, after the expiry of the period of limitation within which the appeal can be filed. (Vol. 20) 1933 Mad 358 (360).

[7] Appeal by one of the defendants in form directed against whole decree except figures of valuation and court-fee showing that only part of the decree is objected to—Amendment sought to be made of valuation, should be allowed. (Vol. 26) 1939 Pat 162 (163) (DB).

3. Defect of parties.—[1] Respondent wrongly named owing to clerical error in the decree—The mistake can be rectified. (Vol. 5) 1918 Cal 582 (583) (DB).

[2] A single appeal by different persons having different defences and reasons for appealing is irregular. ('01) 23 All 137 (142): 27 Ind App 168 (PC).

[3] An appeal filed against a dead person cannot be rectified by adding the legal representatives. ('18) 21 Ind Cas 306 (307): (1913) 1 Upp Bur Rul 175.

4. Scandalous matters.—[1] Memorandum containing scandalous and irrelevant allegations—Such

4. Where there are more plaintiffs or more defendants than one in a suit, and the

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all. the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

[1882—S. 544; 1877—S. 544; 1859—S. 337.]

O. 41 R. 3 (*contd.*)

allegations separable from the rest—Court should return the memorandum and refuse to receive it till such portion is struck out or should itself expunge it. ('98) 22 Mad 155 (158, 161) (DB) * ('91) 15 Bom 488 (489) (DB).

5. Reasons for rejection.—A Court rejecting a memorandum of appeal under this rule should record its reasons for such rejection. ('93) 15 All 367 (370) (DB) * ('85) 9 Bom 452 (454) (DB).

6. Appeal.—[1] An appeal will lie from an order rejecting a memorandum of appeal when it decides so far as that Court is concerned the appeal. ('99) 3 Oudh Cas 234 (235).

[2] A rejection of a memorandum of appeal on the ground of limitation is appealable. (Vol. 7) 1920 Pat 818 (820).

7. Second appeal.—High Court can in second appeal interfere with a decision refusing or admitting an appeal, taken arbitrarily against law. ('98) 23 Bom 513 (517) (DB) * ('81) 8 Cal 251 (253) (DB) * ('78) 10 Bom H C R 397 (398) (DB).

ORDER 41 RULE 4—SYNOPSIS

1. Scope and object of the rule.
2. "Decree."
3. "Common ground".
4. Ground common to all the plaintiffs.
5. Ground common to all the defendants.
6. May reverse the decree in favour of all the plaintiffs or defendants.
7. Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them.
8. Review.
9. Revision.

1. Scope and object of the rule.—[1] Rr. 1 and 33 provide exceptions to the general rule that on an appeal by one of several plaintiffs or defendants, the Appellate Court can reverse or vary the decree of the trial Court only in favour of the party appealing. (Vol. 14) 1927 All 311 (313).

[2] Rr. 4 and 38 give the Court power to make the appropriate order needed in the interests of justice. (Vol. 7) 1920 Cal 428 (434) (DB).

[3] Separable part of decree affecting some of defendants and proceeding on ground common to them all—Appeal by one of them against such part of the decree—Rule 4 may apply. (Vol. 7) 1920 Cal 428 (434) (DB).

[See (Vol. 29) 1912 Pat 204 (209): 20 Pat 511 (DB).]

[4] One of necessary respondents not before Court—Rule 4 has no application. (Vol. 22) 1935 Oudh 329 (331): 11 Luck 5 (DB).

[5] There is no rule that all joint owners must be parties to appeal though they must be made parties

to suits. (Vol. 30) 1943 Bom 301 (304): 1 L R (1943) Bom 143 (DB).]

[6] In this case apparently the decree (which was one for injunction) proceeded on a ground common to all the defendants—It was held nevertheless that the Appellate Court had no jurisdiction to set aside the decree against all the defendants on the appeal by some of them alone—There is no reference to this rule in the judgment. (Vol. 21) 1934 Lah 684 (685): 7 Lah 613.

[7] Where a decree proceeds upon a ground common to all the plaintiffs or defendants and any one of the plaintiffs or the defendants appeals from the whole decree the appeal by one is virtually treated as an appeal on behalf of all. ('96) 22 Bom 500 (508) (DB) * (Vol. 23) 1936 Cal 424 (425) (DB).

[See also (Vol. 27) 1940 All 365 (368): 1 L R (1940) All 425 (DB).]

[8] The rule will not apply where the appeal is directed only against that portion of the decree which affects the appellant. ('10) 5 Ind Cas 102 (104, 105) (SB) * (Mad) * (Vol. 13) 1926 Lah 303 (303) * (Vol. 15) 1928 Mad 1144 (1146) (DB) * (Vol. 8) 1921 All 56 (57, 58): 48 All 320 (DB) * (Vol. 3) 1916 Cal 654 (655) (DB) * ('21) 63 Ind Cas 95 (97) (DB) (Cal) * (Vol. 5) 1918 Lah 335 (337) (DB) * ('89) 11 All 35 (39, 40) (DB).

[9] Where the appealing plaintiff or defendant cannot, under the circumstances of the particular case, be considered as appealing on behalf of the non-appealing plaintiffs or defendants R. 4 does not apply. (Vol. 3) 1916 Lah 113 (114, 115, 117): 1917 Punj Re No. 71 (FB) * (Vol. 32) 1945 Pat 453 (458): 24 Pat 379 (DB).

[10] The rule will apply only where the Court consciously decides to apply it. (Vol. 13) 1926 Mad 991 (994).

[11] The policy of the rule is to give the Appellate Court full power to do justice to all parties, whether before it or not, provided the whole case is gone into at the instance of the parties representing all the necessary contentions in the case. ('13) 25 Mad L Jour 248 (251) (DB) * (Vol. 24) 1937 All 796 (797).

[But see (Vol. 22) 1935 Pesh 106 (107) (DB). (This rule will not apply unless the co-plaintiff is at least made a respondent to the appeal).]

[12] Object of the rule is to prevent contradictory decisions on the matter in the same suit. (Vol. 3) 1916 Pat 400 (401): 1 Pat L Jour 143 * (Vol. 24) 1937 All 796 (797).

[13] The rule does not become inapplicable merely because the non-appealing defendant has, in the meanwhile, obeyed the lower Court's decree. ('08) 18 Mad L Jour 39 (41) (DB).

[14] Merely because the non-appealing defendant has separately appealed from the same decree and has failed in his appeal the rule is not inapplicable. (Vol. 2) 1915 All 367 (368).

O. 41 R. 4 (contd.)

[15] The rule has no application where there are several suits, the decree in each of which proceeds on a ground common to the defendants in all the suits, unless such suits are consolidated. ('90) 13 Mad 249 (252) (DB) * (Vol. 6) 1919 Lah 201 (202): 1919 Pun Re No. 116 * (Vol. 8) 1921 All 56 (57, 58): 43 All 320 (DB) * (Vol. 12) 1925 Bom 290 (291) (DB) (Several appeals—Rule does not apply unless the appeals are consolidated). * (Vol. 12) 1925 Oudh 732 (735) (DB) (Do) * ('90) 13 Mad 249 (252) (DB) (Do).

[But see ('78) 20 Suth W R 77 (77) (DB).]

[16] The rule does not apply where the plaintiff who appeals has no *locus standi* to appeal. (1910) 1910 Pun L R No. 21 P 51 (53).

[17] Where, for a suit under S. 92 of the Code, the consent of the Advocate-General has been given to three persons, they all constitute, in the eye of the law, one plaintiff and therefore one of them alone cannot appeal so as to make this rule applicable. (Vol. 14) 1927 Lah 382 (383) (DB) * (Vol. 22) 1935 Lah 251 (254): 16 Lah 782 (DB).

[18] Where a decree is passed against two defendants on a ground common to both and one of them appeals against the decree while the other files cross-objections to the decree, the Appellate Court can transpose the latter defendant as an appellant and decide the appeal in his favour. (Vol. 11) 1924 All 605 (608, 609) (DB).

[19] Where there are several respondents before the lower Appellate Court, any one of them may maintain a second appeal on behalf of all under this rule but he cannot represent a person who was not a respondent in the lower Appellate Court. ('87) 12 Bom 371 (375) (DB).

[20] A person not a party to the first appeal cannot prefer a second appeal under this rule. (Vol. 18) 1931 All 766 (767) (DB) * ('66) 6 Suth W R 36 (36, 37) (DB).

[21] Official Receiver suing to set aside sale of insolvent's property—Suit dismissed—Creditor of insolvent cannot appeal—Rule 4 shows that it is only parties to the suit that can appeal from a decree therein. (Vol. 28) 1941 Mad 577 (578).

[22] The rule applies also to a cross-appeal by respondents. (Vol. 7) 1920 Cal 428 (434) (DB).

2. "Decree."—[1] A decree may be reversed under this rule in favour of all the defendants even if some of them allowed the decree to be passed *ex parte* against them, provided the other conditions laid down in the rule are satisfied. (Vol. 3) 1916 Pat 400 (401): 1 Pat L Jour 143 * ('70) 18 Suth W R 114 (116) (DB).

[But see (Vol. 2) 1915 Mad 227 (229) (DB).]

[2] Where a decree is passed against some of the defendants on confession of judgment, the decree cannot be reversed in their favour under this rule. ('13) (1913) Pun L R No. 80 p. 801 (304) (DB).

[But see (Vol. 12) 1925 Cal 23 (26) (DB).]

3. "Common ground."—[1] Where the decree appealed from does not proceed on a ground common to all the plaintiffs or defendants, the Appellate Court has no jurisdiction to reverse or vary the entire decree except on the appeal of all the plaintiffs or defendants. (Vol. 29) 1942 Cal 257 (260): ILR (1941) 2 Cal 556 (DB) * (Vol. 14) 1927 All 177 (178) * ('96) 25 Bom 699 (702) (DB) * (1865) 2 Suth W R 227 (230) (SB) * (Vol. 4) 1917 Lah 68 (69) (DB) * (Vol. 6) 1919 Cal 127 (127) (DB) * ('02) 15 C P L R

116 (119) * (Vol. 7) 1920 Low Bur 114 (115) * (Vol. 19) 1932 All 326 (327) * (Vol. 19) 1932 Lah 37 (38): 12 Lah 534 (DB).

[2] The rule applies only where the lower Court's decree proceeds on a common ground and not where the Appellate Court wishes to proceed on a common ground and reverse or vary the lower Court's decree in favour of all the parties. ('70) 14 Suth W R 130 (131, 132) (DB) * ('98) 20 All 8 (9) (DB).

[3] It is enough if the decree proceeds on any ground common to all the plaintiffs or defendants. ('03) 30 Cal 429 (432) (DB) * (Vol. 2) 1915 Cal 618 (619): 42 Cal 451 (DB) * ('07) 30 Mad 470 (472) (DB).

[But see ('95) 1895 Pun Re No. 8, p. 33 (36) (DB).]

[4] It is not necessary that all the defendants should claim an interest in the property affected by the decree. ('07) 30 Mad 470 (472) (FB) (Disapproving 17 Mad 265).

[5] The rule will apply when the defendants put forward a common defence as against the plaintiff, although they dispute each other's rights. (Vol. 14) 1927 Pat 103 (104).

[6] Where a common defence is put forward by the several defendants to a suit, this rule will apply although their interests in the subject-matter of the suit are not inseparable. (Vol. 23) 1936 Lah 612 (616, 617).

[See however (Vol. 26) 1939 All 626 (635) (DB).]

[7] In applying this rule, the Court is entitled to consider the ground on finding upon which the judgment or decision is based, and not merely the operative portion of the decree. ('09) 9 Cal L Jour 461 (461) (DB).

4. Ground common to all the plaintiffs.—[1] Where there are several plaintiffs and the suit is dismissed on a ground common to all of them, the Appellate Court may reverse the decree in favour of all the plaintiffs although only some of them have appealed. (Vol. 1) 1914 Lah 298 (298): 1914 Pun Re No. 68 (DB) * ('12) 15 Ind Cas 409 (412) (DB) (Mad) * (Vol. 14) 1927 Nag 406 (407) * (Vol. 11) 1924 Oudh 385 (389) (DB) * (Vol. 16) 1929 All 393 (394) * (Vol. 11) 1924 Rang 376 (376): 2 Rang 486 (DB) * (Vol. 9) 1922 Lah 57 (58).

[2] Though an application for commutation of rent under the Bengal Tenancy Act must be made by all the landlords, an appeal by some only of the landlords in such proceedings is maintainable. ('17) 41 Ind Cas 787 (788) (Pat).

5. Ground common to all the defendants.—[1] Where a decree is passed against several defendants and the decree proceeds on any ground common to all the defendants, it is open to any of them to appeal from the whole decree and on such appeal the Appellate Court can reverse or vary the decree in favour of all the defendants. (Vol. 29) 1942 Oudh 313 (314): 17 Luck 636 (DB) * (Vol. 17) 1930 Mad 65 (67) (DB) * (Vol. 3) 1916 Cal 890 (890, 891) (DB) (Sale set aside against all purchasers—Reversal of order in appeal by one entres for benefit of all). * ('78) 3 Cal 788 (741) (FB) * ('90) 3 C P L R 130 (130) * (Vol. 7) 1920 Cal 646 (647) (DB) * (Vol. 7) 1920 Cal 388 (390) (DB) * ('01) 23 All 478 (481) (DB) * (Vol. 12) 1925 Mad 237 (238) (DB) * (Vol. 19) 1932 All 710 (711) (DB).

[2] A mortgaged certain properties to X and sold same to B on 5—3—1925. On 10—3—1925, A paid X the whole of the interest due up to that date and it was arranged that the principal should be paid by

O. 41 R. 4 (contd.)

16—10—1925, failing which further interest would accrue from 10-3-1925 till payment. On 16—3—1925, B tendered to X a certain sum as the principal amount due on the mortgage. On X refusing to receive the same, B deposited the amount in Court under S. 84 of the Transfer of Property Act, 1882, on 22—10—1925. X thereafter filed a suit against A and B for the interest accrued due from 10—3—1925 to 22—10—1925 on the ground that no valid tender was made on 16—3—1925. A and B contested the suit on the ground that the tender was a valid one. The trial Court passed a decree against both A and B overruling their plea. B alone appealed against the decree. It was held that the ground on which the decree of the lower Court proceeded, viz., that there was not valid tender, being common to both A and B, the Appellate Court could under this rule reverse the decree against A also though he had not joined in the appeal. (Vol. 16) 1929 Mad 230 (233): 52 Mad 322 (DB).

6. May reverse the decree in favour of all the plaintiffs or defendants.—[1] The exercise of the power under this rule is discretionary. (Vol. 29) 1942 Pat 204 (209): 20 Pat 811 (DB) * (Vol. 19) 1932 Lah 71 (71) (DB) * (Vol. 19) 1932 All 710 (711) (DB) * ('95) 1895 Pun Re No. 8, p. 33 (36) (DB) * ('12) 16 Ind Cas 693 (694) (DB) (Mad) * (Vol. 1) 1914 All 74 (75): 36 All 510 (DB).

[2] Where one of the plaintiffs or defendants appeals without impleading the other plaintiffs or defendants as parties to the appeal this rule applies. (Vol. 24) 1937 Bom 101 (103): I L R (1937) Bom 150 * ('98) 22 Bom 500 (508) (DB) (Appeal by one is virtually appeal by all though they may not be parties to the record) * (Vol. 23) 1936 Cal 424 (425) (DB) * ('39) 43 Cal W N 15 (17). (Rule 4 gives the Court a wide discretion to grant relief to persons who are not before the Court either as appellants or respondents) * ('13) 25 Mad L Jour 248 (251) (DB) (Appellate Court has full power to do justice to all parties whether before it or not.) * (Vol. 29) 1942 Oudh 139 (140) * (Vol. 28) 1941 Oudh 155 (157): 16 Luck 382 * (Vol. 24) 1937 Oudh 448 (449) * (Vol. 27) 1940 All 428 (430) * (Vol. 16) 1929 All 243 (244): 51 All 575 (DB) * (Vol. 25) 1938 All 235 (239): I L R (1938) All 350 (DB).

[But see (Vol. 15) 1928 Lah 43 (43) (DB) * ('28) 110 Ind Cas 250 (250) (Lah) * ('38) 40 Pun L R 6 (7) * (Vol. 22) 1935 Pesh 106 (107) (DB) * (Vol. 11) 1924 All 873 (874).]

[3] The rule does not enable a decree to be passed against a person. (Vol. 21) 1934 Oudh 496 (497) (DB). * (Vol. 21) 1934 Mad 730 (732): 58 Mad 407.

[4] Where A and B obtained a decree against C for a part of the claim made in the suit, and in an appeal by B for the portion of the claim disallowed, C filed cross-objections against the portion decreed, and the Appellate Court dismissed the claim *in toto*. Held that A was bound by the decision, notwithstanding he was not a party to the appeal. ('87) 11 Bom 596 (598) (DB).

[5] Suit for share in property of deceased—Plaintiff conceding that defendant 1 was entitled to certain share and claiming that he and defendants 2 and 3 were each entitled to sixth share in surplus—Suit decreed—In appeal by defendant 2 alone, Defendant 2 held entitled to sixth share in whole property—No appeal or memo of objection by plaintiff or defendant 3—Variation of decree by appellate Court in favour

of plaintiff and defendant 3 held erroneous. (Vol. 32) 1945 Mad 47 (49).

[6] Where a suit is partly decreed and partly dismissed and in an appeal by the plaintiff against the part dismissed, no cross-objections are filed against the part decreed, this rule has no application. ('89) 11 All 35 (39, 40) (DB).

[7] Where a decree is passed against A and B, and B alone appeals from the decree, the Appellate Court cannot, while setting aside the decree against B, pass a new decree against A. (Vol. 5) 1918 Cal 173 (175) (DB).

[8] Where the trial Court has decreed the suit against A and B and B alone appeals from the decree, the Appellate Court while reversing the decree and dismissing the suit against both A and B can also decree in favour of A, the costs of the suit. (Vol. 29) 1942 Cal 257 (260): I L R (1941) 2 Cal 556 (DB).

[9] Where the Appellate Court exonerates a particular defendant from the lower Court's decree and that defendant's interest is separable from that of the others, the appellate decree does not enure to the benefit of the latter. (Vol. 4) 1917 Pat 152 (153): 3 Pat L Jour 166 (DB).

[10] A decree was passed against A, B and C. The decree was executed against A and on appeal by B and C, to which A was not a party, the decree was reversed. It was held that A was entitled to restitution, though he was not a party to the appeal. (Vol. 24) 1937 Bom 101 (103): I L R (1937) Bom 150.

7. Death of one of several appellants in a case where the decree appealed from proceeds on a ground common to all of them.—[1] On the death of one of several appellants, if the right of appeal survives to the surviving appellants alone, the appeal may be proceeded with by latter. (Vol. 30) 1943 Bom 301 (304): I L R (1943) Bom 143 (DB) * (Vol. 15) 1928 Lah 737 (737, 738).

[2] If the lower Court's decree proceeds on a ground common to the deceased as well as to the survivors, then, the latter can, under this rule, appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal. (Vol. 32) 1945 Bom 126 (131) (DB) * (Vol. 28) 1941 Oudh 155 (160): 16 Luck 382.

[3] Where the decree proceeds on a ground common to the deceased as well as to the survivors, if the legal representatives are not substituted within the period of limitation, the appeal abates only so far as the deceased is concerned and not as a whole. (Vol. 32) 1945 Bom 126 (131) (DB) * (Vol. 28) 1941 Pesh 36 (37) (DB) * ('13) 25 Mad L Jour 248 (250) (DB) * (Vol. 20) 1933 All 733 (734) (DB) * (Vol. 13) 1926 Cal 462 (462, 463) * ('30) 125 Ind Cas 180 (180) (DB) (Lah).

[But see (Vol. 21) 1934 Lah 206 (208): 15 Lah 667 (DB).]

[4] If the appeal succeeds, the appellate decree or order enures to the benefit of all the appellants including the deceased. (Vol. 32) 1945 Bom 126 (131) (DB) * (Vol. 28) 1941 Pesh 36 (37) (DB) * (Vol. 12) 1925 Mad 910 (910, 911) (DB) * (Vol. 21) 1934 Cal 703 (704): 61 Cal 879 (DB) * (Vol. 20) 1933 Mad 655 (656) (DB) * (Vol. 5) 1918 Mad 794 (801): 40 Mad 846 (DB) * (Vol. 3) 1916 Lah 401 (402) (DB) * (Vol. 25) 1938 Pat 147 (149) * (Vol. 26) 1939 All 626 (635) (DB) * (Vol. 25) 1938 All 235 (239): I L R (1938) All 350 (DB).

STAY OF PROCEEDINGS AND OF EXECUTION.

5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

O. 41 R. 4 (contd.)

[But see (Vol. 27) 1940 Pat 346 (347): 19 Pat 870 (FB).]

[5] Where a decree dismissing a suit by several plaintiffs has proceeded on a ground common to all of them and some of the plaintiffs alone have appealed against the decree making the other plaintiffs respondents to the appeal, the death of one of the latter and the failure to bring on record his legal representatives within limitation do not affect the maintainability of the appeal. (Vol. 25) 1938 All 235 (239): 1 L R (1938) All 350 (DB).

[6] The rule applies only to appellants and not respondents to an appeal. (Vol. 13) 1926 Cal 335 (336) (DB) * (Vol. 22) 1935 Oudh 329 (331): 11 Luck 5 (DB) * (23) 112 Ind Cas 605 606 (All) * (02) 6 Cal W N 196 (196, 197) (DB) * (Vol. 21) 1934 Mad 730 (732): 58 Mad 407.

[See however (Vol. 19) 1932 Cal 134 (135): 58 Cal 134.]

[7] The death of an unnecessary party does not affect the validity of a decree passed in the absence of his legal representatives. (Vol. 13) 1926 Mad 901 (994).

[See also Order 22 Rules 2, 3, 4 and 11]

8. Revision.—[1] This rule does not apply to applications for review. (04) 1904 Pun Re No. 47 p. 142 (145) (DB).

9. Revision.—[1] Where in a case coming under this rule the Appellate Court refuses to reverse a decree in favour of non-appealing parties, while reversing it in favour of the appellants, on the ground that it has no power to do so, its decree can be set aside in revision. (85) 8 Mad 192 (195) (DB).

[2] The power of the High Court in revision under S. 25 of the Provincial Small Cause Court Act is not less wide than under this rule. (Vol. 8) 1921 Nag 105 (106): 17 Nag L R 20.

ORDER 41 RULE 5—SYNOPSIS.

1. Scope and object of the rule.
2. Rule does not apply where decree has been executed.
3. Rule applies only when decree under appeal is capable of execution.
4. Stay of proceedings.
5. Stay of execution, when may be granted.
6. "Sufficient cause."

7. "Substantial loss."

8. Application must have been made without unreasonable delay.

9. Affidavit in support of the application.

10. Notice to decree-holder.

11. Security for performance of decree.

12. When respondent is insolvent.

13. Insolvency of appellant and deposit.

14. Effect of stay order.

15. Effect of uncommunicated order staying execution.

16. Costs of application.

17. Appeal.

18. Letters Patent appeal.

19. Revision.

20. Review.

1. Scope and object of the rule.—[1] Appeal filed—Appellate Court may order stay of proceedings under the decree or of execution of such decree. (09) 9 Cal L Jour 561 (562) (DB) * (Vol. 24) 1917 All 528 (528) (DB).

[2] Application for stay made to appellate Court—Conditions of sub-rule (3) satisfied—The Court can grant stay of execution whether an application to execute decree has in fact been made or not. (Vol. 20) 1933 Bom 118 (119, 120): 57 Bom 202 (DB).

[3] Before an appeal is filed from an appealable decree, the Court passing it may order the execution to be stayed but not of other proceedings under the decree. Appellate Court has no jurisdiction to order stay of execution of the decree in such a case. (Vol. 8) 1921 All 214 (214): 43 All 513 (DB) * (Vol. 8) 1921 All 342 (343, 344): 43 All 198 (198) (DB) * (72) 17 Suth W R 341 (342) (DB) * (66) 6 Suth W R Misc 15 (15) (DB) * (09) 5 Low Bur Rul 124 (125) (DB).

[4] The object of the rule is to see that the ultimately successful party gets not merely a barren success but is able to reap the fruits of his success. (01) 5 Cal W N 781 (797, 798) (SB).

[5] Decree-holder's right to reap the fruits of his decree should not be lightly interfered with. (11) 38 Cal 754 (761, 762) (DB).

[6] The rule applies to all decrees. (66) 9 Suth W R 448 (448) (FB) * (94) 1894 Pun Re No. 2, p. 2 (4) (DB).

- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.
- (4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

[1882—S. 545; 1877—S. 545; 1859—S. 338.]

Objects and Reasons

"The Committee have added words to section 545 in order to make it clear that proceedings under a decree as well as execution can be stayed by an appellate Court; the recognition of preliminary decrees makes it the more necessary to have an express power to this effect instead of resting on an

inherent power (*Balkishan Sahu v. Khugnu*, I. L. R. 31 Calcutta 772). The Committee have introduced express words authorising an *ex parte* stay, as the need for such an order constantly arises in practice."—S. O. R.

PROVINCIAL AMENDMENT

MADRAS

Substitute the following for the existing sub-rule (1):

"5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of any such final decree, if already made."

[P. Dis. No. 164 of 1932.]

O. 41 R. 5 (contd.)

[7] The rule does not enable the Appellate Court to stay proceedings in a Court not subordinate to it. (Vol 18) 1931 All 57 (58); 53 All 180.

[8] Execution of a decree under which immovable property has been ordered to be sold transferred to the Collector under S. 68—Appeal preferred against the order of the Civil Court directing the execution of the decree by sale—Appellate Court can order stay of sale by the Collector. (Vol 30) 1943 Oudh 265 (266, 267) (DB).

[9] Under O. 20 R. 11 the Court which passed the decree can postpone the payment of the amount decreed. (Vol 14) 1927 Mad 416 (419, 420) (DB).

[10] In cases not covered by any of the provisions dealing with stay of execution a sale or execution can be stayed under the Court's inherent powers. (Vol. 19) 1932 All 288 (288); 54 All 344 (DB) * (10) 7 Ind Cas 1017 (1017); 1910 Pun Re No. 82 * (Vol 6) 1919 Pat 343 (344); 4 Pat L Jour 371 (DB) * (37) 20 Nag L Jour 240 (242).

[See also (Vol. 20) 1933 Mad 563 (564).]

2. Rule does not apply where decree has been executed.—[1] Decree already executed—The rule does not apply. ('12) 35 All 119 (122) (DB) * (Vol 7) 1920 Lah 464 (465) * (Vol 11) 1924 Pat 715 (716) * ('06) 33 Cal 927 (930) (DB) * ('83) 12 Cal L Rep 532 (538) (DB).

[See also (Vol. 8) 1916 Cal 272 (273, 274) (SB).]

[2] Respondent preventing order for stay of execution being passed by representing to the Court that there was no application for execution, and immediately afterwards applying for execution in the lower Court and obtaining delivery of possession, *Held* that delivery of possession could not be allowed to stand. (Vol 15) 1928 Pat 49 (50) (DB).

3. Rule applies only when decree under appeal is capable of execution.—[1] Appeal filed against order overruling objections of the judgment-debtor to the execution of the decree—Appellant applying for stay of sale—This rule has no application. (Vol 20) 1933 All 664 (665).

4. Stay of proceedings.—[1] The mere filing of an appeal does not suspend the operation of a decree and is no bar to proceedings being taken under the decree, except so far as the Appellate Court orders otherwise. (Vol 18) 1931 All 886 (888); 53 All 283 (FB) * (Vol 17) 1930 Pat 227 (229) (DB) * (Vol 11) 1924 Lah 360 (360) * ('83) 6 Mad 98 (99) (DB) * (Vol 28) 1936 Oudh 320 (321); 12 Luck 260 (DB) (Vol 22) 1935 Lah 181 (181) * (Vol 6) 1919 Sind 64 (65); 13 Sind L R 185 (DB).

[See (Vol 5) 1918 P C 151 (153); 46 Cal 670; 46 Ind App 52 (P C) * (Vol 8) 1921 Upp Bur 5 (7); 4 Upp Bur Rul 83 * ('08) 12 Cal W N 885 (886, 887).

[2] The rule expressly authorizes the Appellate Court to stay proceedings under the decree. (Vol. 17) 1930 Lah 108 (108).

[But see (Vol 8) 1921 Pat 328 (329) (DB).]

[3] Appeal against order appointing receiver—Appellate Court can pass order directing receiver not to act till further orders. (Vol 7) 1920 Pat 567 (568); 4 Pat L Jour 642 (DB).

[4] Appeal from preliminary decree in a partition suit or in a mortgage suit. Further proceedings can be stayed. (Vol 20) 1933 Lah 790 (791) * ('28) 111 Ind Cas 383 (383) (Lah) * ('28) 107 Ind Cas 486 (487) (Lah) * (Vol 19) 1932 Lah 271 (272).

[5] Appeal from preliminary decree in a suit for accounts—Order can be made staying enquiry into the accounts, pending appeal. ('04) 31 Cal 722 (724) (FB).

[6] As a general rule no stay will be allowed in an appeal from preliminary decree in a suit for accounts unless irreparable injury is likely to result to the appellant, by not passing such an order. ('21) 61 Ind Cas 9 (13) (DB) (Pat).

[7] Appeal from order granting temporary injunction—Appellate Court has power to order stay of operation of the injunction during pendency of appeal. (Vol 24) 1937 All 528 (528) (DB).

[8] The High Court can suspend a sentence of imprisonment passed under the Provincial Insolvency Act pending the disposal of the appeal from such

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sentence. (Vol 7) 1920 Bom 58 (58): 41 Bom 673 (DB).

[9] A proceeding for restitution on a decree being varied or reversed, cannot be stayed. (Vol 16) 1920 Nag 138 (138).

[See also ('73) 10 Bom H C R 411 (412, 413) (DB).]

[10] Application for possession is a proceeding under the order confirming a sale—Appellate Court can order the same to be stayed pending appeal by the judgment-debtor against the order confirming the sale. (Vol 19) 1932 All 655 (656) (DB).

[11] Proceedings as distinct from execution of a decree stayed by an Appellate Court—Sub-rule (3) does not apply—Furnishing of security is not compulsory. Court has discretion in the matter. (Vol 22) 1935 Nag 16 (17): 31 Nag LR 172.

[12] The Court can make payment of interest condition for staying execution of the decree. (Vol 14) 1927 Mad 927 (928, 929) (DB).

[See (Vol 13) 1926 Cal 1119 (1120): 53 Cal 735.]

[13] A stay order passed by Appellate Court is automatically vacated the moment the appeal is dismissed. (Vol 29) 1942 Oudh 84 (86) * (Vol 26) 1939 Nag 107 (109).

5. Stay of execution, when may be granted.—

[1] Before an appeal is filed the Court which passed the decree can stay execution of the decree. ('94) 21 Cal 561 (564) * (Vol 3) 1916 Cal 272 (274) (SB).

[2] An application for stay of execution of a decree passed on the Original Side of the High Court, in view of an intended appeal, must ordinarily be made to the Judge who tried the case. (Vol 3) 1921 Cal 541 (542): 48 Cal 796 (DB).

[3] For applicability of sub-rule (2) the decree should be an appealable one, and the application for stay should have been made before the expiry of the period of limitation for the appeal. ('87) 9 All 36 (41) * ('84) 10 Cal 817 (819) (DB).

[4] Decree becoming final and unappealable—Court has no power to stay execution thereof in view of a pending application for review. ('87) 9 All 36 (41, 42).

[5] Preliminary decree appealed against—This does not empower the Court to order stay of execution of final decree from which no appeal is intended to be preferred. (Vol 14) 1927 Lah 760 (760).

[See however (Vol. 22) 1935 Mad 43 (45): 58 Mad 116 (DB).]

[6] Court cannot order stay of execution of decree at the instance of a person not a party to the suit, who claims immovable property liable to be taken under the decree. (1864) Marsh 478.

[7] Appeal filed—It is only the Appellate Court that can stay execution. (Vol. 32) 1945 Oudh 96 (101) (DB) * ('12) 35 All 119 (122) (DB) * ('69) 5 Mad H C R 98 (99) (DB) * ('04) 31 Cal 373 (376) (DB) * (Vol. 11) 1924 Lah 602 (603) * ('09) 9 Cal L Jour 561 (563) (SB) * ('04) 27 Mad 602 (606) (DB) (Lower Court can grant time to the judgment-debtor to enable him to obtain stay order) * ('09) (1909) Pun L R No. 52 p. 203 (203).

[8] Appeal filed in *forma pauperis*—Application for leave to appeal as pauper pending disposal—Appellate Court may grant stay. ('79) 1879 Pun Re No. 70, page 191 (192) (DB).

[9] Appeal filed against order refusing to set aside *ex parte* decree—Appellate Court has no power to stay execution of the decree. (Vol 29) 1942 Pat 146 (148)

(DB) * (Vol 3) 1916 Pat 397 (398) (DB) * ('04) 31 Cal 1081 (1082, 1083) (DB).

[10] Appeal against order filing an award—Appellate Court cannot stay execution of decree on the award. (Vol 14) 1927 Lah 494 (495).

[11] Appeal from order filing an award—Court has inherent power to stay execution under the award. (Vol 19) 1931 Bom 384 (384): 55 Bom 801 (DB).

[12] Decree execution of which is sought to be stayed not appealed against—Stay cannot be granted merely because appeal is pending against decree in a connected suit. (Vol 23) 1936 Mad 276 (277): 59 Mad 744 (DB).

[13] Rule 6 sub-rule (2) does not affect powers of Appellate Court under this rule to stay sale, in execution of decree. ('07) 34 Cal 1037 (1049) (FB) * (Vol 6) 1919 Mad 1144 (1145): 41 Mad 813 (DB).

[14] Refusal of stay under this rule does not bar application under R. 6. (Vol 27) 1940 Cal 582 (583) (DB) * ('01) 25 Bom 243 (244) (DB).

[15] Decree specifying date within which judgment-debtor should comply with it—Such date passed without judgment-debtor doing so—Stay may be granted. ('09) 10 Cal L Jour 631 (636) (DB).

6. "Sufficient cause."—[1] A stay of execution under this rule can be ordered only on "sufficient cause" being shown for such stay. ('68) 9 Suth W R 448 (449) (FB) * ('11) 38 Cal 754 (758, 759) (DB) * (Vol 7) 1920 Lah 300 (300).

[2] A stay will not be granted where the appeal does not raise fairly arguable questions. ('12) 23 Mad L Jour 316 (319).

[3] Period of limitation for appeal from decree not expired—This is no sufficient cause for ordering stay. ('66) 5 Suth W R Misc 53 (53) (DB).

[4] Judgment-debtor guilty of contempt of Court in not having complied with decree specifying certain time within which he should have done so—This does not disentitle him to order for stay. ('09) 10 Cal L Jour 631 (636) (DB).

7. "Substantial loss."—[1] Execution should not be stayed unless the Court is satisfied that substantial loss may otherwise result to the judgment-debtor. (Vol 8) 1921 Lah 24 (25): 2 Lah 61 (DB) * (Vol 22) 1935 Lah 140 (141) * (Vol 21) 1934 Nag 160 (161) * ('01) 25 Bom 243 (244) (DB) * ('12) 23 Mad L Jour 316 (319) * ('66) 10 Moo Ind App 322 (327) (PC) * ('07) 34 Cal 1037 (1054) (FB) * (Vol 32) 1945 Oudh 96 (101) (DB).

[2] The loss must be a tangible one and not a mere annoyance to the feelings. ('12) 23 Mad L Jour 316 (319).

[3] Decree for possession of immovable property—It depends upon circumstances of each case whether substantial loss will result to the appellant if stay is refused. Court should consider nature of property character of possession and past enjoyment of the property. ('21) 61 Ind Cas 827 (828) (Lah) * ('21) 61 Ind 9 (13) (DB) (Pat).

[4] Court satisfied that it would be difficult for appellant to recover back property if he succeeds in appeal—There is sufficient cause for granting stay. (Vol 10) 1923 Lah 445 (446) * ('12) 1912 Pun W R 94 p. 247 (248).

[See also (Vol. 10) 1923 Pat 597 (598) (DB).]

[5] Disturbance of appellant's possession is itself a substantial loss. Such possession should be protected

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till the plaintiff has finally established his title. (Vol. 14) 1927 Lah 169 (170).

[See (Vol 7) 1920 Lah 326 (327): 1 Lah 818 (DB).]

[But see (Vol 21) 1934 Nag 160 (161).]

[6] Decree-holder being a woman possessed of no property is no ground for staying execution of decree pending appeal. (Vol. 15) 1928 Lah 329 (329).

[7] Ordinarily the execution of a mere decree for costs cannot be stayed. (Vol. 13) 1926 Pat 54 (55) (DB) * (Vol 4) 1917 Lah 836 (837).

[See (Vol 13) 1926 Lah 605 (606).]

[8] Respondent willing to give security for restitution—Execution of decree for money should not ordinarily be stayed. ('89) 13 Bom 241 (241) (DB).

8. Application must have been made without unreasonable delay.—[1] The application for stay should be made without any unreasonable delay. ('66) 10 Moo Ind App 322 (328) (PC) * ('72) 17 Suth W R 160 (160, 161) (DB) * (Vol 12) 1925 Cal 254 (255, 257) (DB).

9. Affidavit in support of the application.—[1] Application for stay of execution should be supported by affidavit showing existence of sufficient cause for stay. ('91) 15 Bom 536 (537) (DB) * ('01) 25 Bom 243 (244) (DB).

[2] Allegations in affidavit not contradicted by any counter-affidavit—Stay may be granted. ('88) 1888 All W N 249 (249).

[3] Bare statement in affidavit that applicant will suffer substantial loss if execution not stayed, not enough. (Vol 8) 1921 Lah 24 (25): 2 Lah 61 (DB).

10. Notice to decree-holder.—[1] Interim stay order can be passed pending disposal of application for stay without notice to decree-holder. Final order staying execution should not be made without such notice. (Vol 11) 1924 Pat 715 (716) * ('91) 15 Bom 536 (537) (DB).

[2] Failure to give notice to decree-holder—High Court interfered in revision and set aside order for stay. (Vol 11) 1924 Pat 715 (716).

[But see (Vol 7) 1920 Pat 567 (568): 4 Pat L Jour 642 (DB).]

11. Security for performance of decree.—[1] The appellant is not entitled to have order for stay without furnishing security for performance of decree to be ultimately binding upon him. (Vol 22) 1935 Mad 43 (45, 46): 58 Mad 116 (DB) * (Vol 21) 1934 Nag 160 (162) * (Vol 7) 1920 Lah 464 (465) * ('14) 1914 Pun L R No. 59 page 181 (182).

[2] A stay order on condition of security being given comes into operation only on such security being given. (Vol 11) 1924 All 698 (699) (DB).

[3] Court not to accept security without inquiring into its sufficiency. (Vol. 6) 1919 Cal 471 (472) (DB).

[See (Vol 29) 1942 Lah 6 (9) (DB).]

[4] A security, the enforcement of which is likely to lead to litigation, should not be accepted. ('11) 38 Cal 754 (775) (DB).

[5] Stay of execution granted on condition that appellant deposits amount of security in Court—Appeal dismissed—Money so deposited is held to the credit of decree-holder—Depositor cannot withdraw it even if decree-holder has failed to apply for execution within prescribed period of limitation. ('79) 4 Cal 6 (9) (DB).

[6] A decree-holder attaching amount deposited as security in execution of his decree is not entitled to claim any portion thereof in preference to decree-holder with reference to whose decree the deposit was made. (Vol 2) 1915 Lah 147 (150) (DB).

[7] Sum deposited as security exceeding sum ultimately awarded to decree-holder—It should be applied towards payment of costs. (Vol 18) 1931 Cal 474 (476): 58 Cal 1 (DB).

[8] Judgment-debtor satisfying decree otherwise—Sum deposited as security should be returned to him. ('12) 22 Mad L Jour 190 (191, 192) (DB).

[9] Decree amount deposited and stay obtained—Decree-holder not withdrawing it by furnishing security—Deposit invested in Government promissory notes—Such investment increasing in value by date of appellate decree—Decree-holder is entitled only to decretal amount and not what invested amount was on such date. (Vol 22) 1935 Bom 200 (200, 201) (DB).

[10] Execution stayed on giving security—Judgment-debtor cannot cancel security bond. (Vol 16) 1929 Lah 769 (770).

[11] Security bond no longer required—Court may cancel it. ('70) 13 Suth W R 403 (405) (DB).

[12] Immovable property—Security given by judgment-debtor for due performance of decree in pursuance of order of stay of execution under this rule can be realized in execution. (Vol 21) 1934 Mad 1 (3): 57 Mad 218 (DB).

12. When respondent is insolvent.—[1] Respondent decree-holder insolvent—Appellant judgment-debtor applying for stay of execution as to costs ordered to pay costs to respondent's solicitor on his personal undertaking that he would return the amount if appellant succeeded in appeal. (Vol. 10) 1923 Mad 229 (230) (DB).

13. Insolvency of appellant and deposit.—[1] Execution stayed on appellant depositing in Court decretal amount—Appellant thereafter declared insolvent—Amount deposited in Court is payable, on appeal being dismissed, to decree-holder and not to the Official Assignee. (Vol 12) 1925 Cal 416 (417): 51 Cal 1010 (DB).

14. Effect of stay order.—[1] Appellate Court staying proceedings under the decree—Order passed while stay order is in force is without jurisdiction. (Vol 29) 1942 Oudh 24 (24): 17 Luck 189 * (Vol 12) 1925 Cal 1023 (1024) (DB) * (Vol 12) 1925 Pat 553 (555) * (Vol 14) 1927 Mad 450 (451). (Reversed in (Vol 19) 1932 Mad 86: 55 Mad 495 on another point) * ('12) 15 Cal L Jour 335 (336) (DB).

[But see (Vol 30) 1943 Cal 319 (324): ILR (1943) 1 Cal 274 (DB) (33 Cal 927 not approved).]

[2] Stay order conditional on security being given—It does not come into operation till such security is given and does not affect validity of a sale held after order for stay and before giving of security. (Vol 11) 1924 All 698 (699) (DB).

[3] Order for stay set aside on ground of fraud—Sale held while order was in force is valid. (Vol 5) 1918 All 384 (384) (DB).

[4] Order of stay without jurisdiction—Sale held in ignorance of such stay is not invalid. (Vol 29) 1942 Pat 146 (148) (DB).

[5] Appointment of receiver does not operate as stay of execution. (Vol. 8) 1921 Pat 131 (132): 6 Pat L Jour 208 (DB).

6. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application

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15. Effect of uncommunicated order staying execution.—[1] Different views are held on the question whether execution proceedings held by a Court after the passing of an order for stay, but before the communication thereof to the Court, are valid.

[a] It has been held in the following cases that an order for stay of execution takes effect as soon as it is passed and not after it has reached the executing Court. (Vol 20) 1942 Oudh 24 (24); 17 Luck 189 * (Vol 32) 1945 Oudh 96 (100) (DB) * ('06) 83 Cal 927 (934, 944) (DB) * ('12) 15 Cal L Jour 335 (336) (DB).

[But see ('96) 1 Cal W N 226 (227) (DB).]

[b] According to the Madras High Court an order for stay of execution operates only from the time it is communicated to the executing Court. (Vol 5) 1918 Mad 891 (892, 893); 41 Mad 151 (FB) (Overruling (Vol 1) 1914 Mad 261; 38 Mad 766) * (Vol 32) 1945 Mad 891 (891 892) * ('09) 83 Mad 74 (75) (DB).

[See also (Vol 11) 1924 Mad 393 (394).]

[c] A similar view has been taken in the following cases. But an opinion is expressed that if the decree-holder himself is the purchaser, the sale held before the order of stay is communicated to the executing Court would not be valid. (Vol 14) 1927 All 401 (404, 405); 51 All 41 (FB). (Distinguishing (Vol 13) 1926 All 457) * (Vol 30) 1948 Cal 319 (324); ILR (1948) 1 Cal 274 (DB).

[But see ('79) 2 All 686 (687) (DB).]

[d] The Bombay High Court has held that a great deal depends on the nature of the order, the question of good faith and other facts. (Vol 15) 1928 Bom 189 (190, 191); 52 Bom 290 (DB).

[2] It has been held that a sale held by the auctioneer or officer charged with the conduct of the sale, after the Court has ordered the postponement or stay of the sale is illegal and *ultra vires* though at the time of the sale the order of the Court had not reached the auctioneer or officer. (Vol 30) 1943 Lah 349 (351, 352) ((Vol 17) 1930 Lah 17 overruled and (Vol 22) 1935 Lah 694 approved) * (Vol 22) 1935 Lah 694 (695, 696) (DB) * ('90) 12 All 96 (98) (DB) * (Vol 20) 1938 Rang 416 (417, 418); 11 Rang (410) (DB).

16. Costs of application.—[1] In the absence of special circumstances costs of application for stay should be costs in the appeal. (Vol 19) 1932 Bom 127 (128); 56 Bom 276 (FB).

[See however ('98) 25 Cal 893 (894) (SB) (Appellant should be made to pay costs even if successful in his application).]

17. Appeal.—[1] The question whether an order granting or refusing stay of execution is appealable or not depends upon the question whether such an order falls within S. 47. As to this (See Sec. 47.)

18. Letters Patent appeal.—[1] An order granting or refusing stay of execution is a "judgment" within the meaning of the Letters Patent. (Vol 7) 1920 Lah 326 (327); 1 Lah 348 (DB) * (Vol 11) 1924 Mad 597 (599); 47 Mad 316 (DB) * ('01) 5 Cal W N 781 (794, 795) (SB) * (Vol 14) 1927 Mad 398 (401); 50 Mad 880 (DB).

[But see (Vol 30) 1943 Nag 282 (283); ILR (1943) Nag 453 (DB) * ('01) 24 Mad 358 (359, 360) (DB) * ('08) 3 Mad L Tim 307 (308) (DB).]

19. Revision.—[1] This rule does not apply to applications for revision. (Vol 16) 1929 Lah 167 (168).

20. Review.—[1] An order of stay of execution made under this rule is open to review. ('87) 9 All 36 (40, 42).

ORDER 41 RULE 6—SYNOPSIS.

1. Scope and applicability.
2. Restitution—See Section 144.
3. Security.
4. "Property which may be or has been taken in execution."
5. Registration and attestation of security bond—See Order 41 Rule 5.
6. Mode of enforcement of security bond—See Notes on Section 145.
7. Stay of sale of immovable property.
8. Petition to stay sale, where to be made.
9. Appeal.
10. Form.
11. Revision.

1. Scope and applicability.—[1] There can be no order for security for restitution under this rule where—

[a] No appeal has been filed against the decree. ('86) 8 All 639 (640) (DB) * ('87) 9 All 36 (41) * ('66) 6 Suth W R Misc Rul 15 (15).

[b] Where no order for execution has been made. ('01) 25 Bom 538 (538) (DB).

[2] Appeal against a part of the decree—Order for security for restitution cannot be passed with reference to the portion not appealed against. ('90) 1890 Pun Re. No. 120, p. 392 (394). (In such a case, stay of execution cannot be granted.)

[3-4] It is competent for the trial Court as well as the Appellate Court to pass an order for security under this rule. The rule applies only to parties to the suit. (Vol 19) 1932 Bom 326 (326) (DB).

[5] An Appellate Court which directs a subordinate Court to take security under this rule can direct the subordinate Court to apply, in determining the sufficiency of the security, the principles which the Appellate Court would have itself applied. (Vol 24) 1937

of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

[1882—S. 546; 1877—S. 546; 1861—S. 36.]

Objects and Reasons

"The Committee have modified this rule in order to make it clear that security may be required though the property has previously been taken in execution (see *Hukam Chand Boid v. Kamalanand Singh*, I. L. R. 33 Calcutta 927."—S. O. R.

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Pat 380 (382) (DB). (Appellate Court directing Subordinate Court to take security is directly interested in seeing whether its orders have been properly complied with or not—Appellate Court has, in spite of such delegation of duty, power to intervene when Subordinate Court misdirects itself while inquiring about sufficiency of security).

[6] Pending an appeal to the Privy Council, the trial Court has no jurisdiction to pass an order for security under this rule. The matter is governed by the provisions of O. 45 and not by the provisions of this order. (Vol 12) 1925 Rang 254 (255); 3 Rang 158 (DB). (The proper Court to deal with the matter is not the original Court, but the High Court).

2. Restitution.—See Section 144.

3. Security.—[1] A surety is not discharged merely by reason of the death of the decree-holder. (Vol. 4) 1917 Cal 594 (595) (DB).

[2] Where under a decree for redemption, the mortgagor decree-holder deposits the mortgage-money in Court and applies for execution of the decree, the money so deposited can be accepted as security for restitution under this rule. ('12) 1912 Mad W N 397 (397) (DB) (Per Abdur Rahim, J. Contra. Sundara Ayyar, J.)

[3] Where the holder of a decree for money is willing to give security for restitution the Court should not ordinarily grant a stay of execution of the decree. ('89) 18 Bom 241 (241) (DB).

[4] A security of joint family property offered by a member of the family consisting of himself and others should not be accepted as the security bond will not be binding on the joint family. (Vol 24) 1987 Pat 380 (381) (DB).

[5] Surety bond referring to appeal in High Court—Liability is not extended to decision of Privy Council reversing High Court's decision. (Vol 30) 1943 Bom 243 (244, 245) (DB).

[6] Surety for fulfilling such orders or decrees as may be given in appeal—*Held*, surety liable for costs awarded in appeal. ('93) 1893 Bom P J 264 (265) (DB).

[7] Surety bond for allowing execution of a decree pending appeal—Appeal compromised giving time to principal debtor—Surety not party to compromise—Surety not discharged, as the consent order is not excluded by the surety bond. (Vol 20) 1938 Mad 309 (310); 56 Mad 625 (DB).

4. "Property which may be or has been taken in execution."—[1] Security for restitution may be ordered even after property has passed into the hands of the decree-holder in execution of his decree. (Vol 15) 1928 Pat 187 (188) (DB). (In this case, it was held that the Court has inherent power to order security in such a case—The learned Judges seem to have overlooked the fact that under the present rule, it is not necessary to resort to inherent power to order security in such a case.)

[2] The view seems to have been the same even under the previous Codes. ('06) 33 Cal 927 (934) (DB) * (1863) 10 Moo Ind App 196 (202) (PC) * ('67) 8 Suth V R 144 (146) (FB). (But in this case, appeal was preferred after the execution of the decree had taken place—Therefore security for restitution could not be demanded).

5. Registration and attestation of security bond.—See Order 41 Rule 5.

6. Mode of enforcement of security bond.—See Notes on Section 145.

7. Stay of sale of immovable property.—[1] In cases coming under sub-rule (2) the Court is bound to stay the sale of immovable property, on such terms as to giving security or otherwise as it thinks fit. (Vol 28) 1941 Pat 483 (483) (DB) * (Vol 27) 1940 Cal 582 (583) (DB) * (Vol 16) 1929 Lah 68 (69) * ('11) 15 Cal W N 482 (483) (DB). (Court is bound to stay the sale of immovable property in execution of its decree, though the judgment-debtor is entitled to have the sale set aside on deposit of the purchase-money). * ('28) 108 Ind Cas 272 (272) (Lah) * (Vol 23) 1936 Pat 443 (444). (Execution Court cannot dismiss the application summarily). * (Vol 27) 1940 Mad 82 (83); I.L.R. (1940) Mad 420 (DB).

[See (Vol 27) 1940 Cal 543 (544) (DB). (The sub-rule does not apply where sale has not been ordered—But where stay can be ordered Court ought not to grant limited stay order and ask judgment-debtor to obtain further stay from Appellate Court—Court has full power of stay).]

[But see (Vol 19) 1932 All 551 (552); 54 All 874. (Sub-rule (2) is only complementary to R. 5—There is no obligation to stay the sale).]

[2] An order for stay of sale can be passed where the sale has taken place but not confirmed. (Vol 16) 1929 Lah 68 (69).

[See also (Vol 4) 1917 All 40 (40). (Case under O. 41 R. 5).]

[3] The sub-rule applies also to the sale of immovable property in execution of a mortgage decree. (Vol 28) 1941 Pat 483 (484) (DB). (Mortgage decree—Sale Ordered—Appeal directed only against interest awarded by decree—Decree being indivisible sale of entire property must be stayed) * (Vol 16) 1929 Lah 552 (552) * (Vol 20) 1933 All 782 (783); 55 All 983 (DB).

[4] Where a person has become liable as a surety for the performance of a decree and an order for the execution of such a decree by the sale of immovable properties is made against him under S. 145, he is a judgment-debtor within the meaning of this rule and is, therefore, entitled to apply for stay of execution. (Vol 21) 1934 Bom 252 (254); 50 Bom 485 (DB).

[5] The expression "on such terms as to giving security or otherwise" in sub-rule (2) means that the terms may be either as to giving security or any other term, such as the deposit of the decree-amount in the Court ordering the stay. (Vol 27) 1940 Mad

a7. [No security to be required from the Government or a public officer in certain cases] *Repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.*

[a] See now Order 27 Rule 8A, *supra*.

Exercise of powers in appeal from order made in execution of decree.

8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

PROCEDURE ON ADMISSION OF APPEAL

9. (1) Where a memorandum of appeal is admitted, the Appellate Court or the Registry of memorandum of appeal. proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Register of appeals. (2) Such book shall be called the register of Appeals.

[1882—S. 548; 1877—S. 548; 1859—S. 341.]

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82 (83): ILR (1940) Mad 420 (DB). (There is no limit to the discretion of the Court in imposing terms, but it has no discretion to refuse to stay the sale) * (Vol 21) 1984 Mad 709 (710): 58 Mad 280 (DB) * (Vol 23) 1986 Pat 448 (444). (Court has jurisdiction to grant stay conditional on depositing decretal amount in Court.)

[6] An order for the stay of sale of immovable property under this rule does not preclude the execution of the decree by proceedings against the movables of the judgment-debtor. (Vol 18) 1926 Lah 463 (463).

[7] Whores, on the rejection of a claim petition in execution proceedings, the claimant filed a suit for a declaration of his title, and on its being dismissed, appealed from the decree, and, pending the appeal, applied for a stay of sale, it was held that the sale could not be stayed. (Vol 9) 1922 Lah 58 (59). (Proper remedy is to ask for temporary injunction under O. 39).

[See however (Vol 21) 1984 Pat 637 (637). (This rule does not apply but the Court can order stay under its inherent powers—Even in such a case Court would be acting without jurisdiction if it did not put the applicant on terms).]

8. Petition to stay sale, where to be made.—

[1] An application for stay of sale under sub-rule (2) should be made to the executing Court and not to the Appellate Court. ('12) 23 Mad L Jour 677 (678) (DB) * ('11) 11 Ind Cas 22 (22) (DB) (All) * (Vol 19) 1982 Lah 80 (80) * ('98-1900) 1898-1900 Low Bur Rul 546 * (Vol 24) 1987 Lah 841 (841).

[See also the following cases to the same effect under the Old Code. ('98) 15 All 196 (197) (DB) * ('07) 31 Cal 1037 (1044) (FB) * ('08-04) 8 Cal WN 381 (382) (DB).

[2] The Court cannot, under this rule, stay the sale in execution of a decree passed by another Court in another suit. Appellate Court can direct a stay of sale of immovable property by virtue of its general powers under Order 41 Rule 5. ('84) 11 Cal 146 (149) (DB).

9. Appeal.—[1] An order requiring security to be given for restitution is one falling within S. 47 and is appealable.

[See Notes on S. 47]

[2] An order accepting or refusing to accept security is not appealable either as a decree or as an order under S. 47 of the Code. (Vol 19) 1982 Lah 120 (121).

[See however (Vol 6) 1919 Cal 471 (472) (DB). (But an order accepting security and directing delivery of possession is a final order and is appealable).]

[3] A surety against whom a decree is sought to be executed under S. 145 can, by virtue of that section, appeal from an order made against him in execution proceedings. ('88) 12 Bom 71 (76) (DB).

[4] When an Appellate Court directs a subordinate Court under this rule to take security, no appeal lies from the order of the subordinate Court accepting a certain security. But the Appellate Court can interfere where the subordinate Court has erred on a matter of principle. (Vol 24) 1937 Pat 380 (381) (DB).

[See also ('87) 66 Cal L Jour 169 (173, 174) (DB). (Order by High Court directing execution to proceed on furnishing of security—Security to the "satisfaction of the Registrar"—Report by Registrar—Objection thereto—Appeal to Court does not lie—High Court can, however, review order of Registrar on proper grounds).]

[5] A judgment-debtor at whose instance a sale was stayed cannot subsequently appeal from the stay order even assuming such an order is otherwise appealable. (Vol 17) 1980 Lah 190 (191).

10. Form.—For form of security bond, see Appendix G, Form No. 3.

11. Revision.—[1] Where the Court refuses an application under sub-rule (2) and declines to stay execution pending appeal, the High Court can, under S. 115, revise the order. ('11) 15 Cal WN 432 (433) (DB) * (Vol 12) 1925 Lah 256 (257). (Security ordered without making any enquiry as to the value of the property attached—*Held*, order liable to be revised).

ORDER 41 RULE 8—Note 1.

[1] It makes the provisions of Rules 5 and 6 applicable *mutatis mutandis* to cases in which the appeal is not from the decree (as contemplated by those rules) but from an order made in execution of the decree. (Vol 27) 1940 Cal 582 (582) * (Vol 4) 1917 All 40 (40).

[2] Under the rules framed by the High Court of Patna, the Registrar has no power to hear an application under this rule. (Vol 19) 1982 Pat 217 (218) (DB).

ORDER 41 RULE 9—Note 1.

[1] The registration of an appeal is a purely ministerial act. The Court can reject an appeal

10. (1) The Appellate Court may, in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

Where appellant resides out of British India.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

[1882—S. 549; 1877—S. 549; 1859—S. 342. See S. 145.]

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after it has been registered. ('70) 13 Suth W R 351 (352).

[2] The provisions of law as to how an appeal can be dealt with after admission do not apply at the stage before registration of the appeal. (Vol 20) 1933 Mad 358 (359).

[3] An order refusing to admit an appeal under this rule and rejecting it is a decree and is open to appeal. ('08) 8 Cal W N 64 (65, 66). (Provided second appeal is otherwise entertainable having regard to the nature of the original suit).

[4] Where an appellant applies for leave to withdraw the appeal after notice of hearing has been served on the respondent, the respondent should be given notice of the application. The respondent is always entitled to his costs when leave is granted for withdrawal of the appeal. ('68) 3 Mad H C R 363 (369).

ORDER 41 RULE 10—SYNOPSIS.

1. Scope and object of the rule.
2. To what appeals the rule applies.
3. Appeals in *forma pauperis*.
4. Insolvency appeals.
5. Letters Patent appeals.
- 5a. Costs of "original suit."
6. Grounds for demanding security.
- 6a. When order for security is obligatory—Proviso.
7. Delay in applying for security.
8. Notice to show cause.
9. Amount of security.
10. Extension of time for furnishing security.
11. Dismissal of appeal for failure to give security.
12. Restoration of appeal so rejected.
13. Appeal.
14. Stamp and registration.
15. Practice.
16. Enforcement of security.

[1] **Scope and object of the rule.**—[1] The object of S. 549 of the old code was to secure the respondent in an appeal from the risk of having to incur further costs which he might never succeed in getting out of the appellant. ('96) 18 All 101 (103, 104) (FB).

[2] An order for security for costs can be passed under the rule only against the appellant but not against the respondent. ('70) 4 Beng L R (OC) 92 (93) (DB).

[3] Court cannot demand from the appellant, security for the entire decree amount. (Vol 19) 1932 All 511 (511, 512): 54 All 968 (FB).

[4] When a pauper appeal has been admitted, Government cannot apply under this rule for security for the court-fee payable to it. (Vol 24) 1937 Mad 267 (268).

[5] Legislature never intended in enacting this rule to derogate from the right of appeal given by law to every person who is defeated in the Court of first instance. ('85) 7 All 542 (546).

2. To what appeals the rule applies.—[1] This rule applies to appeals from decrees and therefore to appeals from orders under S. 47. (1900) 24 Bom 314 (316) (DB).

[2] This rule will apply to appeals from orders other than those falling under S. 47. and to appeals from decrees or orders made on the original side of a High Court. (Vol 25) 1933 Bom 351 (352): ILR (1938) Bom 399 (DB).

3. Appeals in *forma pauperis*.—[1] The following different views are held as to the applicability of the rule to appeals in *forma pauperis*:—

[a] The rule applies to pauper appeals but the Court should not make an order for security except for very special reasons. ('86) 8 All 203 (204) (FB) * ('85) 7 All 542 (546) * (Vol 7) 1920 Mad 818 (818): 48 Mad 902 (DB) * ('07) 17 Mad L Jour 588 (588) (DB) * (Vol 20) 1933 Mad 519 (521): 56 Mad 323 * (Vol 10) 1923 Rang 244 (245) * (Vol 17) 1930 Nag 28 (32).

[b] The rule does not apply to appeals by paupers. (Vol 5) 1918 Cal 618 (618) (DB) * ('08) 7 Cal L Jour 312 (314) (DB) * (Vol 4, 1917 Bom 137 (138): 42 Bom 5 (DB) * (Vol 9) 1922 Lah 87 (87): 3 Lah 30 (DB) * (Vol 23) 1936 Rang 178 (179): 13 Rang 511 (DB). (Security for costs cannot be demanded from a pauper appellant).

4. Insolvency appeals.—[1] Appeal from order passed by judge of High Court under Presidency Towns Insolvency Act, 1909—The rule applies. (Vol 4) 1917 Cal 626 (626): 43 Cal 243.

[But see ('70) 5 Beng L R 179 (180).]

5. Letters Patent appeals.—[1] The rule applies to appeals under Cl. 15 of the Letters Patent, unless the rules framed by the particular High Court are inconsistent therewith, in which case the former will override the latter. (Vol 8) 1921 PC 80 (82): 48 Cal 481: 48 Ind App 76 (PC). (Overruling 27 Mad 121).

[2] Rule 736 of the Bombay High Court Rules is not inconsistent with this rule and an appellant may be called upon to furnish any additional security for costs. (Vol 10) 1923 Bom 399 (399) (DB) * (Vol 13) 1926 Bom 42 (43) (DB).

[But see ('12) 37 Bom 572 (574).]

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[8] Rule 354 framed by Madras High Court is not inconsistent with this rule. (Vol 12) 1925 Mad 1192 (1193) (DB).

5a. Costs of "original suit."—[1] The expression "original suit" in this rule covers also an original application on which the judgment appealed from was given, whatever its nature may be. (Vol 25) 1938 Bom 351 (352) : ILR (1938) Bom 399 (DB).

6. Grounds for demanding security.—[1] The Court has, a discretion in the matter of 'demanding security for costs. (Vol 23) 1936 Rang 294 (294) : 14 Rang 289 (DB) * (Vol 23) 1936 Rang 109 (110).

[2] As the rule tends to restrict a party's right to appeal, it should be applied with great caution. ('92-96) 2 Upp Bur Rul 279 * ('85) 7 All 542 (546).

[3] Very satisfactory grounds should be shown before making an order for security under this rule. ('84) 1884 All WN 103 (103).

[4] The discretion must be exercised in accordance with sound judicial principles. ('89) 13 Bom 458 (461) (DB) * (Vol 10) 1923 Bom 399 (899) (DB).

[See however (Vol 10) 1923 Bom 264 (264) (DB).]

[5] The Appellate Court may well be guided in the exercise of judicial discretion by the provisions of O. 25 R. 1. ('08) 5 Bom LR 661 (662) (DB).

[6] The following are not sufficient grounds to make an order for security under this rule.

[a] That the appellant may lose and may not pay the costs of the appeal. (Vol 10) 1923 Bom 399 (399) (DB).

[b] That the appellant is an undischarged insolvent. (Vol 6) 1919 Cal 719 (720) : 46 Cal 156 (DB).

[c] That the appellant is a poor man from whom it would be difficult to recover costs of the appeal. (Vol 8) 1921 Pat 233 (233) (DB) * (Vol 10) 1923 Mad 204 (205) * (Vol 17) 1930 Lah 382 (383) (DB) * (Vol 17) 1930 Lah 384 (384) (DB) * ('94) 21 Cal 526 (527) (DB) * ('87) 14 Cal 533 (536) * ('79) 3 Bom 241 (242) (DB) * ('86) 8 All 208 (204) (FB) * (Vol 23) 1936 Rang 294 (294) : 14 Rang 289 (DB) * ('39) 1939 Oudh WN 152 (154) (DB) * (Vol 25) 1938 Mad 380 (380) (DB).

[But see (Vol 18) 1931 Cal 40 (41) : 58 Cal 117 (DB).]

[d] That a third person has incited the appeal. ('86) 1886 All WN 286 (286).

[e] That the appellant has parted with a portion of his interest in the subject-matter of suit for funds to carry on litigation. ('87) 14 Cal 533 (536).

[f] That a relative of the appellant is assisting him financially in litigation. (Vol 10) 1923 Rang 244 (245).

[g] That the appellant has rich relations who can afford to pay the decree amount. (Vol 2) 1915 Cal 595 (595) (DB).

[h] That the appellant has not paid the costs of the original suit. (Vol 18) 1931 Lah 70 (70) * ('33) 1933 Mad WN 263 (264) (DB) * ('08) 5 Bom LR 661 (662) (DB).

[i] That one of the appellants is in hiding. ('86) 1886 All WN 286 (286).

[7] Poverty along with other circumstances may justify an order under this rule. (Vol 10) 1923 Bom 264 (264) (DB) * ('33) 1933 Mad WN 263 (264) (DB) * (Vol 23) 1936 Pat 438 (434) (DB).

[8] Where the appellant is a mere puppet in the hands of others who are promoting the litigation an

order under this rule is justified. ('77) 2 Cal 233 (259) : 4 Ind App 23 (PC) * (Vol 25) 1938 Mad 313 (313) (DB).

[9] Where the honesty and bona fides of the appellant are doubtful or the appeal is vexatious, the appellant may be ordered to furnish security under this rule. (Vol 10) 1923 Bom 399 (399) (DB) * (Vol 18) 1931 Lah 70 (70) * ('89) 13 Bom 458 (462) (DB) * (Vol 25) 1938 Mad 380 (381) (DB). (Reversing on Letters Patent appeal (Vol 24) 1937 Mad 285).

[10] Where the parties have agreed that security for costs should be given, the Court should pass an order for security. ('66) 1 Ind Jur (NS) 223.

[11] Poverty of the appellant is not a ground for dispensing with security where such security is necessary in the circumstances of the case. (Vol 10) 1923 Mad 204 (205) * (Vol 25) 1938 Mad 313 (313) (DB) * (Vol 25) 1938 Mad 380 (380) (DB).

[12] Security for costs should not be ordered where the consequences of such an order would be unduly penal. (Vol 17) 1930 Nag 28 (29) * (Vol 25) 1938 Mad 380 (380) (DB).

6 a. When order for security is obligatory—Proviso.—[1] It is not compulsory to order security for the costs of the suit as well. (Vol 25) 1938 Bom 351 (352) : ILR (1938) Bom 399 (DB).

7. Delay in applying for security.—[1] The respondent must apply for security for costs, before he himself or the appellant incurs costs in the appeal. (Vol 5) 1918 Lah 301 (301) * ('89) 1889 All WN 147 (148, 149) (DB) * ('84) 1884 All WN 99 (99) * (Vol 17) 1930 Lah 629 (630) * (Vol 17) 1930 Cal 520 (521) * (1900) 5 Cal WN 119 (120) (SB) * (Vol 32) 1945 Mad 121 (121) : ILR (1945) Mad 562.

[2] Any delay on the part of the respondent will be a waiver by him of his right under this rule. (1857—60) 7 Moo Ind App 431 (440) (PC).

[3] Delay in applying for security for costs due to steps taken for recovering costs incurred in the lower Court—Application should not be refused. (Vol 25) 1938 Mad 380 (381). (Reversing on Letters Patent appeal (Vol 24) 1937 Mad 285).

8. Notice to show cause.—[1] An order for security for costs of an appeal cannot be passed against a person without giving him notice. ('83) 5 All 380 (381, 382) (DB) (Overruled in 18 All 101 (FP) on another point).

[2] An order for payment of costs passed even after issue of notice will not bind the party unless communicated to him. ('32) 5 Mad 265 (266) (DB).

9. Amount of security.—[1] An order under this rule may direct a specified amount to be paid into Court as security for costs though it is not necessary to do so. (Vol 17) 1930 Mad 355 (356) (DB).

[2] It is enough if the order directs security to be given for the costs of the appeal, or of the original suit or of both. ('96) 18 All 101 (105) (DB) (Overruling 9 All 164).

[3] A surety is discharged as soon as the appeal is allowed and the liability is not revived because the appellate order is reversed by a higher Court. (Vol 14) 1927 All 522 (523) (DB) * (Vol 11) 1924 Cal 528 (528) (DB).

[4] The Taxing Officer's decision as to the amount for which security should be given is subject to revision. (Vol 14) 1927 Bom 499 (501) (DB).

11. (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an

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[5] Security need not be proportionate to the estimated costs of appeal. ('89) 13 Bom 458 (462) (DB).

[6] An Appellate Court may inquire into the sufficiency of security. (Vol 21) 1934 Bom 13 (14) (DB).

10. Extension of time for furnishing security.

[1] The Court may, enlarge the time allowed for furnishing the security ordered. ('82) 1932 Mad W N 655 (659) * ('90) 17 Cal 1 (3) (PO).

[2] The Court may enlarge time even though the period originally fixed has expired. ('90) 17 Cal 512 (515): 17 Ind App 1 (P C) ('11 Cal 716 reversed and 1 All 687 overruled) * ('90) 17 Cal 516 (517): 17 Ind App 9 (PO).

[3] The Court cannot extend the time for furnishing security after the appeal has been rejected for failure to furnish security. (Vol 10) 1923 Cal 317 (318) (DB).

[4] Extension of time is in the discretion of the Court. ('90) 17 Cal 1 (3) (PO) * ('90) 17 Cal 516 (517): 17 Ind App 9 (PO).

[5] When the period fixed expires on a day on which the offices of the Court are closed for business, the security may be accepted on the re-opening day. ('77) 2 Cal 272 (273) (SB) * ('83) 1883 All W N 254 (254) (DB).

[6] On account of the prevalence of plague appellant was not able to arrange for the security—Time should be extended. ('97) 21 Bom 576 (579) (DB).

[7] That the appellant is a wandering fakir is no excuse for not furnishing the security in time and time should not be extended in such case. ('22) 68 Ind Cas 306 (307) (DB) (Lah).

11. Dismissal of appeal for failure to give security.—[1] Sub-rule (2) is mandatory, not permissive. (Vol 8) 1921 PC 80 (84): 48 Cal 481: 48 Ind App 76 (PO) * ('90) 17 Cal 516 (517): 17 Ind App 9 (PO).

[2] A special application by the respondent to have the appeal rejected is not necessary, and he can raise the objection at the hearing of the appeal. (1865-67) 3 Bom H C R (OC) 64 (65) (DB).

[3] Period fixed for giving security expired during long vacation—Court office was open—Security given on the re-opening day—Held Appeal should be rejected. ('83) 1883 All W N 254 (254) (DB).

[4] Security bond not drawn up in the terms of the Judge's order, Held no security was given and appeal should be rejected. ('81) 1881 All W N 35 (35) (DB).

[5] An appeal should not be rejected for a clerical error in the security bond and the error should be allowed to be corrected. (Vol 12) 1925 Oudh 402 (403).

[6] Where the executant of the security bond had not been authorized to execute it on behalf of the appellant, the case should be adjourned till a proper bond is executed and the appeal should not be summarily rejected. (Vol 14) 1927 P C 264 (265) (PO).

[7] The appeal should not be rejected if the order for security has been passed without giving notice to the appellant. ('88) 5 All 380 (381, 382) (DB) (Overruled in 18 All 101 (FB) on another point).

[8] Opportunity to furnish the security not given—Appellant failed to furnish the same—Appeal dismissed—High Court can interfere in revision. (Vol 2) 1915 All 133 (134) (DB).

[9] Appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. (Vol 29) 1942 Mad 29 (30).

12. Restoration of appeal so rejected.—[1] The appellate Court may, restore an appeal, rejected for failure to give security for costs. (Vol 15) 1928 Mad 964 (965, 966) (DB) (Dissenting from 19 Mad L Jour 304) * (Vol 7) 1920 All 112 (114): 42 All 626 (DB) * ('86) 8 All 315 (319): 13 Ind App 57 (PO).

[2] Appellant's application for extension of time dismissed on merits—Application for restoration of appeal rejected for failure to furnish security will be barred. (Vol 16) 1929 Rang 289 (290): 7 Rang 445.

[3] An order restoring an appeal rejected under sub-rule (2) will not bind the respondent if it is made without notice to him. (Vol 5) 1918 Cal 812 (813).

13. Appeal.—[1] No appeal lies against an order restoring an appeal rejected under sub-rule (2) for failure to give security. (Vol 7) 1920 All 112 (115): 42 All 626 (DB).

[2] No appeal lies against an order refusing to restore an appeal rejected under sub-rule (2) for failure to give security. (Vol 8) 1916 Cal 227 (228) (DB) * ('08) 30 All 143 (145) (DB) * (Vol 26) 1939 All 788 (784): ILR (1940) All 19.

[3] Letters Patent appeal—An order dismissing a petition asking the Court to receive a sum of money as security for the costs of an appeal is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable. ('02) 25 Mad 654 (655) (DB).

14. Stamp and registration.—[1] Bond given as security by a party is subject to an *advalorem* stamp under the stamp Act and a court-fee under the Court Fees Act. ('89) 11 All 16 (17) (FB).

[2] Where a security bond is compulsorily registrable, it is not necessary to register the bond until the security has been accepted. ('70) 13 Suth W R 41 (48) (DB).

15. Practice.—[1] On the day fixed for hearing the rule *nisi* for costs obtained by respondent on an affidavit, the appellant should appear and show cause after which the respondent has a right to reply even though the appellant uses no affidavit. ('71) 7 Beng LR (App) 59 (60) (DB).

[2] Rule *nisi* discharged for non-appearance of parties on the day fixed for hearing—Rule can be restored on sufficient cause shown for such default. ('85) 7 All 542 (544).

16. Enforcement of security.—[1] See under section 145 of the Code.

ORDER 41 RULE 11—SYNOPSIS

1. Scope and object of the rule.
2. "After sending for the record."

order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

[1882—S. 551; 1877—S. 551.]

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3. "May dismiss the appeal."

4. Notice to appellant.

5. Time-barred appeal.

6. Order of dismissal, if a decree.

7. Effect of dismissal—Amendment of decree.

8. Dismissal for default under sub-rule (2).

9. Review.

10. Revision.

11. Second appeal.

12. Restriction of grounds of appeal on admission.

13. Insolvency appeals.

1. Scope and object of the rule.—[1] This rule refers to a stage after the appeal has been registered under R. 9. ('98) 15 All 867 (869) (DB) * ('08) 30 All 290 (298).

[2] Rule applies to Letters Patent appeals where the rules of the High Court do not prohibit its application to them. (Vol 7) 1920 Pat 509 (509): 4 Pat L Jour 695 (DB) (Patna High Court Rules permit of summary dismissal of Letters Patent appeals).

[3] The rule does not apply to the summary dismissal of an appeal under S. 476, Criminal Procedure Code. (Vol 17) 1930 Cal 282 (288) (DB).

[4] An order of dismissal for the appellant's failure to make the necessary deposit for printing may be covered by this rule or R. 16. (Vol 8) 1916 Mad 478 (474) (DB).

[5] The procedure of the rule is not applicable where notice of the appeal has been issued to the respondent. ('06) 1906 All WN 186 (186).

[But see (Vol 25) 1938 All 548 (552): ILR (1938) All 814 (DB).]

[6] Pending an appeal by the defendant, the summary dismissal by the Appellate Court, of the plaintiff's suit as not being properly stamped, is irregular. ('92) 15 Mad 288 (289) (DB).

2. "After sending for the record."—[1] An appeal can be dismissed summarily even before the records are sent for. ('35) 18 Nag L Jour 157 (159).

[2] When the record has been lost and the appeal has been dismissed in consequence, the appeal should be retried when the record is found. ('81) 1881 All WN 26 (27) (DB).

3. "May dismiss the appeal."—[1] The discretion given by this rule is a judicial discretion. (Vol 8) 1916 Upp Bur 9 (10): 2 Upp Bur Rul 92.

[2] Discretion should be used only in exceptional cases. ('88) 1888 All WN 221 (221) (DB) * (Vol 25) 1938 Pat 330 (332) (DB) * (Vol 25) 1938 Pat 608 (609).

[See ('80) 4 Bom 462 (465) (DB).]

[3] Where the High Court in dismissing under this rule an appeal from an order of remand, reframed a certain issue, it was held that the procedure adopted, though irregular, was not *ultra vires*. (Vol 19) 1932 All 16 (18) (DB).

[4] If an appeal is severable, Judge may dismiss it in part and admit it in part. (Vol 21) 1934 Bom 207

(211): 58 Bom 897 and 406 (FB) * (Vol 22) 1935 Lah 34 (35).

[But see (Vol 27) 1940 Mad 483 (484): ILR (1940) Mad 785 (FB).]

4. Notice to appellant.—[1] An appeal should not be dismissed under this rule unless notice of the day of hearing has been given to the appellant or his pleader. ('92) 1892 Pun Re No. 7 page 12 (18) (Rev.) * ('92) 1892 Pun Re No. 19, page 47 (49) (Rev.) * ('35) 18 Nag L Jour 157 (159) * ('88) 1888 Pun Re No. 7, page 15 (17) (Rev.).

[2] The day of hearing is to be fixed under this rule by the Court and not by a ministerial officer of the Court.—See also Note 11. ('35) 18 Nag L Jour 157 (159).

5. Time-barred appeal.—[1] If the Judge thinks that the appeal is time-barred he should admit the appeal if it is otherwise valid, and fix a date for hearing the appellant on the question of limitation under R. 11 before issuing notice to the respondent. ('09) 5 Low Bur Rul 15 (16) * (Vol 12) 1925 Oudh 648 (648, 644).

[2] The rejection of an appeal as time-barred. (Vol 7) 1920 Pat 818 (820) * ('85) 7 All 42 (43, 44) (DB).

6. Order of dismissal, if a decree.—[1] The dismissal under sub-rule (1) is a decree. (Vol 13) 1926 Cal 688 (689) * ('97) 24 Cal 759 (762) (DB) * ('81) 3 Mad 1 (2) (DB) * (Vol 4) 1917 Cal 417 (419) (DB) * (1900) 1900 Pun Re No. 9 page 31 (32) * (Vol 24) 1937 Pat 349 (350) * (Vol 1) 1914 Lah 174 (175) (DB) * (Vol 25) 1938 Pat 330 (332) (DB).

[2] A dismissal under sub-rule (2) is not a decree. (Vol 24) 1937 Pat 349 (350).

7. Effect of dismissal—Amendment of decree.

[1] After the dismissal, the decree can be amended only by the Appellate Court. ('08) 30 All 290 (292) * ('99) 22 Mad 293 (294) (DB) * ('97) 24 Cal 759 (762) (DB) * ('10) 11 Cal L Jour 159 (161) (DB) * ('26) 95 Ind Cas 649 (649) (All) * (Vol 7) 1920 Nag 80 (80) * (Vol 10) 1923 Pat 218 (218) (DB) * ('95) 18 Mad 214 (216) (FB).

[But see ('97) 21 Bom 548 (551) (DB) * (Vol 19) 1932 Pat 238 (239, 240): 11 Pat 409 (DB) * (Vol 28) 1941 Oudh 251 (252): 16 Luck 697 (DB) * (Vol 20) 1938 Nag 117 (118).]

8. Dismissal for default under sub-rule (2).

[1] If the appellant or his pleader does not appear the appeal may be dismissed for default. ('92) 1892 Pun Re No. 4, page 7 (8) (Rev.).

[2] When no notice of the date fixed for hearing has been given to the appellant, the appeal cannot be dismissed for default under sub-rule (2). ('92) 1892 Pun Re No. 19, page 47 (48) (Rev.).

[3] Where the pleader of the appellant is present, but is unable through a physical disability to argue the case and the appeal is dismissed, such dismissal is not for default. ('11) 9 Ind Cas 857 (857, 858) (All).

[4] In default of party appeal can be dismissed on merits also. (Vol 25) 1938 All 548 (552): ILR (1938) All 814 (DB).

9. Review.—[1] The dismissal under sub-rule (1) precludes Court from entertaining an application for

12. (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix Day for hearing appeal. a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

[1882—S. 552; 1877—S. 552; 1859—S. 344.]

Appellate Court to give notice to Court whose decree appealed from.

13. (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Transmission of papers to Appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

Copies of exhibits in Court whose decree appealed from.

[1882—S. 550; 1877—S. 550; 1859—S. 343.]

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review of the decree. ('06) 30 Bom 625 (630) (DB) * ('06) 4 Cal L Jour 566 (567) (DB) * (Vol 9) 1922 Bom 180 (181); 46 Bom 1 (DB) * (Vol 4) 1917 Cal 417 (419) (DB).

[2] An order granting a review of an order of dismissal without notice to the respondent cannot be questioned by a different Bench from that which granted the review. (Vol 6) 1919 Cal 502 (502) * (Vol 8) 1916 Cal 741 (743); 48 Cal 178 (DB).

[3] When the dismissal of an appeal is set aside on review, the hearing of the appeal cannot be restricted to the grounds on which review was asked for. (Vol 3) 1916 Cal 741 (743); 48 Cal 178 (DB).

[4] The grounds urged in the application for review which were not raised in the original memorandum of appeal, cannot be argued at the hearing of the appeal after its restoration on review. (Vol 7) 1920 Cal 106 (106, 107) (DB).

[See also Order 47, Rule 8, Note 2.]

[5] The summary rejection of an appeal as being time-barred without fixing a date for hearing the appellant is a good ground for review. (Vol 12) 1925 Oudh 643 (643, 644).

[6] When a second appeal is dismissed under R. 11 (1) no application is maintainable for review on the ground of the discovery of new and important matter. ('71) 16 Suth W R 112 (114) (DB) * (Vol 2) 1915 Cal 71 (71); 41 Cal 809 * (Vol 9) 1922 Cal 165 (165) (DB).

10. Revision.—[1] Where no decree is drawn up on the dismissal of an appeal under sub-rule (1), the so-called appeal from the order of dismissal may be treated as an application for revision. (Vol 1) 1914 Lah 174 (175) (DB).

[2] Where the dismissal was due to a mistake of fact a revision was allowed. (Vol 1) 1914 Lah 174 (175) (DB).

[3] Where an appeal is dismissed summarily on the ground that the Judge had already held in other cases a particular view on the question of law involved in the appeal which view was against the appellant, and

that it would serve no useful purpose to hear the respondent, no revision lies. (Vol 24) 1937 Pat 689 (640) (DB).

11. Second appeal.—[1] Where an appeal against the summary dismissal of an appeal succeeds, it is the usual practice to allow costs throughout. (Vol 26) 1939 Bom 493 (494).

[2] The rule that findings of fact of the lower Appellate Court are conclusive in second appeal applies also to an appeal from the dismissal of an appeal under Rule 11. (Vol 26) 1939 Pat 267 (268) (DB).

[3] *Summary rejection of second appeal.*—At the time of admitting a second appeal the Admission Judge is entitled to reject the appeal summarily. ('08) 15 All 367 (368, 369) (DB).

12. Restriction of grounds of appeal on admission.—[1] A Court cannot restrict the grounds on which the appeal is to be heard finally. ('11) 14 Cal L Jour 146 (147) (DB) * (Vol 21) 1934 Bom 207 (211); 58 Bom 397 and 406 (FB) * (Vol 3) 1916 Cal 711 (743); 48 Cal 178 (DB) * (Vol 23) 1936 Pat 7 (9); 15 Pat 96 (DB).

[2] The appellant can give up some of the grounds of appeal and the Appellate Court may make a note of the fact on the record. (Vol 23) 1936 Pat 7 (8, 9); 15 Pat 96.

[3] Where an appeal summarily dismissed is restored on review, the appellant is not confined at the hearing of the appeal to the grounds taken by him in his review. (Vol 3) 1916 Cal 711 (743); 13 Cal 178 (DB).

13. Insolvency appeals.—[1] If the District Judge refuses leave to appeal under S. 46 Insolvent Debtor's Act (11 & 12 Vid C. 21) the High Court may grant the same and there is no necessity to make a further application under Order 41. (Vol 2) 1915 Cal 477 (477) (DB).

[2] There is nothing in the Provincial Insolvency Act (III of 1907) to interfere with any right of appeal to the Privy Council that might otherwise exist. ('13) 40 Cal 685 (688) (DB).

14. (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court of notice of day for hearing appeal. to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

[1882—S. 553 ; 1877—S. 553 ; 1859—S. 345.]

PROVINCIAL AMENDMENTS

ALLAHABAD

Add the following as rub-rule (3) :

"(3) Notwithstanding anything in sub-rule (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower Appellate Court, or has appeared in the appeal."

CALCUTTA

Insert the following as sub-rule (8) :

"(8) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on its own motion, or *ex parte*, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent :

Provided that—

- (a) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct.
- (b) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal."

[18-10-1927.]

LAHORE

Add the following as sub-rule (3) :

"(3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on the application of any party or on its motion, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of, or at any proceeding subsequent to the decree of that Court, or on the legal representative of any such respondent :

Provided that—

- (a) the Court may require notice of the appeal to be published in any newspapers or in such other manner as it may direct;
- (b) no such order shall preclude any such respondent or legal representative from appearing to contest the appeal."

[13-11-1948.]

MADRAS

Insert the following as a proviso to sub-rule (1) :

"Provided that the Appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred."

[P. Dis. No. 4 of 1927.]

NAGPUR

Add the following sub-rule (3) :

"(3) The Appellate Court may in its discretion dispense with notice to any respondent against whom the suit was heard *ex parte*."

[29-6-1943.]

N.-W.F.P.

Add the following proviso to sub-rule (1) :

"Provided that with the permission of the Court no notice need be served upon a respondent who was a *pro forma* defendant in a suit which was decided *ex parte* against him."

ODDH

Add the following as sub-rule (3) :

"(3) Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred or at any proceeding subsequent to that decree, it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative; and, thereafter service may be

effected by affixing a notice in some conspicuous place in the Court-house of the District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely, publishing the notice in a newspaper or affixing it to the walls or door of the *chaupal* of the village where the respondent last resided or any other method as the Court may direct."

SIND

Add the following as sub-rule (3) :

"(3) The Appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court."

Rule 14A—PATNA

Add the following as Rule 14A :

"R. 14A. The Appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal."

SIND

Add the following as Rule 14A :

"R. 14A. Subject to the leave of the Appellate Court nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent, where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court."

15. The notice to the respondent shall declare that, if he does not appear in the Contents of notice. Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

[1882—S. 554 ; 1877—S. 554 ; 1859—S. 345.]

PROVINCIAL AMENDMENT

Rule 15A—NAGPUR

Insert the following as rule 15A :

"R. 15A. Where after admission of an appeal in the High Court, the Rules of the High Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where, after due service of a notice intimating the steps to be taken and the date before which they must be taken, the appellant fails to take such steps within the prescribed time, the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit."

[29-6-1913.]

ORDER 41 RULE 14—Note 1.

[1] An appeal cannot be heard and decided without fixing a date for such hearing or without giving the respondent due notice of such date. (Vol 4) 1917 Lah 399 (400) * (Vol 3) 1916 Cal 513 (514) (DB).

[2] Failure to give notice to an unnecessary respondent does not vitiate the appeal. ('09) 1909 Pun Re No. 21, page 45 (48) (DB) * (Vol 10) 1923 Cal 221 (223) : 49 Cal 1043 (DB).

[3] It is the duty of the appellant to give the correct address of the respondent. (Vol 4) 1917 Lah 399 (400) * ('09) 1 Ind Cas 158 (161) (Cal).

[4] The service of notice on the respondent should be in the manner provided for the service of summons on a defendant. ('09) 1 Ind Cas 158 (161) (Cal) * (Vol 8) 1921 All 52 (52, 53) : 43 All 411 (DB) * (Vol 19) 1922 Oudh 268 (269).

[5] Service on respondent's pleader is sufficient. ('71) 15 Suth W R 290 (290) (DB).

[6] Where a guardian *ad litem* of a minor has been appointed by the Court, notice of the appeal may be served on the guardian. (Vol 13) 1926 Cal 1106 (1107) (DB).

[7] Appellant is not bound to implead as a respondent every person who was a party to the suit. (Vol 29) 1942 Pesh 79 (80).

[8] Appellant applying neither for fresh notices nor for extension of time—Appeal need not be dis-

missed and the Court can excuse the delay and order fresh notices to issue. (Vol 14) 1927 Bom 68 (69, 70) : 50 Bom 815 (DB).

[9] Appellant failing to take out fresh notices within time allowed—Appeal can be disposed of under O. 17 R. 3. ('12) 17 Ind Cas 294 (295) (DB) (All).

[But compare ('13) 25 Mad L Jour 451 (451) (DB). (In this case Madras High Court held that O. 9 R. 5 applies to appeals and the appellant can apply for fresh Summons at any time within the period specified in Rule 5.)]

[10] Return of notice of appeal as not served—Appellant making undue delay in applying for fresh notices—Appellate Court may refuse to issue fresh notice. ('73) 20 Suth WR 62 (62) (DB).

[11] Where an appeal against a decree for joint possession of land is dismissed as against some of the respondents for failure to serve notice of appeal on them, the appeal cannot proceed even as against the others. (Vol 2) 1915 Cal 786 (786) (DB).

[12] See the undermentioned case under the Madras amendment. (Vol 32) 1945 Mad 86 (86) (DB).

ORDER 41 RULE 15—Note 1.

[1] An appeal cannot be decided *ex parte* if the notice served on the respondent did not specify the date of hearing. (Vol 3) 1916 Cal 513 (514) (DB).

PROCEDURE ON HEARING

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, Right to begin. the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

[1882—S. 555 ; 1877—S. 555.]

17. (1) Where on the day fixed, or on any other day to which the hearing may be Dismissal of appeal adjourned, the appellant does not appear when the appeal is called on for appellant's default. for hearing, the Court may make an order that the appeal be dismissed.

Hearing appeal (2) Where the appellant appears and the respondent does not appear, the ex parte. appeal shall be heard ex parte.

[1882—S. 556 ; 1877—S. 556 ; 1859—S. 346.]

ORDER 41 RULE 16—Note 1.

[1] Mere fact that respondent challenges the right to appeal does not give him the right to begin. ('84) 8 Bom 287 (289) (DB).

[2] Right to appeal challenged—Practice of Calcutta High Court is to require respondent to indicate briefly his grounds of objection—Appellant is then heard in support of the right. ('11) 14 Cal L Jour 489 (492) (DB).

[3] In every appeal the burden is on the appellant to show that the Judgment of the Lower Court is wrong. (Vol 18) 1926 P C 77 (79) : 4 Rang 518 (PC) * (Vol 8) 1921 P C 55 (56) : 17 Nag L R 72 (PC) (some balance in appellant's favour must be established.) * ('98) 3 Cal W N 150 (151) (DB) (Even though the record of the suit has been destroyed).

[4] Where there is a slip in the order in an appeal heard *ex parte*, the error will be attributed to the appellant. ('12) 10 All L Jour 379 (381) (PC).

[5] Non-appearance of respondent on date fixed for hearing—Appeal not heard—He is not precluded from appearing on adjourned date. (Vol 18) 1926 Bom 124 (124, 425) (DB).

[See however (Vol 1) 1914 Mad 97 (98)].

[6] An appellant is not entitled to be heard on the merits, if the appeal is liable to be dismissed on a preliminary ground. (Vol 8) 1916 Mad 473 (474) (DB).

[7] The Appellate Court is bound to hear the respondent before determining an appeal unless it dismisses the appeal at once. ('90) 3 C P L R 178 (179).

[8] The rule does not compel the Court to permit written arguments to be filed. (Vol 16) 1929 Nag 89 (90).

[9] Court hearing arguments of respondent's pleader in absence of appellant or his pleader—Opportunity to reply not given to appellant—Court acts illegally and judgment is not valid, ('21) 68 Ind Cas 945 (946) (Lah) (DB).

[10] Appeal adjourned—Hearing of appeal before day fixed without notice to respondent—*Ex parte* decree—Respondent can have decree set aside. (Vol 18) 1926 Bom 424 (425) (DB).

[11] Appeal heard and decided before day fixed—Pleadings of both parties present and arguing case—Irregularity condoned. (1864) 1 Suth W R 246 (246) (DB).

[12] If the rules of the Court relating to appeals have not been complied with and no adequate excuse

is offered, the appeal should be dismissed. (1865) 3 Bom H C R 68 (64) (DB).

ORDER 41 RULE 17—SYNOPSIS.

1. When the appeal is called on for hearing.
2. Dismissal for default of appearance.
3. "Appearance," Meaning of.
4. Dismissal on merits illegal.
5. Compromise after dismissal for default.
6. Dismissal for default of prosecution.
7. Effect of dismissal for default, on cross-objections.
8. Effect of dismissal for default.
9. Notice of date for hearing appeal.
10. Appeal.
11. Letters Patent appeal.
12. Revision.

1. When the appeal is called on for hearing.—

[1] Rule only applies where appeal is called on for hearing. Appeal called on not for hearing but for being postponed—Rule does not apply. ('10) 42 Pun L R 271 (272).

2. Dismissal for default of appearance.—[1]

Rule confers a discretion on Court to dismiss an appeal for default. (Vol 16) 1929 Rang 11 (12) : 6 Rang 612 * (Vol 12) 1925 Rang 96 (97) : 1 Upp Bur Rul 161 * (Vol 10) 1923 Mad 13 (14) : 45 Mad 883 (DB) * (Vol 16) 1929 Cal 475 (476) : 56 Cal 412 (DB) * ('12) 22 Mad L Jour 284 (295) (DB). (Over ruled in (Vol 7) 1920 Mad 640 : 43 Mad 91 (F.B) on another point.) * ('38) 10 Pun L R 76 (76).

[See also (Vol 7) 1920 Pat 373 (375) : 5 Pat L Jour 17 (DB) * (Vol 14) 1927 Cal 98 (100) : 53 Cal 827 (DB).]

[2] Hearing completed and case merely adjourned for pronouncing judgment—Rule does not apply. ('94) 7 C P L R 1 (2) * ('05) 8 Oudh Cas 261 (262, 263).

[3] An appeal cannot be dismissed for default, if the appellant is dead at the time—*Applicability of rule to remanded appeal*. ('13) 35 All 331 (335, 336) : 16 Oudh Cas 194 : 40 Ind App 150 (PC).

[4] Appeal resubmitted to appellate Court after remand—Non-appearance of appellant on date fixed—Appeal can be dismissed for default. ('09) 4 Ind Cas 816 (817) : 1907-09 Upp Bur Rul (C P C) 27.

[5] Where the Appellate Court remands a case for further enquiry and fixes a date for the return of the

O. 41 R. 17 (contd.)

report, it cannot dismiss the appeal in default before that date for non-appearance of the appellant in the lower Court on the date fixed for the enquiry. (Vol 13) 1926 Lah 574 (574) * ('95) 8 C P L R 69 (70).

[6] Case remanded for disposal to lower appellate Court—Non appearance of appellant on date fixed for hearing—Appeal can be dismissed for default. ('74) 21 Suth W R 65 (65) (DB) * ('89) 2 C P L R 82 (38).

3. "Appearance," Meaning of.—[1] Appellant present but his pleader not prepared to address Court—Appeal dismissed for default—Court need not give decision on any point—In such case "dismissed for default" means dismissed for default of proof and not of appearance—Case does not fall under O. 41 Rule 17 (Vol 27) 1940 All 248 (249) : I L R (1940) All 220 (DB) ((Vol 24) 1937 All 284 dissented from.)

[2] Appellant's pleader applying for time being unable to go on with appeal—Refusal of adjournment and dismissal for want of prosecution is not dismissal for default. (Vol 24) 1937 All 284 (285).

[3] Appeal adjourned for a short while to enable party to engage a fresh counsel to argue his appeal but the new counsel filing his appearance and asking for adjournment—Court thereupon ordering: 'Nobody appears to argue this appeal; I therefore dismiss it with costs'—Held, it was an order dismissing an appeal for default—Appearance in the legal sense means that a party or somebody on his behalf either expressly in words or by his conduct demands an adjudication from the Court. (Vol 26) 1939 All 451 (451).

[4] Where the appellant was present at the hearing of the appeal but not his counsel, it is the duty of the Appellate Court to decide the appeal on the merits—Presumably decision is based on ground that there is no failure to appear in such a case. (Vol 24) 1937 Lah 691 (692).

[5] Appellant's vakil absent—Appellant though present in Court having no intention to conduct appeal—Held there was no appearance and the appeal could be summarily dismissed. (Vol 32) 1945 Mad 300 (301).

[6] See also under O. 8 Rule 1.

4. Dismissal on merits illegal.—[1] Non-appearance of appellant on date of hearing—Appellate Court can either dismiss appeal for default or adjourn it to another date—It cannot dismiss it on merits. (Vol 11) 1924 All 144 (144, 145) : 44 All 669 (DB) * (Vol 16) 1929 Cal 475 (476) : 56 Cal 412 (DB) * (Vol 10) 1923 Mad 13 (14) : 45 Mad 892 (DB) * (Vol 16) 1929 Rang 11 (12) : 6 Rang 612 * (Vol 12) 1925 Rang 96 (97) : 4 Upp Bur Rul 164. (Order treated as one for dismissal for default though purporting to be one of dismissal on merits).

[But see (Vol 8) 1921 Pat 325 (325).]

5. Compromise after dismissal for default.—[1] Appeal dismissed for default of both parties—Application for restoration pending—Compromise petition filed by both parties—Appeal, held, should be restored and compromise given effect to. (Vol 10) 1923 Cal 319 (319, 320) (DB).

6. Dismissal for default of prosecution.—[1] Where the materials essential for the progress of an appeal such as supplying translations of vernacular documents, preparation of Bench copies, etc., are wanting owing to the applicant's default, the Court

can dismiss the appeal for default of prosecution. (Vol 6) 1919 Low Bur 139 (140) : 9 Low Bur Rul 266 (DB) * ('90) 17 Cal 289 (289) (DB).

[2] Madras Appellate Side Rules, R. 105—High Court can dismiss second appeal for failure to translate and print necessary records. (Vol 3) 1916 Mad 473 (474) (DB).

7. Effect of dismissal for default, on cross-objection.—See Notes on Order 41 Rule 22.

8. Effect of dismissal for default.—[1] An order dismissing an appeal for default is not a decree and hence the decree of the lower Court is not superseded by or merged in it. (Vol 4) 1917 All 392 (398) : 39 All 393 * (Vol 1) 1914 P C 66 (67) : 36 All 350 (PC).

[2] Appeal dismissed for default—Decree to be executed is that of lower Court. (Vol 4) 1917 Cal 738 (739) : 44 Cal 954 (DB).

[3] Appeal dismissed for default—Application for amendment of decree must be made to lower Court and not to Appellate Court. (Vol 4) 1917 Nag 24 (24).

[But see ('11) 10 Ind Cas 96 (97) (Mad) (DB).]

[4] Dismissal of appeal for default—Fresh appeal can be filed within limitation. (Vol 10) 1923 Pat 514 (514, 515) : 2 Pat 789 (DB).

[5] Appeal dismissed for default—Decision of lower Court operates as *res judicata*. (Vol 10) 1923 Nag 1 (2).

[6] An order dismissing an appeal for default is a judicial order although it does not deal with the appeal on the merits. (Vol 22) 1935 Lah 771 (773) : 16 Lah 564 (DB).

9. Notice of date for hearing appeal.—[1] The appellant must have due notice of the date of hearing. (Vol 6) 1919 Cal 1058 (1059) (DB) * ('15) 30 Ind Cas 199 (200) (UPBR) (DB) * (Vol 3) 1916 All 326 (327) (DB).

[2] Where no date has been fixed for the hearing of an appeal, the Appellate Court has no power to dismiss the appeal for default. (Vol 11) 1924 Lah 279 (280) * (1865) 2 Suth W R 254 (254) (DB).

[See also (Vol 21) 1934 Lah 984 (984).]

[3] Where an appeal has been remanded for hearing, it is the duty of the parties to apply to the Court to fix a date for the hearing of the appeal or to ascertain from the Court what date has been fixed therefor. ('89) 2 C P L R 32 (33) * ('08) 4 Nag L R 166 (167).

[4] An appeal may be taken up and disposed of before the appointed day if the pleaders of the parties are present and argue the case without objection. (1864) 1 Suth W R 246 (246) (DB).

[5] Notice of adjourned hearing given both to appellant and his counsel—Court ought to wait until notice is duly served upon the appellant especially where his counsel has noted on the notice issued to him that he will be unable to appear. (Vol 23) 1936 Lah 209 (210).

[See also (Vol 27) 1940 Lah 49 (50).]

10. Appeal.—[1] An order dismissing an appeal for default is neither a decree nor an appealable order and hence it is not appealable. ('12) 39 Cal 341 (343) (DB) * (Vol 3) 1916 All 326 (327) (DB) * (Vol 12) 1925 Nag 236 (238).

18. Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed:

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

[1882—S. 557; 1877—S. 557; 1861—S. 5.]

PROVINCIAL AMENDMENT

MADRAS

After the words "cost of serving the notice" insert the words "or if the notice is returned unserved, to deposit within any subsequent period fixed, the sum required to defray the costs of any further attempt to serve the notice."

[Dis. No. 1333 of 1913.]

O. 41 R. 17 (contd.)

[2] Where an appeal is dismissed on the merits, the order is a decree and is appealable as such, notwithstanding that the Court ought to have dismissed the appeal for default and not on the merits. (Vol 11) 1924 All 144 (144): 44 All 669 (DB).

[But see the following cases decided under the old Code (1900) 22 All 66 (77) (FB) (3 All 519 overruled.) * ('78) 15 Suth W R 143 (143) (DB) * ('95) 1895 All WN 140 (140) * ('84) 1884 All W N 167 (167) (DB).]

[3] Appeal dismissed against some respondents for want of notice to them—Appeal dismissed as against others as not being maintainable against them alone—Appeal against decree of dismissal—Previous order dismissing appeal as against some respondents can be attacked under S. 105. (Vol 16) 1929 Pat 609 (610, 611): 9 Pat 408 (DB).

[4] An order dismissing an appeal for failure to pay the deficiency in the stamp for the appeal is an order of rejection of the appeal and as such constitutes a decree. (Vol 9) 1922 Pat 281 (283): 6 Pat L Jour 625 (DB).

[See also S. 2, (2) Note 13 and S. 149, Note 13.]

[5] When an appeal is dismissed under an erroneous impression as to procedural law, an appeal lies from the order of dismissal, because the effect in such a case is that of dismissal on a preliminary point. (Vol 1) 1914 Oudh 303 (304).

11. Letters Patent appeal.—[1] No appeal lies under the Letters Patent from an order dismissing an appeal for default. ('93) 15 All 359 (362) (DB) * ('92) 14 All 861 (861) (DB).

12. Revision.—[1] An application for revision may lie against an order dismissing an appeal for default. (Vol 12) 1925 Nag 236 (238) * ('96) 18 All 119 (120) (DB).

[But see (Vol 27) 1940 All 810 (310) (DB)]

ORDER 41 RULE 18—SYNOPSIS.

1. Dismissal for default in depositing costs of notice.

2. Appeal cannot be dismissed before the date fixed for hearing.

3. Effect of dismissal of appeal against one of several respondents.

4. Dismissal for failure to supply identifier.

5. Appeal.

6. Revision.

1. Dismissal for default in depositing costs of notice.—[1] The rule does not warrant the dismissal of an appeal for failure to file notice in Court as required by the Circular orders. ('12) 13 Ind Cas 694 (694) (Cal) (DB).

[2] Appeal can be dismissed although the default in depositing costs was committed by an ignorant business agent of the appellant. ('69) 11 Suth W R 417 (418) (DB).

[3] In the absence of a date fixed for paying the costs of notice appeal cannot be dismissed for default to pay. (Vol 6) 1919 Lah 203 (203): 1919 Pun Re No. 169 * ('80) 1880 Pun Re No. 13, page 29 (80) (DB).

2. Appeal cannot be dismissed before the day fixed for hearing.—[1] Failure to deposit within time fixed—Appeal cannot be dismissed before date fixed for hearing. ('08) 35 Cal 535 (536) (DB).

3. Effect of dismissal of appeal against one of several respondents.—[1] Decree for joint possession in favour of three persons—Appeal dismissed against one for failure to send notice on him—The appeal cannot proceed against the other two respondents as well. (Vol 2) 1915 Cal 786 (786) (DB) * (Vol 17) 1930 Cal 846 (847).

4. Dismissal for failure to supply identifier.—[1] An appeal cannot be dismissed under the rule on account of the appellant's failure to supply an identifier for identifying the respondent to the process-server. (Vol 10) 1923 Pat 114 (115) (DB).

[See also (Vol 16) 1929 Pat 609 (610): 9 Pat 408 (DB). (Failure to file identifier's evidence—O. 41 R. 18 does not apply.)]

5. Appeal.—[1] No appeal lies against an order under this rule. (Vol 6) 1919 Lah 203 (203): 1919 Pun Re No. 169.

6. Revision.—[1] Date not fixed for payment of costs of service—Appellant failing to pay even on day fixed for hearing—Order dismissing the appeal will not be interfered with in revision. (Vol 6) 1919 Lah 203 (203, 204): 1919 Pun Re No. 169.

19. Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of
appeal dismissed
for default.

[1882—S. 558; 1877—S. 558; 1859—S. 347.]

PROVINCIAL AMENDMENTS

MADRAS

Re-number Rule 19 as 19 (1) and *insert* the following as sub-rule (2):

"The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

[Dis. No. 612 of 1926.]

NAGPUR

Substitute "sub-rule (2) or Rule 15A, or Rule 17" for "sub-rule (2) or Rule 17."

[29-6-1943.]

ORDER 41 RULE 19—SYNOPSIS.

1. Scope and applicability of rule.

1-a. Who can apply for restoration.

2. "Shall re-admit the appeal"

3. Sufficient cause.

4. Court to which application for restoration is to be made.

4-a. Parties to application.

5. Notice.

6. Dismissal for failure to deposit cost of paper-book or to pay court-fees.

7. Other remedy.

8. Appeal.

1. Scope and applicability of rule.—[1] This rule applies only where an appeal has been dismissed under any of the rules specified therein. (Vol 27) 1940 All 248 (249): I L R (1940) All 220 (DB) * (Vol 26) 1939 Pat 678 (680): 19 Pat 159 (FB).

[See (Vol 19) 1932 Cal 770 (771): 59 Cal 1834 (DB) (Appeal dismissed for default of payment of initial deposit—Application to re-admit stamped with court-fee of Rs. 2—Application is entertainable under O. 41 R. 19 read with S. 151 and is sufficiently stamped.)]

1a. Who can apply for restoration.—[1] Property in dispute assigned after filing appeal—Appeal dismissed for appellant's default—Assignee of property cannot apply for restoration of appeal. (Vol 25) 1938 Pat 574 (575) (DB).

[See also (Vol 29) 1942 All 253 (258) (DB) * (Vol 2) 1915 Cal 622 (623) (DB).]

[2] The dismissal of an appeal for default when the arguments have been heard is not covered by R. 17 and this rule does not therefore apply to such a case. ('05) 8 Oudh Cas 261 (262, 263).

2. "Shall re-admit the appeal."—[1] The Court is bound to restore the appeal on sufficient cause being established for the default. ('12) 15 Ind Cas 358 (358, 359) (Low Bur).

3. Sufficient cause.—[1] A summary rejection of an application to restore an application dismissed

for default without enquiry into the allegations contained therein in respect of "sufficient cause" is improper. (Vol 22) 1935 Pesh 110 (110) * (Vol 15) 1928 Cal 102 (102) (DB) * (Vol 12) 1925 Cal 269 (269) (DB) * ('81) 1881 All W N 22 (22) (DB) * ('80) 81 Pun L R 969 (969) * (Vol 6) 1919 Lah 276 (277) * (Vol 20) 1938 Pat 128 (128) (DB) * (Vol 24) 1937 Pat 624 (624) (DB).

[2] The following have been held to amount to "sufficient cause for default":

[a] Absence of pleader in another Court due to miscalculation of time. (Vol 13) 1926 Cal 1231 (1231, 1232) (DB) * (Vol 19) 1932 Lah 65 (65) * ('23) 70 Ind Cas 504 (505) (Lah).

[See however (Vol 12) 1925 Oudh 234 (234, 235).]

[But see (Vol 27) 1940 All 248 (250): I L R (1940) All 220 (DB) * (Vol 10) 1923 Lah 97 (97) (DB) * (Vol 1) 1914 Cal 763 (764) (DB).]

[b] Appeal unexpectedly called earlier than expected. (Vol 19) 1932 Lah 887 (888) * (Vol 26) 1939 Lah 267 (268) * (Vol 13) 1926 Rang 109 (110): 4 Rang 18.

[But see (Vol 11) 1924 Lah 189 (189) * ('08) 31 Mad 157 (159) (DB).]

[c] Transfer of appeal to another Court without notice. (Vol 6) 1919 Cal 1058 (1059) (DB) * (Vol 5) 1918 Pat 341 (342): 3 Pat L Jour 218 (SB) * ('81) 8 Cal L Rep 350 (351) (DB) (Pleader failing to inform party of transfer of appeal to another Court.)

[d] Appellant's agent looking after appeal going out to answer calls of nature when appeal is called on for hearing. (Vol 17) 1930 All 217 (218): 52 All 586.

[e] Illness of pleader. (1908) 35 Cal 799 (802, 806). (Judge refusing to hear another to whom the brief was transferred.) * (1889) All W N 125 (126).

[f] Default of counsel. (Vol 24) 1937 Mad 503 (504): I L R (1937) Mad 607 (DB).

[g] Dismissal without waiting for service of notice upon party where the pleader has noted on the notice his inability to be present. (Vol 23) 1936 Lah 203 (210).

[8] The following were held not to be "sufficient cause" for default:

20. Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Power to adjourn hearing and direct persons appearing interested to be made respondents.

[1882—S. 559; 1877—S. 559; 1859—S. 73. See O. 1 R. 10.]

O. 41 R. 19 (contd.)

[a] Illness of one of several appellants. ('88) 1888 Pun Re No. 38, page 94 (95).

[b] Laches of advocate or carelessness of his clerk. (Vol 13) 1926 Rang 50 (51): 3 Rang 488 * (Vol 20) 1933 Lah 642 (642) * (Vol 20) 1933 Lah 1043 (1043) (DB) * ('09) 5 Low Bur Rul 44 (45, 46) * (Vol 3) 1916 Pat 388 (389): 1 Pat L Jour 65 (DB) * (Vol 13) 1926 Cal 1152 (1152) (DB).

[c] A decision by the Court that there is sufficient cause will not be interfered with in revision in the absence of illegality or material irregularity. (Vol 24) 1937 All 362 (362).

4. Court to which application for restoration is to be made.—[1] The application must be made to the Court which dismissed the appeal for default. ('64) 1864 Suth W R 315 (316) (DB) * ('91) 15 Bom 107 (109) (DB).

4a. Parties to application.—[1] Even where no names are mentioned, if the names of the persons to whom notice should be given are ascertainable from the record and notice is in fact given, the application cannot be dismissed merely on the ground that the names of some of the respondents were not mentioned in the heading of it. (Vol 24) 1937 All 362 (362).

5. Notice.—[1] Notice is not necessary for the restoration of an appeal dismissed for default owing to the absence of both the parties. ('12) 10 All L Jour 399 (400).

[2] The propriety of an *ex parte* order setting aside an order of dismissal for default may be questioned at the hearing of the appeal. (Vol 7) 1920 Sind 34 (35): 14 Sind L R 289 (DB).

[3] An application for restoration in the case of dismissal of appeal for failure to pay deficit Court-fee in time is not covered by this rule and notice to the opposite party is necessary. (Vol 9) 1922 Pat 281 (284): 6 Pat L Jour 625 (DB).

6. Dismissal for failure to deposit cost of paper-book or to pay court-fees.—[1] Appeal dismissed under High Court rules for failure to deposit costs of preparing paper-book—Remedy is not under this rule—Review also does not lie—High Court can restore appeal under its inherent powers. (Vol 29) 1942 Bom 198 (199) * (Vol 13) 1931 Sind 153 (153) (DB).

[See also (Vol 26) 1939 Pat 678 (680, 681): 19 Pat 159 (FB). (An application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed—Though case is not covered by O. 41 R. 19 application may be entertained under S. 151 of the Code—(Vol 13) 1926 Pat 27: 4 Pat 704 overruled (Vol 25) 1938 Pat 111: 17 Pat 252 which follows (Vol 13) 1926 Pat 27: 4 Pat 704 must also be deemed to be overruled.)]

[But see ('97) 24 Cal 350 (354) (FB) (Overruling (1896) 23 Cal 339—Review lies.)]

[2] Appeal dismissed for failure to pay deficit court-fees within time allowed—The appeal cannot be restored under this rule. (Vol 9) 1922 Pat 281 (282): 6 Pat L Jour 625 (DB) * (Vol 7) 1920 Pat 608 (609) (DB).

7. Other remedy.—[1] Appellant whose appeal is dismissed for default can file fresh appeal provided it is within time and is confined to this rule for his remedy. (Vol 10) 1923 Pat 514 (514, 515): 2 Pat 739.

[2] When the appellant has allowed his remedy under this rule to become time-barred he cannot come by way of an application for review. (Vol 10) 1923 All 576 (577) (DB) * (Vol 30) 1943 Sind 132 (134): 1 L R (1943) Kar 409 (DB).

[But see ('10) 6 Ind Cas 482 (483): 1910 Pun L R No. 7.]

[3] Questions as to the *legality* of the order of dismissal cannot be raised in an application under this rule. (Vol 7) 1920 Sind 34 (35): 14 Sind L R 289 (DB) * (Vol 2) 1915 Mad 1111 (1111, 1112) (DB).

8. Appeal.—[1] No appeal lies against an order granting an application for restoration of an appeal under this rule. ('02) 24 All 464 (465) (DB).

[See ('80) 5 Cal 711 (712) (DB).]

[2] No appeal lies against an order refusing an application for restoration to which this rule does not apply. ('96) 18 All 119 (120) (DB) * (1900) 27 Cal 529 (531) (DB) * (Vol 2) 1915 Mad 1111 (1111, 1113) (DB) * (Vol 12) 1925 All 57 (58): 47 All 1 (DB).

[But see ('12) 15 Cal L Jour 633 (634) (DB) (Order of dismissal under R. 18—Order beyond the scope of the rule—Application to restore refused—Appeal lies against refusal).]

[3] An appeal lies against an order refusing to restore an insolvency appeal dismissed for default. (Vol 17) 1930 Lah 112 (112).

[4] An order rejecting an application under this rule is a "judgment" within cl. 10 of the Letters Patent (Lahore), and is appealable as such. (Vol 13) 1925 Lah 617 (617) (DB).

[See also (Vol 22) 1935 Lah 815 (816) (DB).]

ORDER 41 RULE 20—SYNOPSIS.

1. Scope and applicability.
2. Appeals under the U.P. Encumbered Estates Act.
3. "At the hearing."
4. "Any person who was a party to the suit."
5. "Interested in the result of the appeal."
6. "The Court may.....direct that such person be made a respondent."
7. Adding respondent.

O. 41 R. 20 (contd.)**8. Inherent power to add or transpose parties.****9. Effect of non-joinder.****10. Limitation.****11. Addition of parties in second appeal.**

1. Scope and applicability.—[1] Rule does not apply to the addition of fresh parties by the Court of first instance after the case is remanded to it by the Appellate Court for re-trial. (Vol 18) 1981 Bom 408 (409).

2. Appeals under the U.P. Encumbered Estates Act.—[1] Creditors against whom right of appeal has become barred cannot be added as parties to appeal. (Vol 30) 1943 Oudh 57 (58) * (Vol 30) 1943 Oudh 78 (80, 81) (DB) * (Vol 31) 1944 Oudh 9 (10, 11): 19 Luck 488 (DB) * (Vol 29) 1942 Oudh 199 (200) (DB) * (Vol 29) 1942 Oudh 339 (340) (DB) * (Vol 28) 1941 Oudh 580 (582): 17 Luck 175 (DB).

[2] Where other creditors are not likely to be prejudiced by the result of the appeal, they need not be impleaded. (Vol 29) 1942 Oudh 332 (333, 334): 17 Luck 677 (DB).

[3] All creditors made parties to application for review by one of creditors—Order regarding court-fee on such application—Appeal therefrom by such creditor—All creditors are necessary parties and if not impleaded appeal should be dismissed. (Vol 29) 1942 Oudh 353 (354).

[4] Order rejecting objections under S. 11—All creditors originally impleaded as parties to application under Act are necessary parties to appeal. Some creditors not opposing objection is no ground for not impleading them as parties to appeal. (Vol 28) 1941 Oudh 580 (582): 17 Luck 175 (DB).

[5] Appeal by unsuccessful claimant under S. 11—All creditors must be impleaded as respondents. (Vol 29) 1942 Oudh 339 (340) (DB).

3. "At the hearing."—[1] The power to add parties is to be exercised *at the hearing*. ('93) 1898 All W N 35 (86) (DB) * (Vol 13) 1926 Cal 533 (535): 53 Cal 270 (DB) * ('13) 40 Cal 323 (329) (DB).

[2] The rule does not contemplate the addition of a party after the judgment has been pronounced. (Vol 8) 1921 Cal 534 (535) (DB).

4. "Any person who was a party to the suit."

[1] The rule applied only when the proposed party respondent was a *party to the suit* in the trial Court. (Vol 28) 1941 F C 16 (28): I L R (1941) Kar (FC) 72: 1940 F C R 110 (FC).

[2] Appellate Court has inherent power to implead new parties in an appeal even in cases not coming under R. 20. (Vol 28) 1941 F C 16 (28): I L R (1941) Kar (FC) 72: 1940 F C R 110 (FC).

[3] Appellate Court, in a proper case can remand the case to the lower Court with a direction to add the omitted parties. (Vol 27) 1940 All 399 (401) * ('10) 37 Cal 171 (172) (DB) * ('96) 18 All 392 (393) (DB).

[See also (Vol 19) 1982 P C 146 (151) (PO).]

[4] Where a person can be added as a respondent under O. 22 R. 10 he can also be added even if he was not a party to the suit in the lower Court. ('01) 23 All 331 (335) (DB).

[5] Persons as parties to suit but struck off before decree passed—*Held* they are still parties to suit within meaning of the rule. (Vol 3) 1916 Mad 499 (499) (DB).

[Compare (Vol 13) 1926 Lah 499 (500): 8 Lah 161 (DB).]

[6] The words "any person who was a party to the suit" include the representative of such a party. (Vol 3) 1916 Cal 690 (690) (DB).

[Contra (Vol 10) 1923 Rang 114 (115).]

5. "Interested in the result of the appeal."

[1] The test for the addition of a party respondent is whether the proposed party is one whose interests are likely to be prejudiced by the determination of the appeal as *constituted*, and not whether his presence before the Court was necessary for the adequate disposal of the appeal on its merits. (Vol 14) 1927 PC 252 (255, 256): 55 Ind App 7: 6 Rang 29 (PC) (Confirming (Vol 12) 1925 Rang 108 (109, 110): 2 Rang 541 (DB)).

[But see (Vol 16) 1929 Cal 815 (817) (DB) * (Vol 17) 1930 Lah 295 (296) * (Vol 15) 1928 Lah 202 (206) * ('08) 31 Mad 442 (444, 445) (DB) * (Vol 13) 1926 Cal 533 (535): 53 Cal 270 (DB).]

[2] Where a defendant had been exonerated in the lower Court and no appeal had been filed against him within the period of limitation, held he was not interested in the result of the appeal filed by the plaintiff against other defendants. (Vol 14) 1927 P C 252 (255, 256): 55 Ind App 7: 6 Rang 29 (PC).

[3] Where a decree has been passed in favour of a person or a suit has been dismissed against a person and the period of limitation for appealing has expired, held that he cannot be *deemed* as interested in the result of the appeal pending between other persons who were parties to the suit. (Vol 30) 1943 Oudh 78 (80, 81) (DB) * (Vol 28) 1941 Oudh 580 (582): 17 Luck 175 (DB) * (Vol 30) 1943 Mad 609 (610) * ('41) 1941 I Mad L Jour 471 (474) * (Vol 24) 1937 Mad 228 (229) (DB) (Reversed in (Vol 25) 1938 Mad 501 on another point) * (Vol 27) 1940 Lah 314 (314) * (Vol 27) 1940 Rang 97 (100) * (Vol 24) 1937 Sind 236 (237): 31 Sind L R 486.

[4] It cannot be laid down as an inflexible rule that a person referred to in point (3), must be held in every case as not being interested in the result of the appeal. (Vol 30) 1943 Lah 252 (254, 255) * (Vol 24) 1937 Bom 401 (407, 408): I L R (1937) Bom 602 (DB) * (Vol 24) 1937 Mad 741 (743): I L R (1938) Mad 52 (DB).

[See however (Vol 24) 1937 All 82 (88, 89) (DB).]

[5] Person though not impleaded interested in the result of appeal—Appellate Court can make him a respondent in its discretion. (Vol 24) 1937 Mad 741 (744): I L R (1938) Mad 52 (DB).

O. 41 R. 20 (contd.)

[6] Person "interested in the result of appeal" otherwise than merely being a necessary party—He can be joined as a respondent. (Vol 24) 1937 Mad 741 (743, 744): 1 L R (1938) Mad 52 (DB).

[7] The fact that a person is "interested in the result of the appeal" does not in itself make him a necessary party to the appeal and the failure to implead him within limitation is not fatal. (Vol 30) 1943 Lah 252 (254).

[8] Where a person can be added as a respondent under any other provision of law, his not being interested in the result of the appeal is no objection to his being so added. (Vol 8) 1921 Mad 172 (174): 44 Mad 605 (FB) * (Vol 7) 1920 Mad 120 (120, 121) (DB) * (Vol 15) 1928 Pat 343 (345): 7 Pat 510 (DB) * (Vol 8) 1921 Cal 722 (724) (DB) * ('82) 1882 Pun Re No. 20, page 75 (76) (DB).

[9] "Appeal" in this rule includes also cross-objection. (Vol 17) 1920 Mad 120 (120) (DB) * (Vol 18) 1931 Cal 738 (740): 58 Cal 923 (DB).

6. "The Court may.....direct that such person be made a respondent."—[1] The power given to the Court is a discretionary one to be exercised in view of all the circumstances of a case. (Vol 1) 1914 PC 150 (151): 42 Cal 776: 42 Ind App 88 (PC).

[2] Strong grounds will be necessary to induce the Court to exercise its discretion in favour of an appellant who has failed to implead any party within the period of limitation. (Vol 14) 1927 PC 252 (255, 256): 6 Rang 29: 55 Ind App 7 (PC).

[3] Court will not exercise its discretion in favour of an appellant who fails to implead any party:

[a] Deliberately. (Vol 16) 1929 Sind 120 (120) (DB) * ('41) 1941 1 Mad L Jour 471 (474) * (Vol 12) 1925 Oudh 606 (607).

[b] Out of extreme negligence. (Vol 7) 1920 Cal 264 (267) (DB) * (Vol 14) 1927 Lah 189 (189, 190) * (Vol 1) 1914 Lah 276 (278): 1914 Pun Re No. 79 (DB) * (Vol 12) 1925 Rang 108 (110): 2 Rang 579 (DB) * ('38) 40 Pun L R 6 (7, 8).

[See (Vol 17) 1980 Pat 313 (313, 319): 9 Pat 310.]

[4] Appellant not guilty of neglect—Appellate Court may exercise its power in his favour. (Vol 17) 1930 Lah 295 (296) * (Vol 15) 1928 Lah 202 (206) * (Vol 8) 1921 Nag 12 (13) (Certain parties omitted due to mistake of pleader).

[5] Where a respondent has died and the appeal has *abated* as against him owing to his legal representatives not being brought on the record within the period of limitation, the legal representatives cannot be added under this rule. (Vol 13) 1926 Cal 335 (336) (DB) * (Vol 22) 1935 Oudh 329 (331): 11 Luck 5 (DB) * (Vol 13) 1926 Cal 893 (894, 895): 58 Cal 752 (DB) * (Vol 18) 1931 Nag 184 (186): 27 Nag L R 220.

[But compare (Vol 8) 1921 Cal 722 (724) (DB) (Joint appeal by several appellants—One of them dying—His legal representatives not bringing them-

selves on record within the period of limitation—Court has inherent power to add them as respondents, on the application of the surviving appellants so that they may not suffer for the remissness of others).]

[6] Legal representatives brought on record in suit, but not impleaded in appeal—They may be added. (Vol 18) 1926 Lah 689 (690).

[7] Necessary party in appeal not impleaded—Court has no power to add the party after expiry of the period of limitation for the appeal. (Vol 14) 1927 Pat 23 (24): 5 Pat 755 (DB) * (Vol 22) 1935 Pat 106 (107) (DB) * (Vol 27) 1940 Lah 314 (315).

[But see (Vol 14) 1927 Lah 738 (739) (DB) * (Vol 17) 1930 Lah 295 (296) * ('93) 1893 All W N 35 (36) (DB) * (Vol 16) 1929 Sind 120 (120) (DB).]

[8] Where the only person who could be impleaded in the appeal is not impleaded, and there is consequently no valid appeal at all, this rule will not apply. ('13) 18 Ind Cas 37 (39): 1913 Pun Re No. 59 (DB).

[9] The power under the rule may be exercised by the Court on its own motion or on the application of any party. ('91) 13 All 78 (84) * (Vol 22) 1935 Nag 182 (183): 31 Nag L R 223 (DB) * (Vol 18) 1926 Lah 689 (690).

[10] Where the Court finds the presence of party not already joined necessary, it may direct the appellant to apply for bringing him on record and if he fails to do so, may dismiss the appeal. (Vol 12) 1925 Mad 235 (236).

7. Adding respondent.—[1] An Appellate Court can add a person as respondent who, in the trial Court, was arrayed on the same side as the appellant. ('91) 13 All 78 (87) * ('92) 15 Mad 362 (364) (DB).

[2] Person impleaded as defendant in suit—Suit dismissed—Appeal—Such person may be added as respondent on his application although his object in getting added as respondent is to support the appellant and to show that the decree is wrong. (Vol 23) 1936 Cal 593 (626) (DB).

[See however (1941) 1 Mad L Jour 471 (473).]

[3] After an appeal to the Privy Council has been admitted, the High Court has no power to add respondents to the appeal ('10) 12 Ind Cas 69 (69) (DB) (Mad).

8. Inherent power to add or transpose parties.—[1] In cases to which this rule does not apply the Appellate Court can by virtue of its inherent power, add parties respondents to the appeal. (Vol 30) 1943 Lah 252 (255) * (Vol 28) 1941 FC 16 (28): ILR (1941) Kar FC 72: 1940 F C R 110 (FC) * (Vol 28) 1941 Lah 402 (403): 1 L R (1942) Lah 603 (DB) (Overruled in (Vol 31) 1944 Lah 76: 1 L R (1945) Lah 18 (FB) on another point) * (Vol 31) 1944 Lah 76 (86): 1 L R (1945) Lah 18 (FB) * (Vol 8) 1921 Mad 172 (174): 44 Mad 605 (FB).

21. Where an appeal is heard *ex parte* and judgment is pronounced against the respondent,

Re-hearing on application of respondent against whom *ex parte* decree made. he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

[1882—S. 560; 1877—S. 560.]

O. 41 R. 20 (contd.)

[2] *Bona fide* mistake caused by similarity of names in suit—Names of persons left out in appeal consequently—Held, Appellate Court had power to have the memorandum of appeal amended to correct the mistake. (Vol. 16) 1929 Mad 343 (344) (DB).

[See however (Vol. 22) 1935 Lah 632 (633) (DB).]

[3] Inherent powers of Court should be invoked only in exceptional circumstances. (Vol. 10) 1923 Lah 490 (491).

[4] Deceased person joined as respondent through mistake—Court has power to implead his legal representatives. (Vol. 24) 1937 Bom 401 (407): I L R (1937) Bom 602 (DB) * (Vol. 28) 1936 Pesh 192 (193).

[5] The Appellate Court has inherent power in the interests of justice to transpose a party from one category to another. (Vol. 14) 1927 Cal 37 (38) (DB).

9. Effect of non-joinder.—[1] No appeal should be made to fail merely on the ground of the non-joinder of any party. (Vol. 3) 1916 Cal 516 (518) (DB) * ('92) 1892 Pan Be No. 5, p. 22 (24) (DB).

[2] Non-joinder not of necessary parties—Appeal may proceed with reference to parties actually before the Court. (Vol. 30) 1943 Lah 252 (254) * (Vol. 29) 1942 Pesh 79 (80) * (Vol. 28) 1941 Cal 248 (250): I L R (1941) 1 Cal 309 (DB) * (Vol. 27) 1940 Pat 147 (149) * (Vol. 27) 1940 Pat 671 (672) * (Vol. 21) 1934 Cal 488 (489) : 61 Cal 302 (DB) * (Vol. 14) 1927 Mad 82 (83) * (Vol. 16) 1929 Rang 265 (267) : 7 Rang 398 (DB) * (Vol. 24) 1937 Lah 263 (265) * (Vol. 20) 1933 Lah 406 (407).

[3] Non-joinder of necessary parties is fatal to the appeal. (Vol. 28) 1941 Rang 236 (238) : 1941 Rang I L R 300 * (Vol. 27) 1940 Lah 314 (315) * (Vol. 4) 1917 Cal 647 (647) (DB) * (Vol. 3) 1916 Mad 828 (829) (DB) * ('10) 20 Mad L Jour 364 (366) (DB) * (Vol. 9) 1922 Pat 4 (4) * ('37) 171 Ind Cas 898 (898) (Oudh) (DB) * (Vol. 20) 1933 Cal 464 (465) * (Vol. 24) 1937 Lah 180 (182) : I L R (1937) Lah 136 (DB).

[4] Non-joinder of necessary parties—Court may in its discretion add the necessary parties. (1864) 1864 Suth WR Gap 136 (137) (DB) * (1865) 2 Suth WR 254 (255) (DB) * ('74) 21 Suth WR 187 (187) (DB).

[5] The assignee of a decree is, in the absence of fraud, bound by the decree of the Appellate Court though he has not been made a party to the appeal against the decree. (Vol. 3) 1916 Mad 745 (746) : 33 Mad 36 (DB).

10. Limitation.—[1] Party who is interested in the result of the appeal may be added as a respondent though the period of limitation for an appeal by or against him may have expired. (Vol. 30) 1943 Lah 252 (254, 255) * (Vol. 9) 1922 Nag 213 (215). * ('92) 15 Mad 362 (365) (DB) * ('92) 14 All 154 (155, 156) (FB) * ('11) 33 Cal 913 (919) * ('10) 12 Cal L Jour 187 (145) (DB) * (Vol. 8) 1921 Nag 12 (13) * (Vol. 2) 1915 Oudh 159 (160) : 18 Oudh Cas 90 * (Vol. 11) 1924 Pat 773 (774) (DB) * (Vol. 8) 1921 Upp Bur 13 (14) : 4 Upp Bur Rul 87 * ('12) 6 Sind ER 74n (74n), * (Vol. 7) 1920 Low Bur 64 (65) : 10 Low

Bur Rul 191 * (Vol. 27) 1940 Pat 137 (140) : 18 Pat 768 (DB) * (Vol. 26) 1939 Lah 346 (349) : I L R (1940) Lah 40 * (Vol. 24) 1937 Bom 401 (407, 408) : I L R (1937) Bom 602 (DB).

[See however (Vol. 24) 1937 All (82) (88) (DB).]

[But see (Vol. 27) 1940 Lah 314 (314) * (Vol. 22) 1935 Rang 364 (365).]

[2] The power to add respondent after limitation should be exercised very cautiously. (Vol. 14) 1927 PC 252 (255) : 6 Rang 29 : 55 Ind App 7 (PC).

[3] Respondent added, not under Rule 20, but under O. 1 R. 10 read with S. 107. Provisions of Limitation Act will apply. ('79) 2 All 487 (489, 492) (DB).

[4] Party added under inherent power to meet ends of justice—No limitation will apply. (Vol. 30) 1943 Lah 252 (255) * (Vol. 28) 1941 Lah 402 (403) : I L R (1942) Lah 603 (DB). (Overruled in (Vol. 31) 1944 Lah 76 : I L R (1945) Lah 18 (FB) on another point) * (Vol. 31) 1944 Lah 76 (86) : I L R (1945) Lah 18 (FB) * (Vol. 11) 1924 Pat 773 (774) (DB) * ('06) 33 Cal 329 (337) (DB).

[5] Where a person is sought to be added as a respondent under O. 22 R. 10, the fact that the period of limitation for an appeal against him has expired is no bar to his impleadment. (Vol. 22) 1935 Lah 316 (318).

11. Addition of parties in second appeal.—[1] Person a party to the suit in the Court of first instance but not a party in the *first Appellate Court*—High Court in the second appeal has power to make him a respondent. (Vol. 5) 1918 Cal 173 (175) (DB) * (Vol. 14) 1927 Lah 189 (189) * ('96) 19 Mad 151 (152, 153) (DB) * (Vol. 27) 1940 Pat 137 (140) : 18 Pat 768 (DB). (In this case the High Court however remanded the case to the lower Appellate Court for addition of parties) * (Vol. 11) 1924 Pat 773 (774) (DB) * ('08) 6 Oudh Cas 159 (165) * (Vol. 7) 1920 Low Bur 64 (65) : 10 Low Bur Rul 191.

[See however (Vol. 26) 1939 Lah 102 (103) (DB).]

[But see ('94) 16 All 5 (3) (DB) * (Vol. 1) 1914 All 293 (293) : 37 All 57 (DB).]

[2] A obtained a decree against B and C. B appealed from the decree making A alone a respondent. The Appellate Court allowed the appeal and dismissed the suit against both B and C. A filed a second appeal impleading B alone as respondent to the appeal and after the period of limitation for appealing against C had expired sought to have him impleaded as respondent. It was held that C could not be added as a respondent at that stage. (Vol. 26) 1939 Rang 213 (214).

[3] The High Court in second appeal can remand the case to the lower Court for addition of parties. (Vol. 27) 1940 Pat 137 (140) : 18 Pat 768 (DB) * (Vol. 1) 1914 All 293 (293) : 37 All 57 (DB) * ('09) 4 Ind Cas 1132 (1132) (DB) (Mad.).

ORDER 41 RULE 21—SYNOPSIS.

1. Scope and applicability.
2. "He may apply to the Appellate Court."
3. Notice.—See O. 5 R. 12, Note 2.
4. "Sufficient cause."
5. "Appearance."

PROVINCIAL AMENDMENT.

NAGPUR

Re-number the existing rule as sub-rule (1) and add the following as sub-rule (2):

"(2) The provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)."

[29-6-1943.]

22. (1) Any respondent, though he may not have appealed from any part of the decree,

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

O. 41 R. 21 (contd.)

6. "On such terms as to costs or otherwise."

7. Limitation.

8. Appeal.

1. Scope and applicability.—[1] Appellate Court has jurisdiction under this rule to entertain an application for re-hearing by a respondent notwithstanding the fact that another respondent had preferred a second appeal to the High Court which was dismissed under O. 41 R. 11 ('11) 14 Cal L Jour 42 (45, 46) (DB).

[2] Where the appeal is wholly dismissed, the respondent cannot apply for a re-hearing under this rule merely because the judgment contains some remarks which are unfavourable to him. (Vol. 28) 1941 Pat 141 (142).

[3] [See also Notes on O. 9 R. 13.]

2. "He may apply to the Appellate Court."—[1] An application for re-hearing of an appeal under this rule should be made to the same Bench which heard the appeal. (Vol. 3) 1916 Cal 347 (347) (DB).

[2] The pendency of an appeal from the *ex parte* decree is no bar to an application to the lower Appellate Court to set aside the decree under this rule. (Vol. 4) 1917 Nag 26 (28): 14 Nag LR 30.

[3] [See also Notes on Order 9 Rule 13.]

3. Notice.—See Order 5 Rule 12.

4. "Sufficient Cause".—[1] A respondent is entitled to a re-hearing of the appeal provided he proves either that he had not been duly served, or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. (Vol. 27) 1940 Lah 49 (50). (Notice served on a pleader who was not engaged to appear at the place where the appeal was to be heard—Pleader intimating the Court to send notice to the party—Court failing to do so—No proper service of notice) * ('40) 42 Pun LR 271 (272). (Appeal adjourned for 2nd but heard on 1st with notice to the appellant and without notice to the respondent—Appeal must be re-heard.) * ('81) 6 Cal 548 (548) (DB). (Such proof must be given at the time of presenting the application, * (Vol. 20) 1933 Lah 797 (797, 798) * (Vol. 22) 1935 All 660 (661). (Personal service on pardanashin lady—How to be effected) * (Vol. 27) 1940 Mad 53 (54) * (Vol. 31) 1944 Mad 571 (572) (DB) ('Prevented by sufficient cause'—Words apply to party and his pleader.).

[2] The following have been held to amount to sufficient cause: (Vol. 8) 1931 All 364 (365) (DB). (Inability of respondent's agent to attend and instruct her pleader) * ('98) 2 Cal WN 414 (414) (Pleader's clerk failing to inform party of date of hearing owing to illness.) * ('99) 4 Cal WN 85 (85) (SB). (Mistake of pleader's clerk was held to be sufficient cause for restoring an appeal dismissed for default.)

[3] The following have been held not to amount to sufficient cause: (Vol. 4) 1917 All 216 (216): 39 All 388 (DB). (Counsel unable to appear as the agent of the respondent had withdrawn the instructions) * ('05) 1905 All WN 44 (44) (DB). (Laches of pleader—Pleader refusing notice.) * (Vol. 23) 1936 Pat 128 (128). (Appellant entrusting money and papers to a friend—Friend not taking steps in matter—No ground for rehearing of appeal dismissed for default.) * (Vol. 27) 1940 Mad 53 (53). (Omission of the Judge to give appellant notice of transfer of appeal is not a sufficient cause for him to absent himself when appeal is heard) * (Vol. 32) 1945 Oudh 303 (304) (DB). (Non-appearance of advocate held no ground for restoring appeal.)

5. "Appearance".—[1] See Order 3 Rule 1.

[2] Pleader filing vakalat but absent on date of hearing—Held, there was no appearance and decision was *ex parte*. ('82) 11 Cal L Rep. 537 (539) (DB).

6. "On such terms as to costs or otherwise"—Under this rule Court can impose terms other than those relating to costs. Hence, an Appellate Court may require the respondent to furnish security for the due performance of the decree that may be passed on re-hearing. ('85) 1885 Pun Re. No. 70 page 142 (143) (DB).

7. Limitation.—[1] The period of limitation for the re-hearing of an appeal is prescribed by Art. 189 of the Limitation Act; thirty days from the date of the appellate decree or where notice of the appeal was not duly served, when the appellant has knowledge of the decree. See notes on Art. 169 Limitation Act.

[2] There is no law extending provisions of S. 5 Limitation Act to an application setting aside *ex parte* decree passed in appeal. (Vol. 31) 1944 Mad 571 (572) (DB).

8. Appeal.—[1] An appeal lies under O. 47 R. 1 (i) from an order refusing an application for re-hearing under this rule. (Vol. 23) 1936 Mad 680 (681): 39 Mad 1049.

[2] Order dismissing the application "for re-hearing the cross-objections heard *ex parte*" is not appealable but can be revised. (Vol. 6) 1919 Lah 32 (33).

[3] Order refusing to restore revenue appeal—Such order is order "passed in appeal" within the meaning of the Agra Tenancy Act, S. 249 and is not open to appeal. (Vol. 18) 1931 All 533 (533, 534): 53 All 518 (DB).

ORDER 41 RULE 22—SYNOPSIS.

1. Respondent may support decree without filing cross-objections.
2. What objections can be raised by way of cross-objections and when.
3. Cross-objections in second appeal.
4. Cross-objections in appeals from orders.
5. Cross-objections in Letters Patent appeals.

Form of objection and provisions applicable thereto.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeal shall, so far as they can be made applicable apply to an objection under this rule.

[1832—S. 561; 1877—S. 561; 1859—S. 348.]

O. 41 R. 22 (*contd.*)

6. Cross-objections in revision.
7. Who may file cross-objections.
8. Cross-objections by pauper respondent.
9. Against whom cross-objections may be filed.
10. Cross-objections against co-respondent.
11. Omission to file cross-objections.
12. Grounds not raised in cross-objections not to be raised at the hearing.
13. Effect on cross-objections of withdrawal of appeal or its dismissal for default.
14. Effect on cross-objections, of abatement of appeal.
15. Limitation for cross-objections.
16. Appeal filed out of time may be treated as cross-objections.
17. Adding party for purposes of cross-objections.
18. Second appeal.

1. Respondent may support decree without filing cross-objections.—[1] It was held in this case that a person impleaded as defendant to suit and party to decree dismissing suit has a right to show, even as respondent in appeal, that decree was wrongly passed. (Vol. 23) 1936 Cal 593 (826) (DB).

[2] A respondent may support the decree appealed from on grounds decided against him, without filing any cross-objections. ('90) 17 Cal 809 (813, 814) : 17 Ind App 57 (PC) * ('89) 13 Bom 75 (77, 78) (DB) * (Vol. 8) 1921 Mad 172 (174) : 44 Mad 605 (FB) * (Vol. 6) 1919 Pat 196 (199) (DB) * (Vol. 26) 1939 Rang 59 (64) (DB) * ('37) 166 Ind Cas 1007 (1007) (Cal).

[But see (Vol. 15) 1928 All 624 (624).]

[3] On the question whether this rule will enable a respondent to attack any portion of the decree passed against him so long as he does not ask for a variation of the decree, the decisions are conflicting.

(a) The respondent cannot do so. (Vol. 20) 1933 Cal 165 (169) (DB) * (Vol. 25) 1938 Cal 563 (569) (DB) * (Vol. 29) 1942 Lah 87 (88) (DB) * (Vol. 16) 1929 Lah 684 (685) (DB) * (Vol. 8) 1921 Lah 318 (319) * (Vol. 20) 1933 Rang 120 (121) (DB) * (Vol. 20) 1933 Nag 310 (311) * (Vol. 29) 1942 Bom 161 (172) : I L R (1942) Bom 557 (DB).

[But see (Vol. 5) 1918 Lah 129 (130) (DB).]

(b) The expression "support the decree" does not mean support the decision but permits the respondent to show by reference to a ground decided against him, that the appellant has at least secured by the decree as much

as, if not more than, he is entitled to. (Vol. 19) 1933 Pat 134 (138) (DB) * (Vol. 10) 1923 Oudh 123 (126, 135) : 25 Oudh Cas 349 (DB).

(c) Where a suit is partly decreed and partly dismissed and the plaintiff appeals, the defendant - respondent can contest the appeal on a ground which if accepted by the trial Court would have necessitated the total dismissal of the suit. (Vol. 30) 1943 Mad 698 (700) : I L R (1944) Mad 147 (FB) (Overruling (Vol. 14) 1927 Mad 801 : 50 Mad 866 and (Vol. 18) 1931 Mad 513).

(d) When an item in an account appearing in the decree of the lower Court is reduced in appeal, the respondent without filing any cross-objections can support the said decree by showing that the lower Court had wrongly decided against him on other items. (Vol. 25) 1938 Cal 563 (569) (DB) ((Vol. 14) 1927 Mad 801 : 50 Mad 866 followed).

[4] A point taken in the lower Court but not decided by it may be urged in support of the decree under appeal. ('05) 9 Cal W N 14 (13) (DB) * (Vol. 9) 1922 All 280 (280) : 44 All 577 (DB) * (Vol. 15) 1928 Lah 964 (965).

[5] As a general rule, the respondent cannot take a point not taken by him in the lower Court. (Vol. 5) 1913 Cal 227 (228) (DB).

[See however (Vol. 1) 1914 Oudh 149 (152) : 17 Oudh Cas 108.]

[6] The rule does not apply to a finding which does not affect the point at issue as the respondent cannot support the decree with reference to such a finding. (Vol. 12) 1925 Cal 518 (520) (DB).

[See also (Vol. 27) 1940 Mad 617 (618).]

[7] An Appellate Court will not itself raise a point which the respondent does not raise. (Vol. 1) 1914 Cal 839 (840) (DB).

[8] A respondent to a second appeal is not precluded from attacking even the findings of fact of the lower Appellate Court, in supporting the decree of that Court. (Vol. 26) 1939 Rang 59 (63, 64) (DB).

2. What objections can be raised by way of cross-objections and when.—[1] The objections which the respondent could have raised in his memorandum of appeal if he had appealed against that portion of the decree which is against him, can also be raised by way of cross-objections. (Vol. 21) 1934 All 543 (546) : 56 All 912 (DB) * (Vol. 26) 1933 Rang 377 (378) (DB) * (Vol. 31) 1944 Oudh 57 (59) * (Vol. 32) 1945 Pesh 34 (34, 35).

O. 41 R. 22 (contd.)

[2] Where an *ex parte* decree is passed against a defendant for a portion only of the claim made by the plaintiff and the plaintiff appeals against the portion disallowed, the defendant-respondent can file cross-objections in respect of the portion decreed and may therein contend that the order making him *ex parte* in the suit was wrong. (Vol. 11) 1924 Mad 107 (108) (DB).

[3] In an appeal against a decree, the respondent cannot raise, by way of cross-objections, the plea that an order granting a review of the judgment originally passed was wrong. (Vol. 15) 1928 Oudh 405 (405).

[4] A respondent cannot, by way of cross-objections, attack a non-appealable order. (Vol. 14) 1927 Oudh 218 (219).

[5] Where a party could not have appealed from a decree he cannot file any cross-objections in respect of it. (Vol. 31) 1944 Oudh 57 (58) (DB) * (Vol. 16) 1929 Nag 361 (362).

[6] Where a decree is wholly in favour of a party, he cannot file any cross-objections against it by way of criticism of the judgment, though he can support the decree on any of the grounds decided against him. (Vol. 29) 1942 Mad 334 (337) * (Vol. 4) 1917 All 158 (158) * (Vol. 20) 1933 Pat 690 (692) (DB) * ('85) 7 All 606 (610, 611) (FB) * ('11) 1911 Pun LR 202 p. 774 (776).

[7] Where a decree is partly in favour of and partly against a party, he can take any cross-objections to it which he could have taken by way of appeal. (Vol. 11) 1924 Pat 775 (776) (DB) * (Vol. 15) 1928 Lah 221 (224) * ('12) 10 Ind Cas 207 (208) (Lah) : 1912 Pun Re No. 11 * (Vol. 1) 1914 Lah 62 (62).

[8] A files a suit against B and C, C is a *pro forma* defendant. The suit is dismissed. A appeals. C who has not taken any part in the proceedings in the trial Court seeks to file cross-objections in A's appeal, questioning the dismissal of the suit against B and wishing to continue the cross-objections though A does not want to pursue the appeal. C cannot be allowed to do so as there is no decision against him. (Vol. 27) 1940 Cal 377 (378) (DB).

[9] The cross-objections must be directed against the particular decree under appeal. (Vol. 9) 1922 Mad 413 (415) (DB) * (Vol. 10) 1923 Lah 514 (515) * (Vol. 18) 1931 Mad 133 (134, 135).

[10] They need not be confined to the particular portion of the decree appealed against but may refer to any part of the decree and they need not also be confined to the subject-matter of the appeal. (Vol. 6) 1919 Mad 627 (628, 629) (DB).

[11] The failure to award costs cannot form the subject of cross-objections although the matter may be raised by way of supporting the decree of the lower Court. (Vol. 31) 1944 Oudh 57 (59) (DB) * (Vol. 26) 1939 Cal 423 (425) (DB) * (Vol. 23) 1936 Pat 513 (527) : 15 Pat 510 (DB).

[12] A respondent in an appeal under the Provincial Insolvency Act has a right to file a memorandum of objections. (Vol. 27) 1940 Nag 292 (293) : ILR (1942) Nag 156 * (Vol. 6) 1919 Mad 784 (788, 789) : 41 Mad 904 (FB).

[13] The cross-objections under this rule can be filed only in a pending appeal and not after the appeal has been decided. (Vol. 11) 1924 All 867 (868) * (Vol. 4) 1917 All 299 (299, 300).

3. Cross-objections in second appeal.—[1] Cross-objections may be filed in second appeals as well as in first appeals. ('99) 21 All 297 (300) (DB) (Cross-objections cannot be filed in Letters Patent appeals.) * (Vol. 22) 1935 All 404 (405) (DB).

[2] In Oudh where an appellant is entitled to file a second appeal only after obtaining a declaration that it is a fit case for appeal the cross-objector also should obtain such a declaration before filing objections. (Vol. 22) 1935 Oudh 88 (89) : 10 Luck 518 (DB).

[3] The grounds taken in cross-objections filed in second appeals must comply with the provisions of S. 100. ('04) 7 Oudh Cas 49 (50) * (Vol. 26) 1939 Rang 59 (63, 64) (DB).

[4] A files a suit against B. It is partly decreed in favour of A and partly dismissed. A and B file separate appeals. A's appeal is allowed partially and B's appeal is dismissed *in toto*. A thereupon files a second appeal. B does not file any appeal, but only files cross-objections, in A's second appeal. It is not open to B to attack the decree passed in his appeal to the lower Court by means of cross-objections in the appeal preferred against another decree of that Court. (Vol. 13) 1926 All 582 (584) (DB) * (Vol. 9) 1922 Mad 413 (415) (DB) * (Vol. 16) 1929 Oudh 41 (42) (DB) * ('80) 2 All 651 (654) (DB). (In this case both appeals to the lower Court were dismissed—*Held* that in second appeal by one party, other could not object to dismissal of his (latter's) appeal).

[5] B cannot attack the decree of the first Court in such circumstances. ('07) 1907 Pun W R No. 52.

[6] B can attack the decree of the first Court where it is incorporated in the decree of the first Appellate Court. (Vol. 11) 1924 Pat 775 (775, 776) (DB). (This has been dissented from in (Vol. 13) 1926 All 582).

4. Cross-objections in appeals from orders.—[1] Cross-objections can be taken also in appeals from orders ('99) 21 All 297 (300) (DB) * ('08) 18 Mad L Jour 157 (157) (DB).

[But see ('68) 1863 Suth W R Gap 86 (89) (FB).]

5. Cross-objections in Letters Patent appeals.—Cross-objections can be filed in Letters Patent appeals. (Vol. 27) 1940 Lah 438 (441) (DB) (Vol. 18) 1931 All 244 : 53 All 535 (FB) and (Vol. 13) 1926 Mad 316 : 49 Mad 291 (FB) followed * (Vol. 13) 1926 Mad 316 (318, 319) : 49 Mad 291 (FB) (Overruling (Vol. 12) 1925 Mad 725 : 48 Mad 681. Relying on (Vol. 8) 1921 P C 80 : 48 Cal 481 : 48 Ind App 78 (PC) which held that O. 41 R. 10 applied to Letters Patent appeals).

6. Cross-objections in revision.—[1] This rule does not apply to civil revision petitions. (Vol. 28) 1941 Mad 55 (55) * ('12) 1912 Pun LR No. 160 p. 503 (504) * (Vol. 15) 1928 Mad 794 (796).

[Contra ('07) 17 Mad L Jour 62 (63).]

[2] The High Court's powers of revision may be exercised even without any application by an aggrieved party; and when a case is already before it, and the necessary parties are also before it, the Court has ample powers to entertain any questions that may be raised by the respondent. (Vol. 15) 1928 Mad 794 (796).

[See ('07) 17 Mad L Jour 62 (63).]

7. Who may file cross-objections.—[1] A person cannot file cross-objections unless he is a respondent to the appeal. (Vol. 6) 1919 Mad 1026 (1027) (DB) * (1864) 1 Suth W R 341 (342) (DB).

O. 41 R. 22 (contd.)

[See (Vol. 24) 1937 Nag 105 (105) : ILR (1937) Nag 401].

[2] Objections must be such as could have been taken by way of an appeal. (Vol. 29) 1942 Oudh 391 (391) : 18 Luck 256 (DB) * (Vol. 16) 1929 Nag 361 (362) * (Vol. 20) 1933 Rang 377 (378) (DB) * (Vol. 1) 1914 Mad 226 (230) : 38 Mad 556 (DB).

[3] Respondent also filing appeal against decree.

(a) If appeal by respondent is decided, respondent cannot be heard on his cross-objections. (Vol. 15) 1928 Cal 882 (885) (DB) * (Vol. 11) 1924 All 857 (868) * ('03) 25 All 628 (629) (DB).

[See (Vol. 5) 1918 Lah 201 (202) : 1918 Pun Re. No. 20].

(b) Respondent would be barred on principle of *res judicata*. (Vol. 16) 1929 Lah 161 (163).

(c) If the appeal is not decided on the date of the hearing of cross-objections, the respondent is entitled to be heard on his cross-objections. (Vol. 16) 1929 Lah 161 (163) * (Vol. 20) 1933 Lah 487 (488) * (Vol. 11) 1924 All 840 (840).

(d) A respondent who has preferred an appeal cannot file cross-objections. (Vol. 12) 1925 Lah 2 (5) (DB) * (Vol. 23) 1936 Pesh 214 (215) (DB).

[4] The cross-objections filed by a deceased respondent can be prosecuted by his legal representatives. ('38) 42 Cal W N 304 (308) (DB).

8. Cross-objections by pauper respondent.—[1] Sub-rule (5) expressly provides for the filing of cross-objections *in forma pauperis*. ('10) 12 Cal L Jour 173 (181) (DB) * (Vol. 20) 1933 Nag 158 (159) 29 Nag L R 225 (DB) (Overruling 1 Nag L R 33).

[2] The proviso to O. 44 R. 1 applies to cross-objections. (Vol. 28) 1941 Mad 833 (833) (DB) (Vol. 24) 1937 Rang 81 dissented from.)

[But see (Vol. 24) 1937 Rang 81 (81, 82) (DB).]

9. Against whom cross-objections may be filed.—

[1] Cross-objections cannot be allowed against a person who is not a party to the appeal. (Vol. 30) 1943 Mad 609 (610) * (Vol. 27) 1940 All 225 (227) * (Vol. 20) 1933 Nag 186 (186) : 29 Nag L R 173 * (Vol. 13) 1926 Cal 533 (535) : 53 Cal 270 (DB) * (Vol. 7) 1920 Lah 438 (439, 440) : 1 Lah 396 * (Vol. 3) 1916 Pat 43 (44) : 2 Pat L Jour 162 (DB).

[2] Where it was impossible to give relief against the appellant without giving relief against the absent party also, held that the decision on the respondent's cross-objections bound the non-party also. ('87) 11 Bom 596 (598) (DB).

[See also (Vol. 21) 1934 Oudh 131 (132)].

[3] There is no objection to the respondent filing a cross-objection against a person who was a party to the suit in the Court but who has not been joined as a party to the appeal by the opposite party. (Vol. 25) 1933 Mad 329 (330).

10. Cross-objections against co-respondent.—[1] As a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge cross-objections as against the other respondents, the exception holding good among other cases, in those in which the appeal by some of the parties opens out questions which

cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. ('06) 28 All 95 (97, 98) (DB) * (Vol. 22) 1935 All 134 (136, 137) : 57 All 580 * (Vol. 31) 1944 Cal 383 (384) * (Vol. 33) 1946 All 395 (398) (DB) * (Vol. 17) 1930 Bom 1 (5) (DB) * ('18) 37 Bom 511 (512) (DB) * (Vol. 19) 1932 Cal 524 (527) : 59 Cal 667 (DB) * (Vol. 5) 1918 Cal 13 (13, 14) (SB) * ('12) 15 Cal L Jour 61 (63) (DB) * (Vol. 11) 1924 Pat 200 (203) (DB) * (Vol. 21) 1934 Pat 134 (140, 141) : 13 Pat 200 (DB) * (Vol. 7) 1920 Pat 77 (81, 82) : 5 Pat L Jour 328 (DB) * (Vol. 2) 1915 Upp Bar 9 (9, 10) : 11 Upp Bar Rul 58 * (Vol. 30) 1943 Pesh 3 (5) (DB) * (Vol. 7) 1920 Lah 204 (209) (DB) * (Vol. 31) 1944 Lah 433 (434) (DB) (Vol. 10) 1923 Lah 39 overruled) * ('01) 14 C P L R 46 (48) * ('95) 9 C P L R 62 (63, 64) * (Vol. 10) 1923 Oudh 108 (109) : 25 Oudh Cas 280 (DB) * (Vol. 31) 1944 Oudh 130 (131) : 20 Luck 45 * (Vol. 23) 1936 Oudh 182 (183) (DB).

[2] When the questions raised by the cross-objections are common both to the appellant and co-respondent, the cross-objections may be entertained as against both. (Vol. 12) 1925 Cal 973 (977) (DB) * (Vol. 22) 1934 Cal 345 (347) (DB) * ('06) 28 All 95 (97, 98) (DB).

[3] In suits for dissolution of partnership and for accounts, the appeal of one of the partners opens out the whole case and cross-objections can be urged not only against the appellant but also against co-respondents. (Vol. 1) 1914 All 424 (424) : 36 All 505 (DB) * (Vol. 31) 1944 Pat 334 (337) : 23 Pat 216 (DB).

[4] Cross-objections may be allowed to be taken against co-respondents in all cases. (Vol. 30) 1943 Mad 15 (22) * (Vol. 28) 1941 Mad 402 (403) * (Vol. 25) 1933 Mad 329 (331) * (Vol. 2) 1915 Mad 648 (648, 650) : 38 Mad 705 (FB) * ('10) 6 Nag L R 50 (52, 53) * (Vol. 6) 1919 Oudh 60 (61).

11. Omission to file cross-objections.—[1] A party in whose favour a decree has been passed has a substantive right of a valuable kind which should not be lightly interfered with. (Vol. 14) 1927 P C 252 (255, 256) : 55 Ind App 7 : 6 Rang 29 (PC).

[2] As an ordinary rule, in the absence of a cross-appeal or cross-objections by a respondent, the Appellate Court has no power to disturb the decree of the lower Court so far as it is in the appellant's favour. ('89) 11 All 35 (88) (DB) * ('12) 34 All 32 (34, 35) (SB) * (Vol. 26) 1939 P C 86 (91) : ILR (1939) Kar 149 (PC).

[3] In the absence of cross objections, appellate Court cannot grant any relief to the respondent except in so far as such relief is incidental to the relief granted to the appellant. ('07) 3 Nag L R 85 (89) * ('05) 23 Mad 229 (232) (DB) * ('92) 1892 Pun Re No. 46 page 169 (170) (DB) * ('08) 30 All 48 (49) * ('96) 23 Cal 922 (929) (PC) * ('12) 15 Ind Cas 409 (412) (Mad) (DB).

[4] This rule is only a general rule and the power of the Appellate Court to pass any order or decree that may be necessary in the interests of justice is expressly saved by O. 41 R. 33 under the old Code. (Vol. 4) 1917 Oudh 399 (400) * (Vol. 4) 1917 Lah 423 (426) (DB) * (1910) 1910 Mad WN 719 (720) (DB) * (Vol. 14) 1927 All 453 (454) : 49 All 224 (DB).

[5] The general rule mentioned above applies in cases where the decree of the lower Court is such that a remand by the Appellate Court is necessary. ('07) 34 Cal 996 (998) (DB) * ('12) 34 All 32 (35) (DB).

O. 41 R. 22 (contd.)

[But compare ('81) 5 All 643 (645, 646) (DB). (In this case Stuart C.J. took opposite view but Oldfield, J., took the view stated above) * ('78) 1 Cal L. Rep. 144 (146) (DB)].

[6] The Appellate Court cannot as a general rule dispose of the appeal on a point not raised by either party. ('71) 15 Suth WR 227 (227) (DB).

[See also (Vol. 12) 1925 Cal 518 (520) (DB)].

[Compare O. 41 R. 2.]

[7] Where the case is such that the respondent could not have filed an appeal or cross-objections, the Appellate Court can grant him the necessary relief without any cross-objections. ('08) 18 Mad L Jour 586 (587, 588) (DB).

[8] Where the trial Court has not dealt with the respondent's claim to set-off at all, the absence of cross-objections by the respondent is no bar to the entertainment of the point in appeal. ('06) 30 Bom 173 (189) (DB).

12. Grounds not raised in cross-objections not to be raised at the hearing.—[1] The respondent cannot urge at the hearing of the appeal, grounds not set forth in the memorandum of objections, except with the permission of the Court. ('13) 15 Bom LR 130 (166) (DB).

[2] See also Order 41 Rule 2.

13. Effect on cross-objections of withdrawal of appeal or its dismissal for default.—[1] Under the present rule the withdrawal of an appeal does not affect the hearing of the respondent on his cross-objections. (Vol. 12) 1925 Mad 725 (725): 48 Mad 631 (DB). (Note.—Overruled in (Vol. 13) 1926 Mad 316: 49 Mad 291 (FB) on another point) * (Vol. 19) 1932 Mad 722 (723): 55 Mad 975 (DB).

[See (Vol. 21) 1934 Lah 136 (138) (DB)].

[2] Dismissal of appeal for default does not affect hearing of respondent's cross-objections. (Vol. 8) 1921 Mad 405 (405, 406): 44 Mad 828 (DB) * ('11) 9 Ind Cas 572 (572) (Mad) (DB).

[But see (Vol. 1) 1914 Oudh 303 (303, 304).]

[3] Appeal dismissed for default—Restoration of appeal does not *ipso facto* vacate order on cross-objections—Order on cross objections operates as *res judicata* on matter involved in appeal. (Vol. 31) 1944 Lah 174 (174, 175) (DB).

[4] **Dismissal of appeal as time-barred.**—The entertainment of the cross-objections is contingent and dependent upon the hearing of the appeal and when the appeal is dismissed as being time-barred the cross-objections cannot be heard. (Vol. 6) 1919 Mad 784 (790, 791): 41 Mad 904 (FB). (Overruling (Vol. 4) 1917 Mad 876) * ('10) 8 Ind Cas 140 (141) (Mad) (DB) * ('88) 10 All 587 (601, 602) (DB). (Case under the old Code) * (Vol. 11) 1924 Lah 43 (43, 44): 4 Lah 140 (DB).

[5] **Dismissal of appeal for failure to pay court-fees—Effect.**—On the rejection of an appeal without a hearing on account of the appellant's failure to pay the requisite court-fees, the cross-objection cannot be heard. (Vol. 26) 1941 Bom 242 (244): ILR (1941) Bom 477 (DB). * (Vol. 7) 1920 Lah 24 (24) * ('12) 10 Ind Cas 207 (209): 1912 Pan Re No. 11 * (Vol. 18) 1931 Rang 38 (39, 40): 8 Rang 538 (DB) * (Vol. 31) 1944 Oudh 57 (58, 59) * (Vol. 19) 1932 Nag 41 (42): 28 Nag LR 25.

[But see (Vol. 18) 1931 Mad 133 (134)].

[6] **Dismissal of appeal for failure to furnish security for costs—Effect.**—The dismissal of an appeal for failure to furnish security for costs is a dismissal for default and the respondent is entitled to have his cross-objections heard and disposed of on the merits notwithstanding such dismissal. (Vol. 6) 1919 Pat 219 (219): 4 Pat L Jour 164 (DB).

[See however (Vol. 10) 1923 Oudh 108 (108, 109): 25 Oudh Cas 280 (DB)].

[7] **Dismissal of appeal after hearing does not affect cross-objections.**—The respondent is entitled to have his cross-objections heard and disposed of on the merits notwithstanding that the appeal is rejected on the ground that no appeal lies. ('12) 34 All 140 (141). * ('84) 8 Bom 568 (370) (DB) * ('09) 4 Ind Cas 625 (626) (Lah).

[See (Vol. 18) 1931 Rang 38 (39, 40): 8 Rang 538 (DB)].

[But compare ('08) 1908 Pun Re No. 28, page 148: (150) (DB).]

[8] Where an appeal is dismissed for failure to join the necessary parties after hearing the appeal on the question of non-joinder, the cross-objections may be heard. ('98) 21 Mad 352 (353) (DB).

14. Effect on cross-objections, of abatement of appeal.—[1] Cross-objections cannot be heard when the appeal has abated. (Vol. 16) 1929 Lah 807 (808): 11 Lah 1 (DB) * (Vol. 21) 1934 Lah 136 (137) (DB). * (Vol. 8) 1921 Mad 405 (405, 406): 44 Mad 828. * (Vol. 26) 1939 Nag 39 (41): ILR (1940) Nag 324 (DB).

[2] See also O. 22 R. 3.

15. Limitation for cross-objections.—[1] Service of notices on a pleader's clerk is not a correct starting point of limitation. (Vol. 29) 1942 Mad 403 (403) (DB).

[2] Notice of filing of appeal—Subsequent notice fixing date of hearing—Time for filing of cross-objections—Starting point is latter date. ('39) 1939 Oudh WN 530 (539) (DB).

[3] Starting point is date of service of notice of date fixed for hearing appeal and not date on which respondent comes to know that an appeal has been filed. Date of service of notice—Proof—If diary is not sufficient evidence of service on particular date. ('37) 1937 Mad WN 39 (41).

[4] Cross-objection filed within time should not be numbered separately as cross-appeal nor separate decrees passed in respect of it. (Vol. 29) 1942 Oudh 335 (336) (DB).

[5] The Appellate Court has no power to hear the appeal before the expiry of the period of one month so as to deprive the respondent of his right of filing cross-objections. ('90) 13 Mad 492 (493, 494) (DB) * ('02) 5 Oudh Cas 235 (237) * (Vol. 4) 1917 Pat 408 (409).

[6] Where a respondent in a High Court appeal is merely served with a notice of the appeal in the usual form fixing a period of 25 days for appearance but is not served with any notice fixing the date of hearing a memorandum of cross-objections though filed long after one month from the receipt of the former notice, is not out of time. (Vol. 13) 1926 Mad 283 (284) (DB).

[7] A transferee from a respondent is bound by the same period of limitation as would have applied to his

23. Where the Court from whose decree an appeal is preferred has disposed of the suit

Remand of case by upon a preliminary point and the decree is reversed in appeal, the Appellate Appellate Court.

Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

[1882—S. 562; 1877—S. 562; 1859—S. 351.]

OBJECTS AND REASONS.

"After due consideration the Committee have thought it safer not to give legislative sanction to the views enunciated in *Habib Buksh v. Baldeo Prasad*, (I L R 23 Allahabad 167). The power of reversal and remand is liable to be abused, while the procedure under section 566 is free from this liability and at the same time

furnishes an effectual remedy. The words at the end of the rule have been added to clear up a doubt which is stated by the Select Committee to exist as to whether evidence recorded at the original trial can be used in the trial after remand."—S. O. R.

O. 41 R. 22 (contd.)

transferor and cannot file any cross-objections after the expiry of that period. (Vol. 19) 1932 All 45 (47) (DB) * (Vol. 22) 1935 Lah 653 (654) (DB).

[8] The notice referred to in the rule means only the notice of the original day fixed, and the fact that a subsequent notice is given of a postponed date does not give the respondent a fresh opportunity of filing a memorandum of cross-objections. ('93) 7 C P L R 85 (87, 88).

[But see ('87) (1887) Bom PJ 177 (DB) * ('87) 11 Bom 698 (700) (DB).]

[9] When the period of one month expires on a holiday the cross-objections may be filed on the re-opening day. ('82) 4 All 430 (434) (DB).

[But see ('83) 1883 All WN 229 (229) (DB).]

[10] The Appellate Court may in its discretion, extend the period within which the cross-objections are to be filed. ('05) 28 Mad 229 (235) (DB) * (Vol. 9) 1922 Nag 213 (216) * ('90) 14 Bom 111 (112) (DB) * (Vol. 27) 1940 Cal 150 (152) (DB).

[11] Time may be extended even after the objections have been filed. (Vol. 4) 1917 Low Bar 87 (89) (DB).

[12] The extension of time may also be implied from the circumstances of the case. ('02) 1902 All WN 74 (74) (DB).

[13] Cross-objections can be filed before the service of notice. (Vol. 24) 1937 Nag 105 (106); ILR (1937) Nag 401 * (Vol. 31) 1944 Lah 76 (87, 88); ILR (1945) Lah 18 (FB).

[But see (Vol. 23) 1936 Lah 362 (363) (DB).]

[14] A person added as a respondent under O. 41 R. 20 can file cross-objections within one month of his being so added as the date on which he is added may be taken as the date on which he gets notice of the date fixed for hearing. See (Vol. 24) 1937 Nag 105 (105); ILR (1937) Nag 401.

[15] *Cross-objections in forma pauperis*.—Article 170 of the Limitation Act does not apply to cross-objections in *forma pauperis* and such cross-objections may be filed within the period indicated in this rule. (Vol. 16) 1929 Pat 31 (32); 7 Pat 827 (DB).

16. Appeal filed out of time may be treated as cross-objections.—[1] An appeal filed beyond the period of limitation may be treated as cross-objections under this rule. (Vol. 13) 1925 Lah 57 (57) (DB) * (Vol.

21) 1934 Lah 273 (273); 15 Lah 641 * (Vol. 9) 1922 Lah 423 (423, 424).

[See however ('36) 164 Ind Cas 935 (937) (Cal) (DB)].

17. Adding party for purposes of cross-objections.—

[1] Cross-objections can be taken against any person who was a party to the decree although such person may not be already on the record as a party to the appeal and such person may be impleaded as a respondent at the time of filing the cross-objections. (Vol. 30) 1943 Mad 15 (22) (DB) * (Vol. 16) 1929 Mad 479 ((Vol. 22) 1935 All 134; 57 All 580 disapproved on this point) ((Vol. 25) 1938 Mad 329 followed) * (Vol. 7) 1920 Mad 120 (120, 121) (DB) * (Vol. 9) 1922 Nag 213 (215, 216).

[But see (Vol. 13) 1926 Cal 533 (535); 53 Cal 270 (DB) * (Vol. 16) 1929 Mad 479 (480) * (1912) 1912 Mad W N 198 (199).

18. Second appeal.—[1] A decree of an Appellate Court disallowing the cross-objections of a respondent is a "decree passed in appeal" within the meaning of S 100. ('87) 10 Mad 292 (294) * (Vol. 20) 1933 Lah 981 (981, 982).

[2] Cross-objections rejected *in limine*—Order not decree—No second appeal. (Vol. 5) 1918 Lah 201 (202); 1918 Pan Re No. 20 * (Vol. 21) 1934 Lah 278 (274); 15 Lah 641 * ('08) 4 Nag L R 168 (175).

[3] Order that cross-objection abates amounts to a decree and is appealable. (Vol. 26) 1939 Nag 39 (40); I L R (1940) Nag 324 (DB).

[4] Order refusing to extend time for filing cross-objections—No error of law and it cannot be interfered with in second appeal. (Vol. 27) 1940 Cal 150 (152).

ORDER 41 RULE 23—SYNOPSIS.

1. Distinction between Rules 23 and 25.
2. "Preliminary point" Meaning of.
3. Where Court decides on all the issues.
4. Entire suit must have been disposed of on a preliminary point.
5. Order returning or rejecting plaint, whether disposal on preliminary point.
6. Decision of lower Court must be reversed.
7. "The Appellate Court may, if it thinks fit, by order remand the case."
8. "And may further direct what issue or issues shall be tried in the case."

PROVINCIAL AMENDMENTS.

ALLAHABAD

For the words "where the Court from whose decree.....reversed in appeal, the Appellate Court" substitute the words "where an Appellate Court has reversed a decree and all questions arising in the case have not been decided, it."

MADRAS

Substitute the following for Rule 23 :

"23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court, in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the Appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

[R. O. C. No. 5105 of 1930.]

ODDH

Same as that of Allahabad.

Rule 23A—LAHORE

Add the following as Rule 23A :

"R. 23A. Where the Court, from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal, and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

[4-8-1938.]

O. 41 R. 23 (contd.)

9. Inherent power of remand.
10. Wrong onus of proof.
11. Exclusion of evidence.
12. Basing decision on inadmissible evidence.
13. New plea is not a ground of remand.
14. Remand in appeal from order refusing to set aside *ex parte* decree.
15. Remand by consent.
16. Remand in second appeal.
17. Appeal against an order of remand under this rule.
18. Appeal from order of remand under inherent power.
19. Order of remand—When will amount to a decree.
20. Letters Patent appeal.
21. Powers of High Court in appeal from order of remand.
22. To what Court remand can be made.
23. Effect of order of remand.
24. Effect of improper order of remand.
25. Matters decided by order of remand, finality of.
26. Jurisdiction after remand depends upon the order of remand.
27. Procedure after remand.
28. Refund of court-fee on remand.
29. Costs.
30. Revision.
31. Local amendments.

1. Distinction between Rules 23 and 25.—[1] This rule applies only when the lower Court has disposed of the suit upon a preliminary point. (Vol. 30) 1943 Oudh 35 (35) * (Vol. 29) 1942 Pat 195 (196) (DB) * (Vol. 25) 1938 Nag 144 (144) : I L R (1940) Nag 517.

[2] If the trial Court decides the suit on the merits, it is not open to the Appellate Court to order a remand under this rule. (Vol. 10) 1923 Cal 323 (324) (DB) * (Vol. 21) 1934 Lah 576 (579) (DB) * (92) 19 Cal 555 (558) (DB).

[3] The following are the points of distinction between Rules 23 and 25.

[a] The whole case goes back under this rule, for decision to the lower Court (except on the point on which the Appellate Court has reversed the finding of the lower Court); under rule 25, the case is retained on the file of the Appellate Court and only issues are remitted. (Vol. 14) 1927 Cal 401 (402) (DB) * (Vol. 20) 1933 Lah 659 (659) * (Vol. 22) 1935 Oudh 533 (534) (DB) * (Vol. 23) 1936 Nag 140 (141) : I L R (1936) Nag 188.

[b] An order of remand under this rule is appealable but not an order under Rule 25. (Vol. 9) 1922 Oudh 236 (248) : 25 Oudh Cas 199 (DB).

2. "Preliminary point," Meaning of.—[1] A preliminary point is such that the decision thereon in a particular way is sufficient to dispose of the whole suit, without a decision on the other points in the case. (Vol. 28) 1941 Nag 304 (305) : I L R (1941) Nag 629 * ('08) 8 Cal L Jour 159 (160, 161) (DB) * (Vol. 22) 1935 Pat 49 (50) (DB) * (Vol. 4) 1917 Pat 577 (578) (DB) * ('88) 10 All 289 (322, 323, 324, 343) (SB) * ('08) 1903 Pun Re No. 2 page-10 (14) (FB) * (Vol. 9) 1922 Mad 505 (508) : 45 Mad 900 (FB) * ('89) 11 All 194 (223) (FB) (10 All 289 followed) * (Vol. 10) 1923 Oudh 177 (179) : 26 Oudh Cas 10 * (Vol. 27) 1940 Bom 22 (30) : I L R (1939) Bom 658.

[2] A preliminary point may be one of fact or of law. (Vol. 29) 1942 Lah 135 (136) * (Vol. 22) 1935 Pat 49 (50) (DB) * (Vol. 21) 1934 Cal 49 (50) (DB) * (Vol. 27) 1940 Bom 22 (30) : I L R (1939) Bom 658.

[3] The following grounds have been held to constitute preliminary points :

[a] That the suit is barred by *res judicata*. ('66) 5 Suth W R 63 (66) (PC) * (Vol. 12) 1925 Mad 433 (434) (DB).

[b] That the suit is barred by limitation. ('66) 5 Suth W R 63 (64) (PC) * ('09) 13 Cal W N 724 (727) (DB).

[c] That the document on which the suit is based is admissible in evidence. ('87) 1887 All W N 21 (21) (DB) * (Vol. 10) 1923 Bom 142 (145) (DB) * (Vol. 14) 1927 Lah 592 (593).

O. 41 R. 23 (contd.)

(d) That the plaintiff is estopped from proving his case. (Vol. 13) 1926 Mad 808 (808) (DB).

(e) That the plaintiff has no cause of action. (Vol. 29) 1942 Lah 179 (182) * ('97) 20 Mad 25 (27) (DB) * ('87) 9 All 26n (30n).

(f) Application for prosecution under Criminal Procedure Code, S 476—Court rejecting application without going into the merits on the ground that there was an ulterior motive behind the application—Point was a preliminary point. (Vol. 18) 1931 Cal 604 (606): 59 Cal 68 (DB).

(g) That the suit is bad for defect in the description of the defendant. (Vol. 12) 1925 Cal 716 (717): 52 Cal 733 (DB).

(h) That the matter is concluded by a valid award. ('99) 22 Ma: 172 (173) (L B).

(i) That the case raised at the hearing is different from that raised in the plaint. ('84) 1884 Bom P J 128 (128) (DB).

(j) That the suit has abated. ('01) 26 Bom 203 (206) (DB).

[4] A point is not a preliminary point where it relates to the merits of the case, although its decision may dispense with the necessity of a decision on the other points in the case. ('07) 30 Mad 203 (203) (DB) * ('11) (1911) 1 Mad W N 199 (199) (DB) * ('11) 15 Cal W N 575 (576) (DB). (Per Chitty, J. Cox, J., contra) * ('05) 1905 Pan L R No 49, page 187 (183) * ('02) 1902 Pan Re No. 99, page 445 (448) (DB) * (Vol. 7, 1920 Mad 898 (899) (DB).

[But see Vol. 29) 1942 Lah 135 (136) * (1940) 72 Cal L Jour 383 (385) * (Vol. 8) 1921 Mad 118 (118, 119) (DB) * (Vol. 20) 1933 Rang 413 (414, 415) * (1903) 1903 Pan Re No. 2, page 10 (14) (FB).]

[5] In the following cases it was held that it was not decided on a preliminary point as the point on which the whole suit was dismissed related to the merits of the case:

(a) Suit for ejectment and damages, plaintiff's failure to establish the title alleged by him. ('05) 1905 All W N 157 (157) (DB).

(b) In a suit for mesne profits finding that the defendant was not in possession during the period in question. (1897) 1 Cal W N 340 (340) (DB).

(c) Question of factum of death of defendants. (Vol. 10) 1933 Lah 224 (224).

(d) Appellate Court deciding that the plaintiff was entitled to the right claimed by him and remanding for decision on other issues—Remand not under Rule 23. (Vol. 7) 1920 Mad 759 (760) (DB).

(e) Suit by daughter for her share under Mahomedan Law—Trial Court holding that by custom she was excluded from inheritance and dismissing suit ('01) 4 Oudh Cas 23 (24).

[6] The following questions in the suit were held to be preliminary points even though they related to merits of the case:

(a) Suit for damages for breach of contract—Question as to the factum of contract. (Vol. 8) 1921 Mad 118 (118, 119) (DB).

(b) Suit based on an award—Question of the validity of the award. ('05) 27 All 691 (694) (DB).

(c) Question of the validity of the contract on which a suit is based is a preliminary point. ('07) 30 All 63 (66) (DB) * (Vol. 4) 1917 Pat 577 (578): 2 Pat L Jour 398 (DB).

(d) Suit for maintenance—Suit dismissed on the ground that plaintiff was not entitled to maintenance. (Vol. 14) 1927 Mad 1159 (1160) (DB).

(e) Suit by co-sharers for share of profits—Plea of adverse possession regarding part of area upheld—Appeal No finding as to amount of profits—Appellate Court differing and remanding case for disposal according to law—Order of remand held to be one under O. 41, R. 23. (Vol. 20) 1933 Oudh 560 (561).

(f) Redemption suit—Defendant's plea that there was a sale in his favour is a preliminary point. (Vol. 2) 1915 Lah 449 (449, 450).

(g) Suit for compensation for non-delivery against railway—Trial Court dismissing suit for want of proof of 'wilful neglect,' leaving undecided question of damages—Lower Appellate Court holding that wilful neglect was proved and remanding on question of damages—Remand is under O 41, R 23. (Vol. 15) 1928 Lah 774 (775): 10 Lah 360 (DB).

[7] The degree of importance which a point assumes during the hearing of the case does not decide whether a point is preliminary or not. (Vol. 14) 1927 Mad 1159 (1159) (DB).

[8] A case is said to have been disposed of on a preliminary point where there is a decree on the basis of that point as in the following cases:

(a) Decree passed on the basis of an award without trial of other issues. ('05) 2 All L Jour 477 (479) (DB) * ('91) 13 All 386 (388, 389) (DB). (Case decided according to deposition of referee appointed by agreement of both parties).

(b) Decree passed on consent of parties without trying the other issues. (Vol. 18) 1931 P C 107 (109): 27 Nag L R 139 (PC).

(c) Decree passed on the basis of commissioner's report. (Vol. 4) 1917 All 148 (149) (DB).

[Compare (Vol. 9) 1922 Mad 112 (113): 45 Mad 449 (DB)].

(d) Decree based in accordance with oath taken. (Vol. 27) 1940 Oudh 314 (316): 15 Luck 686. * (Vol. 17) 1930 Mad 1017 (1018) (DB) * (Vol. 20) 1933 Oudh 6 (9) (DB) * ('71) 16 Suth W R 109 (110) (DB) * (Vol. 14) 1927 Bom 129 (129): 51 Bom 43.

[9] Point left undecided can arise only after disposal of suit—Disposal of suit without deciding it is not on a preliminary point. (Vol. 4) 1917 Pat 100 (101): 3 Pat L Jour 99 (DB) * ('08) 5 All L Jour 545 (546) (DB).

[Compare also (Vol. 4) 1917 All 148 (149) (DB)].

[Compare however (Vol. 17) 1930 Mad 1017 (1018) (DB) * (Vol. 9) 1922 Mad 112 (113, 114): 45 Mad 449 (DB)].

[10] A suit disposed of under order 17, Rule 3 cannot be said to be disposed of on a preliminary point. (Vol. 22) 1935 Rang 123 (124).

3 Where Court decides on all the issues.—[1] Where the Court has adjudicated on all the issues involved, the disposal cannot be said to be on a preliminary point. (Vol. 30) 1943 Oudh 35 (35) * (Vol. 29) 1942 Pat 195 (196) (DB) * (Vol. 27) 1940 Nag 349 (352):

O. 41 R. 23 (contd.)

I L R (1940) Nag 538 (DB) * (Vol. 22) 1935 Pat 49 (50, 51) (DB) * '29) 119 Ind Cas 2 (3) (DB) (All) * ('90) 12 All 510 (513, 514) (FB) * ('99) 1 Bom L R 72 (73) (DB) * (Vol. 14) 1927 Cal 850 (851) : 55 Cal 219 (DB). (Appellate Court framing additional issue and remanding the case without deciding any of the issues in the trial Court) * (Vol. 11) 1924 Cal 148 (150) (DB) * (Vol. 19) 1932 Lah 443 (443) * (Vol. 17) 1930 Lah 181 (182) * (Vol. 14) 1927 Mad 1190 (1190) (DB) * (Vol. 16) 1929 Nag 63 (63) : 26 Nag L R 44. * (Vol. 9) 1922 Mad 112 (113) : 45 Mad 449 (DB).

[2] Merely because one of the issues of the other issues decided in the case is of a preliminary nature and the suit has been dismissed on that, the disposal is not on a preliminary point. (Vol. 11) 1924 Cal 148 (150) * (1500) 22 All 405 (407) (DB) * (Vol. 10) 1923 Mad 227 (228) (DB) * ('06) 9 Oudh Cas 362 (364) (DB).

[See ('05) 9 Cal W N 60 (69) (DB)].

[3] Because the trial Court has decided the case with reference to the admissions made by both the parties without taking other evidence the disposal does not become one on a preliminary point. (Vol. 16) 1929 Mad 205 (207) (LB).

[But see ('91) 13 All 386 (388, 389) (DB).

[4] Because other points, which might have arisen if the suit had been differently framed or if an amendment of the plaint had been allowed, have not been decided, the decision is not one on a preliminary point. (Vol. 18) 1931 Mad 1 (2) (DB).

[5] Where the Appellate Court allows an amendment of the plaint, the remand is not under this rule. (Vol. 27) 1940 Oudh 367 (368) : 16 Luck 65 (DB) * (Vol. 12) 1925 Mad 229 (229) : 48 Mad 713 (DB) * (Vol. 11) 1924 Lah 245 (246) * (Vol. 14) 1927 Mad 859 (860) (LB) * ('10) 2 All 669 (671) (DB) * (Vol. 3) 1916 Bom 275 (276) (DB) * ('95) 19 Bom 303 (306) (DB).

[6] Where the Appellate Court directs the addition of certain parties and remands the suit, the remand is not under this rule. (Vol. 12) 1925 Rang 320 (320) : 3 Rang 490 (DB) * ('86) 10 Bom 398 (399, 400) (DB) * ('10) 12 Cal L Jour 368 (373) (DB) * (Vol. 3) 1916 Cal 283 (284) : 43 Cal 938 (DB) * ('96) 19 Mad 157 (159) * ('99) 1 Bom L R 369 (369) (DB).

[But see (Vol. 14) 1927 Lah 196 (197) * (Vol. 11) 1924 Lah 33 (34) (DB).

[7] Decision with reference to findings on preliminary issue without decision on other issues—Mere recording of evidence on all issues does not make it a decision on merits. ('08) 30 All 63 (66) (DB) * ('05) 27 All 691 (694) (DB) * ('07) 1907 Pun W R No. 27. * ('96) 19 Mad 422 (423) (DB) * ('93) 16 Mad 207 (210) (DB).

[See (Vol. 27) 1940 Nag 349 (352) : I L R (1940) Nag 538 (DB). (In this case the decision of the Privy Council in 17 All 112 : 22 Ind App 1 (PC) given with reference to S. 562 of the Code of 1882 prior to the amendment of the section in 1888 is relied on for the proposition that this rule cannot apply where no evidence is shut out)].

4 Entire suit must have been disposed of on a preliminary point.—[1] The entire suit must have been disposed of on a preliminary point and not only a portion of it for this rule to operate. ('92) 1892 All

W N 11 (12) (DB) * ('89) 11 All 438 (439) (DB) * (Vol. 19) 1932 Lah 219 (220) * ('02) 1902 Pun Re No. 99. p. 445 (448) (DB) * (Vol. 13) 1926 Pat 514 (515) (LB).

[See however ('99) 12 C P L R 119 (122)].

[2] Suit involving several questions—Some of them decided on merits and some on preliminary point—Held suit not decided on preliminary point. (Vol. 7) 1920 Mad 88 (90) (DB) * (Vol. 19) 1932 Lah 219 (220),

[See however (Vol. 3) 1916 Pat 21 (23, 24)].

[3] Where a suit has not been disposed of on a preliminary point no remand can be made under this rule. (Vol. 14) 1927 Pom 111 (112) (DB) * ('90) 14 Bom 232 (234) (DB) * ('82) 12 Cal L Rep 136 (138) (DB) * (Vol. 19) 1932 Lah 219 (220) * (Vol. 17) 1930 Lah 639 (640) * ('09) 32 Ma 83 (84) * '95' 18 Mad 421 (422) (DB) * (Vol. 14) 1927 Oudh 591 (591) (DB).

[4] It was held that no remand can be made under this rule in the following cases :

(a) Where the lower Court has omitted to decide one or more issues or the Appellate Court requires certain additional issues to be tried. (Vol. 13) 1926 All 65 (66, 66) (DB) * (Vol. 4) 1917 All 451 (454) : 33 All 520 (DB) * ('28) 110 Ind Cas 444 (444) (DB) (Cal) * (Vol. 13) 1926 Cal 978 (977) (DB) * (Vol. 17) 1930 Lah 181 (182) * (Vol. 12) 1925 Lah 480 (480) * (Vol. 12) 1925 Mad 171 (171) (DB) * (Vol. 12) 1925 Mad 169 (170) (DB) * (Vol. 16) 1929 Nag 63 (63) : 26 Nag L R 44 * (Vol. 16) 1929 Bom 175 (176) : 53 Bom 355 (DB) * (Vol. 4) 1917 Pat 463 (464).

(b) Where the lower Court has wrongly rejected certain evidence. ('26) 96 Ind Cas 44 (44) (Lah) * (Vol. 5) 1918 Oudh 170 (171) * (Vol. 16) 1929 Sind 159 (160) (DB) * ('99) 1 Bom L R 110 (112) (LB).

(c) Where the taking of additional evidence is found to be necessary. (Vol. 3) 1916 All 25* (259) (DB) * (Vol. 3) 1916 Pat 172 (172) : 2 Pat L Jour 61 (DB) * (Vol. 16) 1929 Bom 175 (176) : 53 Bom 355 (DB) * (Vol. 7) 1920 Cal 374 (375) (DB).

[See (Vol. 15) 1928 Cal 749 (750) (DB)].

(d) Where the lower Court has not recorded the evidence properly. ('05) 2 Cal L Jour 496 (497) (DB) * ('96) 1896 Pan Re No. 45, p. 129 (130).

(e) Where the lower Court admitted inadmissible evidence. ('95) 5 Mad L Jour 82 (84) (DB).

(f) Where the Appellate Court is dissatisfied with the decision of the lower Court. ('01) 1901 All W N 141 (141) (DB) * (Vol. 15) 1928 Cal 546 (547) : 56 Cal 15 (DB) * (Vol. 9) 1922 Pat 575 (577) : 1 Pat 639 (DB) * (Vol. 6) 1919 Lah 102 (103) : 1919 Pan Re No. 27 (DB).

(g) Where the suit was not properly tried. (Vol. 13) 1926 Pat 516 (516) (DB) * (Vol. 10) 1923 Mad 113 (113) * ('70) 14 Suth W R 69 (70) (DB) * (Vol. 9) 1922 All 226 (228) : 44 All 492 (DB).

5. Order returning or rejecting plaint, whether disposal on preliminary point.—[1] An order returning a plaint for presentation to the proper Court under O. 7, R. 10 is not a disposal of the suit on a preliminary point. (Vol. 29) 1942 Oudh 370 (371) (DB) * ('91) 1891 All W N 165 (166) (DB) * (Vol. 13) 1926 Mad 900 (900) (DB) * (Vol. 3) 1916 Mad 1154 (1154, 1155).

[2] The rejection of a plaint does not amount to a disposal of the suit on a preliminary point. (Vol. 24)

O. 41 R. 23 (contd.)

1937 Lah 380 (381) * ('07) 6 Cal L Jour 214 (216) (DB) * (Vol. 18) 1931 Lah 497 (497) (DB). (Confirming (Vol. 16) 1929 Lah 83) * (Vol. 2) 1915 Lah 8 (8) (DB).

[But see (Vol. 28) 1941 Nag 304 (305) : I L R (1941) Nag 629. * (02) 6 Cal W N 585 (587) (DB) * (Vol. 17) 1930 Nag 295 (296) : 27 Nag L R 226 * ('97) 20 Mar 25 (27) (DB) * (Vol. 29) 1942 Lah 179 (182) (Dismissal of suit on the issue as to its maintainability raised as preliminary point)].

[3] A suit cannot be said to be disposed of when the decision in no way affects the rights of the parties as in the case of rejection of a plaint. ('09) 13 Cal W N 724 (727) (DB).

[See ('13) 35 All 427 (428) (DB)].

[See also (Vol. 3) 1916 All 326 (326) : 38 All 357 (DB) (Do)].

6. Decision of lower Court must be reversed—[1] Suit cannot be remanded unless the decision on the preliminary point is reversed in appeal. (Vol. 2) 1915 Bom 57 (57) : 39 Bom 352 (DB) * (Vol. 13) 1926 Lah 184 (185) * (Vol. 14) 1927 Lah 886 (386) * (Vol. 4) 1917 Cal 105 (105) (DB) * (Vol. 11) 1924 Rang 177 (177) : 1 Rang 656 (DB) * ('70) 14 Suth W R 60 (61) (DB).

[2] Where the decision of the lower Court has not been reversed, a remand cannot be made on the following grounds :

(a) That the Lower Court had decided the issue on a wrong view as to burden of proof. ('12) 34 All 612 (614) (DB).

(b) That on the materials before it the appellate Court is unable to agree with the decision. (Vol. 15) 1928 Mad 1200 (1200) (DB).

(c) That the decision is not supportable on the reasons given but may be supportable on another ground requiring investigation. (Vol. 2) 1915 All 460 (461).

[3] Where the finding of the lower Court on a preliminary point is definitely reversed, the suit may be remanded by the appellate Court making its decision subject to a finding of fact which is left to be determined by the lower Court. (Vol. 10) 1923 Bom 142 (145) (DB).

[4] Mere absence of a formal order setting aside the decree where the intention to do so is clear. ('02) 6 Cal W N 326 (327) (DB).

[5] Suit dismissed on several preliminary points—Decision on all of them should be reversed before remanding suit. (Vol. 12) 1925 Cal 716 (720) : 52 Cal 788 (DB) * ('87) 11 Bom 663 (665) (DB).

[6] The appellate Court cannot affirm the decision of the lower Court regarding one part of the suit and remand the suit regarding the other part. ('04) 27 All 163 (165) (DB) * ('07) 9 Bom L R 966 (967) (DB) * ('87) 8 Suth W R 303 (303) (DB) * ('92) 1892 Pun. Re. No. 3, page 16 (17, 18) (DB) * ('77) 1877 Pun Re. No. 82, page 216 (216) (DB).

7. "The Appellate Court may, if it thinks fit, by order remand the case."—[1] The Court has discretion to remand cases either under this rule or proceed under R. 24 or 25 ('99) 1899 All W N 2 (3) * (Vol. 3) 1916 Oudh 257 (264) * (Vol. 5) 1918 Lah 377 (377) * ('78) 3 Mad 96 (98) (DB).

[See (Vol. 10) 1923 All 603 (604) : 45 All 565 (DB)].

[See also (Vol. 22) 1935 Rang 34 (35) * (Vol. 18) 1929 Mad 718 (720)].

[2] A re-trial in any case in which it can possibly be avoided should be done so and hence a remand should not be made under this rule in a case which could efficiently be dealt with under R. 25. (Vol. 21) 1934 Cal 433 (437) (DB) * (Vol. 20) 1933 Pat 706 (707)

[3] Remand cannot be ordered so as to enable a party to fill up the lacunae in the case. (Vol. 28) 1941 Pesh 28 (30) (DB).

[4] Suit decided by lower Court on an issue of law which is reversed—No evidence on issues of fact—Case should be remanded for deciding the issues of facts. (Vol. 22) 1935 Rang 34 (35).

[5] The Appellate Court reversing the decision on an issue of law and remanding the case, should not make any remark concerning the merits of the claim. (Vol. 23) 1936 Rang 251 (252).

[6] An Appellate Court cannot remand a case unless the appeal is competent. (Vol. 29) 1942 Oudh 339 (340) (DB).

[7] The Appellate Court has no power to decide some of the issues itself and send down the case for a decision on the other issues. (Vol. 4) 1917 All 187 (187) * (Vol. 27) 1940 Nag 349 (354) : I L R (1940) Nag 538 (DB).

[See also (Vol. 10) 1923 Mad 113 (113). (Appellate Court cannot decide one issue and remand the whole case for re-trial)].

[8] Trial Court deciding on all issues—Appellate Court should not set up a new case on remand. (Vol. 14) 1927 Lah 42 (43).

8 "And may further direct what issue or issues shall be tried in the case."—[1] The Appellate Court cannot, while remanding the suit for trial *de novo*, direct that one of the essential issues in the case should be omitted. (Vol. 7) 1920 Cal 374 (375) (DB).

[See also (Vol. 10) 1923 Mad 113 (113)].

[2] Appellate Court setting aside order of trial Court and remanding suit for re-trial. One of the issues reframed and directions issue to take additional evidence on the issue Held that order was illegal and also did not fall under this rule. (Vol. 22) 1935 Lah 161 (162).

9. Inherent power of remand.—[1] In cases not falling within the scope of this rule an Appellate Court has an inherent power to remand a case for re-trial. (Vol. 29) 1942 Pat 195 (196) (DB) * (Vol. 23) 1941 Oudh 561 (562) * (Vol. 27) 1940 Nag 349 (353) : I L R (1940) Nag 538 (DB) * ('40) 15 Luck 448 (450) (DB) * (Vol. 22) 1935 Bom 216 (217, 218) * (Vol. 21) 1934 Rang 163 (171) (DB) * (Vol. 20) 1933 Sind 279 (290) : 27 Sind L R 341 (FB) * (Vol. 9) 1922 Bom 287 (270) 46 Bom 184 (DB) * (Vol. 4) 1917 Cal 44 (46, 47, 48) : 44 Cal 929 (FB) * (Vol. 4) 1917 Cal 269 (277) : 43 Cal 1001 (SB) * (Vol. 17) 1930 Lah 224 (225) (DB) * (Vol. 9) 1922 All 47 (48) * (Vol. 31) 1944 Sind 73 (79) : I L R (1943) Kar 429 * (Vol. 14) 1927 Nag 192 (192) * (Vol. 10) 1923 Oudh 177 (179) : 26 Oudh Cas 10 * (Vol. 14) 1927 Lah 430 (431) (DB) * (Vol. 14) 1927 Mad 335 (336) (DB) * (Vol. 9) 1922 Mad 112 (114) : 45 Mar 449 (DB) * (Vol. 11) 1924 Rang 177 (177) : 1 Rang 656 (DB) * (Vol. 24) 1937 Oudh 338 (340) : 13 Luck 209 (DB) * (Vol. 19) 1932 Pat 236 (238) : 11 Pat 513 (DB).

[See however (Vol. 9) 1922 All 254 (256) : 44 All 176 (DB) (The question is unsettled)].

O. 41 R. 23 (contd.)

[But see (Vol. 1) 1914 Cal 163 (164) : 41 Cal 103 (DB).]

[2] When an appellate Court feels a remand is urgently needed in view of the amendment of the plaint or the addition of parties it can do so, though such cases do not fall under this rule. ('12) 37 Bom 289 (293) (DB).

[3] Inherent power of remand should be exercised only when it is necessary for the ends of justice. (Vol. 28) 1941 Nag 308 (310) : ILR (1942) Nag 487 * (Vol. 5) 1918 Pat 505 (515) : 3 Pat L Jour 253 (DB) * (Vol. 4) 1917 Cal 44 (16 to 50) : 44 Cal 929 (FB) * (Vol. 16) 1929 Nag 63 (64) : 26 Nag LR 44 * (Vol. 15) 1923 Lah 116 (116) * (Vol. 19) 1932 Lah 443 (443) * (Vol. 28) 1936 All 78 (80) (DB) * (Vol. 22) 1935 Bom 222 (225) : 59 Bom 430 * (Vol. 22) 1935 Mad 715 (716) * (Vol. 22) 1935 Rang 19 (21) * (Vol. 23) 1936 Pat 160 (161) (DB).

[See also ('79) 4 Cal 190 (204, 205) : 5 Ind App 149 (PC).]

[4] When there is any specific provision in the Code which would meet the necessities of the case remand should not be ordered. (Vol. 27) 1940 Nag 349 (353) : ILR (1940) Nag 538 (DB) * (Vol. 4) 1917 Cal 44 (43, 49) : 44 Cal 929 (FB) * (Vol. 18) 1931 Mad 791 (791, 792) * (Vol. 7) 1920 Upp Bur 37 (37) : 3 Upp Bur 193 * (Vol. 6) 1919 Mad 561 (562).

[See also (Vol. 3) 1916 Bom 275 (276) (DB).]

[5] When the circumstances are such that the Appellate Court can itself dispose of the case, no remand should be ordered. (Vol. 29) 1942 Pat 379 (331) * (Vol. 3) 1916 Pom 275 (276) (DB) * (12) 37 Bom 289 (294) (DB) * ('12) 1912 Pan LR No. 180 p. 571 (573) * (Vol. 11) 1924 Sind 134 (136) : 18 Sind LR 306 (DB) * (Vol. 9) 1922 Mad 112 (114) : 45 Mad 449 (DB) * (Vol. 15) 1928 Cal 43 (44) (DB) * (Vol. 3) 1916 Nag 17 (18) : 12 Nag LR 126 * (Vol. 9) 1922 All 192 (193) (DB) * (Vol. 22) 1935 Mad 715 ('16) * (Vol. 23) 1936 Nag 8 (12) : 31 Nag LR Sep 72. (Note—Overruler in (Vol. 27) 1940 Nag 349 : ILR (1940) Nag 538 on another point.)

[6] Defect in proceedings due to negligence or default of party applying for remand—Remand should be refused. (Vol. 11) 1924 Cal 396 (397) (DB) * (Vol. 7) 1920 Pat 56 (58) * (Vol. 16) 1929 Lah 444 (446) (DB) * (Vol. 10) 1923 Lah 645 (646) (DB) * (Vol. 8) 1921 Cal 661 (667) (DB) * (Vol. 27) 1940 Mad 609 (609, 610).

[7] No reason to suspect that the parties did not have opportunity to produce evidence at the trial existing, remand cannot be ordered merely on the ground of the Court being unable to decide on the evidence before it because of its insufficiency. (Vol. 30) 1943 Nag 193 (196) : ILR (1940) Nag 213 * (Vol. 24) 1937 Oudh 338 (340) : 13 Luck 209 (DB).

[8] An order of remand in an appeal from an order is not under this rule and must be treated as made under the inherent power of the Court. (Vol. 26) 1939 Oudh 104 (105) (DB).

[9] It was held that Courts have an inherent power to remand in the following cases:

(a) When the appellate Court directs an amendment of the plaint. (Vol. 12) 1925 Mad 229 (229) : 48 Mad 713 (DB) * (Vol. 4) 1917 Cal 391 (391) (DB) * (Vol. 18) 1931 Mad 1 (2) (DB).

(b) When the Court directs the addition of fresh parties. (Vol. 3) 1916 Mad 957 (958) (D.) * ('96) 18 All 332 (333) (DB) * (Vol. 3) 1916 Cal 283 (284) : 43 Cal 938 (DB) * (Vol. 13) 1926 Cal 1076 (1077) (DB).

(c) When the Appellate Court finds that the suit is bad for misjoinder of parties and all causes of action. ('96) 18 All 396 (399) (SB) * ('83) 6 Mad 239 (245) (DB) * ('96) 18 All 131 (141) (DB).

[But see (Vol. 17) 1930 All 863 (864) (DB).]

(d) Dismissal of suit as having been brought in the name of wrong persons as parties. ('01) 23 All 167 (173) (DB). (Wrong person described as plaintiff) * ('97) 19 All 330 (331) (DB) (Do.). (Note.—Overruled in 33 All 735 (FB) on another point) * (Vol. 12) 1925 Cal 716 (717) : 52 Cal 783 (DB). (Wrong person as defendant).

(e) When the lower Court has misunderstood the whole case. (Vol. 4) 1917 P C 156 (159) : 1917 Pan Re No. 104 : 45 Cal 94 : 44 Ind App 218 (PC).

(f) Disposal of suit on an erroneous issue. ('78) 1 Cal L Rep 431 (433) (DB).

(g) When the lower Court has failed to determine material issues in the case. (Vol. 11) 1924 Lah 362 (363) * ('66) 2 Bom H C R 297 (300, 301) (DB) * ('91) 15 Bom 24 (26) (DB) * (Vol. 10) 1923 Mad 718 (718) (DB).

(h) Where a suit has been dismissed for default instead of being tried on the merits. ('03) 26 Mad 267 (268) (DB) * ('03) 25 All 194 (195) (DB).

[But see ('02) 29 Cal 60 (62).]

(i) Lower Court deciding case on an admission in a previous suit without considering other evidence. (Vol. 19) 1932 Lah 126 (126) (DB).

(j) Lower Court had not considered the evidence on certain point—Privy Council, because of its imperfect acquaintance with the facts of the case, referred to remand the whole case to framing issues itself. ('78) 3 Cal 645 (653) (PC).

(k) Procedure adopted by lower Court in disallowing question in cross-examination unjustifiable—Judge's manner of dealing with points for determination unsatisfactory—Case remanded for re-trial. (Vol. 27) 1936 Cal 195 (196) (DB).

10. Wrong onus of proof.—[1] Where the lower Court has thrown the burden of proof on the wrong party, the Appellate Court may remand the case for re-trial. (Vol. 28) 1941 P C 99 (101) (PC).]

11. Exclusion of evidence.—[1] Erroneous exclusion of evidence is a good ground for remanding case in exercise of the inherent powers. (Vol. 15) 1928 Mad 991 (992) (DB) * (Vol. 9) 1922 Mad 112 (114) : 45 Mad 449 (DB) * ('11) 10 Ind Cases 441 (All) * (12) 15 Cal L Jour 258 (262) (DB) * (Vol. 4) 1917 Cal 556 (557) (DB).

[2] Failure to allow opportunities to the parties is a ground for remand. (Vol. 28) 1941 Oudh 561 (563) * ('12) 15 Cal L Jour 258 (259, 262) (DB) * (Vol. 23) 1936 Cal 195 (196) (DB) * (Vol. 20) 1933 Bom 303 (304).

[3] Materials before appellate Court insufficient to decide—Remand for retrial after taking fresh evidence can be ordered. (Vol. 17) 1930 Pat 7 (13) (DB) * (Vol. 14) 1927 Nag 192 (192).

O. 41 R. 23 (contd.)

[See however (Vol. 5) 1918 P C 3 (4): 45 Cal 748: 45 Ind App 94 (PC). (In the circumstances of this case their Lordships did not see any justification for remanding the case.)]

[4] Parties omitting to adduce evidence which ought to have been produced at trial. Remand should not be ordered simply to give them an opportunity to produce the evidence. (Vol. 27) 1940 Mad 511 (512) * (Vol. 25) 1938 All 621 (623): I L R (1938) All 952 * (Vol. 31) 1944 All 293 (295): I L R (1944) All 594.

12. Basing decision on inadmissible evidence.—[1] Lower court's decision based on inadmissible evidence—Case can be remanded for retrial under the inherent powers. (Vol. 7) 1920 Pat 726 (726).

[2] Lower Court's decision based on inadmissible evidence also but amply supported by other evidence—Remand not necessary. (Vol. 11) 1924 Cal 370 (371).

13. New plea is not a ground of remand.—[1] A remand cannot be ordered to enable a new plea raised for the first time in appeal to be tried. (Vol. 30) 1943 Nag 178 (181): I L R (1943) Nag 422 (DB) * (Vol. 6) 1919 Oudh 247 (248) * (Vol. 7) 1920 Cal 107 (108) * (Vol. 7) 1920 Cal 569 (570) (DB).

[See (Vol. 3) 1916 Pat 262 (264): 2 Pat L Jour 8 (DB)].

[See however (Vol. 25) 1938 Pat 97 (98): 16 Pat 682 (DB) (Can be done in exceptional cases.)]

14. Remand in appeal from order refusing to set aside ex parte decree.—[1] Application to set aside ex parte decree dismissed on preliminary point—Decision on preliminary point reversed in appeal—Remand can be ordered only in respect of the application and not the suit. (01) 23 All 220 (226): 28 Ind App 23 (10).

[2] Refusal on merits to set aside ex parte decree. The application cannot be remanded for re-trial. ('08) 7 Cal L Jour 379 (380) (DB).

[3] Appeal from order rejecting application to set aside *ex parte* decree—Appeal Court can treat the application as appeal from decree itself and decide it finally. (Vol. 13) 1926 Cal 1232 (1233) (DB).

15. Remand by consent.—[1] A case can be remanded with the consent of parties though a remand may not be permissible otherwise. (Vol. 1) 1914 Mad 15 (15) (DB) * ('05) 28 Mad 437 (440) (DB) * ('08) 12 Cal W N 590 (595, 596) (DB) (Per Mukerjee J.).

[See also ('09) 36 Cal 833 (839): 36 Ind App 221 (PC) (Additional evidence by consent of parties—They cannot subsequently complain about it.)]

[2] A case may be remanded on the agreement of parties for trial on issues not raised in the memorandum of appeal. ('07) 30 Mad 510 (513) (DB).

16. Remand in second appeal.—[1] Where a first appeal has been disposed of on a preliminary point the High Court may, in second appeal, remand the case if it reverses the decision on the preliminary point. ('82) 9 All 29 n (31n) (Expression 'preliminary point' comprehends both points which are pure questions of law and points which are pure questions of fact) * ('87) 1887 Pun Re No. 98, p. 225 (227) (DB) * ('10) 6 Nag L R 20 (23) * (Vol. 3) 1916 Oudh 257 (263).

[See also (Vol. 18) 1931 Cal 353 (355) (DB) (Lower Appellate Court deciding appeal on preliminary point should decide case on merits as well to obviate a remand if the decision on preliminary point is reversed.)]

[2] Where a first appeal was disposed of on a preliminary point the High Court in second appeal may dispose of it without remanding it. (Vol. 3) 1916 Oudh 257 (264).

[3] The High Court has inherent powers to remand even a case which was not decided in a preliminary point in the following circumstances:—

(a) Where the Lower Appellate Court acts in excess of its powers. (1865) 3 Bom H C R A C 59 (62) (DB).

[But see ('67) 8 Suth W R 503 (503) (DB).]

(b) Where the Lower Court misapprehends the true controversy between the parties. ('75) 23 Suth W R 166 (167) (DB) * (Vol. 14) 1927 Lah 480 (480, 481) (DB) * (Vol. 10) 1923 Lah 206 (207) * (Vol. 8) 1921 All 335 (335) (DB).

(c) Failure to decide material issues. (Vol. 13) 1926 Lah 351 (352) * (Vol. 10) 1923 Lah 303 (303) * (Vol. 7) 1920 Lat 642 (643) * ('06) 4 Cal L Jour 86 (87) (DB) * ('76) 25 Suth W R 140 (141).

(a) Where the decision is based upon an incorrect view of the law applicable. (Vol. 18) 1931 Mad 577 (579) * ('08) 11 Oudh Cas 264 (266, 267).

(e) Decision based upon evidence improperly admitted. (Vol. 14) 1927 Lah 45 (45) * (Vol. 3) 1916 Cal 691 (692) (DB) * (Vol. 23) 1936 Lah 788 (789).

(f) Improper exclusion of evidence. (Vol. 6) 1919 Cal 902 (903) (DB) * (Vol. 4) 1917 Cal 78 (79) (DB) * ('95) 17 All 29 (31, 32) (DB).

(g) Where the lower Appellate Court did not comply with the provisions of O. 41, R. 31. ('84) 10 Cal 932 (936) (DB) * ('89) 1899 All W N 178 (179) * ('86) 9 All 26 (33) (DB) * ('08) 35 Cal 815 (816) (DB) * ('08) 31 Mad 469 (470, 471) (DB) * (Vol. 3) 1916 Pat 262 (263, 264): 2 Pat L Jour 8 (DB) * ('34) 152 Ind Cas 220 (221) (Lah).

(h) Non-joinder of necessary parties. ('85) 9 Bom 128 (131) (DB).

(i) Case decided without giving opportunity to prove case. ('04) 8 Cal W N 390 (394).

(j) Issue not decided on merits but taken for granted. (76) 25 Suth W R 38 (38) (DB).

(k) Lower Appellate Court not deciding point with reference to the evidence bearing upon the point but with reference to the pleadings. (Vol. 10) 1923 Pat 174 (175).

(l) Lower Appellate Court not realising the legal effect of admission by the pleader of a party. (Vol. 5) 1918 Cal 282 (283) (DB).

(m) Appeal disposed of on date earlier than date fixed for hearing of appeal—No notice to parties. ('94) 1894 All W N 19 (19).

[4] A case will not be remanded for re-hearing on an issue raised for the first time in second appeal. (Vol. 3) 1916 P C 126 (128, 129): 43 Cal 1104: 43 Ind App 172 (PC).

[5] Unless it is absolutely necessary in the interests of justice, to remand a case, a remand will not be ordered. (Vol. 11) 1924 Nag 65 (65) * (Vol. 9) 1922 Oudh 268 (269).

O. 41 R. 23 (contd.)

[See (Vol. 23) 1936 Pat 539 (542): 15 Pat 709 (DB) (For a small discrepancy in the finding of amount due, the Court is not in second appeal justified in remanding case for a precise finding.)]

[See also (Vol. 23) 1936 P C 83 (88, 89) (PC.)]

[6] Finding based on no evidence—Case ought not to be remanded. (35) 12 Cal 93 (95) (DB).

[7] The High Court cannot in second appeal reverse a finding of fact of the lower Appellate Court and remand a case on the basis of such reversal, unless the finding is vitiated by any illegality or defect as is mentioned in S. 100. (91) 18 Cal 23 (29, 30): 17 Ind App 122 (124) (Overruling 7 All 649).

[See also (Vol. 27) 1940 Pat 33 (36) (Second Appeal—Lower Appellate Court allowing new grounds to be argued without leave being obtained therefor—Procedure adopted erroneous and the error affecting merits of the case case remanded).]

[4] The High Court may itself decide questions of fact where it is in a position to do so satisfactorily from the materials on the record. (Vol. 28) 1941 Pat 118 (123, 124) * (Vol. 18) 1931 Cal 129 (130, 131) (DB) * (Vol. 17) 1930 Cal 235 (238) (DB).

11. Appeal against an order of remand under this rule. [1] Where an appeal would lie from the decree of the Appellate Court an appeal would lie against an order of remand by virtue of O. 43 R. 1. (a) (Vol. 29) 1932 Lah 179 (132) * (Vol. 28) 1941 Nag 304 (305): 11 L R (1941) Nag 629 * (Vol. 23) 1941 Pesh 23 (30) (DB) * (Vol. 27) 1940 Oudh 314 (316): 15 Luck 616 * (Vol. 12) 1925 Mad 433 (434) (DB) * ('02) 6 Cal W N 326 (327, 328) (DB).

[See (Vol. 8) 1921 Lah 154 (155): 2 Lah 252 (DB) (Court of Appeal confirming dismissal of a suit as to a particular reversing decision as to the rest and remanding that part of the case—Plaintiff is a person aggrieved by the order and may appeal).]

[But see ('13) 18 Ind Cas 525 (526) (DB) (11)].

[2] The test is whether, in the circumstances, an appeal would lie if the order of remand were itself treated as a decree and not as a mere order. (Vol. 17) 1933 All 122 (123) (DB) * (Vol. 9) 1922 Lah 170 (181, 182): 3 Lah 218 (FB) (The view taken in 1911 Pun Re. No. 50 was dissented from) * (Vol. 22) 1935 Pat 456 (456) (DB).

[See however (Vol. 10) 1923 Lah 535 (536) (DB). (No special appeal in Punjab against order of remand if it was based on finding as to custom.)]

[3] No appeal lies against an order of remand in a suit of a small cause nature whose value does not exceed Rs. 500. (Vol. 8) 1921 All 55 (55): 43 All 403 (DB) * (Vol. 6) 1919 All 6 (8): 42 All 200 (DB) * (Vol. 3) 1916 Cal 581 (581) (DB).

[See ('11) 34 Mad 502 (503) (DB) (Suit for mesne profits not being of small cause nature, order of remand in such a suit is appealable.)]

[4] An appeal against an order of remand is only maintainable on a question of law. (Vol. 30) 1943 Oudh 274 (276) (DB) * (Vol. 10) 1923 Lah 206 (207) * (Vol. 9) 1922 Lah 97 (98): 2 Lah 25 (DB) * (Vol. 13) 1926 Mad 475 (476) (DB) * (Vol. 8) 1921 Oudh 214 (214) * ('09) 3 Ind Cas 283 (284) (DB) (Mad) * (Vol. 1) 1914 Lah 328 (331): 1914 Pun Re No. 85 (DB).

[Contra ('10) (1910) Pun L R No. 86 p. 247 (248, 249).]

[5] An order of remand is appealable although it may be wrongly passed under this rule. ('40) 72 Cal L Jour 383 (385) * (Vol. 24) 1937 Lah 454 (455) * (Vol. 9) 1922 All 254 (256): 44 All 176 (DB) * (Vol. 12) 1925 Cal 716 (717, 718): 52 Cal 783 (DB) * (Vol. 17) 1930 Lah 221 (222) * (Vol. 15) 1928 Mad 1200 (1200) (DB).

[But see (Vol. 27) 1940 Nag 349 (351, 352): 11 L R (1940) Nag 538 (DB) * (Vol. 23) 1936 Nag 8 (31 Nag L R 52 overruled) * (Vol. 14) 1927 Cal 850 (852, 853): 55 Cal 219 (DB) * (Vol. 14) 1927 Mad 1190 (1190) (DB).]

[6] The test that is usually relied upon to determine that the remand was made under this rule is to see whether Court-fee has been ordered to be refunded. (Vol. 12) 1925 Cal 716 (717, 718): 52 Cal 783 (DB) * (Vol. 15) 1928 Lah 116 (116) * (Vol. 19) 1932 Lah 311 (311) (Refusal to order refund of court-fee indicates that remand is not under this rule).

[But see (Vol. 19) 1932 Lah 219 (220) * (Vol. 23) 1936 Pat 491 (492).]

[7] Where an order of remand is made in an appeal against an order under O. 43 R. 1, no further appeal is competent. ('07) 1907 Pun Re No. 120, p. 547 (550) * ('95) 19 Maj 167 (168) * (Vol. 26) 1939 Lah 65 (65, 66) * (Vol. 17) 1930 All 122 (123) (DB) (Appeal under O. 43 R. 1 (a)—Remand) * ('11) 33 All 479 (480) (DB) (Do) * ('13) 1913 Pun L R No. 101 p. 381 (382) * (Vol. 13) 1926 Mad 900 (900, 901) (D).

[See also ('06) 3 All L Jour 120 (122, 123) (DB) (Order refusing review—Appeal—Remand in—Held that no appeal being competent from orders refusing review, the appeal was not one under S. 583 and hence the bar of the second paragraph of Section 583) * (Vol. 26) 1939 Oudh 104 (105) (DB).]

[8] An order of remand can be appealed from after it has been carried out and the lower Court has decided the suit on the merits in accordance with the order of remand. ('08) 30 All 479 (482) (FB) * (Vol. 20) 1933 Rang 413 (415) * ('02) 1902 Pun Re No. 37, p. 139 (140) (1900) 1900 Pun L R 314 (315): (1891) Pun Re No. 89 (FB) followed) * ('12) 8 Nag L R 42 (43) * ('12) 15 Oudh Cas 43 (44) * ('12) 15 Oudh Cas 33 (39).

[See also (Vol. 27) 1940 Lah 290 (291)].

[But see ('11) 15 Cal W N 830 (832) (DB) * ('05) 32 Cal 1023 (1029) (DB)].

[9] An appeal lies against an order regarding costs in an order of remand. ('89) 1889 Pun Re No. 89 p. 324 (324).

[10] Ordinarily, in appeal from an order of remand Appellate Court would not modify order without first issuing notice to the opposite party. But if the remand order has been modified without notice to the other party the order modifying the remand order though irregular is not *ultra vires* and without jurisdiction. (Vol. 19) 1932 All 16 (17, 18) (DB).

[11] An appeal against an order of remand should be filed as a miscellaneous appeal and not as a second appeal. (Vol. 20) 1933 Oudh 191 (192): 8 Luck 376 (DB).

18. Appeal from order of remand under inherent power. [1] There is no right of appeal against an order of remand under the inherent power of the Court. (Vol. 30) 1943 Oudh 35 (35) (DB) * ('43) 1943 Oudh W N 310 (311) (DB) * (Vol. 29) 1942 Pat 195 (196) (DB) * (Vol. 28) 1941 Nag 308 (310): 11 L R (1942) Nag 487 * ('41) 196 Ind Cas 562 (562) (Pat) * ('40) 72 Cal

O. 41 R. 23 (contd.)

L Jour 383 (384) * (Vol. 27) 1940 Oudh 387 (389) : 16 Luck 65 (DB) * (40) 15 Luck 448 (450) (DB) * ('21) 68 Ind Cas 858 (858) (DB) (All) * (Vol. 14) 1927 Cal 642 (643, 644) (DB) * (Vol. 19) 1932 Lah 811 (811). (The fact that an order under this rule might have been made will not make it appealable) * (Vol. 19) 1932 Lah 219 (220) * (Vol. 32) 1945 Oudh 133 (134, 135) * (Vol. 16) 1929 Mad 205 (207, 208) (DB) * (Vol. 12) 1925 Mad 229 (229) : 48 Mad 713 (DB) * (Vol. 16) 1929 Nag 63 (63, 64) : 26 Nag L R 44 * (Vol. 7) 1920 Pat 666 (666) (DB) * (Vol. 12) 1925 Rang 320 (320) : 3 Rang 490 (DB) * (Vol. 11) 1924 Rang 177 (177) : 1 Rang 656 (DB).

[2] Order silent as to whether it was passed under S. 151 or under this rule. Though circumstances do not bring it within the scope of this rule it should be presumed as one passed under this rule. (Vol. 9) 1922 All 254 (256) : 44 All 176 (DB) * (Vol. 14) 1927 Cal 401 (402) (DB) * (Vol. 15) 1928 Lah 753 (753) * (Vol. 9) 1922 All 226 (228) : 44 All 492 (DB) * (Vol. 15) 1928 Lah 116 (116) * (Vol. 12) 1925 Cal 1157 (1159) (DB).

[See however (Vol. 20) 1933 Sind 279 (289, 290) : 27 Sind L R 341 (FF). (Appellant must satisfy Court that order of remand was one which could be passed under this rule)].

[But see (Vol. 7) 1920 Mad 898 (899) (DB)].

[3] Remand of a case where several issues were left undecided is to be held as one made under this rule. (Vol. 21) 1934 Mad 643 (643).

[4] Where an order of remand under the Court's inherent powers amounts to an adjudication under S. 2, Cl. (2) it will be appealable as a decree under S. 96. (Vol. 28) 1941 Cal 446 (447) * (Vol. 27) 1940 Nag 349 (353) : 1 L R (1940) Nag 533 (DB) * (Vol. 12) 1925 Cal 716 (717, 718) : 52 Cal 783 (DB) * (Vol. 15) 1928 Nag 68 (68) * (Vol. 9) 1922 Mad 112 (115) : 45 Mad 449 (DB).

[5] Trial Court rejecting plaint for want of sufficient Court-fee—Appellate Court remanding case for trial on merits after holding proper court-fee has been paid—No second appeal lies against the order. (Vol. 32) 1945 Mad 430 (430, 431) : 1 L R (1945) Mad 886.

19. Order of remand—When will amount to a decree.—[1] Where the order does not decide the rights of parties it will not amount to a decree. (Vol. 29) 1942 Pat 195 (196) (DB) * (Vol. 7) 1920 Pat 738 (overruled) * (Vol. 14) 1927 Cal 850 (851) : 55 Cal 219 (DB) * (Vol. 16) 1929 Nag 63 (63) : 26 Nag L R 44 * (Vol. 23) 1936 Pesh 79 (79) (DB) * (Vol. 22) 1935 Pat 49 (51) (DB).

20. Letters Patent appeal.—[1] An order of remand by a single Judge of the High Court whether passed under this rule or in exercise of inherent powers is a "judgment" within the meaning of Cl. 15 of the Letters Patent, and is appealable as such. (09) 13 Cal W N 105 (108). (Remand under O. 41 R. 23) * (Vol. 20) 1933 All 262 (263) : 55 All 326 (FB). (Clause 10 Letters Patent (Allahabad). Remand under O. 41 R. 23) * ('08) 35 Cal 1098 (1098) (DB). (Remand under O. 41 R. 23. Remand under inherent powers) * ('99) 21 All 178 (180). (Clause 10, Letters Patent of the Allahabad High Court order under inherent powers) * (Vol. 9) 1922 Pat 381 (385) : 1 Pat 246 (DB). (Reversing (Vol. 7) 1920 Pat 86—Clause 10, Letters Patent of the Patna High Court order under inherent powers).

21. Powers of High Court in appeal from order of remand.—[1] Appeal from Order of Remand—High Court can not only decide the validity of the order but can enter into the merits of the decision by first Court on the preliminary point. ('81) 3 All 675 (680) (FB) * ('90) 14 Bom 14 (17) (FB) * ('90) 17 Cal 163 (170, 171) (DB) * ('80) 5 Cal 144 (146) (DB) * ('03) 1903 Pan Re. No. 1, page 1 (3) (FB) * ('95) 1895 Pan Re. No. 85, page 404 (406, 407) (FB). (Overruling 1866 Pan Re. No. 126) * ('12) 15 Oudh Cas 33 (35).

[But see ('05) 28 Mad 444 (451, 452) (DB)].

[2] High Court hearing appeal from an order of remand may if possible dispose of the case itself. ('94) 16 All 252 (254) (DB) * ('12) 15 Oudh Cas 33 (35) * ('97) 20 Mad 152 (154) (DB).

[See also (Vol. 22) 1935 Mad 707 (708).]

[3] In an appeal from an order of remand wrongly passed under this rule the High Court may enter into the merits of the lower Court's decision and dispose of the case itself. ('98) 1898 Pan Re. No. 56 page 135 (187) (DB).

[4] In an appeal against an order of remand wrongly passed under this rule the High Court may remand it to the lower Appellate Court according to the necessities of the case. ('85) 7 All 136 (139, 140) (DB).

[5] The High Court in an appeal from an order of remand cannot go into any questions unconnected with the correctness of the order of remand. (Vol. 15) 1928 Maj 430 (432) (DB) * ('02) 1902 Pan Re. No. 28 page 111 (113) (DB).

[See also ('86) 8 All 172 (176, 177) (FB)—(Overruled in 9 All 147 (FB) on another point)].

22. To what Court remand can be made [1] Ordinarily a case should be remanded to the Court from whose decree the appeal is preferred and to no other Court. ('95) 19 Bom 303 (306) (DB) * ('13) 1913 Pan L R No. 279 p. 939 (941).

[2] Appellate Court having power to transfer the case to another Court does nothing illegal in transferring the case to such other Court. (Vol. 9) 1922 Lah 239 (240) * ('09) 1 Ind Cas 110 (112) (Cal) * (Vol. 4) 1917 Cal 201 (203) (DB) * ('13) (1913) Pan L R No. 279 p. 939 (941).

[3] A remand cannot be made to a person who has no jurisdiction to decide the case. (Vol. 20) 1933 Maj 471 (475).

23. Effect of order of remand.—[1] An order of remand re-opens the whole case for retrial by the lower Court except in regard to matters decided by the order of remand. (Vol. 3) 1916 Cal 77 (78) (DB) * (Vol. 15) 1928 Mad 14 (14) * (Vol. 6) 1919 Maj 150 (153) (DB).

[See also ('89) 12 Moo Ind App 495 (502, 503) (PC)].

[2] Where a suit is remanded, the lower Court cannot raise another preliminary point which was not the subject matter of the appeal, and decide the case thereon. (Vol. 3) 1916 All 215 (215) (DB) * ('05) 2 Cal L Jour 403 (405, 407) (DB) * ('84) 8 Bom 535 (537) (DB) * ('78) 2 Bom 120 (130, 131) (SB).

[But see ('97) 1897 All W N 108 (109) (DB) * (Vol. 9) 1922 Mad 514 (516, 517) (DB) * ('07) 11 Cal W N 330 (336) (DB)].

[3] Party abstaining from trial proceedings and failing to appeal against order of lower Court cannot appear as an objector on remand. (Vol. 20) 1933 Lah 948 (949) (DB).

O. 41 R. 28 (*contd.*)

[4] Appellate Court cannot pass any order in a remanded suit unless and until it comes before it in appeal. ('83) 1883 All W N 171 (172) (DB) * (Vol. 23) 1936 Nag 140 (141) : 1 L R (1936) Nag 188.

[5] Appellate Court remanding a case for addition of a necessary party and trial—Before that party to be added is heard, Appellate Court should not indicate the order which should be passed by the lower Court. (Vol. 19) 1932 PC 146 (150, 151) (PC).

[4. Effect of improper order of remand.—[1] An interim order of remand is not one passed without jurisdiction and neither the order nor subsequent proceedings based on it can be interfered with unless the decision of the case on merits or the jurisdiction of the Court is in any other respect has been affected. ('89) 13 Bom 449 (453) (FB) * (Vol. 10) 1923 Cal 385 (386) (DB) * (Vol. 1) 1914 Cal 163 (164) : 41 Cal 108 (DB).

[But see ('90) 12 All 510 (513, 514, 519, 522) (FB) * ('09) 32 Ma 1 83 (85) (DB) * ('96) 19 Ma 1 479 (481) (DB) * (Vol. 7) 1920 Pat 86 (87, 88).]

[2] If an Appellate Court passes an order of remand in a matter over which it has no jurisdiction, the order is *ultra vires*. ('89) 11 All 35 (38, 39, 40) (DB). (In such cases S. 99 will not apply.)

[See however ('09) 1 Ind Cas 460 (461) (DB) (Lah).]

[3] Remand order set aside—Subsequent proceedings based on it also fall with it. (Vol. 9) 1922 All 35 (37) : 44 All 211 (DB).

[4] Remand order set aside—Decree of original Court is restored—Limitation for execution runs from appellate order. ('02) 5 Oudh Cas 301 (303).

25. Matters decided by order of remand, finality of—[1] An order of remand under this rule if not appealed against becomes final. (Vol. 27) 1940 Lah 290 (291) * (Vol. 7) 1920 Lah 193 (193, 194) * (Vol. 23) 1936 Cal 590 (592).

[See however (Vol. 14) 1927 All 694 (695)—Order of remand not appealed against—Appeal against decree to High Court—High Court bound to take notice of subsequent event making order of remand nugatory.]

[2] Persons not aggrieved by an order of remand can attack it in an appeal from the first decree after remand. (Vol. 18) 1931 Oudh 242 (243) (DB) * (Vol. 23) 1941 Mad 530 (531, 532) : 1 L R (1941) Mad 850 (FB).

[3] A point can be raised by the appellate Court *suo motu* though party may be precluded. (Vol. 13) 1926 Nag 147 (148).

[4] Suit *prima facie* barred but plaintiff not stating facts saving it from bar—Question of bar raised only in appeal and remand to give opportunity to plaintiff to prove acknowledgment—Order appealed against by defendant but dismissed—Defendant can attack the order in the appeal from the decree. (Vol. 23) 1941 Pat 147 (151) : 19 Pat 938 (DB).

[5] An order of remand under this rule is, as regards the Court passing the order, conclusive on all points decided thereby which cannot be re-opened in that Court in appeal from the decision of the lower Court on remand. (Vol. 10) 1923 Pat 226 (228) (DB) * (Vol. 8) 1921 All 276 (277) : 43 All 377 (DB) * (Vol. 9) 1922 Oudh 236 (243) : 25 Oudh Cas 189 (DB) * (Vol. 5) 1918 Nag 193 (195) (DB) * ('09) 32 Ma 1 318 (320) (DB) * (Vol. 19) 1932 All 603 (604) (DB) * (Vol. 5) 1918 Cal 182 (182) (DB) * (Vol. 10) 1923 Oudh 50 (51) : 25 Oudh Cas 254 (DB) * (Vol. 9) 1922 Pat 884

(885) : 1 Pat 246 (DB). (Letters Patent appeal reversing (Vol. 7) 1920 Pat 86) * ('10) 34 Ma 1 72 (73) * ('10) 12 Cal L Jour 428 (433) (DB) * (Vol. 26) 1939 Lah 423 (424) : 1 L R (1940) Lah 70 (DB).

[6] Court to which the case is remanded cannot go behind the order of remand. ('76) 25 Suth W R 157 (159, 160) (PC) * (Vol. 8) 1921 Nag 129 (130).

[See (Vol. 3) 1916 Mad 421 (421, 422) (DB).]

[7] An order of remand does not preclude the determination of points not conclusively decided by it. (Vol. 28) 1941 Cal 446 (447, 448) * ('11) 11 Ind Cas 6 (7) (DB) (Cal) * (Vol. 15) 1928 Bom 201 (202) (DB) * (Vol. 12) 1925 Oudh 527 (528) (DB) * ('12) 14 Oudh Cas 321 (323) (DB).

[8] Different conclusions from the one previously arrived at can be held in respect of points not touched by the order of remand. (Vol. 28) 1941 Nag 188 (190, 191) : 1 L R (1942) Nag 441 (DB) * (Vol. 7) 1920 Cal 350 (351) (DB) * (11) 14 Oudh Cas 321 (323, 324) (DB) * (Vol. 19) 1932 Oudh 123 (126) : 7 Luck 454 (DB) * (Vol. 25) 1938 All 388 (389).

26. Jurisdiction after remand depends upon the order of remand.—[1] It is only that Court to which the case is remanded that can try it. (Vol. 10) 1923 Mad 351 (351, 352).

[2] A case remanded to a District Court can be transferred by it to any other Court subordinate to it and competent to try it. (Vol. 9) 1922 All 35 (36) : 44 All 211 (DB) * (Vol. 1) 1914 Cal 638 (639) (DB)].

[3] An order of remand cannot confer on the lower Court—Jurisdiction which it would not have possessed but for the order of remand. (Vol. 16) 1929 Lah 534 (535) (DB) * (Vol. 2) 1915 Mad 1223 (1227) : 39 Mad 195 (FB).

[4] The lower Court can have no jurisdiction to enter into questions which fall outside the limits of the enquiry referred to it. ('81) 7 Cal L Rep 103 (106) (DB).

[5] All questions included within the scope of the enquiry referred to it can be dealt with by the lower Court. (Vol. 3) 1916 Cal 722 (726) (DB). (Remand order to find whether a person has a title includes an enquiry as to whether he has lost the title or whether he is precluded from relying upon the title).

27. Procedure after remand.—[1] When a case is remanded for re-trial the Court is to proceed *de novo* and is entitled to take evidence again even of those witnesses who had already been examined. (67) 8 Suth W R 285 (287) (DB) * ('68) 10 Suth W R 491 (492) (DB).

[2] Where the remand is only to enable the Judge in the lower Court to record his reasons for his judgment, a trial *de novo* is *ultra vires*. (1865) 2 Suth W R 275 (276) (DB) * ('66) 1 Ind Jur (N S) 101 * ('66) 5 Suth W R 124 (124) (DB).

[3] When the lower Court has not properly carried out the order of remand, the case may be again remanded to it. ('64) 1864 Suth W R Misc 39 (40) (DB).

[But see ('67) 8 Suth W R 503 (503) (DB).]

[4] Where a case is remanded to the lower Court for re-trial the parties are not entitled as of right to notice of the date fixed for re-hearing. (Vol. 12) 1925 Nag 31 (31) * ('11) 7 Nag L R 172 (174).

[5] Nor are the parties entitled to notice of the receipt of records by the lower Court. (Vol. 20) 1933 Cal 83 (85) (DB) * (31) 8 Oudh W N 1285 (1287).

24. Where the evidence upon the record is sufficient to enable the Appellate Court to

Where evidence on record sufficient, Appellate Court may determine case finally.

pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

[1882—S. 565; 1877—S. 565; 1859—S. 353.]

O. 41 R. 23 (contd.)

[6] The parties are entitled to have a reasonable date fixed for further hearing. ('70) 14 Suth W R 401 (402) (DB) * ('63) 9 Suth W R 294 (295) (DB).]

[7] No fresh vakalatnama is necessary in a remanded case. (1864) 1 Suth W R 276 (277) (DB).

28. Refund of court-fee on remand.—[1] Where a remand is made under this rule the Appellate Court is bound to order a refund of the court-fee. ('42) 1 L R (1942) All 84 (85) * (Vol. 5) 1918 Bom 157 (157, 158): 42 Bom 363 (DB) * (Vol. 21) 1934 Ma 643 (644) * (Vol. 17) 1930 Lah 441 (442) * (Vol. 19) 1932 Lah 311 (311) * (Vol. 13) 1932 All 641 (642): 54 All 1031 (SB).

[2] Refund of court-fee cannot be ordered where the remand is under the inherent powers of the Court. (Vol. 5) 1918 Nag 271 (272) * (Vol. 3) 1916 Nag 17 (18): 12 Nag L R 126 * (Vol. 20) 1933 Pesh 101 (104) (DB) * (Vol. 23) 1936 Rang 208 (209, 210): 14 Rang 173 (FB) * (Vol. 5) 1918 Pat 260 (261): 3 Pat L Jour 116 (DB).

[But see (Vol. 20) 1933 Lah 135 (135) * (Vol. 17) 1930 Lah 441 (442) (Power is discretionary)]

[3] When an appeal is remanded as to a part, the appellant is entitled to a refund of a proportionate part of the court-fee. ('66) 6 Suth W R Misc 65 (68) (FB) * (Vol. 4) 1917 All 314 (314, 315).

29. Costs.—[1] Court that remands has power to apportion costs. (1865—66) 10 Moo Ind App 476 (489) (PC) * ('92) 1892 All W N 205 (216) (Ordinarily costs must be left to abide the result.)

[2] Costs of remand can be recovered only if order of remand provides for them. ('70) 13 Suth W R 39 (40) (DB).

[3] Remand due to appellant's failure to press the case properly in the lower Court—The appellant should be saddled with the costs. (Vol. 20) 1933 All 216 (217) (DB) * (Vol. 3) 1916 Mad 429 (430) (DB).

30. Revision.—Remand under O. 41 R. 23.—[1] No revision lies against an order of remand made under R. 23. (Vol. 20) 1933 Pesh 48 (49) (DB).

[But see (Vol. 27) 1940 Lah 290 (291).]

[2] Even if an order of remand is not justified under the terms of this rule it is not a case of want of jurisdiction within the meaning of S. 115 as the Court has inherent jurisdiction to remand. ('21) 64 Ind Cas 436 (437) (Cal).

[See (Vol. 27) 1940 Nag 349 (353): 1 L R (1940) Nag 538 (DB).]

[3] No revision lies against an order of remand under the inherent power of the Court which does not decide any rights of the parties. (Vol. 14) 1927 Mad 1190 (1190) (DB) * (Vol. 14) 1927 Ma 335 (336) (DB) * (Vol. 8) 1921 Mad 716 (716) (DB) * (Vol. 29) 1942 Oudh 334 (335) * (Vol. 29) 1942 Oudh 370 (371)

(DB) * (Vol. 10) 1923 Bom 401 (401) (DB) * ('12) 13 Ind Cas 855 (855) * ('12) 1912 Pun L R No. 140 * (Vol. 11) 1924 Lah 487 (487).

[But see (Vol. 27) 1940 Oudh 367 (368): 16 Luck 65 (DB) * (Vol. 12) 1925 Cal 716 (718): 52 Cal 783 (DB) * (Vol. 17) 1930 All 863 (864) (DB) * (Vol. 14) 1927 Cal 401 (402) (DB) * ('21) 63 In Cas 853 (858) (DB) (All) * (Vol. 18) 1931 Lah 302 (302) * (Vol. 12) 1925 Mad 171 (172) (DB) * (Vol. 18) 1931 Mad 1 (5) (DB) * (Vol. 23) 1936 Pat 160 (161) (DB).]

[4] A revision will lie in the following cases:

(a) Where an Appellate Court entertains an appeal from an unappealable order and remands the case. ('06) 3 All L Jour 120 (123) (DB).

(b) Where an Appellate Court remands a case to a Court which is not competent to try it. (Vol. 2) 1915 Mad 1223 (1234, 1235): 39 Mad 195 (FB).

(c) Remand directing the lower Court to return the plaint where the lower Court has jurisdiction to try the suit. (Vol. 10) 1923 Lah 524 (525).

[5] An appeal filed against an order passed under inherent powers cannot be treated as an application for revision. (Vol. 32) 1945 Oudh 133 (134, 135).

31. Local Amendm nts.—[1] O. 41 R. 23 (Allahabad) See ('42) 1 L R (1942) All 84 (85).]

[2] O. 41 R. 23 (Oudh) (See (Vol. 27) 1940 Oudh 387 (388): 16 Luck 65 * (Vol. 26) 1939 Oudh 157 (158) * (Vol. 31) 1944 Oudh 130 (130, : 20 Luck 45 (DB) * (Vol. 31) 1944 Oudh 117 (118): 19 Luck 411 (DB).]

[3] O. 41 R. 23 A (Lahore) (See (Vol. 29) 1942 Lah 201 (203): 1 L R (1943) Lah 569 (DB) * (Vol. 27) 1940 Lah 68 (64): 1 L R (1940) Lah 593).

ORDER 41 RULE 24—Note 1.

[1] This rule enables the Appellate Court to dispose of a case finally without a remand if the evidence on the record is sufficient for the purpose. ('11) 10 Ind Cas 225 (226) (All) * ('95) 17 All 112 (116): 22 Ind App 1 (PC) * ('91) 13 All 53 (63): 17 Ind App 150 (PC).

[2] When a new case is pleaded in the Appellate Court, that Court will not act under this rule unless the case arises on the facts stated in the pleadings and the opposite party is not taken by surprise. (Vol. 4) 1917 Cal 469 (475, 478) (SB) * ('75) 12 Bom HCR 23 (28, 49) (DB).

[See also ('13) 7 Low Bur Rul 79 (80)].

[But see (Vol. 4) 1917 Cal 196 (197) (DB)].

[3] In an appeal against an order returning a plaint for presentation to the proper Court, the Appellate Court cannot decide the suit on merits; the appeal, not being against the decree in the suit. (Vol. 14) 1927 Oudh 218 (219).

25. Where the Court from whose decree the appeal is preferred has omitted to frame or

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from. try any issue, or to determine any question of facts, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

[1882—S. 566; 1877—S. 566; 1859—S. 354.]

ORDER 41 RULE 25—SYNOPSIS.

1. Scope of the rule.
2. "Has omitted to frame or try any issue."
3. "May, if necessary, frame issues."
4. "Shall direct such Court to take the additional evidence required."
5. What Court may try the issues remitted.
6. Powers and duties of Court to which issues are remitted.
7. New issues raised before the Appellate Court.
8. Remand in second appeal.
9. Appeal.
10. Letters Patent appeal.
11. Revision.

1. Scope.—Where the lower Court has failed to try any issue or determine any question of fact essential to the right decision of the suit on the merits the Appellate Court can remit the case for findings. (Vol. 7) 1920 P C 67 (63); 43 Mad 537; 47 Ind App 76 (P C) * ('79) 4 Cal 744 (746); 6 Ind App 15 (P C) * ('86) 9 Mad 44 (45) (FB) * ('84) 7 Mad 3 (10) (FB) * (Vol. 18) 1931 P C 136 (140); 53 All 190; 58 Ind App 173 (P C) * (Vol. 29) 1942 Lah 201 (203); 11LR (1943) Lah 569 (Finding that trial Court did not frame proper issues and wrongly excluded certain documentary evidence—Case should be remanded).

[2] Lower Court not deciding the case on a preliminary point—Omission to try material issue or to determine a material question of fact—The Appellate Court may retain case on its own file and remit issues for findings. (Vol. 2) 1915 All 460 (461) (DB) * (Vol. 21) 1934 Lah 576 (579) (DB) * (Vol. 22) 1935 Lah 161 (161) * (Vol. 16) 1929 Bom 175 (176); 53 Bom 335 (DB) * (Vol. 13) 1926 Cal 976 (977) (DB) * (Vol. 13) 1926 Cal 954 (954, 955) (DB) * (Vol. 12) 1925 Mad 169 (170) (DB) * (Vol. 10) 1923 Mad 227 (228) (DB) * (Vol. 4) 1917 Pat 463 (464) * (Vol. 24) 1937 All 580 (581).

[3] Mere fact that the case can be remanded under R. 23 is no bar to a remand under this rule. ('99) 1899 All W N 2 (3).

[4] Appeal from order under O 7 R. 10—Appellate Court cannot remand issues which would have arisen if the lower Court had entertained the suit. (Vol. 12) 1925 Oudh 393 (394); 29 Oudh Cas 21.

2. "Has omitted to frame or try any issue."—[1] Where the lower Court has not omitted to decide any issue or any question of fact, a remand cannot be ordered. (Vol. 29) 1942 Lah 1 (6); 1 L R (1942) Lah 59 (FB) * (Vol. 1) 1914 Oudh 103 (103) * (Vol. 6) 1919 Cal 945 (945) (DB) * ('89) 2 C P L R 113 (114) * (Vol. 9) 1922 Pat 575 (577); 1 Pat 639 (DB) * (Vol. 15) 1928 Cal 546 (547); 58 Cal 15 (DB) * (1900) 1 Low

Bur Ral 143 (143) * (Vol. 4) 1917 Pat 139 (140); 2 Pat L Jour 564 (DB) * ('93) 16 Mad 299 (301) (P C).

[2] A case cannot be remanded to enable a party to provide evidence which he failed to give at the trial. (Vol. 27) 1940 Mad 511 (512) * ('87) 9 All 513 (518, 519) (DB) * ('80) 5 Cal 233 (285, 286) (DB) * (Vol. 25) 1938 All 621 (623); 1 L R (1938) All 952 * (Vol. 22) 1935 Pat 499 (500) (DB).

[See also (Vol. 14) 1927 Bom 125 (126, 127) (DB) * (Vol. 11) 1924 Cal 396 (397) (DB) * (Vol. 14) 1927 Lah 272 (273); 8 Lah 123 (DB)].

[3] Where the lower Court has not arrived at its findings after a full and proper trial a remand can be made. ('94) 18 Bom 250 (255) (DB) * ('85) 7 All 649 (655) (FB) (Note.—Overruled in 18 Cal 23; 17 Ind App 122 (P C) and 20 Cal 93; 19 Ind App 238 (P C) on a different point.) * ('95) 17 All 117 (119, 120) (DB) * (Vol. 16) 1929 Lah 376 (377).

[See also (Vol. 28) 1941 Oudh 561 (562). (Court has inherent power to remand—Lower Court improperly refusing to allow a witness to be examined—Remand for further evidence and fresh finding is justified) * (Vol. 27) 1940 Mad 511 (512). (No evidence as to assets and liabilities out of which maintenance was to be paid—Appellate Court finding appellant entitled to maintenance and remanding case for further evidence that was wanting—The order of remand held was not improper)].

[But see ('69) 11 Suth W R 35 (36) (DB)].

[4] The omission by plaintiff to press a certain point is no ground for refusing to remit an issue on the point where the issue was not framed or tried. ('02) 4 Bom L R 818 (820) (DB).

[But see (Vol. 7) 1920 Cal 325 (326) (DB)].

3. "May, if necessary, frame issues."—[1] Every case in which the lower Court has failed to frame or decide any issue need not be remitted. ('70) 13 Moo Ind App 573 (583) (P C) * (Vol. 15) 1923 Mad 635 (636) (DB).

[2] The Court in each case has the discretion to remand or not. (Vol. 10) 1923 Cal 291 (292) (DB) * ('79) 4 Cal 190 (204, 205); 5 Ind App 149 (P C).

[See also (Vol. 27) 1940 All 24 (27); 1 L R (1939) All 901 (DB). Suit contested by one of the defendants—Other defendants *ex parte* throughout—Partial decrees—Plaintiff's appeal—Non-contesting defendants made parties to complete array of parties—Remand at the instance of plaintiff—Non-contesting defendant was not allowed to raise fresh issue—Such issue not remitted as it would prejudice contesting parties) * (Vol. 5) 1918 P C 3 (4); 45 Cal 748; 45 Ind App 94 (P C).

O. 41 R. 25 (contd.)

[3] No formal issue—Question fully tried after affording all opportunities to the parties to produce evidence—Remand not necessary. (Vol. 11) 1924 Bom 113 (114) (DB) * ('07) 29 All 184 (195) : 34 Ind App 27 (PC) * (Vol. 19) 1932 Lah 293 (294) : 13 Lah 399 (DB).

[4] Where the parties have led evidence fully on the point a remand is not necessary. (Vol. 14) 1927 All 410 (411) * (Vol. 6) 1919 Lah 119 (120) * (Vol. 5) 1918 Lah 264 (265).

[5] Wrong issue framed but finding given on point which would have been raised if correct issue had been framed—High Court in second appeal refused to remand for a new finding on that issue. ('97) 21 Bom 325 (327) (DB).

[6] Where a point is newly raised in the Appellate Court opposite party should be given an opportunity to meet the new case. (Vol. 2) 1915 Lah 251 (251) * (Vol. 4) 1917 Cal 196 (197) * (DB) * ('89) 1839 Bom P J 333 (333) (DB).

[7] Where there is no possibility of the party asking for remand establishing his case remand should not be ordered. (Vol. 12) 1925 Oudh 97 (98) : 27 Oudh Cas 383.

[8] An order for remand under this should specify the issues to be tried by the lower Court. (1900) 27 Cal 951 (960) : 27 Ind App 110 (PC).

[See (Vol. 14) 1927 Cal 657 (658) (DB). (Order merely sending back papers with directions to record clear findings is not one under Rule 25).

4. "Shall direct such Court to take the additional evidence required."—[1] The Appellate Court has discretion to direct the lower Court to find on a specific issue on a consideration of the evidence in the case without also directing the taking of further evidence. ('12) 15 Ind Cas 670 (671) (All) * ('94) 1894 All W N 158 (158) (DB).

[2] Where the appellate Court has not directed the lower Court to take further evidence, the lower Court may take further evidence. ('96) 19 Mad 127 (139) (DB) * (Vol. 24) 1937 Lah 639 (640).

[3] Where there is no direction to take further evidence the Court is not bound to take it. ('13) 20 Ind Cas 35 (36) (DB) (Cal).

[See also ('88) 1888 All W N 81 (81) (DB). (It is not a matter of right that further evidence can be taken upon remand—Duty of Court to which issues are remitted is to try those issues upon evidence on record].

[But see ('81) 1881 All W N 75 (76) (DB). (Omission to direct further evidence to be taken—Still party is entitled to adduce further evidence)].

5. What Court may try the issues remitted.—[1] Where issues are referred to the Court from which the appeal was preferred, no other Court has power to try them. ('07) 29 All 660 (662) (DB).

[2] An order remitting issues to a Court other than that from which the appeal has been preferred, is not one without jurisdiction but is only an error of procedure. ('86) 1886 Pan Re No. 111, Page 263 (264).

[3] Lower Court losing territorial jurisdiction during pendency of appeal—High Court remanding issues for finding—*Held* Court was deemed to have

retained jurisdiction in pending cases or that order of remand should be deemed to be an order transferring the case. ('10) (1910) Mad W N 477 (478) (DB).

[4] Though an order of remand was made by a Court which had no jurisdiction to deal with the case, the result of the enquiry made in pursuance of the order could be taken into consideration by the Appellate Court which subsequently dealt with the case. ('09) 1 Ind Cas 460 (461) (DB) (Lah). 8.

[5] Additional District Judge remanding case to a Subordinate Judge—District Judge can transfer the proceedings to another Subordinate Judge. (Vol. 20) 1933 Lah 29 (31) : 13 Lah 806.

6. Powers and duties of Court to which issues are remitted.—[1] A Court to which issues are remitted under this rule can only try the issues and has no power to decide the *suit itself*. (Vol. 28) 1941 Nag 308 (310) : 1 L R (1942) Nag 487 * ('01) 23 All 167 (171) (DB) * ('74) 22 Suth W R 207 (208) (DB). (Court to which issue is sent down for trial has no authority to consider matters not covered by the issue—Hence, it has no power to refer the whole case to arbitration) * ('11) 8 All L Jour 894 (895) (DB) * ('90) 7 Cal L Rep 103 (105, 106) (DB).

[See however ('70) 13 Suth W R 91 (93) (DB)].

[2] The suit pending the trial of the issues by the lower Court continues to be pending in the Appellate Court. (Vol. 19) 1932 Rang 137 (137) : 10 Rang 335 (DB).

[3] The Court to which issues are remitted has no power to refer the case to arbitration. ('85) 7 All 523 (526) (DB) * ('74) 22 Suth W R 207 (208) (DB) * ('06) 1906 All W N 221 (222).

[4] Court to which issues are remitted cannot delegate its function of deciding the remanded issues to any other Court. ('92) 14 All 23 (24, 25) * (Vol. 14) 1927 Lah 769 (770) * ('13) 1913 Pan Re No. 105 (DB) * (Vol. 3) 1916 Sind 93 (93) : 9 Sind L R 148 (DB).

[See ('07) 29 All 660 (662) (DB) * ('95) 19 Bom 551 (552, 553) (DB) * ('09) 3 Sind L R 120 (120) (DB).

[5] Remand by High Court of issues to the lower Appellate Court for findings, the latter can direct the Court of first instance to take further evidence. (Vol. 3) 1916 Sind 93 (93) : 9 Sind L R 148 (DB) * (Vol. 5) 1918 Lah 342 (342) * (08) 32 Bom 441 (445) (DB) * ('09) 3 Sind L R 120 (120) (DB).

[6] The lower appellate Court to which issues are remitted can appoint a Commissioner to examine witnesses under S. 75 of the Code. (Vol. 12) 1925 Lah 39 (41) : 5 Lah 252 (DB).

[7] The Court to which issues are remitted cannot decide only some of the issues and say that in view of the law its finding on the other issues is not necessary. (Vol. 14) 1927 Bom 594 (599) : 61 Bom 1026 (DB).

[8] Where direction is to record a finding after taking evidence the parties should be allowed to produce evidence. (Vol. 8) 1921 All 127 (128) * (Vol. 26) 1939 Lah 339 (339) (Opinion on issues without hearing parties is no opinion).

[9] Finding recorded without allowing parties to produce evidence—On such recording the Court does

Findings and evidence to be put on record. Objections to finding.

Determination of appeal.

26. (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

[1882—S. 567; 1877—S. 567; 1859—S. 354.]

O. 41 R. 25 (contd.)

not become *functus officio*—It can restore case and allow production of evidence. (Vol. 8) 1921 All 127 (128).

[10] After a case is remanded under this rule the lower Court cannot add new parties to the suit. 1907 Pan L R No. 20 page 45 (45).

[11] The lower Court even after remand of the case can bring on record the legal representatives of a deceased appellant. 7 Oudh Cas. 17 (18) (DB).

[12] Where the appellate Court remits one of two points involved on which the lower Court failed to decide, and a decision on the point remitted is necessary only if the other point is not accepted by the Appellate Court the order of remand should be construed to mean that the decision on the other point has been confirmed. (Vol. 9) 1922 P C 51 (52) (PC).

7. New issues raised before the Appellate Court.—

[1] A remand cannot be generally ordered for the decision of a point raised for the first time in the appeal. (Vol. 5) 1918 P C 3 (4) : 45 Cal 748 : 45 Ind App 94 (PC).

[2] An Appellate Court can, in a proper case, remand issues even on points not arising on the pleadings as framed. (Vol. 27) 1940 All 24 (28) : 1 L R (1939) All 901 (DB) * (92) 14 All 366 (371) (PC).

[3] A remand on issues raised for the first time in appeal can be made only for good cause shown, and on payment of all costs thrown away. (Vol. 3) 1916 PC 126 (128, 129) : 43 Cal 1104 : 43 Ind App 172 (PC).

[4] Subsequent alteration of case law by a decision of the Privy Council which alters the complexion of the case and raises new questions not previously raised in the case, is a good cause for remitting the issues. (Vol. 28) 1941 PC 85 (88) : 1 L R (1941) Kar P C 134 : 1 L R (1942) Bom 75 : 69 Ind App 64 (PC).

[5] A remand can be ordered on a point not raised in the memorandum of appeal. (Vol. 8) 1921 Lah 256 (258) (DB).

8. Remand in second appeal.—[1] The High Court in second appeal can remit issues to the lower Court under this rule. (Vol. 9) 1922 P C 292 (297, 298) : 45 Mad 586 : 49 Ind App 286 (PC) * (Vol. 26) 1939 Nag 173 (174) : 1 L R (1940) Nag 643 (DB).

[See however (Vol. 10) 1923 Cal 521 (523) (DB).] Second appeal involving several points difficult to disentangle—Appropriate course to follow is to make not an order under O. 41 R. 25, but an order of remand in the exercise of inherent powers.]

[2] In the case of second appeals remand of issues should be made to the lower Appellate Court. (Vol. 26) 1939 Nag 173 (174) : 1 L R (1940) Nag 643 (DB). (In this case issues were remitted by the High Court in second appeal to the trial Court and it was held that the general rule that the High Court should not interfere with the findings of the fact of the lower

Appellate Court did not apply to the findings of the trial Court on such issues and that such finding could not be treated as on the same footing as the findings returned by a lower Appellate Court on remand of issues under this rule).

9. Appeal.—[1] No appeal lies against an order remitting issues to the lower Court under this rule. (Vol. 21) 1934 All 455 (455) : 56 All 655 (DB) * (Vol. 22) 1935 All 140 (140) (DB) * (Vol. 20) 1933 Cal 496 (497) (DB) * (Vol. 20) 1933 Oudh 350 (351) (DB) * (Vol. 22) 1935 Oudh 333 (334) (DB) * (Vol. 14) 1927 Cal 642 (644) (DB) * (Vol. 11) 1924 Rang 131 (131) * (Vol. 7) 1920 Pat 735 (736) (DB).

[2] Order remitting issues to the lower Court can be questioned in the appeal filed against the decision eventually arrived at, after the receipt of finding from the lower Court. (Vol. 7) 1920 Pat 735 (736) (DB) * (Vol. 20) 1933 Bom 251 (252) (DB) * (Vol. 13) 1926 Cal 568 (579) (DB) * (Vol. 14) 1927 Oudh 499 (501, 502) (DB) * (Vol. 11) 1924 Rang 131 (131).

10. Letters Patent appeal.—[1] No appeal lies under the Letters Patent against an order remitting issues under this rule. (182) 8 Cal 147 (147, 148) (DB) * (Vol. 14) 1927 Mad 317 (319) (DB) * (Vol. 5) 1918 Pat 680 (682) : 2 Pat L Joar 663 (SB).

11. Revision.—[1] Under S. 115, in cases where the Court below has failed to exercise a jurisdiction vested in it the High Court can pass orders as it thinks fit without remanding the case. (Vol. 22) 1935 Pesh 21 (22).

[2] Appeal memo can be treated as application in revision. (Vol. 20) 1933 Cal 496 (497) (DB).

[3] Order of appellate Court remanding a case under this rule is not open to revision. (186) 1886 Pan Re No. 111 Page 263 (264) (DB) * (Vol. 5) 1918 Lah 377 (377) (DB). (Order is not a case decided within the meaning of Panjab Courts Act) * (Vol. 22) 1935 Oudh 334 (335) : 11 Luck 67 (DB).

[See however (Vol. 8) 1921 Lah 370 (371)—(Order under R. 25 will be interfered with in exceptional cases)].

[4] Where the appellate Court remands the suit to lower Court and also frames issues with directions to take additional evidence, its order is illegal and can be set aside in revision. (Vol. 22) 1935 Lah 161 (162).

[5] Where the Appellate Court purports to remand a case under its inherent powers in a case covered by this rule it is a material irregularity in the exercise of jurisdiction. (Vol. 22) 1935 Bom 216 (218).

ORDER 41 RULE 26—SYNOPSIS.

1. Appellate Court to fix time for presenting memorandum of objections.
2. Effect of not filing objections.
3. " Shall proceed to determine the appeal."
4. Unnecessary remission.
5. Second appeal.

Production of additional evidence in Appellate Court.

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

O. 41 R. 26 (contd.)

1. Appellate Court to fix time for presenting memorandum of objections.—[1] The Appellate Court must fix a time within which objections to the findings returned by the lower Court should be filed. ('68) 3 Agra 96 (96) (DB).

[2] Failure to fix time is mere technical irregularity and may be ignored if it does not in any way prejudice the party complaining of the same. ('15) 26 Ind Cas 736 (737) (DB) (Oudh).

[3] If no time is fixed for filing objections, they may be filed at any time before the hearing. ('84) 1884 All W N 158 (158) (DB).

[4] The period for filing objections may be fixed at the time of remitting the issues and not necessarily after the return of the findings. ('10) 6 Nag L R 109 (110).

2. Effect of not filing objections.—[1] Where no objections to the findings are filed within the time fixed the Court may, in its discretion, allow or decline to allow the objections to be taken afterwards. ('85) 7 All 79 (91, 92) (FB).

[2] The Appellate Court cannot treat the findings received from the lower Court as final and binding merely because objections are not filed in time. The Appellate Court must examine the findings on their merits and "proceed to determine the appeal." ('84) 6 All 391 (392, 393) (DB) * ('10) 6 Nag L R 109 (110). * ('93-1900) 1893-1900 Low Bar Rul 503 * (Vol. 4) 1917 Sind 71 (71) : 10 Sind L R 203 (DB).

[But see ('66) 1 Agra 50 (51) (DB). (Appellate Court is not competent to alter the finding in respect of which no objection is preferred within the time fixed.)]

[3] Where objections to findings were not taken in the lower Appellate Court which remitted the issues, they cannot be raised for the first time as grounds of second appeal. ('88) 10 All 28 (29).

3. "Shall proceed to determine the appeal."—[1] At the hearing after the remand, the Appellate Court is to determine the appeal on the whole of the material on record, including the evidence and findings returned by the lower Court under the remand order. (Vol. 7) 1920 Cal 93 (94) (DB).

[2] It is not open to the Appellate Court to consider only the findings returned by the Lower Court under the remand, and simply confirm the other findings without examining them on the merits. ('67) 8 Sath W R 303 (303) (DB).

[3] The Appellate Court must take into consideration any objections to the findings returned by the lower Court, that may be duly filed. ('12) 16 Ind Case 354 (355) (DB) (Mad).

[4] Where the lower Court makes its return without giving its findings on any of the issues, the Appellate Court can remit the issues again for a proper finding being given. (Vol. 9) 1922 P C 292 (297, 298) : 45 Mad 586 : 49 Ind App 286 (P C) * ('68) 10 Sath W R 236 (237) (DB).

[5] It has been held by the Panjab Chief Court that before the return of findings by the lower Court

the Appellate Court has no jurisdiction to dismiss the appeal for default. ('06) 1906 Pan L R No. 90, page 275 (278).

[6] See also Note 4.

4. Unnecessary remission.—[1] On the question whether on receipt of fresh finding from the lower Court, the Appellate Court can reconsider the views expressed by it before the remand and hold that the remand was improper and unnecessary, the following views are expressed.

(a) The Appellate Court can hold that the order of remand was unnecessary and improper. (Vol. 10) 1923 All 384 (385, 386) * (Vol. 15) 1923 Cal 186 (188) (DB). * ('13) 18 Cal L Jour 181 (185) (DB) * (Vol. 10) 1923 Oudh 50 (51) : 25 Oudh Cas 245 (DB).

(b) When a single Judge of the High Court makes an order of remand under R. 25 and the case subsequently comes on for final disposal before a Bench of two Judges, the latter can go back upon the order of remand and the views expressed therein. (Vol. 18) 1931 Cal 353 (354) (DB) * ('13) 18 Cal L Jour 354 (357) (DB) * (Vol. 3) 1916 Cal 554 (556) : 42 Cal 888 (DB) * (Vol. 32) 1945 All 268 (269, 271) : 1 L R (1945) All 798 (FB).

(c) The order of remand under R. 25 is an interlocutory order which, will operate as *res judicata* and is binding on the Court which passed it until it is set aside in appropriate proceedings. (Vol. 10) 1923 Cal 521 (522, 523) (DB).

(d) If a point has not been explicitly or impliedly decided at the time of the remand order, there is nothing to preclude its determination when the case comes back after remand. (Vol. 26) 1939 Pat 580 (583) (DB) * (Vol. 23) 1936 Lah 584 (565, 566) (DB).

[2] An Appellate Court is not bound to reconsider the views expressed in the remand order. ('13) 17 Cal W N 462 (465, 466) (DB) * (Vol. 13) 1926 Mad 830 (832) (DB) * (Vol. 6) 1918 Nag 193 (195) (DB).

[3] The Appellate Court is not bound on the return of the findings, to hear the case *de novo* but may confine counsel to arguments on the findings returned. ('88) 10 All 162 (165, 166) (DB).

[4] A party is not entitled to raise new issues for the first time at the hearing after the remand. ('83) 1883 Pan Re No. 54, page 167 (169) (DB) * (1865) 3 Sath W R Misc 5 (5) (DB).

5. Second Appeal.—[1] The findings of the lower Appellate Court upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in the case of first appeal but objections to such findings must be restricted to the limits within which the original pleas in second appeal are confined. ('85) 7 All 765 (768, 769) (FB) * (Vol. 15) 1928 P C 219 (221) (PC).

[But see ('84) 7 Mad 52 (53, 54) (DB).]

ORDER 41 RULE 27—SYNOPSIS.

1. Scope and object of the rule.
2. "Has refused to admit evidence which ought to have been admitted."
3. "If the Appellate Court requires," etc.

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

[1882—S. 568; 1877—S. 568; 1859—S. 355.]

PROVINCIAL AMENDMENTS.

ALLAHABAD

(1) *Insert* the following as clause (b) :

"(b) the evidence sought to be adduced by a party to the appeal is evidence, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, or."

[As amended on 31-7-1943.]

(2) *Convert* the existing clause "(b)" into clause "(c)".

MADRAS

(1) *Insert* the following as clause (b) of sub-rule (1) :

"(b) the party seeking to adduce additional evidence satisfies the Appellate Court that such evidence, notwithstanding the exercise of due diligence, was not within his knowledge or could not be produced by him at or before the time when the decree under appeal was passed, or."

(2) *Convert* the existing clause "(b)" into clause "(c)".

ODDH

Same as that of Allahabad.

O. 41 R. 27 (contd.)

4. "The Appellate Court requires any document to be produced."
5. Where Appellate Court requires any witness to be examined.
6. "To enable it to pronounce judgment."
7. "Or for any other substantial cause."
8. Discovery of fresh evidence.
9. Record of reasons.
10. Additional evidence by consent of parties.
11. Procedure to be adopted under this rule.
12. Application to put in evidence.
13. Opportunity to opposite party to contest admissibility of, or rebut, the fresh evidence.
14. Remand for trial *de novo*.
15. Court, if can take notice of subsequent events.
16. Party on whom onus is shifted by Appellate Court, if entitled to let in additional evidence.
17. Second appeal.
18. Privy Council.
19. Revision.

1. Scope and object of the rule.—[1] This rule elucidates the provisions of S. 107 clause (d) of the Code. (Vol. 18) 1931 P C 143 (148) : 58 Ind App 254 : 10 Pat 654 (P C).

[2] The rule is an exception to the general rule. (Vol. 22) 1935 Rang 39 (41).

[3] Appellate Court is entitled to call for fresh evidence only when conditions laid down in this rule are found to exist. (Vol. 30) 1943 Pat 327 (344) : 22 Pat 220 (DB) * (Vol. 29) 1942 Lah 1 (6) : I L R (1942) Lah 59 (DB) * (Vol. 28) 1941 Oudh 341 (342) (DB) * (Vol. 10) 1923 Cal 300 (301) * (Vol. 20) 1933 Lah 547 (548) : 14 Lah 152 (DB) * (Vol. 6) 1919 Cal 170 (171) (DB) * ('98) 1 Oudh Cas 199 (204) * (Vol. 23) 1936 Mad 385 (386) * (Vol. 23) 1936 All 239 (251) : 58 All 505 (DB) * (Vol. 27) 1940 Pat 161 (162) : 18 Pat 854 (857) (DB).

[See (Vol. 21) 1934 All 217 (226) : 56 All 504 (DB)].

[4] Court is not bound to allow additional evidence; the matter is entirely in the discretion of the Court. (Vol. 29) 1942 Cal 493 (503) (SB) * (Vol. 18) 1931 Lah 506 (506) * (Vol. 20) 1933 Lah 1014 (1014) * ('11) 33 All 379 (381) (DB) * (Vol. 4) 1917 All 96 (97) (DB) * (Vol. 10) 1923 Cal 285 (286) * (Vol. 3) 1916 Mad 816 (818) : 33 Mad 414 (DB) * (Vol. 10) 1923 Oudh 109 (111) : 26 Oudh Cas 66 * (Vol. 17) 1930 Oudh 110 (111) : 5 Luck 453 * (Vol. 12) 1925 Pat 504 (504) (DB) * (Vol. 25) 1938 Rang 170 (171).

[5] This rule alone can be looked to for taking additional evidence and the Court has no jurisdiction to admit such evidence in cases where this rule does not apply. ('07) 31 Bom 381 (390) : 34 Ind App 115 (PC) * (Vol. 18) 1931 P C 143 : 58 Ind App 254 : 10 Pat 654 (PC) (Vol. 10) 1923 P C 128 : 2 Pat 676 : 50 Ind App 183 (PC) —explained.]

[6] This rule does not prohibit the Appellate Court from doing any of the following things :

(a) To take into consideration admissions by the parties before the Appellate Court. (Vol. 7) 1920 P C 81 (81) : 16 Nag L R 59 (PC).

(b) To issue a commission for local investigation or to examine and adjust accounts. (Vol. 19) 1932 All 270 (271) * (Vol. 14) 1927 All 175 (175) * ('72) 17 Sath W R 300 (301) (DB) * (Vol. 10) 1923 Lah 115 (116) : 3 Lah 382 (DB).

[But see (Vol. 10) 1923 All 413 (413, 414) * ('37) 1937 Mad W N 89 (40).]

(c) To refer to books which may have a bearing on the facts of the case. (Vol. 8) 1921 Cal 661 (672) (DB).

(d) To send for papers from its own records or from the records of any other Court and inspect the same. ('13) 9 Nag L R 11 (13) * (Vol. 2) 1915 All 476 (477).

[See also (Vol. 17) 1930 Lah 750 (752) (DB)].

(e) To examine parties present in Court. ('70) 13 Sath W R 328 (329) (DB).

[See (Vol. 20) 1933 Lah 328 (329).]

[7] Appeal against *ex parte* decree.—Additional evidence may be admitted. (Vol. 3) 1916 Sind 34 (34) : 9 Sind L R 191 (DL).

O. 41 R. 27 (contd.)

[8] The rule is made applicable to second appeals by O. 42, R. 1. (Vol. 6) 1919 Mad 17 (18) (DB) * (Vol. 16) 1929 All 375 (375) (DB).

[9] High Court has no power, in second appeal, to admit additional evidence for the purpose of entering into questions of fact. (Vol. 16) 1929 All 375 (375) (DB) * ('72) 9 Bom H C R 89 (90) (SB) * (Vol. 13) 1926 Cal 941 (943) (DB) * (Vol. 5) 1918 Mad 1159 (1162) (DB) * (Vol. 16) 1929 Pat 98 (99) (DB) * ('08) 31 Mad 415 (416) (DB).

[10] High Court may, under its inherent powers, remand a case for re-trial with a direction to take additional evidence. (Vol. 11) 1924 Cal 1071 (1072).

[11] The rule applies to appeals in income-tax proceedings. (Vol. 17) 1930 Rang 4 (7): 7 Rang 655 (SB).

[12] The rule does not apply to proceedings under S. 195, Criminal Procedure Code. ('07) 30 Mad 311 (312, 313) (DB).

[13] No evidence at all given on a vital issue in a case—Trial Court pronouncing judgment on the record as it stood—Application by aggrieved party to Appellate Court to allow him to let in evidence on the point—Rule does not apply. (Vol. 23) 1936 Lah 71 (72) (DB).

[14] This rule does not contemplate the setting aside of the judgment of the trial Court before the additional evidence has been recorded. (Vol. 31) 1944 Sind 57 (53): 1 L R (1943) Kar 415 (DB).

2. "Has refused to admit evidence which ought to have been admitted"—[1] Evidence improperly rejected by trial Court—Appellate Court may admit additional evidence. (Vol. 11) 1924 Cal 578 (531): 51 Cal 195 (DB) * (Vol. 33) 1946 Oudh 163 (171, 172): 21 Luck 1 (DB) * ('11) 33 All 690 (695) (DB). * ('91) 18 Cal 201 (214): 17 Ind App 159 (PC) * (Vol. 19) 1932 Lah 202 (202) (DB) * (Vol. 14) 1927 Mad 1065 (1065) * (Vol. 11) 1924 Oudh 252 (254): 27 Oudh Cas 114 (DB) * (Vol. 15) 1928 Pat 113 (114): 7 Pat 90 (DB) * (Vol. 3) 1916 Sind 34 (34): 9 Sind L R 191 (DB).

[2] Evidence properly rejected—Appellate Court cannot admit the same. ('73) 4 Cal 213 (215) (DB) * (Vol. 8) 1921 Lah 279 (279, 280) (DB) * (Vol. 10) 1923 Sind 42 (47, 48) (DB) * ('11) 11 Ind Case 289 (290) (Oudh) * (Vol. 7) 1920 Oudh 128 (142).

[3] Lower Court declined to take certain evidence tendered by party as being unnecessary, and passed a decree in his favour—Appellate Court taking different view of the matter should not reverse decree without giving decree-holder opportunity to adduce evidence not taken by lower Court. ('87) 9 All 339 (340) * ('75) 23 Suth W R 63 (64) (DB) * ('69) 8 Bom H C R A C 88 (89) (DB) * ('08) 30 All 387 (388) (DB) * ('98) 22 Bom 253 (255) (DB) * (Vol. 1) 1914 Cal 772 (773).

3. "If the Appellate Court requires," etc.—[1] Under clause (b) of sub-r. (1) of the rule it is only when the Court "requires" it (i.e., finds it needful) that additional evidence can be admitted. (Vol. 30) 1943 Nag 289 (291): 1 L R (1943) Nag 492 * (Vol. 28) 1941 Cal 378 (380): 1 L R (1941) 1 Cal 536 * (Vol. 23) 1941 Oudh 429 (431) (DB) * ('41) 193 Ind Cas 129 (131) (DB) (Pat) * (Vol. 18) 1931 PC 143 (148): 58 Ind App 254: 10 Pat 654 (PC) * ('07) 31 Bom 381 (390): 34 Ind App 115 (PC).

[2] It must be the Court that requires the additional evidence upon its appreciation of the evidence as it

stands. (Vol. 28) 1941 Cal 378 (380, 381): 1 L R (1941) 1 Cal 536 * (Vol. 28) 1941 Oudh 341 (348) (DB) * (Vol. 18) 1931 P C 143 (148, 149): 58 Ind App 254: 10 Pat 654 (PC) * (Vol. 26) 1939 PC 152 (154): 1 L R (1939) Kar (PC) 258 (PC).

[3] The legitimate occasion for the exercise of discretion under this rule is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent to the Court. ('07) 31 Bom 381 (390): 34 Ind App 115 (PC) * (Vol. 18) 1931 PC 175 (177) (PC) * (Vol. 18) 1931 PC 143 (148, 149): 58 Ind App 254: 10 Pat 654 (PC).

[4] Additional evidence cannot be admitted on a preliminary objection before hearing of the appeal. ('07) 31 Bom 381 (390): 34 Ind App 115 (PC) * (Vol. 18) 1931 PC 143 (148): 58 Ind App 253: 10 Pat 654 (PC).

[5] Party can point out the defect or to move the Court to supply the defect. (Vol. 18) 1931 P C 143 (149): 58 Ind App 254: 10 Pat 654 (PC).

[6] Additional evidence cannot be admitted in appeal for reasons independent of the existence of any lacuna or defect. (Vol. 18, 1931 P C 143 (148, 149): 58 Ind App 254: 10 Pat 654 (PC).

4. "The Appellate Court requires any document to be produced"—[1] Court permitting documentary evidence to be produced—it should also permit oral evidence to be adduced in order to prove those documents. ('13) 20 Ind Cas 542 (543) (Oudh).

[2] Copies of certain documents produced in trial Court—Appellate Court is entitled to allow production of their originals to satisfy itself as to correctness of copies where such a course in no way prejudices other party. (Vol. 30) 1943 All 183 (184) (DB).

5. Where Appellate Court requires any witness to be examined.—[1] Appellate Court should not take additional evidence impugning testimony of a witness called in the Court below unless that witness is given opportunity to clear up the mistake. ('14) 36 All 93 (100): 16 Oudh Cas 386: 41 Ind App 76 (PC).

[2] Important witness to proceedings tendered as a witness at the trial but refused by trial Judge on the ground that he was engaged as counsel in the case—Appellate Court can record his evidence at the appellate stage. (Vol. 26) 1939 P C 152 (154): 1 L R (1939) Kar (PC) 258 (PC).

6. "To enable it to pronounce judgment."—[1] Appellate Court finding itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands—it may admit additional evidence. (Vol. 29) 1942 Oudh 485 (487, 488) (DB) * (Vol. 9) 1922 Bom 267 (269): 46 Bom 184 (DB) * (Vol. 21) 1934 Lah 529 (529) (DB) * (Vol. 10) 1923 Lah 115 (116): 3 Lah 382 (DB) * ('12) 22 Mad L Jour 14 (19, 22) (DB) * (1864) 2 Bom H C R 61 (64) * (Vol. 11) 1924 Cal 578 (581): 51 Cal 185 (DB) * (Vol. 25) 1938 All 353 (356) * (Vol. 23) 1936 Pat 600 (601) (DB) * (Vol. 22) 1935 Pat 178 (180): 14 Pat 595 (DB).

[See (Vol. 6) 1919 Cal 311 (312) (DB).]

[2] Ability to pronounce judgment refers to ability to pronounce judgment *satisfactory to the mind of the Court* delivering it. (Vol. 3) 1916 Mad 816 (817): 38 Mad 414 (DB) * ('89) 3 Beng L R A C 218 (224) (DB) * (Vol. 17) 1930 Lah 441 (442) * (Vol. 17) 1930 Pat 105 (105) (DB) * (Vol. 3) 1916 Mad 966 (968) (FB) * (1868) 1868 Suth W R Sp No. 124 (125) (FB) * (Vol. 25) 1938 Lah 161 (162).

O. 41 R. 27 (contd.)

[3] Appellate Court should not allow new evidence to be added in order to enable a party to raise a new point in appeal. ('76) 3 Ind App 259 (279) (PC) * (Vol. 17) 1930 All 220 (221).

[4] Party on whom onus of proving a certain point lies failing to discharge the onus—He is not entitled to fresh opportunity to produce evidence. (Vol. 5) 1918 Pat 253 (253) * 1 Pat L Jour 435 (DB) * (Vol. 23) 1936 Lah 71 (72) (DB).

[But see (Vol. 16) 1929 Pat 324 (325) (DB)].

7. "Or for any other substantial cause"—[1] It is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply. (Vol. 30) 1943 Nag 289 (291): I L R (1943) Nag 492 * (Vol. 18) 1931 P C 143 (148, 149): 58 Ind App 254; 10 Pat 654 (PC).

[2] The words "or for any other substantial cause" need not be construed *efusdem generis*. ('12, '36 Mad 477 (479) (DB) * (Vol. 2) 1915 Mad 732 (762) (DB) * (Vol. 10) 1923 Lah 584 (585).

[But see (Vol. 28) 1941 Oudh 429 (431) (DB) * (Vol. 10) 1923 Oudh 109 (111): 26 Oudh Cas 66].]

[3] Power to allow additional evidence may be exercised when any point is required to be cleared up in the interests of justice. (Vol. 11) 1924 (al 578 (580, 581): 51 Cal 185 (DB) * (Vol. 12) 1931 Pat 181 (182) (DB) * (Vol. 12) 1925 Mad 444 (446) * (Vol. 6) 1919 All 49 (49): 42 All 48 (DB).

[4] Power to allow additional evidence should be exercised cautiously and sparingly and in exceptional cases. (Vol. 18) 1931 P C 143 (149): 58 Ind App 254: 10 Pat 654 (PC) * (Vol. 13) 1926 P C 34 (36): 49 Mad 435: 53 Ind App 84 (PC) * ('66) 11 Moo Ind App 28 (48, 49) (PC) * (Vol. 31) 1944 Sind 73 (78): I L R (1943) Kar 429 * (Vol. 27) 1940 Mad 707 (710) * ('12) 15 Oudh Cas 253 (255).

[5] New evidence should have a direct and important bearing on a main issue in the case. (Vol. 18) 1931 PC 143 (149): 58 Ind App 254: 10 Pat 654 (PC).

[6] Party unable, through no fault of his, to produce evidence in trial Court—Additional evidence may be allowed. ('05) 27 All 634 (651): 32 Ind App 205: 8 Oudh Cas 317 (PC) * (Vol. 20) 1933 All 104 (106) (DB).

[7] Evidence taken by lower Court imperfectly—Appellate Court unable to pass satisfactory judgment—Additional evidence may be admitted. (Vol. 27) 1940 Mad 707 (710) * (Vol. 14) 1927 Mad 1065 (1065).

[8] Through negligence of guardian of a minor party important document not produced in lower Court—Additional evidence can be permitted. (Vol. 16) 1929 Lah 91 (92).

[9] Additional evidence allowed under sanction of costs. (Vol. 3) 1916 P C 141 (145): 44 Cal 328 43 Ind App 803 (PC).

[10] Document in possession of Court—Party seeking help of trial Court for producing document—Help not given—Case to be remanded to get the documents filed. (Vol. 23) 1936 Pat 631 (634).

[11] Documents referred to during trial but not produced were admitted in second appeal. (Vol. 25) 1938 Rang 170 (172).

[12] Provisions of this rule are not intended to allow a litigant unsuccessful in the lower Court to patch up the weak parts of his case in the Court of Appeal. (Vol. 29) 1942 All 315 (319) (DB) * (Vol. 28) 1941 Lah 144

(145) (DB) * (Vol. 28) 1941 Oudh 77 (79): 16 Luck. 230 * (Vol. 27) 1940 Mad 707 (710) * (Vol. 27) 1940 Nag 80 (80, 81) * (Vol. 18) 1931 P C 143 (148): 58 Ind App 254: 10 Pat 654 (PC).

[13] In the absence of satisfactory reasons for non-production of evidence in the trial Court, additional evidence should not be admitted in appeal. (Vol. 30), 1943 Lah 265 (266) * (Vol. 2) 1915 P C 73 (78) (PC).

[See however (Vol. 24) 1937 Cal 537 (539): I L R (1937) 2 Cal 661 (DB)].

[14] Party guilty of remissness in the lower Court is not entitled to indulgence of being allowed to give further evidence under this rule. (Vol. 30) 1943 Bom 397 (402) (DB) * (Vol. 33) 1946 Oudh 163 (172): 21 Luck 1 (DB) * (Vol. 30) 1943 Nag 289 (291): I L R (1943) Nag 492 * (Vol. 28) 1941 Cal 378 (380): I L R (1941) 1 Cal 536 * (Vol. 7) 1920 P C 81 (83): 47 Cal 662: 47 Ind App 11 (PC).

[15] Party who having opportunity to produce evidence in the lower Court failed to do so cannot have it admitted in appeal. (Vol. 30) 1943 Lah 166 (168) * (Vol. 31) 1944 Sind 57 (60): I L R (1943) Kar 415 (DB) * (Vol. 31) 1944 Sind 73 (78): I L R (1943) Kar 429 * (Vol. 31) 1944 Sind 61 (64): I L R (1943) Kar 420 (DB) * (Vol. 29) 1942 Bom 227 (231) (DB) * (Vol. 28), 1941 Lah 144 (145) (DB) * (Vol. 28) 1941 Pat 433 (435): 20 Pat 130 (DB) (Plaintiff not producing account books to support his claim in trial Court—Appeal by plaintiff against dismissal of his suit—Arguments concluded—*Held*, plaintiff could not be allowed to produce account books afterwards) * (Vol. 27) 1940 Mad 707 (710) * (Vol. 6) 1919 Oudh 379 (381) (DB) * (Vol. 9) 1922 Bom 147 (148) (DB) * (Vol. 11) 1924 All 231 (232) * (Vol. 14) 1927 Nag 393 (393) * (Vol. 18) 1931 Oudh 298 (301) (DB) * (Vol. 19) 1932 Mad 709 (713) (DB) * (Vol. 23) 1936 Pat 600 (601) (DB) * (Vol. 28) 1941 Rang 544 (547) (DB) * ('87) 9 All 366 (383) (DB) * (Vol. 6) 1919 Cal 637 (641, 642): 46 Cal 119 (DB).

[But see (Vol. 29) 1942 Oudh 485 (487, 488) (DB) (Vol. 25) 1938 Oudh 135 reversed].]

[16] Inadvertence of the party or his inability to understand legal issues involved or wrong advice of a pleader or negligence of a pleader does not constitute a "substantial cause." (Vol. 7) 1920 Pat 266 (266): 6 Pat L Jour 263 (DB) * (Vol. 11) 1924 All 538 (539): 46 All 264 (DB) * (Vol. 29) 1942 Oudh 122 (124): 17 Luck 441 (DB) * (Vol. 17) 1930 Bom 272 (272) (DB) * (Vol. 19) 1932 Lah 93 (94) * (Vol. 11) 1924 Lah 444 (447): 5 Lah 84 (DB) * (Vol. 17) 1930 Sind 318 (324): 25 Sind L R 39 (DB) * (Vol. 12) 1925 Mad 793 (793).

[17] Importance of evidence is not of itself a sufficient ground for admitting evidence in appeal. (Vol. 29) 1942 Nag 92 (94): I L R (1942) Nag 369 * (Vol. 26) 1939 Mad 54 (55).

[18] Document deliberately withheld in trial Court—Admission sought in appeal on false grounds—Document should be rejected. (Vol. 29) 1942 Nag 92 (94): I L R (1942) Nag 369.

[19] Document being of unimpeachable authenticity is very material in considering whether Court should or should not exercise its discretion in favour of a party under O 13, R. 2, C P Code, but in determining whether or not an order should be made under O. 41, R. 27, considerations of a materially different character arise. (Vol. 24) 1937 Cal 537 (539): I L R (1937) 2 Cal 661 (DB).

O. 41 R. 27 (*contd.*)

8. **Discovery of fresh evidence.**—[1] Discovery of fresh evidence subsequent to decision of lower Court—No ground for its admission in appeal. ('07) 31 Bom 381 (390); 34 Ind App 115 (PC) * (Vol. 33) 1946 Oudh 129 (142, 143) (DB) * (Vol. 21) 1934 All 175 (175, 176) * (Vol. 26) 1939 Rang 92 (94) * (Vol. 26) 1939 Lah 265 (266) * (Vol. 24) 1937 Cal 537 (539); 1 L R (1937) 2 Cal 661 (DB).

[2] *Appellate Court must require* the evidence discovered to enable it to pronounce judgment or for any other substantial cause. (Vol. 14) 1927 P C 123 (126, 127) (PC).

[3] Evidence discovered not required by Appellate Court—Proper course is to apply for review or judgment. ('04) 31 Bom 381 (390); 34 Ind App 115 (PC) * (Vol. 21) 1934 All 175 (176).

[4] Appellate Court requiring evidence discovered—Party not exercising due diligence—Evidence should not be admitted. (Vol. 17) 1930 Lah 1004 (1007); 12 Lah 172 (173) * (Vol. 33) 1946 Mad 168 (163).

[5] It has been held in the following case that irrespective of the requirements of the Appellate Court based on any lacuna or other defect in the evidence on the record, evidence which was not known to the party in the trial Court can be admitted, as additional evidence under this rule. (Vol. 24) 1937 Pat 584 (585); 16 Pat 371 (DB).

[6] Amended rule of Allahabad High Court and the Oudh Chief Court—Evidence which was not within the knowledge of the party or which could not be produced in the trial Court in spite of his due diligence can be admitted in Appellate Court. (Vol. 23) 1936 All 217 (218) (DB) * (Vol. 28) 1941 Oudh 341 (342, 343) (DB).

9. **Record of reasons.**—[1] Appellate Court admitting additional evidence should record its reasons. (Vol. 19) 1931 P C 175 (177) (PC) * ('66) 11 Moo Ind App 28 (48) (PC) * ('77) 26 Sath W R 55 (76) (PC).

[2] Provision for recording reasons is only directory and not mandatory. (Vol. 14) 1927 Cal 126 (129) (DB). (Dissenting from (Vol. 6) 1919 Cal 170) * ('86) 12 Cal 37 (38) (LB).

[3] Failure to record reasons does not make evidence inadmissible. (Vol. 27) 1940 Mad 707 (709) * (Vol. 13) 1926 Cal 369 (370) (DB) * ('85) 12 Cal 37 (38) (DB) * (Vol. 5) 1918 Lah 10 (11) (DB) * (Vol. 23) 1936 Pat 57 (58).

[See also (Vol. 26) 1939 All 663 (665)].

[4] Provision as to recording of reasons is not a condition precedent to reception of evidence. ('87) 11 Moo Ind App 345 (368) (PC).

[See also (Vol. 26) 1939 P C 152 (154); 1 L R (1939) Kar (P C) 258 (PC)].

[5] The reasons need not be recorded in a separate order. (Vol. 12) 1925 All 752 (753) (DB) * ('12) 22 Mad L Jour 14 (22) (DB). (Per Phillips, J.).

[But see ('12) 15 Oudh Cas 253 (254) * (Vol. 26) 1939 Bom 401 (402).

[6] Reference to peculiar circumstances of the case—Statement that evidence is necessary to pronounce judgment or that additional evidence was admitted in the interests of justice—Not sufficient compliance with requirement as to recording of reasons. ('13) 19 Ind Cas 572 (574) (DB) (Cal) * (Vol. 33) 1946 Mad 203

(204) * (Vol. 11) 1924 All 303 (303, 304) * ('70) 14 Sath W R 19 (20) (DB) * (Vol. 25) 1938 Mad 372 (373).

[7] Issue by the Appellate Court of a commission for local investigation—No reasons need be recorded for issuing such commission. (Vol. 19) 1 32 All 276 (271).

[8] Appellate Court not admitting additional evidence—No reasons need be recorded. (Vol. 29) 1942 Cal 498 (503) (SB).

10. **Additional evidence by consent of parties.**—[1] Parties consenting to the admission of additional evidence—They cannot afterwards object to the reception of such evidence. ('09) 36 Cal 833 (839); 36 Ind App 221 (PC) * (Vol. 31) 1944 Oudh 220 (225) (DB) * (Vol. 26) 1939 Mad 54 (55).

[2] A party in whose favour an order for the admission of additional evidence, is made cannot subsequently attack it. (Vol. 16) 1929 Cal 492 (493).

[3] Party taking advantage of order for admission of additional evidence cannot subsequently question the order ('75) 24 Sath W R 325 (326) * (Vol. 9) 1922 Nag 119 (120, 121).

11. **Procedure to be adopted under his rule.**—[1] Formalities as regards admission and recording of evidence in original Court apply to additional evidence taken in Appellate Court. ('29) 118 Ind Cas 315 (316) (DB) Pat. * (Vol. 1) 1914 Bom 255 (254); 38 Bom 665 (DB) * (Vol. 13) 1920 Cal 684 (68) (DB) * ('01) 6 Cal W N 31 (32) (DB).

[2] Appellate Court is not authorized to send a document to thumb impression bureau and act upon the report. (Vol. 2) 1915 All 112 (112, 113)

[See also (Vol. 19) 1932 Pat 352 (352); 11 Pat 792 (DB).]

[3] Issue of a general commission to try an issue is not warranted by this rule. ('88) 1 C P L R 160 (161, 162).

[4] Appellate Court first ordering additional evidence, and then cancelling the order and remanding case for retrial—There is no illegality. ('87) 1887 All W N 145 (145) (LB).

12. **Application to put in evidence.**—[1] The rule does not require an application for the admission of additional evidence. But such an application is not prohibited. In fact the existence or otherwise of such an application seems to have been regarded as an indication of whether the Court "required" the additional evidence. (Vol. 2) 1915 Mad 588 (588) (DB) * (Vol. 4) 1917 Mad 153 (153) (DB) * (Vol. 31) 1944 Sind 57 (60); 1 L R (1943) Kar 415 (DB).

13. **Opportunity to opposite party to contest admissibility of, or rebut, the fresh evidence.**—[1] Additional evidence sought to be admitted in appeal—Opposite party should be given opportunity to contest its admissibility and to adduce rebutting evidence. (Vol. 11) 1924 Cal 403 (404) (DB) * (Vol. 23) 1936 Lah 188 (189) * (Vol. 17) 1930 All 220 (221) * (Vol. 21) 1934 Lah 462 (464) (DB) * (Vol. 12) 1925 Cal 671 (672) (DB) * (Vol. 12) 1925 Mad 181 (183) * ('13) 9 Nag L R 11 (15) * ('12) 15 Oudh Cas 253 (256) * (Vol. 4) 1917 Pat 13 (15) (DB) * (Vol. 14) 1927 Cal 140 (143) (DB) * (Vol. 25) 1938 Pat 11 (12).

[But see (Vol. 20) 1933 Cal 319 (320).]

[2] Failure to give such opportunity does not vitiate proceedings if no prejudice is caused to opposite party. (Vol. 7) 1920 Cal 813 (814) (DB).

28. Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

[1882—S. 569; 1877—S. 569; 1859—S. 356.]

O. 41 B. 27 (contd.)

14. Remand for trial de novo—[1] The rule contemplates a disposal of the case on the merits by the Appellate Court itself (11) 10 Ind Cas 675 (675) (DB) (Mad).

[2] Appellate Court desiring to take further evidence should follow procedure laid down in Rules 27 and 28 and not to remand the whole case. (Vol. 30) 1943 Mad 726 (726) * ('26) 1926 Mad W N 48 (48) (DB) * (Vol. 22) 1935 Bom 222 (224): 59 Bom 430. * (Vol. 8) 1916 All 258 (259) (DB) * ('93) 17 Bom 733 (734) (DB) * (Vol. 15) 1928 Cal 749 (750) (DB) * (Vol. 15) 1928 Cal 748 (748) (DB) * (Vol. 17) 1930 Lah 441 (442) * (Vol. 18) 1929 Sind 159 (160) (DB) * (Vol. 5) 1918 Oudh 170 (171).

[See also (Vol. 29) 1942 Lah 201 (203) (DB).]

[3] In exceptional cases Appellate Court has an inherent power to remand the case for taking additional evidence. (Vol. 28) 1941 Oudh 561 (562) * (Vol. 15) 1928 Mad 991 (992) (DB) * (Vol. 22) 1935 Bom 222 (224): 59 Bom 430. * (Vol. 23) 1936 Pat 631 (634) * (Vol. 21) 1934 Lah 664 (666) (DB).

15. Court, if can take notice of subsequent events—

[1] As a general rule, a Court of Appeal is considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered but in exceptional cases it will take notice of facts which may have arisen subsequently. (Vol. 30) 1943 Oudh 271 (272) (DB) * ('07) 6 Cal L Jour 74 (78) (DB) * (Vol. 22) 1935 L h 32 (33) * (Vol. 12) 1925 Pat 612 (613) * (Vol. 7) 1920 Cal 816 (816) (DB) * (Vol. 5) 1918 Lah 10 (12) (DB) * (Vol. 7) 1920 Pat 559 (561): 4 Pat L Jour 312 (DB) * (Vol. 24) 1937 Mad 544 (546) * (Vol. 23) 1936 Bom 37 (41): 60 Bom 125 (DB).

16. Party on whom onus is shifted by Appellate Court, if entitled to let in additional evidence.—[1]

A party on whom the onus is shifted by the Appellate Court is not entitled to let in additional evidence if he is not taken by surprise by the action of the Appellate Court. (Vol. 1) 1914 Oudh 44 (51) (DB) * (Vol. 13) 1926 Lah 494 (495): 7 Lah 297 (DB) * (Vol. 19) 1932 Lah 293 (294): 13 Lah 399 (DB).

17. Second appeal.—[1] Order of Appellate Court admitting or rejecting additional evidence.—No appeal lies.—Order can be questioned in appeal from the appellate decree. (Vol. 22) 1935 Bom 222 (223): 59 Bom 430 * (Vol. 4) 1917 Oudh 114 (115): 19 Oudh Cas 314 * (Vol. 18) 1931 Lah 506 (506) * (Vol. 24) 1937 Sind 233 (234) (DB).

[2] High Court will not ordinarily interfere with the discretion of lower Appellate Court in admitting or refusing to admit additional evidence unless such Court has not exercised its discretion in a judicial manner or in accordance with law. ('97-'01) 1897-1901 Upp Bur Rul 309 * (Vol. 16) 1929 Pat 98 (100) (DB) * (Vol. 29) 1942 Oudh 485 (486, 487) (DB) * (Vol. 25) 1938 Oudh 135 reversed * (Vol. 14) 1927 Cal 140 (145) (DB). (Per page, J-) * (Vol. 2) 1915 All 64 (65) * (Vol. 24) 1937 Lah 115 (116) * (Vol. 22) 1935 Pat 470 (471) * (Vol. 6) 1919 Mad 1166 (1171): 42 Mad 737 (FB) * (Vol. 12) 1925 All 288 (289): 47 All 412

(DB) * (Vol. 10) 1923 Cal 285 (286) * (Vol. 10) 1923 Oudh 109 (111): 26 Oudh Cas 66 * (Vol. 24) 1937 Lah 409 (410).

[3] Objection can be raised on the ground that lower Appellate Court has admitted additional evidence in contravention of this rule or has refused to exercise discretion vested in it by this rule. ('85) 11 Cal 139 (142, 143) (DB) * (Vol. 10) 1923 Cal 300 (301) * (Vol. 27) 1940 Mad 707 (709) * (1900) 28 All 121 (122) (DB).

[4] Additional evidence admitted in contravention of this rule should be discarded as inadmissible. (Vol. 18) 1931 P C 175 (177) (PC) * ('07) 31 Bom 381 (391): 34 Ind App 115 (PC).

[5] Decree should not be reversed or varied on ground of improper admission of additional evidence unless decision on merits has been affected thereby. (Vol. 2) 1915 Mad 762 (762) (DB) * (Vol. 21) 1934 Cal 269 (270) (DB) * (Vol. 20) 1933 Lah 328 (329) * (Vol. 8) 1921 Sind 155 (157): 16 Sind L R 17 (DB) * ('70) 14 Sath W R 19 (20) (DB).

[See however (Vol. 25) 1938 Sind 198 (200): 1 L R (1939) Kar 111 (DB).]

[6] Lower Appellate Court admitting additional evidence—Second appeal cannot, on that account, be treated as a first appeal so as enable questions of fact to be gone into. ('97) 24 Cal 98 (101) (DB) * ('86) 12 Cal 37 (38) (DB).

18. Privy Council.—[1] There is no restriction on the powers of the Privy Council to admit additional evidence in appeals before it. (Vol. 10) 1923 P C 128 (136): 2 Pat 676: 50 Ind App 183 (PC).

[Compare ('69) 3 Beng L R 25 (26) (PC).]

[2] Rejecting of application for admission of additional evidence does not give a right of appeal to Privy Council, ('94) 21 Cal 484 (487).

19. Revision.—[1] Appellate Court admitting additional evidence which it is not competent to receive—No revision lies. (Vol. 7) 1920 Pat 266 (266): 5 Pat L Jour 263 (DB) * ('09) 12 Oudh Cas 405 (414) (DB).

[See however (Vol. 30) 1943 Nag 289 (292): 1 L R (1943) Nag 492.]

[2] Order permitting appellant to adduce additional evidence on payment of costs—Respondent's counsel accepting costs behind his back—Respondent is not precluded from contesting order in revision. (Vol. 30) 1943 Nag 289 (292, 293): 1 L R (1943) Nag 492.

ORDER 41 RULE 28—Note 1.

[1] This rule permits the Appellate Court to either take the additional evidence itself or direct the lower Court to take it. (Vol. 29) 1942 Pat 379 (381): * (1864) Sath W R Sup No. 124 (125) (DB) * (Vol. 21) 1934 Lah 664 (666) (DB) * (Vol. 8) 1921 Cal 122 (123) (DB).

[2] The lower Court taking evidence under this rule acts in a ministerial capacity.—The parties may object to the admissibility of the evidence before the Appellate Court, though they may not have taken any such objection before the lower Court. ('66) 2 Sath W R 80 (85) (DB).

29. Where additional evidence is directed or allowed to be taken, the Appellate Court Points to be defined shall specify the points to which the evidence is to be confined, and record and recorded. on its proceedings the points so specified.

[1882—S. 570; 1877—S. 570; 1859—S. 357.]

JUDGMENT IN APPEAL.

30. The Appellate Court, after hearing the parties or their pleaders and referring to any Judgment when and part of the proceedings, whether on appeal or in the Court from whose decree where pronounced. the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

[1882—S. 571; 1877—S. 571; 1859—S. 349.]

31 The judgment of the Appellate Court shall be in writing and Contents, date and signature of judgment. shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and,
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

[1882—S. 574; 1877—S. 574; 1859—S. 359.]

O. 41 R. 28 (contd.)

[3] Party to appeal dying pending proceedings for taking additional evidence before lower Court—Application for substitution of legal representatives can be entertained only by appellate court. (Vol. 16) 1929 All 319 (320) (DB).

[4] The Appellate Court may under this rule send the case back to the first Court to have a local enquiry made. (Vol. 13) 1926 Cal 897 (898) (DB).

[But see ('72) 17 Suth W R 300 (301) (DB).]

ORDER 41 RULE 29—Note 1.

[1] When additional evidence is allowed to be given, this rule requires that the Appellate Court should specify and record on the proceedings the points to which the evidence should be confined. ('68) 9 Suth W R 127 (129) (DB) * (Vol. 21) 1934 Cal 627 (629) : 60 Cal 753 (DB) * (Vol. 25) 1938 Mad 372 (374) * (Vol. 23) 1936 Lah 933 (935) * (Vol. 26) 1939 Bom 401 (402, 403).

[2] The procedure specified in this rule ought not to be neglected merely because there is no objection raised by the other side to the admission of additional evidence. (Vol. 27) 1940 Mad 707 (709).

[3] Non-observance of this rule is material irregularity. (Vol. 25) 1938 Mad 372 (374) * (Vol. 26) 1939 Bom 401 (402, 403).

ORDER 41 RULE 30—Note 1.

[1] The rule authorises a judgment to be pronounced only after hearing the parties or their pleaders. ('71) 15 Suth W R 54 (55) (DB).

[2] Party to appeal dying before hearing of appeal—Legal representative not brought on record—Appeal heard—Decree is nullity whether it is adverse to or in favour of deceased. ('02) 26 Bom 317 (319) (DB) * (Vol. 7) 1920 Oudh 57 (58) * (Vol. 6) 1919 Cal 410 (411) (BB).

[See also (Vol. 5) 1918 Cal 421 (422) (DB) * (Vol. 3) 1916 Mad 574 (575) : 89 Mad 386 (DB)].

[3] The duty of hearing the parties or their pleaders under this rule arises only when they address the Court, and when they do not do so, the Appellate Court is not precluded from pronouncing judgment on the merits under this rule. (Vol. 25) 1938 All 543 (552) : I L R (1938) All 814 (DB)

[4] Rule only applies when there is hearing of appeal—Appellant or his pleader not prepared to address Court—Rule does not apply—Court not bound to decide appeal on merits. (Vol. 27) 1940 All 243 (249) : I L R (1940) All 220 (DB). (Dissenting from (Vol. 24) 1937 All 234).

[5] No appearance by or on behalf of appellant—Appeal may be dismissed for default. (Vol. 27) 1940 All 310 (310) (DB).

[6] Provisions as to judgment being pronounced in open Court and after notice not complied with—Appeal filed within ninety days of appellant's coming to know of decision—Appeal held was within time—In any case there was "Sufficient Cause" for delay within S. 5 Limitation Act. (Vol. 28) 1941 Rang 194 (195) : 1941 Rang L R 213 (DB) * (Vol. 6) 1919 Lah 102 (103) : 1919 Pan Re No. 27 (DB).

[7] Judgment may be given at once after hearing is over or on some future day. ('71) 15 Suth W R 54 (55) (DB).

ORDER 41 RULE 31—SYNOPSIS.

1. Object of the rule.
2. Judgment of affirmance.
3. Judgment of reversal.
4. "Points for determination."
5. "Decision thereon".
6. Reasons for decision.
7. "Where the decree appealed from is reversed," etc—Clause (d).
8. Summary dismissal of appeal under Order 41, Rule 11.

PROVINCIAL AMENDMENTS.

ALLAHABAD

At the end of the rule, *substitute* a semi-colon for the full stop and *add* the following :

"Provided that where the presiding Judge pronounces his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge and shall bear the date of its pronouncement."

MADRAS

The following is *substituted* for Rule 31 :

"31. The judgment of the Appellate Court shall be in writing and shall state—(a) the points for determination; (b) the decision thereon; (c) the reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein; provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge."

[4-9-1917.]

O. 41 R. 31 (*contd.*)

9. Non-compliance with rule—Effect—General.

10. Second appeal—Maintainability of, on ground of non-compliance.

11. Non-compliance with the rule by lower Appellate Court Procedure of High Court.

12. Appeal in proceedings under Section 476 of the Criminal Procedure Code.

13. Applicability of rule to High Court.

1. Object of the rule.—[1] Object of rule is to afford parties opportunity of knowing and understanding grounds of decision to enable them to exercise right of second appeal and to enable High Court in second appeal to judge whether lower Court has properly appreciated and decided the case. (84) 10 Cal 932 (935) (DB) * (Vol. 2) 1915 Low Bar 32 (33) * (Vol. 11) 1924 All 100 (100).

2. Judgment of affirmance.—[1] Appellate Court affirming decision of lower Court—More general expression of concurrence with lower courts' judgment is not sufficient. (Vol. 18) 1931 All 589 (5-9): 53 All 523 (DB) * (Vol. 21) 1934 Lah 77 (74) * (Vol. 11) 1924 All 100 100, 101 * (Vol. 5) 1918 Bom 235 (235, 236) (1B) * (99) 1 Bom LR 490 (491) (DB) * (Vol. 16) 1929 Cal 110 (114): 55 Cal 1216 (DB) * (Vol. 15) 1928 Cal 403 (403) * (Vol. 17) 1930 Lah 152 (152) * (Vol. 15) 1928 Mad 16 (17) * (Vol. 15) 1923 Oudh 374 (375, DB) * (Vol. 14) 1927 Oudh 95 (96): 29 Oudh C.S. 330: 1 Luck 458 * (Vol. 6) 1919 Pat 162 (162) * (Vol. 14) 1927 Rang 208 (208) (DB) * (12) 17 Ind Cas 893 (899) (Low Bar).

[2] An affirming judgment need not enter into detailed reasons to the same extent as a judgment of reversal (Vol. 13) 1926 Cal 545 (545) (DB) * (Vol. 10) 1923 Cal 163 (163, 164) (DB).

[3] Case comparatively simple—Trial Court dealing with it fully and accurately—Appellate Court appreciating cases properly and deciding it after considering evidence—Fact that it does not repeat reasons given by trial Court does not vitiate judgment. (81) 8 Cal LR 597 (599) (DB) * (Vol. 20) 1913 Nag 6 (7): 23 Nag LR 340 * (Vol. 13) 1926 Cal 545 (545) (DB) * (Vol. 14) 1927 Cal 323 (324) (DB) * (Vol. 10) 1923 Cal 163 (163, 164) (DB) * (Vol. 5) 1918 Bom 235 (235) (DB) * (Vol. 15) 1923 Oudh 480 (480) (DB) * (Vol. 6) 1919 Pat 13 (16) (DB).

3. Judgment of reversal.—[1] An appellate judgment reversing the judgment of the lower Court should be adequate and satisfactory. (Vol. 5) 1918 Pat 543

(545) * (10) 7 Ind Cas 421 (421) (DB) (Cal) * (1864) 1 Sath W R 193 (199) (DB).

[See also (Vol. 21) 1934 Mad 169 (173)].

[2] Appellate judgment must contain definite findings on the questions involved. (Vol. 15) 1923 Mad 489 (490) (DB) * (10) 7 Ind Cas 421 (421) (DB) (Cal) * (Vol. 13) 1926 Oudh 578 (587): 1 Luck 489.

[3] Appellate judgment must give reasons for reversing the decision of the trial Court (41) 73 Cal Jour 196 (198) * (Vol. 7) 1920 Cal 538 (539) (DB) * (Vol. 13) 1926 Pat 436 (438) * (Vol. 10) 1923 Pat 275 (276) * (92) 16 Bom 540 (545) (1B) * (Vol. 2) 1915 Oudh 218 (219) (DB) * (72) 92 1872—1892 Low Bar Bul 653 * (Vol. 4) 1917 Oudh 374 (374).

[4] Judgment must come into close quarters with the judgment appealed from. (Vol. 28) 1911 Mad 393 (393) * (Vol. 15) 1926 Nag 455 (459) * (Vol. 10) 1926 Nag 55 (56).

[5] Judgment must express an opinion on all the points on which the lower Court has based its conclusions. (41) 73 Cal LR 196 (197). Judgment must show that findings of trial Court and reasons therefor have been fully considered by Appellate Court * (66) 11 Moo Ind App 177 (183) (PC) * (1865) 4 Sath W R 100 (100) (DB).

[6] It is not necessary for an Appellate Court when reversing the decision of the trial Court, to meet the reasons given by such Court. (Vol. 28) 1911 Cal 248 (251): 1 LR (1941) 1 Cal 309 (DB) * (Vol. 2) 1915 Cal 99 (99, 100) (DB).

4. "Points for determination."—[1] This rule requires the Appellate Court to state in its judgment the points that arise for determination. (08) 10 Bom LR 492 (494) (DB) * (70) 2 N W P H C R 109 (109) (DB).

[2] Points for decision must cover all the important questions involved in the case. (Vol. 16) 1929 Cal 110 (114): 55 Cal 1216 (DB) * (90) 12 All 46 (49) * (Vol. 13) 1926 Lah 351 (352) * (12) 36 Bom 379 (380) (DE) * (Vol. 4) 1917 Pat 429 (429, 430): 2 Pat LR 701 (DB) * (Vol. 1) 1914 Mad 685 (686) (DB) * (Vol. 7) 1920 Lah 323 (322) * (84) 1884 All W N 99 (99) (DB) * (Vol. 12) 1925 Cal 316 (317).

[3] Points for decision must not be general and vague. (Vol. 30) 1943 PC 24 (25): 70 Ind App 18: 1 LR (1943) 1 Cal 372 (PC) * (87) 9 All 26 (31, 32) (DB) * (05) 7 Bom LR 174 (174) (DB) * (Vol. 21) 1934 Lah 1009 (1010).

O. 41 R 31 (contd.)

[4] The object of the legislature in making it incumbent on an Appellate Court to raise points for determination, is to clear up the pleadings, and focus the attention of the Court and of the parties, on the specific and rival contention of the parties. ('05) 7 Bom L R 174 (174) (DB).

[5] An Appellate Court is not bound to decide a point which although taken in the grounds of appeal, has been abandoned. (1900) 3 Oudh Cas 279 (280) (DB).

[See also (Vol. 20) 1933 Lah 570 (572) * (Vol. 14) 1927 Lah 763 (769) * (Vol. 6) 1919 Cal 112 (113) * ('10) 5 Ind Cas 813 (814) (DB) (Mad).]

[6] Point not urged at hearing of appeal need not be decided. (Vol. 10) 1923 P C 90 (92); 26 Oudh Cas 228; 50 Ind App 179 (P C) * (Vol. 12) 1925 All 535 (536); 47 All 929 (DB) * ('71) 15 Suth W R 296 (297) (DB).

[7] New point need not be decided. (Vol. 10) 1923 Lah 259 (259).

[8] Point not raised by parties—Appellate Court is not bound to decide such point. (Vol. 5) 1918 P C 53 (55); 40 All 497 (P C).

[9] Point not necessary for disposal of appeal need not be decided. ('05) 9 Cal W N 60 (67) (DB).

5. "Decision thereon"—[1] There must be a finding on each point raised for determination. (Vol. 20) 1933 P C 33 (35); 60 Ind App 49 (P C) * ('70) 2 N W P H C R 142 (142) (DB).

[2] Finding must be definite and not ambiguous or inferential. (Vol. 7) 1920 Pat 424 (425) (D); * ('93-1900) 1893-1900 Low Bar Rul 1 * (Vol. 30) 1943 P C 24 (25); 1 L R (1943) 1 Cal 372; 70 Ind App 18 (P C) * (Vol. 4) 1917 Cal 233 (234) (DB).

6. Reasons for decision.—[1] The Appellate Court must state in its judgment the reasons for its decision. ('93-1900) 1893-1900 Low Bar Rul 343 * (Vol. 14) 1927 Oudh 95 (96); 29 Oudh Cas 330; 1 Luck 458 * (Vol. 2) 1915 Oudh 218 (219) (D); * ('69) 11 Suth W R 559 (560) (DB) * ('87) 9 All 30 n (31n) * (Vol. 4) 1917 Lah 210 (210) * (Vol. 25) 1938 Pat 69 (70) (DB).

[2] The Appellate Court must set forth the evidence relied upon and must come to its own independent conclusion on a consideration of such evidence. It must not proceed on the assumption that it is, in any way, bound by the views of the trial Court. (Vol. 29) 1942 Cal 493 (504) (SB) * ('09) 35 Cal 813 (316) (DB) * (Vol. 7) 1920 Cal 774 (775) (DB) * (Vol. 15) 1928 All 102 (103) (DB) * ('99) 22 Mad 12 (13) (D); * ('81) 8 Bom 23 (30) (D); * (Vol. 9) 1922 Oudh 122 (123); 25 Oudh Cas 69 * ('12) 17 Ind Cas 893 (899). (Low Bar) * ('93-1900) 1893-1900 Low Bar Rul 64 * (Vol. 8) 1921 Cal 852 (855) (DB) * (Vol. 4) 1917 Pat 388 (388, 389) (DB).

[3] Where evidence is well balanced, Appellate Court may select its own inference. (Vol. 28) 1941 P C 16 (20); 1 L R (1941) 1 Cal 463; 1 L R (1941) Kar P C 54; 63 Ind App 34 (P C).

[4] Unless good reasons are given, any interference with conclusion of trial Court on matters of oral evidence is erroneous in law. (Vol. 23) 1941 Mad 395 (393).

[5] Lower Court having opportunity of seeing witnesses. No good reason shown by Appellate Court for interfering with finding of lower Court—Appellate

judgment set aside. (Vol. 26) 1939 P C 225 (228); 1 L R (1939) Kar P C 375 (P C).

[6] Several suits disposed of by common judgment—Appellate Court should consider evidence in each case separately. (Vol. 11) 1924 All 245 (247, 248) (DB).

[7] Mere statement that point is proved or not proved is not proper judgment. (Vol. 3) 1916 Pat 262 (263); 2 Pat L Jour 8 (DB) * (Vol. 3) 1916 Pat 349 (350) * ('84) 10 Cal 932 (935) (DB) * ('95) 19 Bom 323 (326) (DB) * (Vol. 6) 1919 Pat 521 (521).

[8] Judgment merely stating that counsel admits that certain evidence is the best evidence is not proper judgment. (Vol. 3) 1916 All 260 (260).

[9] Mere statement in judgment that argument of plaintiff's counsel represent correct view of case is not sufficient compliance with this rule. (Vol. 8) 1921 Lah 119 (120); 2 Lah 271 (DB).

[10] Judgment disposing of case by saying that point is absurd or ridiculous or worthless is not proper judgment. (1900) 1 Low Bar Rul 204 (205) * ('71) 16 Suth W R 280 (281) (DB) * ('66) 6 Suth W R App X 21 (21) (D).

[11] Statement that the Judge is in agreement with lower Court is not proper judgment. (Vol. 30) 1943 P C 24 (25); 1 L R (1943) 1 Cal 372; 70 Ind App 18 (P C) * (Vol. 25) 1938 Pat 69 (70) (DB).

[12] The judgment should not be based on mere conjectures and presumptions or on evidence not legally admitted. (Vol. 5) 1918 Lah 135 (136) * (Vol. 7) 1920 Lah 322 (323) * ('01) 6 Cal W N 31 (32) (DB).

[13] The whole evidence on the record need not be reviewed. It is enough if the evidence discussed is reasonably adequate for a proper decision of the case. (Vol. 4) 1917 Pat 238 (239) (DB) * ('19) 11 Suth W R 34 (34) (DB) * (Vol. 23) (1936) Lah 543 (544).

[14] It is not necessary to discuss a document not brought to the notice of the Appellate Court. (Vol. 6) 1919 Oudh 44 (46); 22 Oudh Cas 312 (DB).

[15] Where a judgment does not discuss a document of obvious importance, it may be presumed that the Court has not considered it. (Vol. 6) 1919 Oudh 44 (46); 22 Oudh Cas 312 (DB).

[But see (Vol. 7) 1920 Cal 869 (869) (DB).]

7. "Where the decree appealed from is reversed," etc.—Cause (d).—[1] Where an Appellate Court reverses or modifies the decree appealed from it must specify in its judgment the relief to which the appellant is entitled; it is not enough merely to say, that the appeal is decreed, or that the decree is reversed. ('70) 2 N W P H C R 415 (416) (DB) * ('63) 1 Beng L R A C 50 (55) (DB) * (Vol. 22) 1935 Rang 139 (140).

[2] Conclusions in appellate judgment differing in important points from those of trial Court—Appellate Court must specify in its decree modifications necessitated by its conclusions. ('87) 12 All 46 (48).

8. Summary dismissal of appeal under Order 41, Rule 11.—[1] There is a conflict of decisions as to the applicability of this rule to cases of summary dismissal of an appeal under rule 11.

(a) Rule applies to such cases and appellate Court is not exempt from writing judgment in manner prescribed by Rule 31. ('98) 25 Cal 97 (98) (DB) * (Vol. 10) 1923 Cal 553 (558) (DB) * ('22) 65 Ind Cas 479 (480) (Cal) * (Vol. 13) 1926 Cal 992 (992) (DB) * ('81) 3 Mad 1 (2). (DB) * (Vol. 18) 1931 All 597 (599); 54 All 220

O. 47 R. 31 (contd.)

(FB) (Overruling 30 All 319) * (Vol. 18) 1931 All 589 (589) : 53 All 528 (DB) * (Vol. 13) 1926 Rang 129 (130) : 4 Rang 66. (Note.—Overruled in (Vol. 23) 1936 Rang 208 : 14 Rang 173 (F B) on another point.) * (Vol. 14) 1927 Rang 208 (208) (DB) * ('79) 1879 Pan Re No. 100, page 271 (273) (DB) * ('75) 1875 Pan Re No. 45, page 127 (127) (DB) * ('81) 1881 Pan Re No. 24, page 50 (51) (DB) * (Vol. 24) 1937 Lah 552 (352) * ('06) 9 Oadh Cas 32 (32).

(b) Rule does not apply—Appellate Court is not bound to write formal judgment in such cases. (Vol. 21) 1934 Pat 341 (344) : 13 Pat 540 (DB) * (Vol. 16) 1929 Nag 63 (69) : 25 Nag L R 55 (DB) * ('10) 4 Sind L R 154 (185) (DB) * (Vol. 3) 1916 Upp Bar 9 (10) : 2 Upp Bar Rul 92 * (Vol. 24) 1937 Sind 206 (207) : 31 Sind L R 167 (DB) * (Vol. 24) 1937 Sind 247 (247) (DB) * ('11) 36 Bom 116 (118) (DB) * ('13) 37 Bom 610 (613) (FB).

(c) Under civil circular No. 51 of 1930 of Bombay High Court, Appellate Courts are bound to comply with the requirements of Rule 31 even in cases falling under Rule 11. ('13) 37 Bom 610 (613) (FB) * ('94) 1394 Bon P J 113 (113) (DB) * ('91) 1891 Bom P J 239 (239) (DB).

[See also ('03) 5 Bom L R 233 (233) (DB) * ('91) 1391 Bon P J 53 (53) (DB).]

[2] In special circumstances of any case, a short judgment may be held sufficient. ('09) 13 Cal W N 1031 (1033) (DB) * ('07) 5 Cal L Jour 348 (349) (DB).

[See also (Vol. 10) 1923 Cal 553 (553) (DB).]

[3] Order dismissing appeal under Rule 11 not subject to further appeal—it is not necessary to write judgment though it would be satisfactory if one is written. (Vol. 21) 1934 Cal 26 (27) (DB).

9. Non-compliance with rule—Effect—General.—

[1] This rule is imperative and a judgment which is not in accordance with it, is not one according to law. ('37) 9 All 26 (27, 28, 31) (DB) * (Vol. 20) 1933 Lah 332 (332, 333) * ('85) 7 All 649 (656) (FB) (Note.—Overruled in 18 Cal 23 : 17 Ind App 122 (P C) and 20 Cal 93 : 19 Ind App 228 (P C) on another point.) * ('05) 3 Oadh Cas 290 (292) (DB) * (Vol. 7) 1920 Sind 12 (13) : 14 Sind L R 132 (DB) * (Vol. 10) 1923 Pat 275 (276) * ('09) 13 Cal W N 143 (145) (DB) * (Vol. 11) 1921 All 100 (100, 101) * (Vol. 23) 1936 Rang 262 (263).

[2] A substantial compliance with the rule is enough. What is substantial compliance depends on the facts and circumstances of each case. (Vol. 30) 1943 Oadh 105 (106) * (Vol. 10) 1923 Cal 163 (163, 164) (DB) * (Vol. 3) 1916 Pat 349 (350) * (Vol. 18) 1931 All 537 (600) : 54 All 220 (F B) * (74) 21 Sath W R 260 (260, 261) (DB).

[3] It must be evident from the judgment of the appellate Court that it has properly appreciated the case has applied its mind to it and has decided it after considering the evidence on the record. (Vol. 27) 1940 Pat 33 (33) * (Vol. 14) 1927 Cal 323 (324) (DB) * (Vol. 13) 1926 Cal 545 (545) (DB) * (Vol. 3) 1916 Lah 133 (140) * (Vol. 1) 1914 Oadh 265 (265) * (Vol. 6) 1919 Pat 13 (16) (DB) * (Vol. 12) 1925 Cal 316 (317) * (Vol. 6) 1919 Lah 336 (337) (DB) * (Vol. 12) 1925 All 808 (809).

[4] Appellate Court substantially complying with rule. Its judgment will not be interfered with merely because it does not strictly fulfil the formalities laid down therein. ('87) 9 All 26 (31) (DB) * (Vol. 7) 1920 Sind 12 (13) : 14 Sind L R 152 (DB) * (Vol. 18) 1931 All 537 (600) : 54 All 220 (FB).

[5] The rule does not say that if its requirements are not complied with, the judgment shall be a nullity. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. (Vol. 25) 1933 PC 292 (295) : 66 Ind App 12 : I L R (1939) Lah 56 : I L R (1939) Kar (PC) 35 (PC).

10. Second appeal—Maintainability of, on ground of non-compliance—[1] A second appeal will lie on the ground that the judgment of the lower Appellate Court does not substantially comply with this rule, and is therefore not a judgment according to law. (Vol. 28) 1941 Mad 393 (394) * ('08) 31 Mad 469 (470) (FB) * ('93) 25 Cal 97 (98) (DB) * (Vol. 11) 1924 All 100 (100, 101) * ('85) 7 All 649 (656) (FB). (Note.—Overruled in 20 Cal 93 : 19 Ind App 228 (P C) on another point.) * ('05) 8 Oadh Cas 290 (292) (DB) * ('11) 11 Ind Cas 915 (915) (Low Bur) * ('09) 13 Cal W N 143 (146) (DB) * (Vol. 3) 1916 Upp Bar 9 (10) : 2 Upp Bar Rul 92. (Error may possibly have affected decision on merits.) * (Vol. 6) 1919 Pat 124 (126) * ('70) 1870 Pan Re No. 6 page 20 (23) (DB).

[But see ('86) 12 Cal 199 (203) (DB) * ('72) 18 Sath W R 473 (473) (DB) * ('66) 4 Bom H C R A C 105 (103) (DB).]

[2] Findings of fact of the lower Appellate Court for which reasons are not given are not conclusive in second appeal. ('84) 8 Bom 368 (371) (DB) * ('95) 19 Bom 523 (326) (DB) * ('08) 35 Cal 813 (816) (DB) * (Vol. 14) 1927 Lah 418 (419) * (Vol. 14) 1927 Oadh 95 (96) : 29 Oadh Cas 330 : I Luck 453 * (Vol. 5) 1918 Lah 336 (338) * (Vol. 4) 1917 Pat 288 (289) (DB) * (Vol. 3) 1916 Lah 139 (140).

11. Non-compliance with the rule by lower Appellate Court—Procedure of High Court.—

[1] Where the lower Appellate Court has not substantially complied with this rule, the High Court may reverse the decree and remand the case for disposal according to law. ('41) 73 Cal L Jour 196 (198) * (Vol. 28) 1941 Mad 393 (394) * ('87) 9 All 26 (28) (DB) * ('93) 17 Bom 428 (430) (DB) * ('93) 25 Cal 97 (98) (DB) * ('08) 31 Mad 469 (470, 471) (FB) * ('34) 6 All 383 (385) (DB) * (Vol. 11) 1924 All 100 (101) * (Vol. 10) 1923 Cal 553 (553) (DB) * (Vol. 14) 1927 Rang 208 (208) (DB) * (Vol. 13) 1926 Rang 129 (131) : 4 Rang 66. (Note.—Overruled in (Vol. 23) 1936 Rang 208 : 14 Rang 173 (FB) on another point.) * (Vol. 10) 1923 Pat 275 (276) * (Vol. 25) 1938 Oadh 374 (375) (DB) * (Vol. 14) 1927 Oadh 95 (97) : 29 Oadh Cas 330 : I Luck 458 * (Vol. 15) 1928 Mad 16 (17) * (Vol. 14) 1927 Lah 418 (419) * (Vol. 15) 1923 Lah 655 (657).

[But see ('86) 12 Cal 199 (203) (DB) * ('84) 10 Cal 932 (935, 936) (DB) * ('72) 18 Sath W R 473 (473) (DB) * ('73) 20 Sath W R 403 (404) (DB) * ('79) 1879 Pan Re No. 100 page 271 (273) (DB).]

[2] The High Court may, instead of remanding the whole case, call for fresh findings from the lower Appellate Court. (Vol. 3) 1916 Mad 427 (427) (DB).

32. The judgment may be for confirming, varying or reversing the decree from which the What judgment appeal is preferred, or, if the parties to the appeal agree as to the form which may direct. the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

[1882—S. 577; 1877—S. 577; 1859—S. 350.]

33. The Appellate Court shall have power to pass any decree and make any order which Power of Court ought to have been passed or made and to pass or make such further or other of Appeal. decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

a [Provided that the Appellate Court shall not make any order under section 85A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]

Illustration.

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

[Cf. R. S. C. O. 58 R. 4.]

- a. *Inserted* by the Civil Procedure (Amendment) Act, 1922 (9 [IX] of 1922), S. 4 which under S. 1 (2) of the Act may be brought into force in any Province by the Provincial Government on any specified dates. The Act has accordingly been brought into force in Bombay, Bengal, U. P., Punjab, Bihar, C. P., Assam, Orissa and Sind.

OBJECTS AND REASONS.

"The Committee consider it most important that an Appellate Court should have the fullest power to do complete justice between the parties. The illustration indicates a type of case for which provision is intended to be made."—S.O.R.

O. 41 R. 31 (contd.)

12. Appeal in proceedings under Section 476 of the Criminal Procedure Code.—[1] The judgment in an appeal in proceedings under S. 476 of the Criminal Procedure Code must give reasons for the decision. (Vol. 18) 1931 Cal 454 (454, 455) (DB) * (Vol. 14) 1927 Cal 284 (284, 285): 54 Cal 355 (DB).

13. Applicability of rule to High Court.—[1] The High Court must give reasons for its decision in its judgments. ('89) 11 All 460 (470): 16 Ind App 205 (P C) * ('89) 12 Moo Ind App 495 (502) (P C).

[See also (Vol. 25) 1938 P C 292 (295): 66 Ind App 12: 1 L R (1939) Lah 56: 1 L R (1939) Kar P C 55 (P C)].

[But see ('87) 9 All 93 (95) (FB).]

[2] Under Order 49 Rule 2, where at the commencement of the present Code there were, in force, any rules for the recording of judgments by Chartered High Courts, the present rule cannot in any way affect the operation of such rules. (Vol. 16) 1929 All 403 (403) (DB).

[See also ('87) 9 All 93 (95, 96) (FB).]

ORDER 41 RULE 32—Note 1.

[1] Under this rule, an Appellate Court has no power to "dismiss" an appeal. The judgment must be one for confirming, varying or reversing the decree appealed from. But an appeal may be "dismissed" under Rule 11, as being incompetent, as where it is time-barred or is barred under section 102. ('12) 39 Cal 925 (930) (DB).

[See also ('72) 14 Moo Ind App 465 (490, 491, 492) (P C) * ('09) 5 Low Bur Bul 11 (11).]

[2] Trial Court fixing by decree time for payment of Court-fees Appeal filed—Appellate Court can vary the order by extending time for payment. (Vol. 25) 1938 All 150 (151).

[3] Decree modified in appeal—Appellate decree supersedes lower Court's decree *in toto*. (Vol. 30) 1943 Mad 160 (161) * (1900) 23 Mad 60 (67) (DB).

[4] Appeal from High Court judgment withdrawn later on as parties compromised—High Court's decision is final. ('88) 6 Mad 43 (46, 47) (DB).

[5] Judgment of lower Court affirmed—Time runs from appellate-judgment. ('69) 5 Mad H C R 215 (219) (DB).

ORDER 41 RULE 33—SYNOPSIS.

1. Scope of rule.
2. Any decree or order which ought to have been passed.
3. "Such further or other decree or order."
4. Power to take cognizance of subsequent events.
5. Appeal only as to part of the decree.
6. Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objections.
7. Power can be exercised in favour of persons not parties to appeal.
8. Decree against several persons—Appeal or cross-objections by one—Power of Appellate Court to set aside decree against all.
- 8a. Cross-objections against co-respondent.
9. Power, if can be exercised against person not party to appeal.

O. 41 R. 33 (contd.)**10. Addition of parties in appeal.****11. Illustration to the rule.****12. Proviso.****13. Limitation—See Limitation Act, S. 3 and Art. 152.****14. Res judicata.****15. Remand.****16. Second appeal.****17. Privy Council appeal.****18. Revision.****19. Letters Patent appeal.**

1. Scope of rule.—[1] The object of the rule is to enable the appellate Court to do complete justice between the parties and to avoid contradictory and inconsistent decisions on the same questions in the same suit (Vol. 29) 1942 Pat 204 (209); 20 Pat 811 (DB) * (11) 34 All 32 (34, 35) (FB). (No sufficient reason for a respondent neglecting to appeal or file objections—Grant of relief to respondent under this rule is not justified.) * (Vol. 5) 1918 Nag 223 (231). 14 Nag L K 50. (Relief in favour of a person not party to appeal and not claimed by him cannot be granted.) * (Vol. 15) 1928 All 77 (80); 50 All 213 (DB) * (Vol. 8) 1916 Pat 400 (401); 1 Pat L Jour 143 * (Vol. 6) 1919 Mad 196 (197) (DB).

[See (Vol. 5) 1918 Mad 794 (799); 40 Mad 846 (DB).]

[See also report of the Special Committee.]

[2] For this purpose a discretionary power is conferred on the Appellate Court to pass such decree or order as ought to have been passed or as the nature of the case may require. (Vol. 4) 1920 Lah 433 (440); 1 Lah 396 (Party failing to avail himself of the ordinary remedy open to him with power should not be exercised) * (Vol. 20) 1933 Lah 682 (685) (DB) * (Vol. 20) 1933 Mad 806 (808). (Powers under this rule can be exercised in favour of party not on record in appeal) * (Vol. 7) 1920 Cal 722 (728) (DB) (Court not bound to take action under rule 33) * (Vol. 14) 1927 P C 552 (256); 6 Rang 29; 55 Ind App 7 (P C) (Do.) * (Vol. 15) 1923 All 745 (750), 51, 52; 51 All 65 (DB). (Though the discretion is wide Court is not bound to use it) * (Vol. 15) 1923 Lah 599 (601); 9 Lah 291 (DB) (Do.) * (Vol. 13) 1923 Mad 513 (515, 519) (Do.) * (Vol. 17) 1930 Mad 707 (709) (Refusal to act under the rule is not an error of law when which the second Appellate Court is bound to interfere).

[See also (Vol. 22) 1935 Lah 378 (379)].

[3] The discretion conferred is wide. (Vol. 1) 1914 Cal 722 (723) (DB) * (Vol. 5) 1916 Cal 136 (149); 43 Cal 190 (DB) * (11) 1911 Pan L K No. 103 P. 409 (410) (DB) * (Vol. 7) 1920 Pat 77 (81); 5 Pat L Jour 323 (DB) * (Vol. 13) 1923 Bom 238 (294) (DB) * (Vol. 13) 1923 Cal 51 (53) (DB) * (Vol. 14) 1927 Mad 620 (621, 622); 50 Mad 614 (DB) * (Vol. 22) 1935 Lah 378 (379) * (11) 34 All 32 (34) (FB) (In proper cases Court should not hesitate to use the discretion) * (Vol. 5) 1918 Cal 13 (14) (SB) (Do.) * (Vol. 17) 1930 Mad 801 (805, 806); 53 Mad 881 (14 B) (Do.) * (Vol. 12) 1925 Lah 155 (156) (On reversal of decree for one relief, alternative relief should be granted if justice requires it).

[4] But as the power is in derogation of the general principle that a party cannot avoid a decree against him without filing any appeal or cross-objection, it must be exercised with care and caution. (Vol. 5) 1918 Cal 13

(14, 15) (SB) * (13) (1913) Mad W N 1024 (1024) * (Vol. 20) 1933 Lah 682 (685) (DB) * (11) 34 All 32 (34) (FB). (No sufficient reason for neglecting to appeal or file objections—Power conferred by this rule should not be exercised) * (Vol. 7) 1920 Pat 77 (82); 5 Pat L Jour 323 (DB) * (Vol. 13) 1926 Cal 57 (59) (1 B) * (Vol. 15) 1928 All 746 (750); 51 All 63 (DB) * (Vol. 15) 1928 Lah 599 (601); 9 Lah 291 (DB) * (Vol. 22) 1935 Mad 175 (178) * (Vol. 24) 1937 Pesh 69 (71).

[5] No hard and fast rule can, however, be laid down as to the circumstances under which the power may or may not be exercised and each case must depend on its own facts. (Vol. 20) 1933 Mad 806 (808) * (Vol. 1), 1914 Cal 722 (728) (DB) * (11) 34 All 32 (34) (FB) * (Vol. 14) 1927 All 453 (454); 49 All 224 (DB) * (Vol. 17) 1930 Mad 801 (806); 53 Mad 881 (FB).

[6] There is no restriction as to the class of suits to which the rule applies. (Vol. 9) 1922 Cal 398 (399); 49 Cal 379 (DB). (Rule applies to partition suits) * (Vol. 18) 1931 Mad 6 (8) (DB). (Suit to set aside decrees passed against several defendants—Amount of liabilities of the defendants could not be separated in this case).

[7] Suits against several defendants. Applicability of rule is not confined to cases of one cause of action or ground of liability against the defendants. (Vol. 24) 1937 Pat 628 (631); 16 Pat 557 (DB).

[8] The rule applies to second appeals. (See O. 42 R. 1). (Vol. 50) 1943 All 342 (343) (DB) * (Vol. 13) 1926 P C 34; 49 Mad 455; 53 Ind App 84 (P C) explained * (Vol. 27) 1940 Pat 300 (302) (DB).

[9] Applications for revision—Principle of the rule applies. (Vol. 11) 1924 Nag 154 (155). Court of Small Causes decreed plaintiff's claim against defendant 2 and dismissed it as against defendant 1—Revision by defendant 2—Revising Court while dismissing claim against defendant 2 can decree the same against defendant 1.

2. Any decree or order which ought to have been passed.—[1] Three out of four trustees bring a suit for rent against lessee of trust properties, adding other trustee as second defendant—Trial Court passes decree for three-fourths of rent in favour of plaintiff's, and for one-fourth, in favour of second defendant. First defendant appeals. Appellate Court dismissing appeal passes a decree for entire sum in favour of plaintiff's declaring at the same time, that one-fourth of it is for the second defendant's share. Held that the Appellate Court has power to do so. (Vol. 3) 1916 P C 182 (184, 185); 44 Cal 759; 44 Ind App 65 (PC).

[See also (Vol. 3) 1916 P C 96 (101); 43 Cal 660 (P C). (A suing B C—Decree in favour of A and C—Appeal by B—Appellate Court can transpose C as plaintiff and maintain decree in his favour).

[2] Plaintiffs sue for a declaration that the proceedings taken against them by the defendants are *ultra vires* and null and void. The trial Court passes an order of mandamus against them instead of giving a declaratory decree. The defendants appeal. The Appellate Court considers that an order of mandamus should not have been passed but that a decree for a declaration should have been passed. It has power to pass such a decree. (Vol. 19) 1932 Rang 123 (128); 10 Rang 412 (FB).

[3] Suit against A and B—Decree against A but suit dismissed against B without costs—Appeal by A—Appellate Court can while accepting appeal and dismissing suit against A as well award costs of suit to B also though he has not appealed. (Vol. 29) 1942 Cal 257 (260); 11R (1941) 2 Cal 556 (DB).

O. 41 R. 33 (*contd.*)

[4] In dismissing appeal, Appellate Court can amend decree (Vol. 6) 1919 Lah 341 (344) (DB) * (Vol. 6) 1919 Pat 196 (199) (DB) * (Vol. 5) 1919 Nag 41 (44) - (Vol. 3) 1916 Mad 538 (540) (DB).

[See also (Vol. 11) 1924 Pat 322 (324).

[5] Even though appeal may not be from order of refusal to extend time, Appellate Court can, in appeal from order setting aside award, extend time for making award. (Vol. 7) 1920 Cal 115 (117): 46 Cal 1059 (DB).

[6] Plaintiff claiming reliefs in alternative—Trial Court granting one relief—Appellate Court can grant the other one instead. (Vol. 2) 1915 Cal 579 (582) (DB).

[7] Suit for specific performance of contract to sell immovable property—Subsequent vendee also defendant—Appellate Court has, while dismissing defendant's appeal power to pass a decree in the proper form. (1912) 22 Mad L Jour 124 (125) (DB) - (Vol. 2) 1915 Mad 37 (37).

[8] Appeal by defendant—Appellant's contention was that suit had abated—Appellate Court can hold so—This case however makes no reference to this rule. (Vol. 16) 1929 Lah 256 (256).

[9] Trial Court rejecting plaint for want of court-fee—Appellate Court reversing order may reject plaint on another ground, viz., on the ground of suit being barred by limitation. (Vol. 10) 1923 Nag 30 (31).

[10] Trial Court decreeing suit on a particular ground—Appellate Court can reverse decision on that point but may maintain the decree on another ground. (13) 6 Low Bar Rul 144 (145).

3. "Such further or other decree or order."—[1] Appellate Court has power to deal with the case in any way that may seem equitable to all the parties concerned. (11) 1911 Pan L R No. 103 p. 409 (410) * (Vol. 3) 1916 Cal 136 (149): 43 Cal 790 (DB). (Cross-objection against co-respondent—Appellate Court has power to alter decree of the trial Court) * (Vol. 3) 1916 Mad 56 (57) (DB). (Suit for possession by purchaser who had not paid full price—Appellate Court decreed possession subject to the condition that plaintiff deposited the balance within specified time) * (Vol. 25) 1938 All 150 (151) (Power to extend time fixed by lower Court's decree for payment of court-fees) * (Vol. 22) 1935 Pat 497 (498) (The powers of a Court of Appeal are not restricted to affirmation, reversal or modification of the decree appealed from).

[2] Powers of Appellate Court to pass orders which ought to have been passed are very wide. (Vol. 4) 1917 P C 111 (115) (P C).

[3] A property, the subject of two mortgages, one in favour of A and the other in favour of B, is sold for arrears of revenue and purchased by C. A sues for the enforcement of his mortgage against the surplus sale proceeds and makes B, a defendant to the suit claiming priority over him. The suit is decreed. B appeals against the decree. In the meanwhile there is a suit by B for setting aside the revenue sale and this suit is also decreed. C, appeals against this decree. Both appeals are heard together and one dismissed. The appellate Court can in dismissing the appeals direct that A's rights should be enforced against the property

instead of against the sale proceeds. (Vol. 4) 1917 P C 111 (113, 115) (P C).

[4] A suit is erroneously dismissed on the merits instead of for default. In appeal filed by the plaintiff the Appellate Court can, not only pass an order of dismissal for default, but also a further order that the suit do stand restored and that the lower Court do proceed to try the suit according to law. (10) 33 Mad 241 (245) (DB).

[5] Where on an application to set aside an execution sale on the ground of the price being less than that payable under certain rules, the lower Court refuses to set aside the sale, and, on appeal, the Appellate Court considers that the sale should be set aside, it has power to accept the purchaser's offer of a higher price, and to leave the sale undisturbed. (Vol. 17) 1930 Bom 290 (292): 54 Bom 348 (DB).

[6] Appellate Court not to grant relief not asked for in plaint. (Vol. 5) 1918 Nag 228 (231): 14 Nag L R 56 - (Vol. 4) 1917 Pat 42 (43): 2 Pat L Jour 698 (DB). * (Vol. 10) 1923 All 235 (241, 242) (DB).

[7] Appeal from *ex parte* decree—Power of the Appellate Court in appeal from *ex parte* decree is not confined only to the investigation of the cause of non-appearance. (Vol. 16) 1929 Cal 322 (325): 56 Cal 21 (DB).

[8] Appellate Court may issue a fresh commission for the purpose of examining accounts and remedying certain mistakes and omissions made by another commissioner. (Vol. 10) 1923 Lah 115 (116): 3 Lah 382 (DB).

[9] If the record of a case under appeal is lost, the Appellate Court has power to remand the case for reconstruction of the record. (Vol. 10) 1923 Mad 647 (648, 649): 46 Mad 679 (SB).

[10] Suit for removal of mutawalli and appointment of new mutawalli dismissed—Appellate Court agreeing with conclusion of trial Court but in interest of trust, settling scheme—Held that notwithstanding the absence of sanction under S. 92, Appellate Court had power under this rule to do so as it did. (Vol. 23) 1936 Lah 361 (362) (DB). (Note: It is doubtful whether the above decision is correct).

4. Power to take cognizance of subsequent events.—

[1] See also Notes on O. 7 R. 7 and on O. 41 R. 27.

[2] As a general rule, a Court of Appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts which may have arisen subsequently. (61—63) 9 Moo Ind App 287 (330) (PC) * (Vol. 14) 1927 Lah 198 (199): 8 Lah 215 (DB).

[3] But the Court will, in exceptional cases, depart from this rule, especially where, by so doing it can shorten litigation and best attain the ends of justice. In such cases it is not only competent to a Court of Appeal, but it may be its duty to take notice of events which have happened subsequently to the passing of the decree or order appealed against. (Vol. 30) 1943 Oudh 271 (272): 19 Luck 29 (DB). (Appellate Court can take cognizance of a change of circumstances or a law having retrospective effect made during the pendency of the appeal.) * (Vol. 29) 1942 Mad 291 (293) (New Act passed pending appeal.)

O. 41 R. 33 (*contd.*)

[4] No doubts, powers conferred by O. 41 R. 33 on Appellate Courts are very wide but they cannot be exercised so as to affect a vested right, for instance by virtue of law of limitation or right declared to be vested by a decree of the trial Court in a pre-emptor. (Vol. 31) 1944 Lah 319 (321): I L R (1944) Lah 443 (FB).

[5] Plaintiff's claim to property as her father's heir negated by trial Court—Pending plaintiff's appeal, one of the defendants dying and plaintiff becoming entitled to suit property as her heir—Plaintiff's fresh rights could not be declared in the suit as brought. (Vol. 32) 1945 Pat 87 (92): 23 Pat 508.

[6] Appeal before Privy Council—Alteration in case law during pendency of appeal before High Court—Plaintiff placed in most embarrassing position—Dismissal of suit entailing risk of injustice—Plaintiff held should be allowed to amend pleadings by raising new issues and new lines of argument—Case remanded to High Court. (Vol. 28) 1941 P C 85 (88): I L R (1942) Pom 75: I L R (1941) Kar P C 134: 69 Ind App 64 (PC).

[7] Subsequent litigation can be taken into consideration (Vol. 24) 1941 F C 5 (13, 14): 1940 F C R 84: 20 Pat 429: I L R (1941) Kar F C 1 (FC) 36 Mad 489 and (Vol. 23) 1936 P C 49: 15 Pat 268: 63 Ind App 47 (P C) relied on).

[8] Plea for *res judicata* based on final judgment between the parties delivered pending appeal. (Vol. 28) 1941 Mad 815 (816).

[9] Entry in Land Registration Record made since institution of appeal. (Vol. 27) 1940 Pat 300 (302) (DB).

[10] Court is entitled to take into consideration events subsequent to the date of plaint, provided this can be done without prejudice to the parties. (Vol. 21) 1934 Mad 675 (676).

[11] Change in case of law was held sufficient ground for not filing cross-objections. (Vol. 12) 1925 Mad 266 (268).

[12] Appellate Court can consider a subsequent change in the case affecting rights of parties. (Vol. 17) 1930 Rang 190 (191) (DB).

[13] Statute affecting vested rights of parties passed after passing of decree but before hearing of appeal therefrom—Appellate Court should consider new statute affecting rights in new appeal before it. (Vol. 23) 1936 Bom 57 (40): 60 Bom 125 (LB).

[14] Decree against sale proceeds of mortgaged property—Subsequently sale set aside—Appellate Court passed a decree against the mortgaged property. (Vol. 4) 1917 P C 111 (113, 115) (PC).

[15] Lower Court ordering execution in conformity with procedure then in force—Change in processual law, affecting initiation of execution proceedings—Execution legally started does not become illegal and Appellate Court should not interfere with lower Court's order. (Vol. 15) 1928 Mad 1194 (1194) (DB), (Quarter V. Mapleson (1883) 9 Q B D 672 distinguished).

5. Appeal only as to part of the decree.—[1] This rule expressly empowers the Appellate Court on an appeal from one part of the decree, to reverse or

modify the other part. (Vol. 7) 1920 Cal 428 (434) (DB) * (Vol. 13) 1926 Cal 1042 (1043, 1045) (DB). (Thus Appellate Court can dismiss the suit though the appeal is not directed against the whole decree) * (Vol. 12) 1925 Mad 266 (267, 268).

[2] But this power should be exercised only where the portion of the decree appealed against is so inseparably connected with the portion not appealed against that justice cannot be done unless the latter portion is also interfered with. (Vol. 24) 1937 Pat 40 (43): 16 Pat 45 (DB). (Appellate Court would not interfere where there are two independent transactions, though the questions of law and fact involved in both of them to some extent are the same).

[3] Plaintiff's claim to certain lands in defendant's village based on custom of dhar dhura decreed—Defendants owning separate and independent shares in village—Appeal by some of co-sharers defendants belonging to one family and independent of other co-sharers claiming that the plaintiff's suit be dismissed as against them—Dismissal of plaintiff's suit as against appellants cannot result in conflicting decrees, and Appellate Court held had power to do so. (Vol. 30) 1943 All 68 (74) (DB).

[4] Where there are several suits and a separate decree is passed in each of them, the appellate Court has no jurisdiction in an appeal against one of them to set aside the other decrees. (Vol. 12) 1925 Bom 290 (291) (DB) * (Vol. 6) 1919 Lah 201 (202): 1919 Pun Re No. 116.

6. Power may be exercised in favour of respondents or parties who have not filed appeal or cross-objections.—[1] As an ordinary rule, an appellate Court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it, and this general rule holds good notwithstanding the enactment of Rule 33. (11) 34 All 32 (36) (FB) * (Vol. 26) 1939 P C 86 (91): I L R (1939) Kar (P C) 149 (P C) * (Vol. 26) 1939 Cal 582 (585) (DB) * (Vol. 26) 1939 Cal 593 (594) (DB). (Suit dismissed against A, one of the defendants—No appeal or cross-objection filed against this decision—Decree against other defendants reversed in first appeal—Second appeal by plaintiff—Relief against A cannot be granted in second appeal) * (Vol. 22) 1935 Nag 243 (244) (Claim decreed in part—Appeal by defendant—Respondent not filing cross-objection in respect of claims disallowed—He cannot be allowed to argue in favour of that claim under O. 41 R. 33).

[2] But in exceptional cases, the rule enables an appellate Court to pass such decree as ought to have been passed; or as the nature of the case may require, even if such decree would be in favour of parties who have not filed any appeal or cross-objections against the lower Court's decree. (Vol. 29) 1942 Pat 493 (505, 506): 21 Pat 397 (DB). (Claim to compound interest based on agreement partly allowed by trial Court—Appeal by plaintiff—Cross-objection by some of defendants-respondents that suit was not maintainable—Agreement found void—Suit held should be dismissed against all defendants as otherwise it would result in two contradictory decrees) * (Vol. 16) 1929 Cal 123 (126): 56 Cal 598 (DB). (Such power can be exercised, e.g., where Court is put in a position of having to make impossible contradictory or unworkable orders) * (Vol. 3) 1916 P C 192 (184, 185): 44 Cal 759: 44 Ind App 65 (P C) * (Vol. 18) 1931 P C 234 (239): 58 Ind App

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350: 54 Mad 774 (P C) * (Vol. 27) 1940 Pat 47 (48) (A appellate Court has power to alter a decree in favour of a respondent who has not filed an appeal or objection, although the alteration is to the detriment of the other respondents) * (Vol. 25) 1938 Pat 275 (276): 17 Pat 338 (DB). (Suit against two sets of defendants—Plaintiff claiming relief against defendants first party or in alternative against defendants second party—Trial Court holding defendants first party liable—Appeal filed by defendants first party—Appellate Court is entitled under O. 41 R. 33, to pass decree against defendants second party even though there is no appeal by plaintiff) * (Vol. 25) 1938 Mad 322 (323) (DB).

[But see (Vol. 7) 1920 Oudh 145 (146): 23 Oudh Cas 110 (This case makes no reference to Rule 33 and follows a decision under the old Code)]

[3] Ordinarily, the power conferred by this rule will be confined to those cases where, as a result of interference in favour of the appellant, further interference with the decree of the lower Court is rendered necessary, in order to adjust the rights of the parties according to justice, equity and good conscience. (Vol. 1) 1914 Cal 722 (723) (DB) * ('11) 84 All 32 (35) (FB) * (Vol. 22) 1935 Cal 453 (459). (The provisions of this rule should not be applied so as to enable a party to ignore other provisions of the code, e.g., Order 41 Rule 22) * (Vol. 20) 1933 Nag 186 (186): 29 Nag L R 173. (Rule is applicable where the suit is against defendants in the alternative) * (Vol. 21) 1934 Pat 134 (141, 142): 13 Pat 200 (DB) * (Vol. 21) 1934 Pat 524 (526) (But where distinct and separate decree is passed against non-appelling defendant Appellate Court ought not to interfere in his favour).

[4] A claims Rs. 500 as due to him either from B or C and, in a suit against both of them claiming relief in the alternative, obtains a decree against B. B appeals making A and C respondents. The appellate Court comes to the conclusion that C and not B is liable to A. It has jurisdiction while allowing B's appeal to pass a decree in favour of A against C. (Vol. 30) 1943 All 842 (844) (DB) * (Vol. 25) 1938 Pat 275 (276): 17 Pat 338 (DB).

[See also (Vol. 24) 1937 Pat 628 (631): 16 Pat 557 (DB).] (Suit for contribution against two sets of defendants—Decree passed in suit—Appeals filed by plaintiff and one set of defendants—Latter can raise in their appeal question of liability of the other defendants though plaintiff in his appeal does not claim any relief against such defendants).

[5] A sues B and C for a certain sum of money. The suit is decreed against B and dismissed against C. B appeals making A and C respondents to the appeal. The appellate Court can, while reversing the decree against B, pass a decree against C or if it considers necessary against both B and C. ('22) 64 Ind Cas 178 (180) (DB) (Cal) * (Vol. 18) 1931 Lah 370 (371) (DB). (Suit for price of goods sold) * (Vol. 18) 1931 Nag 97 (98) (Assignee of debt suing assignor and debtor) * ('04) 31 Cal 643 (645, 646) (FB). (Suit for contribution) * (Vol. 14) 1927 Mad 349 (350). (Suit on mortgage—Trial Court decreed suit against one of the defendants who appealed—Appellate Court passed a decree against all defendants) * (Vol. 24) 1937 Pat 628 (631): 16 Pat 557 (DB). (B asking for such variation so that his own liability may be reduced—Decree may be passed against both B and C) * ('40) 187 Ind Cas 634 (635) (DB) (Pat) (Do.).

[6] A suit is brought on behalf of the public for a declaration (a) and that the public are entitled to use the locks on a certain river without paying tolls to the defendant, and (b) that the defendant is under an obligation to keep the locks in repair. The trial Court holds that the plaintiff is entitled to use the locks without paying tolls but the defendant is under no obligation to keep the locks in repair and a decree is accordingly passed. The defendant appeals, but the plaintiff neither appeals or files cross-objections against the decree. The appellate Court has jurisdiction to pass a decree declaring that the public are liable to pay tolls and also declaring that the defendant is under an obligation to keep the locks in repair. (1901) 2 Ch D 671 (720) Attorney-General v. Simpson * (Vol. 15) 1928 All 77 (80): 50 All 218 (DB). (Decree against mother and minor son—Direction that properties in one village to be sold—Appeal—Minor son found not liable—Decree against mother can be directed to be enforced against properties in another village also) * (Vol. 18) 1931 P C 234 (239): 53 Ind App 350: 54 Mad 774 (P C) (Confirming (Vol. 17) 1930 Mad 154).

[7] A is the vendee of certain lands from B. B fails to deliver possession of the lands to A. A sues B for possession, or in the alternative for the return of the purchase-money. The trial Court awards A a decree for possession. B appeals. The appellate Court considers that A is not entitled to sue for possession, but entitled to the return of the purchase-money. The appellate Court can vary the decree accordingly. ('09) 18 Mad L Jour 586 (587, 588) (DB). (But case would have been different had the trial Court refused prayer for possession—In such a case appellate Court could have no power to alter the decree to one of possession in the absence of cross-objection) * (Vol. 12) 1925 Lah 155 (156). Where plaintiff made alternative claims on one of which the trial Court decreed the claim, the appellate Court in reversing the decree is bound to see whether the plaintiff is not entitled to the alternative relief).

[See also (Vol. 24) 1937 Cal 10 (12) (DB)].

[8] A, an auction-purchaser, sues B, the judgment-debtor, for possession or in the alternative C the decree-holder, for refund of the purchase-money. The trial Court decrees possession. B appeals making A and C respondents. The Appellate Court comes to the conclusion that A is not entitled to recover possession from B but is entitled to the refund of the purchase-money from C. A decree may be passed to this effect. ('13) 15 Bom L R 41 (44) (DB) * (Vol. 14) 1927 Cal 831 (832) (DB). (Trial Court decreed refund of purchase-money—Appellate Court decreed possession).

[9] A selling certain land to B—B deprived of such land owing to action of C—B suing A and C claiming possession of land and in the alternative refund of purchase-money from A—Trial Court holding that he was not entitled to get the land and decreeing his claim for money against A—Appeal by A impleading B and C—Appellate Court holding that A was not liable and that B was entitled to recover the land—A decree can be passed for possession of the land in favour of B against C. (Vol. 25) 1938 Pat 323 (324).

[10] A mortgaging certain land to B with possession—B deprived of land by C—B suing A and C, claiming a decree against A for refund of consideration or in the alternative a decree for possession against C—Trial Court holding that A had no right to mortgage the land

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and passing a decree for refund of consideration against him—Appeal by A impleading B and C as respondents—Appellate Court holding that the mortgage was good and reversing trial Court's decree for refund of consideration can at the same time pass a decree for possession in B's favour against C. (Vol. 27) 1940 Pat 47 (48).

[11] Suit by plaintiff for share in deceased's property—Plaintiff conceding that defendant 1 was entitled to Rs. 5,000 and claiming that he and defendants 2 and 3 were each entitled to sixth share in surplus and paying court-fee on share claimed—Suit decreed as aforesaid—Appeal by defendant 2 alone allowed and defendant 2 held entitled to sixth share in whole property—No appeal or memo. of objections by plaintiff and defendant 3—Variation of decree by Appellate Court in favour of plaintiff and defendant 3 by allowing them sixth share in whole property, held erroneous. (Vol. 32) 1945 Mad 47 (49).

[12] Decree in favour of plaintiff of trial Court supplemented by Appellate Court in appeal by defendant—No new relief added but decree merely elucidated in favour of plaintiff—Decree of appellate Court supplementing that of trial Court is valid. (Vol. 33) 1946 Nag 228 (230): I L R (1946) Nag 246.

[13] A and B sue C for recovery of certain property. The trial Court passes a decree in A's favour but dismisses B's suit. C appeals. B neither appeals nor prefers cross-objections. The Appellate Court holds that B and not A is the person entitled. It can pass a decree in B's favour. (Vol. 2) 1915 P C 57 (58, 59): 43 Cal 417 (P C). (Confirming (1911) 38 Cal 721).

[But see (Vol. 15) 1928 All 746 (751, 752): 51 All 68 (DB)].

[14] The Appellate Court has jurisdiction to pass a decree in the respondent's favour even in cases where he has not filed any cross-objection or appeal though the question whether the power should be exercised in a given case depends on its own circumstances. (Vol. 32) 1945 Mad 412 (422) (DB) * (Vol. 30) 1943 Nag 273 (276): I L R (1943) Nag 462. (Suit by decree-holder under O. 21 R. 63 decreed so far as judgment-debtor's half share in property attached—Appeal by decree-holder—No appeal or cross-objection by defendants—Appellate Court cannot dismiss whole suit) * (Vol. 30) 1943 Oudh 365 (366) (Appeal by defendant dismissed—Plaintiff-respondent not having filed cross-objections and having shown no good grounds for this failure, Appellate Court refused to exercise its powers under R. 35) * (Vol. 17) 1930 Mad 801 (806): 53 Mad 881 (FB). (Plaintiff dissatisfied with decree, appealing—In proper case Appellate Court can dismiss plaintiff's suit *in toto* though respondent has not preferred cross-appeal or memorandum of objections.) (Confirming (Vol. 12) 1925 Mad 266) * (Vol. 20) 1933 Mad 529 (531, 533) (DB) (*ex parte* decree against some defendants restored by High Court—Against rest *ex parte* decree set aside—Suit tried by another Sub-Judge and dismissed as based on false document—Plaintiff alone appealing—Appeal dismissed—High Court can dismiss the suit as against the defendants who had not appealed) * ('12) 8 Nag I R 174 (176) (Suit partly decreed and partly dismissed—Appeal by plaintiff—No appeal or cross-objection by defendant—Appellate Court can dismiss whole suit as barred by limitation) * (Vol. 16) 1929 Rang 158 (159):

7 Rang 88 (DB). (Decree for mesne profits—Appeal by plaintiff for enhancing amount—Appellate Court can modify decree in defendant's favour) * (Vol. 8) 1921 All 367 (368): 43 All 85 (DB). (Suit by A against B and C—Decree partly against B and partly against C—Appeal by B—No appeal or cross-objection by C—Appellate Court can exonerate C completely and make B liable for the whole claim, *vide contra* 18 Ind Cas 530 (All) * (Vol. 17) 1930 Rang 190 (191) (DB). (Suit partly decreed and partly dismissed—Appeal by defendant—Whole suit may be decreed, though plaintiff has not appealed or filed cross-objections) * (Vol. 20) 1933 Lah 40 (41) (Do) * (Vol. 2) 1915 All 284 (285) (DB). (Do) * (Vol. 16) 1929 All 398 (399) (DB). (Suit for pre-emption decreed partly—Appeal by defendant—Appellate Court may decree whole claim, though plaintiff has not filed appeal or cross-objection) * (Vol. 18) 1926 Mad 631 (633) (Suit dismissed by defendant wrongly ordered to pay court-fee payable on a previous suit filed by him—Appeal by plaintiff—Appeal dismissed—Appellate Court has power to set aside the erroneous order against the defendant.)

[15] On the above principles a Court has jurisdiction, in dismissing an appeal to rectify an error in the judgment and decree of the lower Court although the respondent has not filed any appeal or cross-objection against the decree. (Vol. 24) 1937 All 401 (406): I L R (1937) All 489 (DB) * (Vol. 25) 1938 Lah 188 (189): I L R (1938) Lah 148 (DB). (Appeal by defendant dismissed—Appellate Court can amend decree of lower Court so as to bring it into conformity with judgment.)

[16] In exercising the power under this rule, the Court should not lose sight of the other provisions of law such as the Court-fees Act or the Limitation Act which are likely to be infringed by the exercise of such power. (Vol. 29) 1942 Mad 748 (753.) (Held that Appellate Court while decreeing suit could not exercise its power under this rule in favour of respondent-creditors, as it would affect a vested right which had come into existence by virtue of their failure to file suits within limitation) * (Vol. 29) 1942 Pat 204 (209): 20 Pat 811 (DB) * (Vol. 8) 1916 Cal 261 (262) (DB) * (Vol. 21) 1934 Pat 134 (141): 13 Pat 200 (DB) * (Vol. 3) 1916 Cal 250 (251) (DB) (Provisions of R. 22 of O. 41, should not be lost sight of) * ('11) 34 All 32 (34) (FB) * (Vol. 4) 1917 Pat 52 (53) (DB) (Do) * (Vol. 5) 1918 Cal 13 (15) (SB) * (Vol. 27) 1940 Pat 137 (139): 18 Pat 768 (DB) * (Vol. 24) 1937 Pesh 69 (71) (Powers under R. 33 are to be exercised only where failure to exercise will lead to impossible, contradictory and unworkable orders.)

[17] Care and judicial discretion must be exercised in view of all the circumstances of the case. ('11) 34 All 32 (34) (FB) * (Vol. 21) 1934 Pat 134 (141): 13 Pat 200 (DB) * (Vol. 25) 1938 Mad 322 (323) (DB).

[18] The following conditions should be satisfied before such power is exercised in favour of a party:

(a) The Court must be satisfied that there are good reasons for such party not having filed any appeal or cross-objection. (Vol. 29) 1942 Pat 204 (209): 20 Pat 811 (DB) * (Vol. 30) 1943 Oudh 365 (366) (Respondent not filing cross-objection—No grounds shown for not filing same—No interference) * (Vol. 32) 1945 Bom 28 (33): I L R (1944) Bom 619 (DB). (Person not appealing against the decree—Though represented as

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respondent by pleader, pleader also not appearing—Appellate Court cannot extend the indulgence of varying the decree in his favour) * (Vol. 11) 34 All 82 (34, 35) (FB) * (Vol. 12) 1925 Mad 266 (267) (Confirmed in (Vol. 17) 1930 Mad 801: 53 Mad 881 (FB)).

(b) Interference in favour of such party must be rendered necessary by the conclusion to which the Appellate Court comes in deciding the appeal. (Vol. 29) 1942 Mad 748 (751) (Suit by one creditor for refund under S. 73 (2)—Other creditors joined as formal parties—Appellate Court decreeing suit cannot pass decree in favour of latter creditors—Their proper remedy was to sue separately under S. 73 (2) * (Vol. 15) 1928 All 746 (750): 51 All 63 (DB).

(c) Interference must be necessary in the interests of justice, equity and good conscience. (Vol. 13) 1926 Cal 57 (59) (DB) * (Vol. 13) 1926 Cal 1042 (1044) (DB) * (Vol. 5) 1918 Cal 13 (15) (SB.) (This rule is applicable generally in cases where but for recourse to it, the ends of justice would be defeated) * (Vol. 15) 1928 Lah 947 (948.) (Such interference is necessary where decision leads to two inconsistent decrees) * (Vol. 12) 1925 Pat 285 (287): 4 Pat 37 (DB) * (Vol. 18) 1931 Lah 370 (371) (DB.) (Plaintiff not coming into the Court with clean hands—Powers under rule not to be exercised in his favour) * (Vol. 15) 1928 Mad 1144 (1146) (DB).

[See also (Vol. 20) 1933 Pat 224 (233): 12 Pat 261 (DB.) (Rule 33 gives discretion in order to further the ends of justice and not to favour one party as against another).]

[19] A decree is passed in an administration suit, dividing the estate between A and B, and rejecting the claim of C to be entitled to the whole estate in preference to both A and B. A appeals from the decree claiming a higher share. C does not file any appeal or cross-objection. The Appellate Court has no power in such appeal to enter into the question of C's preferential right. (Vol. 17) 1930 Rang 237 (238): 8 Rang 480 (DB).

[See (Vol. 16) 1929 Rang 265 (267): 7 Rang 398 (DB).]

[20] In an ejectment suit by landlord each defendant claiming to be in possession of specific plots of land—Suit decreed—Appeal by some defendants—Appellate Court when allowing appeal cannot dismiss suit against non-appealing defendants. (Vol. 32) 1945 Pat 453 (459): 24 Pat 359 (DB).

[21] The Appellate Court can interfere in favour of a party or a respondent, who has filed an appeal or cross-objection and failed therein. (Vol. 12) 1925 Lah 2 (9) (DB) * (Vol. 18) 1931 Mad 277 (278) (DB) (Independent appeals by plaintiff and defendant—Latter's appeal abating—He as respondent in plaintiff's appeal can invoke Rule 33).

[22] There is nothing in this rule or in the illustration to it to confine its application to cases where there is but one cause of action or ground of liability against the defendants. (Vol. 24) 1937 Pat 628 (631): 16 Pat 557 (DB).

[See (Vol. 40) 187 Ind Cas 634 (635) (DB) (Pat.) (Suit on mortgage—Decree against first set of defendant

exonerating other set of defendants—Appeal by former against decree seeking to make latter also liable—No appeal by plaintiff—Held, such appeal was competent).]

7. Power can be exercised in favour of persons not parties to appeal.—[1] The appellate Court can exercise its power under this rule in favour of parties to the suit who were not impleaded as parties to the appeal. (Vol. 30) 1943 Mad 160 (161) * (Vol. 29) 1942 Cal 257 (260): 1 L R (1941) 2 Cal 556 (DB) * (Vol. 28) 1941 Cal 368 (370) (DB) * (Vol. 22) 1935 Cal 24 (26): 61 Cal 919. (But the power cannot be exercised to the prejudice of a person who is not a party to appeal) * (Vol. 20) 1933 Mad 806 (808) (Do) * (Vol. 6) 1919 Mad 196 (197) (DB.) (Preferably they may be made parties) * (Vol. 16) 1929 All 243 (244): 51 All 575 (DB) * (Vol. 13) 1926 Cal 1042 (1043) (DB.) (Illustration to the rule does not restrict the scope of the rule) * (Vol. 18) 1931 Cal 738 (740): 58 Cal 923 (DB). (But power under this rule cannot be exercised to the prejudice or detriment of absent respondent) * (Vol. 23) 1936 Pat 604 (605) (DB) * (Vol. 26) 1939 Rang 213 (214) * (Vol. 24) 1937 Oudh 448 (449).

[See also (Vol. 14) 1927 Nag 196 (197).]

[But see (Vol. 6) 1919 Cal 127 (127) (DB) * (Vol. 20) 1933 Cal 787 (787, 788) (DB) * (Vol. 13) 1926 Nag 185 (186) * (Vol. 7) 1920 Low Bur 114 (114) * (Vol. 15) 1928 All 746 (751): 51 All 63 (DB).]

8. Decree against several persons—Appeal or cross-objections by one—Power of Appellate Court to set aside decree against all.—[1] Where a decree is passed against several persons and one of them appeals against it, it is competent to the Appellate Court under this rule to set aside the decree against all of them although such decree does not proceed on any ground common to all the persons against whom it is passed. (Vol. 27) 1940 All 225 (227) * (Vol. 11) 1924 Pat 386 (339) (DB) * (Vol. 14) 1927 All 37 (37): 48 All 551 (DB) * (Vol. 10) 1923 Mad 392 (402) (DB.) (Decree set aside in order to avoid inconsistency) * (Vol. 16) 1929 Cal 123 (126): 56 Cal 598 (DB) * (Vol. 13) 1926 All 425 (426) (The case makes no reference to this rule) * (Vol. 5) 1918 Mad 794 (799): 40 Mad 846 (DB) * (Vol. 3) 1916 Pat 400 (401): 1 Pat L Jour 143 * (Vol. 24) 1937 Oudh 448 (449) * (Vol. 2) 1915 Mad 227 (229) (DB).

[See also (Vol. 27) 1940 All 81 (82) * (Vol. 13) 1926 Mad 974 (975) * (Vol. 29) 1942 Cal 257 (260): 1 L R (1941) 2 Cal 556 (DB).]

[2] Similarly where cross-objections filed by one of several defendants are accepted by the Appellate Court, such Court can reverse or vary the decree in favour of all the defendants in order to avoid two contradictory decrees resulting in the same case. (Vol. 29) 1942 Pat 493 (505, 506): 21 Pat 397 (DB).

[3] The power of the Appellate Court cannot be exercised as a matter of course and in the absence of special reasons. (Vol. 30) 1943 All L Jour 1298 (1301) (DB) * (Vol. 14) 1927 Nag 196 (197) * (Vol. 3) 1916 Lah 113 (114, 117): 1917 Pun Re No. 71 (FB) * (Vol. 4) 1917 Cal 87 (88) (DB).

[4] Where there are several defendants and the decree imposes a separate liability on each of them and one of them appeals against that part of the decree

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and passing a decree for refund of consideration against him—Appeal by A impleading B and C as respondents—Appellate Court holding that the mortgage was good and reversing trial Court's decree for refund of consideration can at the same time pass a decree for possession in B's favour against C. (Vol. 27) 1940 Pat 47 (48).

[11] Suit by plaintiff for share in deceased's property—Plaintiff conceding that defendant 1 was entitled to Rs. 5,000 and claiming that he and defendants 2 and 3 were each entitled to sixth share in surplus and paying court-fee on share claimed—Suit decreed as aforesaid—Appeal by defendant 2 alone allowed and defendant 2 held entitled to sixth share in whole property—No appeal or memo. of objections by plaintiff and defendant 3—Variation of decree by Appellate Court in favour of plaintiff and defendant 3 by allowing them sixth share in whole property, held erroneous. (Vol. 32) 1945 Mad 47 (49).

[12] Decree in favour of plaintiff of trial Court supplemented by Appellate Court in appeal by defendant—No new relief added but decree merely elucidated in favour of plaintiff—Decree of appellate Court supplementing that of trial Court is valid. (Vol. 33) 1946 Nag 228 (230): I L R (1946) Nag 246.

[13] A and B sue C for recovery of certain property. The trial Court passes a decree in A's favour but dismisses B's suit. C appeals. B neither appeals nor prefers cross-objections. The Appellate Court holds that B and not A is the person entitled. It can pass a decree in B's favour. (Vol. 2) 1915 P C 57 (58, 59): 43 Cal 417 (P C). (Confirming (1911) 38 Cal 721).

[But see (Vol. 15) 1928 All 746 (751, 752): 51 All 63 (DB)].

[14] The Appellate Court has jurisdiction to pass a decree in the respondent's favour even in cases where he has not filed any cross-objection or appeal though the question whether the power should be exercised in a given case depends on its own circumstances. (Vol. 32) 1945 Mad 412 (422) (DB) * (Vol. 30) 1943 Nag 273 (276): I L R (1943) Nag 462. (Suit by decree-holder under O. 21 R. 63 decreed so far as judgment-debtor's half share in property attached—Appeal by decree-holder—No appeal or cross-objection by defendants—Appellate Court cannot dismiss whole suit) * (Vol. 30) 1943 Oudh 365 (366) (Appeal by defendant dismissed—Plaintiff-respondent not having filed cross-objections and having shown no good grounds for this failure, Appellate Court refused to exercise its powers under R. 33) * (Vol. 17) 1930 Mad 801 (806): 53 Mad 881 (F B). (Plaintiff dissatisfied with decree, appealing—In proper case Appellate Court can dismiss plaintiff's suit *in toto* though respondent has not preferred cross-appeal or memorandum of objections.) (Confirming (Vol. 12) 1925 Mad 266) * (Vol. 20) 1933 Mad 529 (531, 533) (DB) (*ex parte* decree against some defendants restored by High Court—Against rest *ex parte* decree set aside—Suit tried by another Sub-Judge and dismissed as based on false document—Plaintiff alone appealing—Appeal dismissed—High Court can dismiss the suit as against the defendants who had not appealed) * ('12) 8 Nag L R 174 (176) (Suit partly decreed and partly dismissed—Appeal by plaintiff—No appeal or cross-objection by defendant—Appellate Court can dismiss whole suit as barred by limitation) * (Vol. 16) 1929 Rang 158 (159):

7 Rang 88 (DB). (Decree for mesne profits—Appeal by plaintiff for enhancing amount—Appellate Court can modify decree in defendant's favour) * (Vol. 8) 1921 All 367 (368): 43 All 85 (DB). (Suit by A against B and C—Decree partly against B and partly against C—Appeal by B—No appeal or cross-objection by C—Appellate Court can exonerate C completely and make B liable for the whole claim, *vide contra* 18 Ind Cas 530 (All) * (Vol. 17) 1930 Rang 190 (191) (DB). (Suit partly decreed and partly dismissed—Appeal by defendant—Whole suit may be decreed, though plaintiff has not appealed or filed cross-objections) * (Vol. 20) 1933 Lah 40 (41) (Do) * (Vol. 2) 1915 All 284 (285) (DB). (Do) * (Vol. 16) 1929 All 398 (399) (DB). (Suit for pre-emption decreed partly—Appeal by defendant—Appellate Court may decree whole claim, though plaintiff has not filed appeal or cross-objection) * (Vol. 18) 1926 Mad 631 (633) (Suit dismissed by defendant wrongly ordered to pay court-fee payable on a previous suit filed by him—Appeal by plaintiff—Appeal dismissed—Appellate Court has power to set aside the erroneous order against the defendant.)

[15] On the above principles a Court has jurisdiction, in dismissing an appeal to rectify an error in the judgment and decree of the lower Court although the respondent has not filed any appeal or cross-objection against the decree. (Vol. 24) 1937 All 401 (406): I L R (1937) All 489 (DB) * (Vol. 25) 1938 Lah 188 (189): I L R (1938) Lah 148 (DB). (Appeal by defendant dismissed—Appellate Court can amend decree of lower Court so as to bring it into conformity with judgment.)

[16] In exercising the power under this rule, the Court should not lose sight of the other provisions of law such as the Court-fees Act or the Limitation Act which are likely to be infringed by the exercise of such power. (Vol. 29) 1942 Mad 748 (753.) (*Held* that Appellate Court while decreeing suit could not exercise its power under this rule in favour of respondent-creditors, as it would affect a vested right which had come into existence by virtue of their failure to file suits within limitation) * (Vol. 29) 1942 Pat 204 (209): 20 Pat 811 (DB) * (Vol. 3) 1916 Cal 261 (262) (DB) * (Vol. 21) 1934 Pat 134 (141): 13 Pat 200 (DB) * (Vol. 3) 1916 Cal 250 (251) (DB) (Provisions of R. 22 of O. 41, should not be lost sight of) * ('11) 34 All 32 (34) (FB) * (Vol. 4) 1917 Pat 52 (53) (DB) (Do) * (Vol. 5) 1918 Cal 13 (15) (SB) * (Vol. 27) 1940 Pat 137 (139): 18 Pat 768 (DB) * (Vol. 24) 1937 Pesh 69 (71) (Powers under R. 33 are to be exercised only where failure to exercise will lead to impossible, contradictory and unworkable orders.)

[17] Care and judicial discretion must be exercised in view of all the circumstances of the case. ('11) 34 All 32 (34) (FB) * (Vol. 21) 1934 Pat 134 (141): 13 Pat 200 (DB) * (Vol. 25) 1938 Mad 322 (323) (DB).

[18] The following conditions should be satisfied before such power is exercised in favour of a party:

(a) The Court must be satisfied that there are good reasons for such party not having filed any appeal or cross-objection. (Vol. 29) 1942 Pat 204 (209): 20 Pat 811 (DB) * (Vol. 30) 1943 Oudh 365 (366) (Respondent not filing cross-objection—No grounds shown for not filing same—No interference) * (Vol. 32) 1945 Bom 28 (33): I L R (1944) Bom 619 (DB). (Person not appealing against the decree—Though represented as

O. 41 R. 33 (contd.)

respondent by pleader, pleader also not appearing—Appellate Court cannot extend the indulgence of varying the decree in his favour) * ('11) 34 All 32 (34, 35) (FB) * (Vol. 12) 1925 Mad 266 (267) (Confirmed in (Vol. 17) 1930 Mad 801: 53 Mad 881 (FB)).

(b) Interference in favour of such party must be rendered necessary by the conclusion to which the Appellate Court comes in deciding the appeal. (Vol. 29) 1942 Mad 748 (751) (Suit by one creditor for refund under S. 73 (2)—Other creditors joined as formal parties—Appellate Court decreeing suit cannot pass decree in favour of latter creditors—Their proper remedy was to sue separately under S. 73 (2) * (Vol. 15) 1928 All 746 (750): 51 All 63 (DB).

(c) Interference must be necessary in the interests of justice, equity and good conscience. (Vol. 13) 1926 Cal 57 (59) (DB) * (Vol. 13) 1926 Cal 1042 (1044) (DB) * (Vol. 5) 1918 Cal 13 (15) (SB). (This rule is applicable generally in cases where but for recourse to it, the ends of justice would be defeated) * (Vol. 15) 1928 Lah 947 (948). (Such interference is necessary where decision leads to two inconsistent decrees) * (Vol. 12) 1925 Pat 285 (287): 4 Pat 37 (DB) * (Vol. 18) 1931 Lah 370 (371) (DB). (Plaintiff not coming into the Court with clean hands—Powers under rule not to be exercised in his favour) * (Vol. 15) 1928 Mad 1144 (1146) (DB).

[See also (Vol. 20) 1933 Pat 224 (233): 12 Pat 261 (DB). (Rule 33 gives discretion in order to further the ends of justice and not to favour one party as against another).]

[19] A decree is passed in an administration suit, dividing the estate between A and B, and rejecting the claim of C to be entitled to the whole estate in preference to both A and B. A appeals from the decree claiming a higher share. C does not file any appeal or cross-objection. The Appellate Court has no power in such appeal to enter into the question of C's preferential right. (Vol. 17) 1930 Rang 237 (238): 8 Rang 480 (DB).

[See (Vol. 16) 1929 Rang 265 (267): 7 Rang 398 (DB).]

[20] In an ejectment suit by landlord each defendant claiming to be in possession of specific plots of land—Suit decreed—Appeal by some defendants—Appellate Court when allowing appeal cannot dismiss suit against non-appealing defendants. (Vol. 32) 1945 Pat 453 (458): 24 Pat 359 (DB).

[21] The Appellate Court can interfere in favour of a party or a respondent, who has filed an appeal or cross-objection and failed therein. (Vol. 12) 1925 Lah 2 (9) (DB) * (Vol. 18) 1931 Mad 277 (278) (DB) (Independent appeals by plaintiff and defendant—Latter's appeal abating—He as respondent in plaintiff's appeal can invoke Rule 33).

[22] There is nothing in this rule or in the illustration to it to confine its application to cases where there is but one cause of action or ground of liability against the defendants. (Vol. 24) 1937 Pat 628 (631): 16 Pat 557 (DB).

[See ('40) 187 Ind Cas 634 (635) (DB) (Pat.) (Suit on mortgage—Decree against first set of defendant

exonerating other set of defendants—Appeal by former against decree seeking to make latter also liable—No appeal by plaintiff—Held, such appeal was competent).]

7. Power can be exercised in favour of persons not parties to appeal.—[1] The appellate Court can exercise its power under this rule in favour of parties to the suit who were not impleaded as parties to the appeal. (Vol. 30) 1943 Mad 160 (161) * (Vol. 29) 1942 Cal 257 (260): 1 L R (1941) 2 Cal 556 (DB) * (Vol. 28) 1941 Cal 368 (370) (DB) * (Vol. 22) 1935 Cal 24 (26): 61 Cal 919. (But the power cannot be exercised to the prejudice of a person who is not a party to appeal) * (Vol. 20) 1933 Mad 806 (808) (Do) * (Vol. 6) 1919 Mad 196 (197) (DB). (Preferably they may be made parties) * (Vol. 16) 1929 All 243 (244): 51 All 575 (DB) * (Vol. 13) 1926 Cal 1042 (1043) (DB). (Illustration to the rule does not restrict the scope of the rule) * (Vol. 18) 1931 Cal 788 (740): 58 Cal 923 (DB). (But power under this rule cannot be exercised to the prejudice or detriment of absent respondent) * (Vol. 23) 1936 Pat 604 (605) (DB) * (Vol. 26) 1939 Rang 213 (214) * (Vol. 24) 1937 Oudh 448 (449).

[See also (Vol. 14) 1927 Nag 196 (197).]

[But see (Vol. 6) 1919 Cal 127 (127) (DB) * (Vol. 20) 1933 Cal 787 (787, 788) (DB) * (Vol. 13) 1926 Nag 135 (136) * (Vol. 7) 1920 Low Bur 114 (114) * (Vol. 15) 1928 All 746 (751): 51 All 63 (DB).]

8. Decree against several persons—Appeal or cross-objections by one—Power of Appellate Court to set aside decree against all.—[1] Where a decree is passed against several persons and one of them appeals against it, it is competent to the Appellate Court under this rule to set aside the decree against all of them although such decree does not proceed on any ground common to all the persons against whom it is passed. (Vol. 27) 1940 All 225 (227) * (Vol. 11) 1924 Pat 336 (339) (DB) * (Vol. 14) 1927 All 37 (37): 48 All 551 (DB) * (Vol. 10) 1923 Mad 392 (402) (DB). (Decree set aside in order to avoid inconsistency) * (Vol. 16) 1929 Cal 123 (126): 56 Cal 598 (DB) * (Vol. 13) 1926 All 425 (426). (The case makes no reference to this rule) * (Vol. 5) 1918 Mad 794 (799): 40 Mad 846 (DB) * (Vol. 3) 1916 Pat 400 (401): 1 Pat L Jour 143 * (Vol. 24) 1937 Oudh 448 (449) * (Vol. 2) 1915 Mad 227 (229) (DB).

[See also (Vol. 27) 1940 All 81 (82) * (Vol. 18) 1926 Mad 974 (975) * (Vol. 29) 1942 Cal 257 (260): 1 L R (1941) 2 Cal 556 (DB).]

[2] Similarly where cross-objections filed by one of several defendants are accepted by the Appellate Court, such Court can reverse or vary the decree in favour of all the defendants in order to avoid two contradictory decrees resulting in the same case. (Vol. 29) 1942 Pat 493 (505, 506): 21 Pat 397 (DB).

[3] The power of the Appellate Court cannot be exercised as a matter of course and in the absence of special reasons. ('30) (1930) All L Jour 1298 (1801) (DB) * (Vol. 14) 1927 Nag 196 (197) * (Vol. 3) 1916 Lah 113 (114, 117): 1917 Pun Re No. 71 (FB) * (Vol. 4) 1917 Cal 87 (88) (DB).

[4] Where there are several defendants and the decree imposes a separate liability on each of them and one or them appeals against that part of the decree

O 41 R. 23 (*contd.*)

which concerns him, the Appellate Court cannot set aside the decree against all the defendants. (Vol. 29) 1942 Pat 204 (209): 20 Pat 811 (DB) * (Vol. 8) 1921 All 36 (57, 58): 43 All 320 (DB) * (Vol. 21) 1934 Pat 524 (526) * (Vol. 15) 1928 Mad 1144 (1146) (DB) * (Vol. 15) 1928 Cal 593 (595): 55 Cal 1193 (DB) * (Vol. 5) 1918 Mad 665 (666, 667) (DB) (This rule should be read in the light of O. 41 R. 4) * (Vol. 27) 1940 Pat 137 (139): 18 Pat 768 (DB) * (Vol. 24) 1937 Pat 40 (43): 16 Pat 45 (DB) * (Vol. 22) 1935 Lah 889 (890, 891) (DB).

[See also (Vol. 30) 1943 All 68 (74) (DB).]

[But see (Vol. 6) 1919 Mad 196 (197) (DB) * (Vol. 12) 1925 Pat 40 (41, 42, 43): 3 Pat 327 (DB).]

[5] Where a decree is passed against two defendants against one of whom it is passed on confession of judgment, and against the other after contest, and the latter appeals against the decree, the Appellate Court cannot set aside the decree in favour of the former. (13) 1913 Pun L R No. 80 P 301 (307) (DB).

[See also (Vol. 28) 1941 Cal 368 (370) (DB)—(Some defendants compromising and giving up their claims.)]

[6] Suit by A against B and C decreed—B appeals impleading A and C as respondents—C admitting that he acquired a lower Court's decree by payment of the decretal amount and binding himself not to appeal from decree B succeeding in appeal and suit dismissed against him—*Held* that discretionary powers under this rule could not be exercised in C's favour. (Vol. 27) 1940 Nag 129 (133): 1 L R (1940) Nag 244.

8-a. Cross-objections against co-respondent.—[1] This rule does not entitle a respondent to file a cross-objection against a co-respondent. (Vol. 23) 1936 Pat 604 (605) (DB).

[2] [See also Notes on O. 41 R. 22.]

9. Power if can be exercised against person not party to appeal.—[1] Under this rule, the Appellate Court has no power to interfere to the prejudice of a person who was a party to the suit but who was not impleaded in the appeal. (Vol. 30) 1943 Mad 160 (161) (Order affirming trial Court's decree against party is not adverse) * (Vol. 27) 1940 All 225 (226) * (Vol. 27) 1940 Mad 609 (609) ((Vol. 16) 1929 Cal 315 dissented) * (Vol. 22) 1935 Cal 24 (26): 61 Cal 919 * (Vol. 20) 1933 Mad 806 (808) * (Vol. 21) 1934 Pat 589 (591) (DB) * (Vol. 12) 1925 Mad 266 (267) ((1910) Mad W N 719 held wrongly decided) * (Vol. 7) 1920 Lah 438 (440): 1 Lah 396 * (Vol. 18) 1931 Cal 738 (739, 740): 53 Cal 923 (Do) * (Vol. 23) 1936 Pat 49 (52): 15 Pat 219 (DB) * (Vol. 24) 1937 Sind 312 (314) (DB) * (Vol. 24) 1937 Sind 236 (237): 31 Sind L R 486 (DB).

[See also (Vol. 27) 1940 Rang 97 (99, 100) * (Vol. 13) 1926 Cal 535 (536) (DB) * (Vol. 12) 1925 Rang 108 (109, 110): 2 Rang 541 (DB) * (Vol. 16) 1929 All 195 (196) (DB).

[But see (Vol. 16) 1929 Cal 315 (317) (DB) * (Vol. 13) 1926 Cal 1042 (1044) (DB) (*Obiter*) * (Vol. 3) 1916 Mad 1219 (1220).

[2] Appellate Court can pass an order under this rule against a party who has been impleaded in the appeal

but who has not appeared. (Vol. 25) 1938 Pat 323 (324).

[3] See also Notes on Rule 4 and Rule 22, O. 41.

10. Addition of parties in appeal.—[1] Appellate Court has power under R. 33 to add parties to the appeal. (Vol. 9) 1922 Cal 398 (399): 49 Cal 379 (11B) (The power of adding parties can be exercised in partition suits) * (Vol. 20) 1933 Mad 806 (809) * (Vol. 15) 1928 Lah 947 (948) * (Vol. 22) 1935 Mad 175 (178) (Power under this rule can be used only in special circumstances) * (Vol. 16) 1929 Rang 265 (267): 7 Rang 398 (DB) * (Vol. 24) 1937 Pat 628 (631): 16 Pat 557 (DB).

[See also (Vol. 22) 1935 Nag 182 (183): 31 Nag L R 223 (DB) (Addition under O. 41 R. 20) * (Vol. 22) 1935 Rang 364 (365). (Party cannot be added after limitation has expired.) * (Vol. 14) 1927 PC 252 (256): 55 Ind App 7: 6 Rang 29 (PC) * (Vol. 28) 1941 Rang 63 (64): 1940 Rang L R 693 (DB).

[But compare (Vol. 13) 1926 Lah 499 (500): 8 Lah 161 (DB).]

[2] In a suit to enforce a mortgage, the defendants who were purchasers of various items of the mortgaged property contended that the mortgage bond was invalid. The Court found against the contention and passed a decree in favour of the plaintiff. One of the defendants who was interested in some of the mortgaged properties appealed against the decree and attacked in such appeal the validity of the mortgage bond. It was held that the other defendants, were not necessary parties to the appeal. (Vol. 22) 1935 Mad 121 (124) (DB).

[3] A sues B and C, the claim being laid against them in the alternative. The suit is decreed against B but dismissed against C. B prefers an appeal and if his only ground of appeal is that the liability to A is on C and not on himself, i.e., B, he must join C as a party to the appeal otherwise he cannot obtain a reversal of the decree against him. (Vol. 28) 1941 Rang 63 (64, 65): 1940 Rang L R 693 (DB) ((Vol. 19) 1932 Rang 16: 9 Rang 614 followed.)

[4] Suit by A against B and C decreed fully against B and partially against C, C only appealing—B not party to appeal—C's appeal allowed and suit dismissed against C—Second appeal by A, not joining B—*Held*, B can apply to be impleaded in A's appeal and ask for reduction of decretal debt in view of Debt Relief Acts passed pending A's appeal. (Vol. 30) 1943 Mad 180 (161).

[5] Suit for contribution against other co-sharers on certain basis. Only one defendant contesting suit—Suit decreed as prayed—Appeal by such defendant challenging basis of calculation—Other co-sharer defendants are necessary parties. (Vol. 31) 1944 Cal 383 (384).

11. Illustration to the rule.—[1] The illustration to the rule indicates a type of cases for which provision is intended to be made. (See Report of the Special Committee) (Vol. 20) 1933 Mad 806 (808) * (Vol. 3) 1916 Lah 113 (114, 117): 1917 Pun Re No. 71 (FB) * (Vol. 14) 1927 Mad 620 (622): 50 Mad 614 (DB).

[See also (11) 34 All 32 (35) (FB) * (Vol. 21) 1934 All 89 (91) (DB)].

O. 41 R. 33 (contd.)

[2] The illustration is not exhaustive of the classes of cases to which the rules apply and does not restrict the scope of the rule. (Vol. 2) 1915 Mad 227 (229) (DB). (The rule covers cases where a party puts forward an untrue claim) * (Vol. 6) 1919 Mad 196 (197) (DB) * (Vol. 13) 1926 Cal 1042 (1044) (DB) * (Vol. 17) 1930 Mad 801 (804): 53 Mad 881 (FB). (In proper cases the rule should be applied.)

12 Proviso.—[1] The effect of the proviso is that the Appellate Court cannot make an order for compensatory costs under S. 35 A where the trial Court has refused to do so.

[See also Notes on S. 35 A.]

13. Limitation.—See Limitation Act, Section 3 and Article 132.

14. Res judicata.—[1] A sues B and C in the alternative for a certain sum of money. The suit is decreed against B and dismissed against C. B appeals making A and C respondents. The Appellate Court sets aside the decree against B. It can at the same time pass a decree against C. But its failure to do so does not operate *res judicata* because it was not obligatory but only discretionary on the part of the Appellate Court to grant relief to A. (Vol. 5) 1918 Cal 223 (224, 225) (DB) (Similarly failure of A to ask for relief under R. 33 does not operate as *res judicata*.)

[2] Where a defendant appeals as to a part of the decree against him, it has been held that he is precluded by *res judicata* from urging in support of his appeal a point which goes to the root of the whole decree including the portion of it from which he has not appealed. (Vol. 17) 1930 Mad 471 (472, 473) (Decision inconsistent with rule and to the Full Bench decision in 29 Mad 333 (335) (FB).)

[3] A filed a suit against B and C claiming a certain plot of land. (C claimed the land as a purchaser from B.) The trial Court held that A and not B was the owner of the land and decreed the suit. C filed an appeal against the decree; but B did not file any appeal. It was held that C's appeal was not barred by the fact that B had not filed an appeal against the decree. If C succeeded in the appeal and the decree was reversed, such reversal would operate for the benefit of B also. (Vol. 25) 1938 Mad 501 (502) (DB). (Distinguishing and explaining (Vol. 14) 1927 P C 252: 55 Ind App 7: 6 Rang 29 (PC).)

15. Remand.—[1] Suit for maintenance by concubine of deceased Hindu—Another claim by widow of deceased for maintenance against estate of deceased, remanded for taking further evidence as to quantum of assets and liabilities of estate—Appellate Court, while holding concubine plaintiff entitled to maintenance, held justified in remanding case for further evidence as it was desirable, in order to arrive at the correct rate of maintenance to the widow and to the concubine, to consider both claims with reference to the available assets and the demands legitimately made upon such estate. (Vol. 27) 1940 Mad 511 (512).

[2] Suit partly decreed and partly dismissed—Appeal by plaintiff—No appeal or cross-objection by defendant

—Whole case may be remanded. (Vol. 6) 1919 Cal 65 (65): 46 Cal 738 (DB).

16. Second appeal.—[1] A sues B and C. The suit is decreed against B but dismissed against C. B. appeals from the decree but A does not file any appeal or cross-objections. B's appeal is allowed and A's entire suit is, therefore, dismissed. A files a second appeal impleading B and C as respondents. He is not entitled to file a second appeal against C because to allow him to do so would be to allow him to prefer an appeal directly to the High Court from the decision of the trial Court (Vol. 15) 1928 Lah 599 (601): 9 Lah 291 (DB) * ('10) 34 Mad 249 (250) (DB) * ('09) 31 All 521 (522) (DB) (C was not a party to B's appeal) * (Vol. 26) 1939 Cal 593 (594) (DB).

[See also (Vol. 13) 1926 P C 34 (35): 49 Mad 435: 53 Ind App 84 (P C) (Privy Council appeal)].

[But see (Vol. 12) 1925 All 555 (555): 47 All 597 (DB) * ('10) 1910 Mad W N 640 (641) (DB) (No longer good law in view of (Vol. 13) 1926 P C 34 (35): 49 Mad 435: 53 Ind App 84 (P C).)]

[2] A sues B and C making the claim against them in the alternative. If a decree is made against B alone and on B's appeal the decree against him is reversed the Appellate Court has power under this rule to pass a decree against C. If the Appellate Court fails to pass such a decree, the High Court can on second appeal by A pass a decree against C. (Vol. 30) 1943 All 342 (344) (DB) ((Vol. 13) 1926 P C 34: 49 Mad 435: 53 Ind App 84 (P C) dist.)

[3] A sues for Rs. 1,000. The trial Court passes a decree for Rs. 600. The defendant appeals but A does not file any appeal or cross-objection. The defendant's appeal is allowed and A's suit is dismissed in its entirety. A files a second appeal. He cannot contend in the second appeal that his whole suit should be decreed. The utmost he can claim is the restoration of the trial Court's decree. (Vol. 3) 1916 P C 148 (149): 44 Cal 1 (P C).

[See also (Vol. 5) 1918 Lah 374 (375).]

[But see (Vol. 4) 1917 Oudh 399 (400) * (Vol. 13) 1926 Rang 172 (175): 4 Rang 110 * ('09) (1909) Pun L R No. 83 p. 308 (310, 311). (Note—these cases are not good law.)]

[4] Where the omission to grant a relief is due to a mere slip of the pen, it can be decreed on further appeal, though no appeal was preferred against the decree of the first Court. ('09) 1909 Pun L R No. 83 p. 308 (311).

[5] The mere fact that a decree might have been passed in favour of a party to the suit who was not impleaded as a party to the appeal does not make him constructively a party to the appeal so as to enable him to file a second appeal against the decree in the appeal. ('12 16 Ind Cas 693 (694) (DB) (Mad) (A's suit decreed against B and C—B alone appeals and A's suit is dismissed—A appeals without impleading C—Case remanded and decree passed by lower Appellate Court in favour of A—Appeal by C is incompetent.)

[6] No appeal lies against an order of remand passed not under O. 41 R. 23, but under the present rule. (Vol. 16) 1929 Nag 63 (63): 26 Nag L R 44.

34. Where the appeal is heard by more Judges than one, any Judge dissenting from the Dissent to be judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

[1882—S. 576; 1877—S. 576; 1859—S. 359.]

DECREE IN APPEAL.

Date and contents of decree. **a 35.** (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

O. 41 R. 33 (contd.)

[7] The refusal to take action under R. 33 in the exercise of its discretion by a lower Appellate Court is not an error of law within S. 100 so as to sustain a second appeal. (Vol. 17) 1930 Mad 707 (707).

[See also (Vol. 23) 1941 Oudh 56 (53): 16 Luck 113. (It was doubted whether in second appeal, this rule could be applied, when the point as to its applicability, was not raised in the lower Appellate Court) * (Vol. 20) 1933 All 113 (114) (DB).]

[8] Though S. 100 only allows a second appeal on the ground that the decree of lower Court is vitiated in one of the ways specified therein and though S. 101 provides that a second appeal will not lie on any other ground, these two provisions must be read with this rule so that the High Court in second appeal must be held to be competent to pass such decree or order as the circumstances of the case may require although as at the date of the decree of the lower Court, its decree was not open to any objection and the necessity of passing a decree or order to a different effect has arisen owing to subsequent happenings. (Vol. 27) 1940 Pat 300 (302) (DB).

17. Privy Council appeal.—[1] A sues B and C. The claim is decreed against B but dismissed against C. B appeals to the High Court and appeal is allowed. A appeals to the Privy Council impleading both B and C. His appeal against C is not maintainable because it amounts to a direct appeal to the Privy Council from the decree of the trial Court. (Vol. 13) 1926 P C 34 (35): 49 Mad 435: 53 Ind App 84 (P C).

18. Revision.—[1] Where an Appellate Court refuses to interfere in favour of a respondent on the ground that it has no jurisdiction to do so in the absence of cross-objections, it fails to exercise a jurisdiction vested in it by law within S. 115. ('13) 1913 Mad WN 1024 (1024).

[2] No revision lies against an interlocutory order refusing to add certain persons as parties to the appeal. (Vol. 3) 1916 Mad 1219 (1220).

19. Letters Patent appeal.—[1] Suit on a pronote against R or L in the alternative, decreed against R and dismissed against L.—In appeal by R, suit dismissed against R but decreed against L, although L was not impleaded in appeal as respondent, within limitation.—In second appeal decree in R's favour maintained but decree against L reversed but certificate for Letter Patent Appeal given.—Letters Patent Bench holding that reversal of decree against L was correct but that decree should have been passed against R.—Contention that certificate for Letters Patent Appeal was only given with reference to question whether the

reversal of decree against L in second appeal was correct and that therefore if the Letters Patent Bench held it was correct it could not pass decree against R.—Contention overruled and final Court's decree against R restored. (Vol. 28) 1941 Rang 63 (65): 1940 Rang L R 693 (DB).

ORDER 41 RULE 35—Note 1.

[1] The date of the decree for purposes of limitation for filing a second appeal is the date on which the judgment is delivered. ('90) 12 All 79 (81) (SB).

[2] Except when the Appellate Court confirms without variation the decree of the original Court, the decree of the Appellate Court must be drawn up in such a form that it can be executed without reference to the decree of the original Court. (Vol. 22) 1935 Rang 139 (140).

[3] Appellate decree should embody so much of lower Court's decree as it is intended to affirm, so as to avoid necessity of reference to superseded decree. (Vol. 7) 1920 Low Bur 118 (121): 10 Low Bur Rul 280 * ('91) 13 All 343 (344, 345) (DB).

[4] Decree not specifying sum due to appellant.—But reference to judgment and decree of lower Court made.—Decree held was capable of execution, defect in decree being due to mistake of officers of Court. ('87) 11 Bom 177 (179) (DB) * ('87) 8 Suth W R 114 (115) (P C) * ('78) 2 Cal L Rep 504 (506) * ('08) 29 Mad 84 (86, 87) (DB) * (Vol. 7) 1920 Pat 192 (194).

[5] As to construction of appellate decrees, see the following cases. ('70) 13 Suth W R 23 (23, 24) (DB) * ('12) 5 Sind L R 254 (256) (DB).]

[But compare ('71) 15 Suth W R 530 (530) (DB).]

[6] A party cannot recover any sum as costs of the appeal if it is not entered in the decree. The amount or particulars of costs incurred in the lower Court need not be specified in the appellate decree and the same may be ascertained from the lower Court's decree. ('74) 21 Suth W R 74 (74, 75) (DB) * ('72) 18 Suth W R 286 (286) (DB) * ('10) 11 Cal L Jour 207 (208, 209) (DB).

[7] The Appellate Court must finally determine by which of the parties the costs are to be paid; it cannot declare that the costs shall be borne by the party who will be unsuccessful in a suit to be hereafter brought. ('75) 23 Suth W R 89 (90) (DB).

[8] The Appellate Court can deprive a successful party of his costs for sufficient reasons. (1880) 8 Moo Ind App 170 (192) (P C).

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Judge dissenting from judgment need not sign decree. Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

[1882—S. 579; 1877—S. 579; 1859—S. 360.]

[a] This rule does not apply to the Chief Court of Oudh in the exercise of its appellate jurisdiction: *See* the Oudh Courts Act, 1925 (U. P. Act 4 [IV] of 1925); Section 16 (3).

PROVINCIAL AMENDMENTS.

LAHORE

Add the following as a proviso to rule 35 (4) :

"Provided also in the case of the High Court, that the Registrar, or such other officer as may be in charge of the Judicial Department from time to time, shall sign the decree on behalf of the Judge or Judges who passed it; but that such Registrar, or such officer, shall not sign such decree on behalf of a dissenting Judge."

[29-1-1937.]

MADRAS

Substitute the following for sub-rule (2) :

"(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, *their addresses for service* and a clear specification of the relief granted or other adjudication made."

[B. O. C. No. 3299 B-1 of 1930.]

Copies of judgment and decree to be furnished to the parties. **36.** Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

[1882—S. 580; 1877—S. 580; 1859—S. 360.]

37. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

[1882—S. 581; 1877—S. 581; 1859—S. 361.]

PROVINCIAL AMENDMENTS.

ALLAHABAD

(1) *Delete* the words "and shall be filed with the original proceedings in the suit."

(2) *Add* a new paragraph as follows :

"Where the Appellate Court is the High Court the copies aforesaid shall be filed with the original proceedings in the suit."

RULE 38—

ALLAHABAD

Add the following as R. 38 :

"R. 38. (1) An address for service filed under O. 7 R. 19 or O. 8 R. 11, or subsequently altered under O. 7 R. 24, or O. 8 R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

BOMBAY

The following shall be *added* as R. 38 :

Address for service filed to hold good during appellate proceedings. " R. 38. (1) An address for service filed under O. 7 R. 19, or O. 8 R. 11, subsequently altered under O. 7 R. 24, or O. 8 R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-r. (3).

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

[15-10-1930.]

LAHORE

The following shall be *added* as Rule 38 :

" R. 38. (1) An address for service filed under O. 7 R. 19, or O. 8 R. 11, or subsequently altered under O. 7 R. 24, or O. 8 R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) The notice of appeal, and other processes connected with proceedings therein, shall issue to the addressees mentioned in cl. (1), above, and service effected at such addresses shall be as effective as if it had been made personally on the appellant or respondent, as the case may be.

(3) Rules 21, 22, 23, 24 and 25 of O. 7 shall apply, so far as may be, to appellate proceedings."

[24-11-1927 and 29-1-1937.]

N.-W. F. P.

Add the following as rule 38 :

" R. 38. (1) An address for service filed under O. 7 R. 19 or O. 8 R. 11, or subsequently altered under O. 7 R. 22 or O. 8 R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings."

OUDEH

Add the following as Rule 38 :

" R. 38. (1) An address for service filed under O. 7 R. 19, or O. 8 R. 11, or subsequently altered under O. 7 R. 26 or O. 8 R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and process shall issue from the Appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

PATNA

Add the following as Rule 38 :

" R. 38. (1) An address for service filed under O. 7 R. 19, O. 8 R. 11, or subsequently altered under O. 7 R. 22 or O. 8 R. 12, shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings."

SIND

Add the following as Rule 38 :

" R. 38. (1) An address for service filed under O. 7 R. 19, or O. 8 R. 11 subsequently altered under O. 7 R. 24, or O. 8 R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-rule (3).
Address for service filed to hold good during appellate proceedings.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 22, 23 and 24 of Order 7 shall apply, so far as may be, to appellate proceedings."

ORDERS 41A and 41B—MADRAS

After Order 41 insert the following as Orders 41A and 41B :

"ORDER XLIA.

Appeals to the High Court from Original Decrees of Subordinate Courts.

R. 1. The rules contained in order 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

R. 2. (1) The memorandum of appeal shall be accompanied by twelve printed copies of the judgment, one of such copies being a certified copy, the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in R. 22 of O. 41 the period prescribed for entry of appearance by the respondent and filing by him of memorandum of cross-objections, if any, shall unless otherwise ordered, be thirty days from the service on notice upon him.

[R. 2 is Mandatory—Appellant must produce requisite number of printed copies of judgment or order appealed against—Typed copy of lower Court's order is insufficient.]

R. 3. (1) If the respondent intends to appear and defend the appeal he shall, within the period specified in the notice of appeal, enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record ;

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit; the application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

R. 4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred.

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

R. 5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court: Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address.

O. 41A R. 2 (MADRAS)—Note 1.

[1] Production of printed copies of judgment can be dispensed with. (Vol. 33) 1946 Mad 163 (164),

[But see (Vol. 32) 1945 Mad 353 (354).]

R. 6. All notices and processes, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court between the hours of 11 A.M. and 5 P. M. at the address for service of the party to be served.

R. 7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

R. 8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

R. 9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

R. 10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of the Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit:

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

R. 11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15, and the cost of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs. 30. At the request of any party the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

Memorandum of Objections.

R. 12. (1) If the acknowledgment mentioned in R. 22 (3) of O. 41 is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

R. 13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in R. 22 (3) of O. 41, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in Rule 12(1).

R. 14. Rule 31 of Order 41 shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary.

[18-10-1917.]

ORDER XLI B.

Letters Patent Appeals.

R. 1. The Rules of Order 41A shall apply, so far as may be, to appeals to the High Court of Madras under Clause 15 of the Letters Patent of the said Court:

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

R. 2. Notice of the appeal shall be given in manner prescribed by O. 41A, R. 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said Order."

[18-10-1917.]

O. 41A R. 6 (MADRAS)—Note 1.

(1) Service of notice of appeal by merely leaving it at the office of advocate is not service on party or his

pleader, for limitation. (Vol. 29) 1942 Mad 403 (403) (DB).

ORDER X L I I.
APPEALS FROM APPELLATE DECREES

Procedure. 1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

[1882—S. 587; 1877—S. 587; 1859—S. 377. See Ss. 100 to 103, 107 and 108.]

PROVINCIAL AMENDMENTS.

ALLAHABAD

Substitute the following for Rule 1 :

"1. The rules of Order 41 shall apply, as far as may be, to appeals from appellate decrees, subject to the following proviso.

Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and also (unless the Court sees fit to dispense with either or both) by copies of the judgment on which the said decree is founded and of the judgment of the Court of first instance." [24-7-1944.]

CALCUTTA

For Rule 1, *substitute* the following :

"1. The rules of order 41 shall apply, so far as may be, to appeals from appellate decrees :

Provided that every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and also (unless the Court sees fit to dispense with any or all of them), by copies of the judgment on which the said decree is founded and of the judgment and decree of the Court of first instance." [15-2-1938]

ORDER 42—MADRAS

Substitute the following for Order 42 :

ORDER X L I I

Appeals from appellate decrees.

1. The rules of Order 41 and Order 41 A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order :

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy; and also four printed copies of the judgment of the Court of first instance, one of them being a certified copy.

2. (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers :

One certified copy of the decrees of the Court of first instance and of the Appellate Court and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy ;

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal :

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the documents certified by the pleader to be a correct translation shall be presented :

(3) If the appellant fails to comply with this rule, the appeal may be dismissed." [18-10-1917]

RULE 2—LAHORE

Add the following as Rule 2 :

"R. 2. In addition to the copies specified in O. 41, R. 1, the memorandum of appeal shall be

ORDER 42 RULE 1—Note 1.

[1] The words "appeals from appellate decrees" have reference only to second appeals filed under S 100 of this Code—in a second appeal under S 12 of the Oudh Courts Act, respondent is not entitled

as of right to file cross-object on. (Vol. 22) 1935 Oudh 88 (89) : 10 Luck 513 (DB).

O 42 R 2 (LAHORE)—Note 1.

[1] Every second appeal must be accompanied by a copy of the decree of lower appellate Court (Vol. 14) 1927 Lah 912 (913).

accompanied by a copy of the judgment of the Court of first instance, unless the Appellate Court dispenses therewith." [19-3-1926.]

RULE 2—N.-W.F.P.

Same as that of Lahore.

ORDER XLIII.

APPEALS FROM ORDERS.

Appeals from orders. **1.** An appeal shall lie from the following orders under the provisions of Section 104, namely :—

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court ;
- (b) an order under rule 10 of Order VIII pronouncing judgment against a party ;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal, for an order to set aside the dismissal of a suit ;
- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte ;
- (e) an order under rule 4 of Order X pronouncing judgment against a party ;
- (f) an order under rule 21 of Order XI ;
- (g) an order under rule 10 of Order XVI for the attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ;
- (i) an order under rule 84 of Order XXI on an objection to the draft of a document or of an endorsement ;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ;
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement compromise or satisfaction ;
- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (o) an order a [under rule 2, rule 4 or rule 7] of Order XXXIV refusing to extend the time for the payment of mortgage-money ;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;

O. 42 R. 2 (Lah) (contd.)

[2] Copy of the judgment of trial Court should be filed along with the memorandum of second appeal. (Vol. 13) 1926 Lahore 626 (626, 627) (DB) * (Vol. 8) 1921 Lah 73 (73) : 2 Lah 227.

O. 42 R. 2 (N.-W.F.P.)—Note 1.

[1] Appeal filed within limitation but without copy of the judgment of the trial Court—Appeal returned—Appeal again filed with said copy after expiry of limitation for appeal—Appeal is time barred. (Vol. 24) 1937 Pesah 50 (50), (DB).

[But see (Vol. 23) 1936 Pesah 77 (78).]

ORDER 43 RULE 1—SYNOPSIS.

- 1. Appeals from orders.
- 2. Clause (a) : Order returning plaint for presentation to the proper Court.
- 3. Clause (c) : Order rejecting application under Order 9 Rule 9 to set aside dismissal of suit.
- 4. Clause (d) : Order rejecting application for setting aside ex parte decree.
- 5. Clause (m) : Order recording or refusing to record compromise.
- 6. Clause (u) : Order of remand under Order 41 Rule 23.
- 7. Clause (v) : Order refusing grant of certificate under Order 45 Rule 6.

- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ;
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ;
- (s) an order under rule 1 or rule 4 of Order XL ;
- (t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal ;
- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;
- (w) an order under rule 4 of Order XLVII granting an application for review.

[1882—S. 588 ; 1877—S. 588 ; 1859—Ss. 36, 94, 363, 365. See sections 104 to 106.]

[a] *Substituted* by the Transfer of Property (Amendment) Supplementary Act, 1930, 16 [XVI] of 1930), Section 2 for "under Rule 3 or or Rule 8."

OBJECTS AND REASONS.

"Rule 1 (o).—The extension of time for the payment of mortgage-money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing, but not from an order granting, an extension of time."—S.O.R.

"Rule 1.—We suggest that there should be appeals from orders pronouncing judgment against a party under Or. VIII R 10. Or. X, R. 4 and Or. XVI R. 20. These orders are under the present law appealable as decrees, but having regard to the definition of a decree in the Code they would no longer be appealable in that way, and we think it necessary to make them appealable as orders. We have also given an appeal against an order made under rule 21 of Order XI,"—S.C.R.

PROVINCIAL AMENDMENTS.

BOMBAY

Clause (w) of Rule 1 of Order 43 shall be *deleted*

[9-3-1926.]

CALCUTTA

Insert the following *after* clause (z) :

"(z) (a) an order under Rule 57 of Order XXI directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue."

[3-2-1933.]

LAHORE

In clause (u) *after* the word and figure "Rule 23" *insert* the words and figure "or Rule 23-A."

[3-8-1928.]

MADRAS

(1) *Substitute* the following *for* clause (d) of Rule 1 :

"(d) an order under Rule 13 or Rule 15 of Order IX rejecting an application (in a case open to appeal for an order to set aside a decree or order passed *ex parte*."

[6-3-1933.]

(2) *Substitute* the following *for* clause (s) of Rule 1 :

"(s) an order under rule 1 or rule 4 of Order XL except an order under the proviso to sub-rule (2) of rule 4."

[P. Dis. No. 60 of 1933.]

PATNA

Add the following as clause (ii) *after* clause (z) :

"(ii) an order in garnishee proceedings other than an order referred to in Rule 63H (1) of Order XXI."

[7-1-1936.]

SIND

Substitute the words "any order" for the words "an order under rule 23 of Order XLI" appearing in clause (u) of Rule 1.

O. 43 R. 1 (*contd.*)

1. Appeals from orders.—[1] Memo of appeal insufficiently stamped—Memo rejected—No appeal lies. (Vol. 25) 1938 Nag 122 (124) : I L R (1938) Nag 196 (FB).

[2] Order on application for appointment of

trustees for Hindu cemetery is neither appealable order nor judgment. (Vol. 24) 1937 Rang 522 (523) (DB).

[3] Order adding person as party to suit is not appealable, nor one open to revision. (Vol. 26) 1939 Oudh 102 (103) : 14 Luck 447 (DB).

O. 43 R. 1 (contd.)

[4] Where a decree is passed removing a mahant from office and in consequence an order is made on a miscellaneous application for appointing a committee in order that a suitable mahant should be appointed in place of the one evicted, the order is not appealable. (Vol. 21) 1934 Pesh 43 (44).

[5] Order dismissing an application under S. 34, Trusts Act, is not an order appealable under O. 43 R. 1. (Vol. 22) 1935 Oudh 72 (74) (DB).

[6] Order rejecting memorandum of appeal is appealable only when order finally disposes of dispute. (Vol. 25) 1938 Pat 461 (462): 17 Pat 245 (DB).

[7] Partition suit—Preliminary decree passed—Subsequent order refusing to take accounts from particular year before final decree—Order is not appealable (Vol. 32) 1945 Oudh 312 (313): 20 Luck 557 (DB).

2. Clause (a): Order returning plaint for presentation to the proper Court.—[1] Suit filed in A court not numbered—Plaint returned without notice to defendant and represented in B Court—Order returning plaint held not appealable by defendant as the order cannot be considered to be adverse to him and the defendant is not precluded from questioning the order though he has not appealed against. (Vol. 30) 1943 Mad 490 (490).

[2] Order returning appeal for presentation to proper Court. - No appeal lies. ('40) 42 Pan L R 364 (365) * (Vol. 17) 1930 Lah 832 (833) (DB).

[3] A plaintiff is not precluded from prosecuting his appeal against the order returning his plaint for presentation to proper Court, if in compliance with that order he presents the plaint to another Court in order to save limitation in case his appeal is dismissed. (Vol. 26) 1939 Lah 18 (19).

[4] An order returning a petition for permission to sue *in forma pauperis* to which a plaint is as usual appended is not appealable. (Vol. 22) 1935 Mad 1043 (1043).

[5] Appeal lies from order returning plaint to be presented to proper Court. (Vol. 5) 1918 Lah 116 (117).

3. Clause (c): Order rejecting application under Order 9 Rule 9 to set aside dismissal of suit.—

[1] Application to restore to the file a suit dismissed for default or decided *ex parte* itself dismissed for default—Application to restore such application dismissed—Order of dismissal is not appealable. (Vol. 28) 1941 Mad 17 (17) * (Vol. 19) 1932 Nag 101 (102): 28 Nag L R 83 (DB) (overruling (Vol. 10) 1923 Nag 293 * (Vol. 22) 1935 Mad 609 (609): 53 Mad 814 (DB)).

[But see (Vol. 24) 1937 Oudh 344 (347): 13 Luck 246 (DB).]

[2] An order dismissing application under O 9 R 9 for default will amount to its rejection within the meaning of this clause. (Vol. 30) 1943 Mad 384 (385) * (Vol. 23) 1936 All 737 (738) (DB).

[3] Order rejecting application to restore application for probate dismissed for default is appealable. (Vol. 23) 1936 Lah 868 (864) (DB).

[4] Suit dismissed for default—Application to set aside dismissal allowed on condition to deposit Rs. 25

as costs within one week—Money not deposited within time—Application for deposit one day late, dismissed for want of jurisdiction—Order held come within this clause. (Vol. 32) 1945 Oudh 273 (274): 20 Luck 427 (DB).

4. Clause (d): Order rejecting application for setting aside *ex parte* decree.—[1] Order allowing application for setting aside an *ex parte* decree—No appeal lies. ('16) 34 Ind Cas 702 (702): 3 Oudh L Jour 229.

[2] Order rejecting application to set aside an *ex parte* order—Appeal does not lie. ('06) 1906 Low Bur Rul 203 (204) (FB) * ('12) 39 Cal 393 (394) (DB).

[3] Petition to set aside *ex parte* decree allowed—Petitioner to pay costs within fixed time—In default petition to stand dismissed—Default committed—Order on petition held appealable under this clause. (Vol. 31) 1944 Mad 383 (385): 1 L R (1945) Mad 203 (DB).

[4] If there could be no appeal under any circumstances against a decree that could be passed in the suit or proceeding, there would be no appeal against an order refusing to set aside the *ex parte* decree passed in such a suit or proceeding. (Vol. 23) 1936 Cal 485 (487, 488): 1 L R (1937) 1 Cal 135.

5. Clause (m): Order recording or refusing to record compromise.—[1] An appeal lies against an order recording a compromise although at the time when it was recorded there was no contest in the lower Court as to its factum or validity. (Vol. 23) 1936 Mad 385 (386) * (Vol. 23) 1936 Mad 347 (349) * (Vol. 13) 1926 Bom 39 and (Vol. 20) 1933 Bom 205: 57 Bom 206 dissented from).

[See also (Vol. 28) 1941 Oudh 598 (599): 17 Luck 17 (DB).]

[2] Refusal based on Court holding that no compromise has been made—Clause applies. (Vol. 27) 1940 Pat 629 (631) (DB) * (Vol. 16) 1929 Nag 275 (276): 26 Nag L R 101 * (Vol. 14) 1927 Lah 546 (518) (DB) * (Vol. 23) 1936 All 433 (433) (DB).

[See also (Vol. 15) 1928 Lah 39 (40).]

[But see (Vol. 11) 1924 Lah 248 (249).]

[3] Order recording compromise—Decree passed in terms of compromise—Still appeal lies. (Vol. 21) 1934 Cal 846 (846): 61 Cal 910 (DB) * (Vol. 31) 1944 Bom 239 (241, 242): 1 L R (1944) Bom 405 (DB) * (Vol. 12) 1925 Mad 606 (607) (DB) * (Vol. 20) 1933 Cal 94 (95) (DB) * (Vol. 23) 1936 Mad 385 (386) * (Vol. 25) 1938 Lah 766 (766).

[See also (Vol. 20) 1933 Pat 306 (427): 12 Pat 356 (DB).]

[But see (Vol. 20) 1933 Bom 205 (208): 57 Bom 206 (DB).]

[4] Consolidate order passed recording a compromise and passing a decree in terms of the compromise—Appeal against such order is one under this clause. (Vol. 25) 1938 Lah 350 (351) * (Vol. 23) 1936 Lah 963 (965) (DB).

[5] No second appeal lies against an order recording or refusing to record a compromise. (Vol. 22) 1935 Cal 239 (240): 62 Cal 229 * (Vol. 22) 1935 All 738 (738, 739).

[6] Award in suit under S 92—Appeal lies from order refusing or recording compromise. (Vol. 31) 1944 Pat 115 (118) (DB).

Procedure.

2. The rules of Order XLI shall apply, so far as may be, to appeals from orders.

[1882—S. 590; 1877—S. 590; 1859—S. 866—See S. 108, cl. (b).]

PROVINCIAL AMENDMENTS.

Rules 2 and 3—MADRAS.

(1) *Substitute* the following for Rule 2:

"R. 2. The Rules of Order 41 and of Order 41A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law:

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court."

(2) *Add* the following as rule 3:

Appeals from "R. 3. (1) The provisions of Order 42 shall apply, so far as may be, to appeals from *Appellate orders.* appellate orders.

(2) A memorandum of appeal from an appellate order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance, and by a certified copy of the judgment and of the order of the Appellate Court.

(3) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal:

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented."

[P. Dis. No. 788 of 1932.]

Rule 3—OUDH.

Add the following as Rule 3:

"R. 3. In every appeal under Rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred and the parties, if any, by whom such costs are to be paid."

ORDER XLIV.

PAUPER APPEALS.

1. Any person entitled to prefer an appeal, who is unable to pay the fee required for the Who may appeal memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable:

O. 43 R. 1 (*contd.*)

[7] For further illustrations see the following cases:—(Vol. 28) 1941 Ran 316 (318): 1941 Rang L R 774 (DB) * (Vol. 12) 1925 Cal 924 (925) (DB) * (Vol. 23) 1936 Nag 8 (10): 31 Nag L R Sup 72 (overruled in (Vol. 27) Nag 349: I L R (1940) Nag 538 on another point) * (Vol. 21) 1934 Oudh 417 (417, 418) * (Vol. 23) 1936 Sind 59 (60): 29 Sind L R 437 (DB).

6. Clause (u): Order of remand under Order 41 Rule 23.—[1] An appeal lies under this clause only when the order of remand is one under O. 41 R. 23. (Vol. 32) 1945 Mad 430 (431): I L R (1945) Mad 836 * (Vol. 30) 1943 Oudh 35 (35) (DB) * (Vol. 30) 1943 Oudh 128 (128) (DB) * (41) 196 Ind Cas 562 (562) (Pat) * (Vol. 23) 1941 Pesh 28 (30) (DB) * (Vol. 22) 1935 Pat 49 (51) (DB).

[2] An order of remand under the inherent power of the Court is not appealable. (Vol. 30) 1943 Oudh 35 (35) (DB) * (Vol. 31) 1944 Oudh 130 (130): 20 Luck 45 (DB) * (Vol. 27) 1940 Oudh 367 (368): 16 Luck 65 (DB), 5 (Vol. 14) 1927 All 496 (496) * (Vol. 17) 1930 Oudh 356 (368) (DB) * (Vol. 21) 1934 Pesh 88 (89).

[3] Appellate Court reversing order of lower Court rejecting plaintiff or setting aside order of lower Court

for trial again. Order is not appealable. (Vol. 16) 1931 Lah 497 (497) (DB) * (Vol. 24) 1937 Lah 330 (331) * (Vol. 29) 1942 Lah 179 (182) * (18) 35 All 427 (428) (DB).

[But see (Vol. 28) 1941 Nag 304 (305): ILR (1941) Nag 629.

[4] Order of remand purporting to be made under O. 41 R. 23 is appealable though really O. 41 R. 23 does not apply. (Vol. 24) 1937 Lah 454 (455).

[But see (Vol. 27) 1940 Nag 349 (351, 352): I L R (1940) Nag 538 (DB). (Overruling (Vol. 23) 1936 Nag 8: 31 Nag L R Sup 72).

[5] Order of remand passed in an appeal against an order—No appeal lies. (28) 111 Ind Cas 789 (790) (DB) (Oudh) * (Vol. 26) 1939 Lah 65 (66).

7. Clause (v): Order refusing grant of certificate under order 45 Rule 6.—[1] Order granting a certificate of leave to appeal to Privy Council is not appealable. (Vol. 24) 1937 Mad 950 (950) (DB).

ORDER 44 RULE 1—Synopsis.

1. "Person." Meaning of. See Notes on Order 38 Rule 1.

2. "Entitled to prefer an appeal."

Procedure on application for admission of appeal.— Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

[1882—S. 592; 1877—S. 592; 1859—Ss. 369, 370.]

OBJECTS AND REASONS.

"Words [namely, 'including the presentation of such application'] have been added to avoid the conclusion at which the Madras High Court has recently arrived (ILR 26 Madras 369)."—S.O.R.

PROVINCIAL AMENDMENT.

OUDH

Add another proviso as follows :

"Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents."

O. 44 R. 1 (contd.)

3. "Who is unable to pay the fee required."
4. Application accompanied by memorandum of appeal.
5. Subject to provisions relating to suits by paupers
3. In all matters including the presentation of such application.
7. Proviso to the rule.
8. Power to grant time for payment of court-fee.
9. Effect of allowing application for leave to appeal as pauper.
10. Power to order security for costs. See Order 41 Rule 10.
11. Cross-objection or cross-appeal by a pauper respondent. See Notes on Order 41 Rule 22.
12. Appeal.
13. Letters Patent appeal.
14. Privy Council appeal.

1. "Person," Meaning of.—See Notes on Order 33 Rule 1.

2 "Entitled to prefer an appeal."—[1] Order deciding certain preliminary issues and not amounting to decree—Application for leave to appeal in *forma pauperis* not maintainable as the order is not open to appeal. (Vol. 23) 1936 Lah 406 (406) (DB).

[2] The Court will not approve of a practice whereby one of the defendants who is clearly possessed of assets abstains from joining in an appeal in order that the other defendants may prosecute the appeal as paupers. Such conduct will be sufficient to deprive the non-appealing defendant of his costs if the decree is reversed or varied in his favour also. (Vol. 30) 1943 Mad 263 (265).

3. "Who is unable to pay the fee required."—[1] See Notes on Order 33 Rule 1.

4. Application accompanied by a memorandum of appeal.—[1] Unlike the plaint in a pauper suit which forms an integral portion of the pauper application itself, the application for leave to appeal as a pauper is a distinct document from the memorandum of appeal accompanying the application. The memorandum of appeal itself cannot be treated as an application for leave to appeal as a pauper. (Vol. 2) 1915 All 310 (311) (DB).

[2] Effect of proviso to rule is to make it subject to provisions of O. 41 R. 1—Application for leave to

appeal not accompanied by copy of decree and judgment is not valid. (Vol. 23) 1936 Mad 600 (602).

5. Subject to provisions relating to suits by paupers.—[1] Granting of leave to appeal as a pauper is subject to provisions of O. 33. Thus an appellant is not entitled to leave.

(a) If he has entered into an agreement with reference to subject matter of appeal ('30) 122 Ind Cas 831 (831) (DB) (Pat) * ('07) 30 Mad 547 (548) (DB).

(b) If he has not stated all his assets with utmost good faith. (Vol. 17) 1930 Pat 368 (369) (DB).

(c) If he has transferred all his interest in subject-matter of suit before filing of his application. (Vol. 23) 1936 Mad 665 (665).

[2] The application for leave to appeal as a pauper should be verified at its foot, as required by O. 33 R. 2. ('68) 11 Oudh Cas 19 (20); (1895) All W N 34 followed).

[See however (Vol. 24) 1937 Nag 108 (109, 110); I L R (1938) Nag 245.]

[3] Application for leave not verified but accompanied by affidavit by which the statements in application are stated to be true—No concealment in application—Rule is sufficiently complied with. (Vol. 10) 1923 Lah 684 (684).

[See also (Vol. 24) (1937) Nag 108 (110); I L R (1938) Nag 245 (Court should allow applicant a chance to correct defect in verification before rejecting application).

[4] Application for leave without list of properties is not invalid—If can be supplied even after limitation period. ('99) 1899 Pun Re No 19, page 114 (116) (DB).

6. In all matters including the presentation of such application.—[1] A pardanashin lady being exempted from personal appearance under S. 132 of the Code need not present the application to appeal in *forma pauperis* in person. (Vol. 29) 1942 Oudh 240 (243) 17 Luck 628 (Authorized agent can appeal.) * ('02) 24 All 172 (173) (DB) * ('85) 8 Mad 504 (505).

[2] The memorandum of appeal need not be presented in person. (Vol. 13) 1926 Oudh 13 (14). 23

7. Proviso to the rule.—[1] The proviso is mandatory. (Vol. 19) 1932 Lah 654 (655) * (Vol. 20) 1935 Mad 519 (520, 521): 56 Mad 323 (DB) (Reasons for leave should be briefly stated) * (Vol. 16) 1929 Lah.

O. 44 R. 1 (contd.)

539 (539) * (Vol. 12) 1925 Pat 442 (443) : 4 Pat 67 (DB) * (Vol. 13) 1931 Rang 131 (134) - 9 Rang 92. * (Vol. 19) 1932 All 712 (712) (DB). (Applicant entitled to be heard only if Judge after reading judgment thinks it to be wrong).

[See (Vol. 29) 1942 All 45 (46) : I L R (1941) All 793.]

[2] The object of this enactment is not to admit appeals in *forma pauperis* too freely against parties who have succeeded in Court below, as there is the danger of the successful respondents being dragged into Court by reason of unscrupulous persons filing frivolous appeals in *forma pauperis*. (28) 109 Ind Cas 391 (392) (Lah.).

[See (1904) 28 Bom 451 (452, 453) (DB).]

[3] A party cannot be allowed to appeal as pauper unless the decree appealed from appears to be contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. (Vol. 28) 1941 Oudh 113 (113) (DB) * (Vol. 27) 1940 Oudh 203 (209) : 15 Luck 397 (DB) * (Vol. 12) 1925 Lah 391 (391) * (Vol. 20) 1933 Mad 519 (520) : 56 Mad 323 (DB) * (Vol. 7) 1920 Mad 230 (231) (DB) * (Vol. 17) 1930 Pat 142 (143) (DB) (Decree altered in material particular by a successor of Judge—Leave can be granted) * (Vol. 23) 1936 Mad 842 (843).

[See also (Vol. 22) 1935 Pesh 22 (23).]

[4] Unlike O. 41 R. 11, the Court has no discretionary power under the proviso to go into the record except the judgment and the decree. (Vol. 12) 1925 Rang 249 (250) (DB) * ('10) 13 Oudh Cas 302 (302).

[5] Court is not bound to hear arguments in support of the contention that the decree is unjust and contrary to law. (Vol. 29) 1942 Mad 478 (478) : I L R (1942) Mad 746 (DB) * (Vol. 23) 1936 Mad 101 (102) : 59 Mad 805 * ('38) 1938 Oudh W N 1246 (1247) (DB).

[But see (Vol. 23) 1941 Mad 49 (50) : ILR (1941) Mad 389 (Vol. 23) 1936 Mad 101 : 59 Mad 805 dissented from]

[6] A mere issue of a notice to the respondent under Appendix G, Form No. 11 is no ground for holding that the Court is satisfied as to the conditions laid down in the proviso, and the respondent appearing in answer to the notice may be allowed to urge that the application should be rejected on the ground that the conditions of the proviso have not been satisfied. (Vol. 21) 1934 All 1004 (1006, 1007) : 57 All 440 (FB) * (Vol. 21) 1934 All 424 (426) : 56 All 895 (DB) (The Government Pleader is also entitled to urge the same ground) * (Vol. 18) 1931 Pat 183 (184, 185) : 10 Pat 606 (FB) (Overruling (Vol. 11) 1924 Pat 791) * (Vol. 15) 1928 Pat 118 : 6 Pat 687 * (Vol. 16) 1929 Pat 27 : 7 Pat 825 and (Vol. 16) 1929 Pat 31 : 7 Pat 827) * (Vol. 21) 1934 Lah 72 (73) : 15 Lah 132 (DB) * (Vol. 16) 1929 Lah 514 (515) * (Vol. 26) 1939 Rang 25 (28) : 1938 Rang L R 651 (If an application for leave to appeal in *forma pauperis* is admitted in the absence of the respondent, and without notice to him it is open to him at the final hearing of the rule to show that the case does not satisfy the proviso to R. 1 of O. 44) * (Vol. 24) 1937 Nag 150 (151) : I L R (1937) Nag 468 (Preliminary finding that decree is contrary to law—Respondent can still urge that appellant is not pauper and that decree is not contrary to law.)

[See however (Vol. 26) 1939 All 715 (716) : ILR (1939) All 917 (DB) (Counsel for respondent is not entitled to be heard on the merits of the proposed appeal.) * (Vol. 23) 1936 Mad 842 (843) (Court issuing notice to respondent without considering whether or not there is substance in appeal—Court subsequently rescinding order and hearing pleaders on question whether there is substance in appeal and on finding no substance in appeal, rejecting application—Procedure followed is justifiable and legal.)

[But see (Vol. 20) 1933 Mad 653 (659) * (Vol. 19) 1932 Mad 523 (524, 525, 527) : 55 Mad 932 (DB) * (Vol. 23) 1936 Mad 661 (662) (unless the order directing notice to go is qualified by some observations showing that the respondent is to be heard on the question of law, the ordinary rule is that the issue of notice means nothing more than that the question of pauperism is to be gone into, the Court being satisfied that on the face of the record it does satisfy the requirements of the proviso to O. 44 R. 1.)

[7] The mere fact that notice has been issued to the opposite party and the Government Advocate upon an application for leave to appeal as a pauper does not preclude the Court from afterwards rejecting the application on the ground of the decree of the lower Court not being contrary to law or unjust as required by the proviso. (Vol. 24) 1937 Oudh 222 (224) : 13 Luck 31 (FB) (Overruling (Vol. 24) 1937 Oudh 2.)

[8] Leave to sue refused—Time granted for paying court-fee—Court fees paid—Suit dismissed as barred by limitation on day when court fee was supplied—Application for leave to appeal—Appellate Court rejecting application under proviso on ground that suit was rightly dismissed by trial Court—Decision of trial Court is contrary to law and appellate Court is not justified in rejecting application for leave—Matter can be set right in revision. (Vol. 31) 1944 Nag 357 (358, 359) : ILR (1944) Nag 623.

8. Power to grant time for payment of court-fee.—

[1] The rejection of an application for leave to appeal as a pauper does not *ipso facto* operate as rejection of the memorandum of appeal. (Vol. 5) 1918 Mad 1039 (1039, 1040) : 40 Mad 687 (DB) * (Vol. 22) 1935 All 620 (625, 626) : 57 All 933 (FB) (But if application under this rule is made without copies of decree and judgment and if the application rejected, there is no longer any appeal pending.) * (Vol. 5) 1918 All 194 (194) : 40 All 381 (DB) * (Vol. 18) 1931 Rang 131 (132) : 9 Rang 92.

[2] Application for leave rejected—Court has power under S. 149 of the Code to give further time for the payment of the requisite court-fee stamp and admit the appeal. (Vol. 25) 1941 Cal 659 (661) : ILR (1941) 1 Cal 428 (DB) * ('40) 15 Luck 390 (391) (DB) * ('97) 22 Bom 849 (857, 861) (DB) * ('97) 21 Bom 576 (579) (DB) * ('04) 26 All 329 (330) (DB) * ('29) 115 Ind Cas 678 (679) (DB) (Pat) * (Vol. 22) 1935 Oudh 231 (232) : 10 Luck 569 (DB) * (Vol. 24) 1937 Mad 161 (162) : ILR (1937) Mad 584 (DB) * (Vol. 23) 1936 Lah 909 (910) * ('28) 9 Pat L Tim 613 (615, 616) (DB) * (Vol. 23) 1936 Mad 101 (102) : 59 Mad 805.

[See (Vol. 22) 1935 Pesh 22 (23) (But Court is not bound to grant time.)

[See however (Vol. 22) 1935 Rang 336 (339) : 13 Rang 50.]

Inquiry into 2. The inquiry into the pauperism of the applicant may be made
pauperism. either by the Appellate Court or under the orders of the Appellate Court by
he Court from whose decision the appeal is preferred :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court
from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be
necessary, unless the Appellate Court sees cause to direct such inquiry.

[1882—S. 593.]

PROVINCIAL AMENDMENT.

MADRAS.

Insert the words "after hearing the Government Pleader," after the words "Appellate Court" in the
proviso.

O. 44 R 1 (contd)

[But see (V 1. 26) 1939 Rang 25 (28) : 1938 Rang
LR 651 * (Vol 23) 1936 Pesh 69 (71).]

[3] The memorandum of appeal though originally
un-stamped is not a nullity and can be validated
with effect from date of presentation by payment of
court-fee provided that the original application to
appeal in *forma pauperis* was not *mala fide* or
fraudulent. (Vol 30) 1943 Oudh 458 (460) : 19 Luck
234 (DB) (Court-fee paid pending enquiry into
pauperism) * (Vol. 9) 1922 Lah 225 (226) : 3 Lah 35
(DB) * (Vol. 3) 1916 Low Bur 124 (124) (DB) *
(Vol 19) 1932 Oudh 343 (344) (Court-fee is on the
scale at the time when the petition for leave was
presented.)

[But see ('91) 13 All 305 (308) (DB).]

[4] The Appellate Court can excuse delay under
S. 5 of the Limitation Act and admit appeal after
expiry of the limitation, on payment of the full
court-fee. (Vol. 32) 1945 Oudh 172 (173) (DB) *
(V. 1 3) 1916 Lah 6 (6) : 1916 Pun Re No. 74 * (Vol.
15) 1928 All 499 (499) (DB) * ('04) 26 All 329 (330,
331) (DB) * ('99) 26 Cal 925 (928) (DB) * ('29) 115
Ind Cas 678 (679) (DB) (Pat).]

[5] Application for leave filed after expiry of limi-
tation—Subsequent payment of Court-fee will not
validate appeal. (1909) 4 Ind Cas 1002 (1003) * 1909
Pun W R N 144 (DB) * ('06) 1906 Pun Re No. 78
p 291 (294) (DB).]

[See (Vol. 20) 1933 All 308 (309).]

[See however (Vol. 24) 1937 Lah 819 (820) (DB)
(Application to appeal in *forma pauperis* to High
Court dismissed as barred by time—Division Bench
extending time for paying court-fee on appeal—
Court-fee paid—Held that the order of the Division
Bench implicitly held that there was an appeal and
that time should be extended and that the order not
being *ex parte* was binding upon the parties.)

[But see ('40) 15 Luck 390 (391) (DB).]

[9] Effect of allowing application for leave to appeal
as pauper.—(1) Where an application for leave to
appeal as a pauper is allowed, the appellant will be
entitled to file an application for review of the judg-
ment passed in the appeal, without paying any court-
fee. (Vol. 23) 1936 Cal 752 (753) (DB).]

[2] A respondent cannot be allowed to file an
application for review in *forma pauperis*. (Vol. 30)
1943 Mad 177 (178).

10. Power to order security for costs.—See Order
41 Rule 10.

11. Cross-objection or cross-appeal by a pauper
respondent.—See Notes on Order 41 Rule 22.

12 Appeal.—[1] An order rejecting an application
for leave to appeal in *forma pauperis* is in effect a
rejection of the appeal for a preliminary defect and is
therefore a decree and as such is appealable. (Vol.
23) 1936 Mal 101 (101) : 59 Mad 805.

13. Letters Patent appeal.—[1] An order rejecting
an application under this rule is appealable under
cl. 15 Letters Patent (Madras.) (See Vol. 18) 1931
Mad 193 (193) : 52 Mad 66 (Assumed).

[See also ('10) 35 Mad 1 (9) (FB) (Dissenting 26
Mad 437 and 9 Mad 447 decided under the old Code.)]

[2] Order rejecting application under this Rule—
Appeal under cl. 15 Letters Patent—High Court
refused to interfere as matter was one of exercise of
discretion by Court. (Vol 13) 1926 Mad 656 (656).
(DB).

14. Privy Council appeal.—[1] Order 44 does not
apply to appeals to His Majesty in Council and High
Court has no jurisdiction to grant leave to a pauper in
forma pauperis to the Privy Council. (Vol. 5) 1918
Pat 303 (304) : 3 Pat L Jour 179 (DB) * ('18) 17 Cal
L Jour 381 (383) (DB) * (Vol. 5) 1918 Mad 18 (18) :
42 Mad 32 (DB) * 1846) 4 Moo Ind App 114 (136).
(PC) * (Vol. 23) 1936 Pesh 36 (36) (DB).

[See ('94) 21 Cal 523 (525) (Question left open).]

[But see ('67) 8 Sath W R 48 (48).]

[2] The petitioner may apply in England for leave
to appeal to Privy Council in *forma pauperis* in
accordance with the rules that govern such applica-
tions. ('13) 17 Cal L Jour 381 (383) (DB).

ORDER 44 RULE 2—Note 1

[1] Where the Appellate Court directs the lower
Court under this rule to make an enquiry into pau-
perism of the appellant, the report of the trial Court
as regards the pauperism does not operate as a final
disposal of the application and does not affect the
power of the Appellate Court to consider and decide
whether leave should or should not be granted.
(Vol. 29) 1942 Oudh 422 (423) (DB) * ('07) 30 Mad 547
(547).

ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

"Decree" defined.

1. In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order.

[1882—S. 594; 1877—S. 584; See Ss. 109 to 112.]

Application to Court whose decree complained of.

2. Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

[1882—S. 598; 1877—S. 598.]

3. (1) Every petition shall state the grounds of appeal and pray for a certificate either as to that, as regards amount or value and nature, the case fulfils the requirements of S. 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

[1882—S. 600; 1877—S. 600; See S. 110.]

PROVINCIAL AMENDMENT.

BOMBAY

In sub-rule (2) *after* the words "to show cause why the said certificate should not be granted" the following words shall be *inserted*, namely:—"unless it thinks fit to refuse the certificate." [8-7-1921.]

NAGPUR

(1) *Substitute* the following for the existing sub-rule (2):

"(2) Upon receipt of such petition, the Court, after sending for the record, and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, may dismiss the petition."

(2) *Add* the following as sub-rule (3):

"(3) Unless the Court dismisses the petition under sub-rule (2) it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted." [29-6-1943.]

ORDER 45 RULE 1—Note 1.

[1] As to the meaning of the words "final order" see Notes on S. 109.

[2] See sections 109 and 110 as to cross-appeals, see Notes on S. 110.

[3] Cross-appeal allowed from part of a decree appealed from although respondents had not applied in India for leave to appeal within proper time—Respondents being mistaken in the practice of Judicial Committee upon cross-appeal. (1857) 6 Moo Ind App 464 (465, 466) (P.C.).

[4] Cross appeal not filed within time admitted on certain conditions. (1860) 8 Moo Ind App 498 (499, 500) (P.C.).

ORDER 45 RULE 2—Note 1.

[1] Where there are two appeals from two decrees, although they are decided by a common judgment, two separate applications are necessary even though both the decrees were based on one common judgment. (Vol. 19) 1932 Lah 441 (442) (DB) * (Vol. 7) 1920 Pat 267 (270) (DB).

[2] Where A appeals to the High Court making B a party to the appeal and succeeds in the appeal, B is entitled to present a petition for leave to appeal to the Privy Council. (Vol. 12) 1925 Pat 712 (712) (DB). (High Court cannot question *locus standi* of applicant.)

[3] See Notes under Order 44 Rule 1.

[4] An order for leave to appeal in *forma pauperis* takes effect from its date and has no effect whatever on

costs incurred before that date. (Vol. 1) 1914 P C 227 (227) (P.C.). (Costs of petition for special leave to appeal in *forma pauperis* cannot be taxed on the pauper scale.)

[5] An application for leave to appeal to the Privy Council must be filed within ninety days of the date of the decree or order appealed from, under Art. 179 of Limitation Act, 1908. See notes on Act 179, Limitation Act, 1908.

ORDER 45 RULE 3—SYNOPSIS.

1. Scope of the rule.
2. Naming of respondents in petition.
3. Certificate as to value or fitness. See Notes on Sections 109 and S. 110.
4. Certificate as to fitness.
5. *Ex-parte* grant of leave to appeal.
6. Non-prosecution of petition.
- 6a. Appeal, Revision and Review.
- 6b. Revision.
7. Form. See Appendix G, Form No. 12.

1. Scope of the rule.—[1] This rule must be read with S. 109, cl. (c) and S. 110.

[2] A party wishing to file an appeal to His Majesty in Council should file a petition to the High Court under this rule stating the grounds of appeal and praying for the issue of a certificate that the case fulfils the requirements of S. 110 or is "otherwise fit" for appeal.

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated. (Objection regarding admissibility of evidence not taken in petition under this rule—Objection not allowed to be raised in the appeal before Privy Council. ('01) 24 All 174 (178); 29 Ind App 40 (PC) * ('75) 12 Bom H C R 8 (S) (DB).)

[See S 110.]

O. 45 R. 3 (contd.)

(Vol. 26) 1939 PC 249 (252 253); I L R (1940) Kar PC 1 (PC). (Objection regarding admissibility of evidence not taken in petition under this rule—Objection not allowed to be raised in the appeal before Privy Council. ('01) 24 All 174 (178); 29 Ind App 40 (PC) * ('75) 12 Bom H C R 8 (S) (DB).)

(See also (Vol. 8) 1921 Pat 134 (135) (DB) (Defendant not taking any part in defending the suit or appeal held not entitled to leave separately.)

[3] This rule does not restrict the power or prerogative of the Judicial Committee to grant special leave to appeal. (See ('97) 19 All 95 (97); 23 Ind App 167 (PC). (Special leave granted without security.) * ('07) 30 Mad 135 (138); 34 Ind App 93 (PC) (Special leave granted as the appeal raised questions of law of general importance touching religious bodies in India in regard to public processions.)

[4] See Notes on S. 112.

[5] Certificate under this rule cannot be granted after there has been a final adjudication in the matter by the Judicial Committee. (Vol. 12) 1925 PC 174 (175) (PC) (Reversing (Vol. 11) 1924 Lah 225; 4 Lah 445.)

2. Naming of respondents in petition.—[1] An application for leave to appeal to the Privy Council from an order of winding up of a company is bad if it does not name any one as the respondent to the appeal. (Vol. 23) 1936 Lah 322 (324) (FB). (Per Young, C. J., and Addison, J.: Tek Chand, J., Contra.)

3. Certificate as to value or fitness.—See Notes on Sections 109 and 110.

4. Certificate as to fitness.—[1] It is the certificate granting leave to appeal and not the order for such certificate, which the Judicial Committee will consider and act upon; and unless the certificate upon which leave to appeal is based is in such a form as to justify that leave, it will be held not to have been properly given. ('01) 23 All 415 (418); 28 Ind App 182 (PC).

[2] Where an appeal is certified to be otherwise fit, it is of the utmost importance that the certificate should, on the face of it, show clearly the grounds upon which it is based. There should be an indication of the nature of the question that is involved in the appeal and that the discretion conferred by S. 109, cl. (c) was invoked or was exercised. (Vol. 8) 1921 PC 25 (26); 44 Mad 293; 48 Ind App 31 (PC).

[See also (Vol. 8) 1921 PC 128 (128); 48 Ind App 376 (PC).]

[3] Even if the High Court refuses a certificate, it is desirable that the reasons for such refusal should be stated. ('06) 29 Mad 194 (195); 33 Ind App 67 (PC).

[4] The respondent can raise a preliminary objection before the Judicial Committee on the ground that the order granting leave is *ultra vires* and that hence the appeal is not maintainable. ('75) 2 Ind App. 205 (206) (PC).

[5] An objection as to valuation should be taken at the earliest possible opportunity. ('69) 13 Moo Ind App 85 (95) (PC). (Should take such objection when petition for leave to appeal is heard.)

[6] The Privy Council will not interfere with any question of valuation, unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound. (Vol. 8) 1921 PC 50 (52); 48 Cal 110; 47 Ind App 255 (PC). * (Vol. 3) 1916 PC 18 (20); 38 All 488; 43 Ind App 187 (PC).

[See also (Vol. 9) 1922 PC 257 (258); 41 Mad 475; 49 Ind App 211 (PC) (Order of Council dated 9-2-1920 showing certificate not conclusive as to valuation.)

5. Ex parte grant of leave to appeal.—[1] An *ex parte* order granting leave to appeal is liable to be rescinded if it is obtained by any misrepresentation or concealment of fact which ought to have been disclosed. ('82) 4 All 500 (508); 9 Ind App 70 (PC) * (1861) 8 Moo Ind App 193 (195) (PC) * (1854) 6 Moo Ind App 207 (208, 209) (PC) * ('75) 2 Ind App 71 (81) (PC).

6. Non-Prosecution of petition.—[1] The petition is liable to be struck off for default if the applicant does not prosecute it diligently. ('86) 12 Cal 658 (660) * ('97) 2 Cal W N (xlv) (xlv) (PC). (In this case security was not given.) ('76) 1 Cal 142 (143).

[2] The Court can, however, restore the petition on sufficient cause being shown. ('67) 7 Suth W R 531 (531) (FB) * ('89) 16 Cal 397 (403); 16 Ind App 71 (PC) (First application granting leave withdrawn—Second application can be granted).

[But see ('66) 6 Suth W R Misc 121 (121)]

[3] The Privy Council may also dismiss an appeal presented to it for want of prosecution where no further proceedings are taken in the High Court, as required by the rules. (1857) 6 Moo Ind App 346 (347) (PC).

6-a. Appeal, Revision and Review.—[1] No appeal lies to the High Court from an order of a District Court granting leave to appeal to the Privy Council in an appeal under S. 75 of the Provincial Insolvency Act. (Vol. 24) 1937 Mad 930 (936) (DB).

[2] Order granting or refusing leave to appeal—No appeal lies under cl. 15 of the Letters Patent. ('90) 17 Cal 455 (458) (DB) * ('76) 1 Cal 102 (103) * ('81) 7 Cal 339 (342) (DB). (Order refusing certificate).

[3] High Court can interfere in revision where the subordinate Court has acted without jurisdiction in passing an order granting or refusing a certificate under this order (Vol. 24) 1937 Mad 930 (937) (DB).

[4] Order granting or refusing leave can be reviewed. ('84) 16 Cal 292n (294n) (DB). (Order granting leave). * ('12) 39 Cal 1037 (1040) (DB) (Order refusing leave).

7. FORM

See—Appendix G. Form No. 12

ORDER 45 RULE 4—SYNOPSIS.

1. Consolidation or Suits.
2. Inherent power to consolidate.
3. "Judgment", meaning of.
4. Costs.

1. Consolidation of Suits.—[1] The object of the rule is that where there are appeals from one judgement

5. In the event of any dispute arising between the parties as to the amount or value of the

Remission of dispute subject-matter of the suit in the Court of first instance, or as to the amount to Court of first instance, or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

O. 45 R 4 (contd.)

involving substantially the same questions for determination before the Privy Council they may be consolidated if, in the aggregate, the value of the appeals amounts to the appealable minimum. (Vol. 5) 1918 Pat 196 (196, 197) : 3 Pat L Jour 446 (DB) * (Vol. 11) 13 Cal L Jour 503 (504) (DB) * (Vol. 10) 1923 Mad 602 (602, 603) (DB) (No consolidation made as there were two separate judgments) * (Vol. 31) 1944 Mad 269 (270) ; I L R (1944) Mad 890).

[2] The mere fact that there is a common question in two suits is not sufficient to consolidate them if there are other questions which are not common. (Vol. 26) 1939 Mad 734 (735) : I L R (1939) Mad 593 (DB).

[See also (Vol. 24) 1937 Pesh 61 (62) (DB).]

[3] In interpreting the words "same judgement," the spirit of the rule should be observed and a narrow interpretation should not be given to it. (Vol. 14) 1927 Bom 19 (20) : 50 Bom 753 (DB).

[4] The suits were regarded as having been decided by the same judgement for the purposes of this rule in the following cases :—

(a) Where the judgment in one suit was merely a copy of the other. (Vol. 19) 1932 Mad 125 (126) : 55 Mad 106 (DB).

(b) Where the judgment in one suit merely referred to the judgement in the other, and, adopting its reasons a decree was accordingly passed. (Vol. 14) 1927 Bom 19 (20) : 50 Bom 753 (DB).

(c) Where the evidence in the two suits was, at the request of the parties, considered as a whole, and the Court came to a decision on the whole of the evidence in favour of a party, it was held that it was a proper case to which the procedure sanctioned by this rule should be applied. (Vol. 8) 1921 All 270 (270) : 43 All 223 (DB).

(d) Two suits involving substantially same questions disposed of by common judgement—Appeals therefrom also disposed of by common judgement—*Held* consolidation should be allowed. (Vol. 33) 1946 Mad 250 (250, 251) 1 L R (1946) Mad 672.

[5] Same judgment affirming lower Court's judgment in part relating to one defendant and modifying it in part relating to another defendant.—No substantial question of law involved in former part and in regard to the latter part appealable value less than Rs. 10,000—Both defendants applied jointly for leave to appeal. *Held* that leave should be refused. (Vol. 10) 1923 Nag 198 (199) (DB).

[6] Consolidation cannot be ordered in respect of deposit of printing charges or for furnishing security for costs. (Vol. 33) 1946 Mad 250 (250, 251) : 1 L R (1946) Mad 672.]

[7] The Court is not bound to consolidate suits in every case in which the conditions mentioned in the rule may be present. (Vol. 26) 1939 Mad 734 (735) : I L R (1939) Mad 593 (DB).

[8] The rule does not apply where two or more appeals are filed in the same suit and disposed of by the

same judgment. But where the appeals involve substantially the same questions for determination, the High Court can certify the case to be a fit one for appeal under Cl (c) of S. 109 although the requirements of S. 110 as to pecuniary value may not be satisfied. (Vol. 23) 1936 All 832 (833) : I L R (1937) All 105 (DB). (5 Ind Cas 583 followed : (Vol. 6) 1919 Mad 275 : 42 Mad 228 distinguished).

[9] The rule applies only to appeals to the King in Council and not to appeals to the High Court. (Vol. 10) 1910 Pun LR 17 P 41 (42).

2. Inherent power to Consolidate.—[1] The rule does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of security for the costs and for saving expenses. (Vol. 5) 1918 Pat 196 (197) : 3 Pat L Jour 446 (DB).

[2] Rule 7 of the Schedule to the Rules of the Indian Order in Council (9th February 1920) regarding appeals to the Privy Council invests the High Court with power to allow consolidation of appeals for the purpose of giving security in cases not falling directly within the scope of O. 45 R. 4. (Vol. 25) 1938 Lah 207 (208) (DB). (Note.—This case is overruled in (Vol. 29) 1942 Lah 147 : I L R (1942) Lah 447 (FB) on another point).

[3] Ordinarily inherent powers exist as regards matter, relating exclusively to the proceedings in Court which exercised such powers (Vol. 23) 1936 All 832 (833) : I L R (1937) All 105 (DB).

(4) Such power cannot be exercised for settling pecuniary valuation when the rule forbids it in cases governed by different judgment. (Vol. 8) 1921 Pat 97 (98) : 6 Pat L Jour 97 (DB).

3. "Judgment," meaning of.—[1] The word "Judgment" refers to the judgment appealed against and not the judgment of the Court below. (Vol. 19) 1932 Mad 125 (126) : 55 Mad 106 (DB).

[2] Common judgment in two suits in trial Court—No consolidation of suits unless there is a common judgment in the High Court also. (Vol. 8) 1921 Pat 97 (98) : 6 Pat L Jour 97 (DB).

4 Costs.—[1] The effect of an order of consolidation of several appeals under this rule is to make them a single appeal, and if costs are awarded against the respondents, they are jointly and severally liable for the whole costs. (Vol. 10) 1923 Pat 215 (216) (DB).

[2] As to security for costs in consolidated appeals, see Notes on Rule 7.

ORDER 45 ULTER 5—Note 1.

[1] A remand should not be made under this rule when an issue as to valuation was raised and decided in the trial Court and the parties acquiesced in the finding on that issue. (Vol. 5) 1918 Bom 224 (225) : 42 Bom 609 (DB) * (Vol. 14) 1927 Cal 413 (419) (DB) * (Vol. 8) 1921 Pat 97 (98) : 6 Pat L Jour 97 (DB).

[See also (Vol. 2) 1915 Oudh 165 (168) (DB). Defendant not objecting as to plaintiff valuation—*Held*, he cannot object in High Court).

Effect of refusal of certificate.

6. Where such certificate is refused, the petition shall be dismissed.

[1882—S. 601; 1877—S. 601.]

Security and deposit required on grant of certificate.

7. (1) Where the certificate is granted, the applicant shall, within a[ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow] from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security ^b[in cash or in Government securities] for the cost of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any Order of His Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded:

^b[Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:]

Provided, further, that no adjournment shall be granted to an opposite party to contest the nature of such security.]

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the expense of printing such copy.

[1882—S. 602.]

[a] Substituted by the Indian Limitation and Code of Civil Procedure (Amendment) Act 1920 (26 [XXVI] of 1920), s. 3 for "six months."

[b] Inserted, *ibid*.

PROVINCIAL AMENDMENTS.

ALLAHABAD

In rule 7 (1) (a) *between* the words "the respondent" and the words "and" *insert* the following words:

O. 45 R. 5 (*contd.*)

[2] The Court to which the remand is made should itself carry out the investigation and cannot remit it to some other officer. (Vol. 3) 1916 Cal 102 (102): 43 Cal 225 (DB).

[3] The Court has power to hold a local enquiry for the purpose of determining the value of the subject-matter. (Vol. 12) 1925 Cal 414 (415) (DB) (Such a power is discretionary).

[4] Full information with reference to the proceedings under this rule should be included in the record to be sent to the Privy Council. (Vol. 20) 1933 PC 232 (232): 12 Pat 679: 60 Ind App 366 (PC).

[5] Petition by creditor for adjudication of respondent as insolvent dismissed by High Court—Leave to appeal to Privy Council applied for—Question of value of subject-matter should not be referred to District Court, if respondent will be required to file schedule of his assets. (Vol. 21) 1934 Rang 292 (295): 12 Rang 355 (DB).

ORDER 45 RULE 6—Note 1.

[1] The High Courts should in refusing a certificate for leave to appeal state the grounds on which they refused it. ('06) 29 Mad 194 (195): 33 Ind App 67 (DB).

[2] Where an application for leave to appeal is dismissed with costs, the proper Court to execute the order as to costs is the trial Court. ('07) 34 Cal 860 (862) (DB)

[See however ('81) 6 Cal 201 (203) (DB) (*Held* High Court can execute such order.)]

[3] An appeal lies against an order made by any Court other than a High Court refusing the grant of a certificate under this rule and the period of limitation is thirty days from the date of the order under Article 153 of the Limitation Act—See O. 43 R 1 (z).

ORDER 45 RULE 7—SYNOPSIS.

1. Scope of the Rule.
2. "Date of the decree," meaning of.
3. Security and Deposit.
4. Security in case of Consolidated Appeal.
5. Form of Security—Proviso.
6. Extension of time.
7. Record not to include unnecessary papers.
8. Delay.
9. Letters Patent Appeal.

1. Scope of the rule.—[1] This rule prescribes the course to be followed by the applicant (appellant) after the issue of a certificate as to fitness of appeal. He should

"except when the Secretary of State for India in Council is the applicant."

In the first proviso to R. 7 (1) for the words "at the time of granting the certificate" *substitute* the words "at any time before expiry of the period for furnishing security."

MADRAS

Re-number the present sub-rule (2) as sub-rule (3) and *insert* the following as sub-rule (2):

"(5) No such security as is mentioned in Rule 7 (1), clause (a), shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act purporting to be done by him in his official capacity."

ODH

In Rule 7 (1) (a) *between* the words "the respondent" and the word "and" *insert* the following words

"except when the Secretary of State for India in Council is the applicant."

BOMBAY

Rule 7 A—After Rule 7, the following rule shall be *inserted*, namely:

"R. 7A. No such security as is mentioned in R. 7 (1), cl. (a) shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity." [8-7-1921.]

NAGPUR

Insert the following as new Rule 7A:

Security from the Secretary of State for India or from a public officer when dispensed with. "R. 7A. No such security as is mentioned in R. 7 (1), cl. (a) shall be required from the Secretary of State for India in Council or, where the Provincial Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity." [29-6-1948.]

SIND

Insert the following as Rule 7A:

"R. 7A. No such security as is mentioned in cl. (a) of sub-r. (1) of R. 7 shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

O. 45 R. 7 (contd.)

furnish security for the costs of the respondent and also deposit the expenses for translating etc., of the records within the time fixed by clause (i). ('75) 19 Suth W R 305 (306) (petitioner has not right to change the estimate of expenses; if he is dissatisfied he can apply to the officer to amend it.) * (Vol. 20) 1933 All 241 (243); 55 All 432 (FB) (Applicant depositing security amount only—Translation and printing charges not deposited and no explanation given—This rule not complied with—Note; overruled in (Vol. 26) 1939 All 299; I L R (1939) All 549 (FB) on another point).

[2] The rule does not apply to cases where special leave to appeal is granted by the Privy Council under S. 112 and the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council. (Vol. 12) 1925 Oudh 99 (100).

[But see ('07) 11 Cal W N 1104 (1105) (SB) (Court can extend time to deposit for some cogent reason—Extension of time not given—Case under old Code.)

2. "Date of the Decree."—[1] The "date of the decree" is the date on which the decree is pronounced and not the date on which it is signed by the Judge. ('10) 14 Cal W N 420 (423) (DB) * (Vol. 26) 1939 Pat 667 (669, 670); 19 Pat 123 (FB).

3. Security and Deposit.—[1] The appellant should furnish security for the costs of the respondent. ('67) 7 Suth W R 338 (338).

[2] The security should be in cash or in Government securities unless the Court acting under the Proviso order that some other form of security may be furnished.

(Vol. 20) 1933 All 225 (227); 55 All 246 (DB) (Applicant having no cash or Government promissory notes permitted to furnish security in immovable property.)

[See also (Vol. 20) 1933 All 410 (410) (DB). (Government promissory notes deposited with Court as security but not endorsed in favour of Registrar amounts of security) * ('09) 9 Cal L Jour 559 (560) (DB) (In case of Government securities: market value at the time of deposit should be taken into consideration)]

[3] Solicitors for the respondent in England can claim payment of their bill of costs from the money deposited as security. (Vol. 18) 1931 Cal 734 (734); 5S Cal 1034 (DB) * (Vol. 26) 1939 Bom 250 (252); I L R (1939) Bom 307 (DB).

[See (Vol. 20) 1933 All 3 (3, 4) (DB).

[4] It is open to the decree holder by way of caution to attach the security deposited by the judgment-debtor so as to prevent him from dealing with it any further. (Vol. 17) 1930 All 225 (242); 52 All 619 (FB); (On appeal from (Vol. 16) 1929 All 794).

[5] Certain amount deposited in Court as security for costs—Appeal to the Privy Council dismissed with costs—Appellant's liability for costs discharged otherwise by appropriation under debt relief legislation—Decree-holder is not entitled to be paid his costs out of the deposit. (Vol. 28) 1941 Mad 817 (822); I L R (1942) Mad 60. (DB) (Case relating to Madras Agriculturists' Relief Act of 1938.)

4. Security in Consolidated Appeal.—[1] When two appeals are consolidated for valuation security has to be furnished in respect of each of the appeals. It is not enough if security is given in one appeal alone. (Vol. 6) 1919 Pat 92 (93); 4 Pat L Jour 198 (DB).

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the Powers of Court decree appealed from shall be unconditionally executed, unless the Court pending appeal. otherwise directs.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

[1882—S. 608 ; 1877—Section 608.]

ORDER 45 RULE 13—SYNOPSIS.

1. "Court."

2. Stay of execution, if can be ordered before the granting of certificate.

3. Taking such security from the respondent.

4. Stay of execution on taking security from the appellant—Clause (c).

5. Stay of execution in view of application for special leave.

6. Stay of execution after special leave to appeal is granted by the Privy Council.

7. Stay of execution by Privy Council.

8. Security after execution.

9. To give such other directions.

10. "By the appointment of a receiver."

11. Powers of the High Court pending appeal to the Privy Council.

12. Letters Patent appeal.

1. "Court".—[1] The word "Court" in this rule means the High Court and not the Subordinate Court of original jurisdiction. A Subordinate Judge or a District Judge has no jurisdiction to stay execution of a decree of the High Court. The provisions of this rule are meant entirely to govern all questions regarding the execution of the decree under appeal before the Privy Council and the provisions of O. 41 R. 6 do not apply thereto. (Vol. 4) 1917 Pat 85 (86) : 3 Pat L. Jour 40 (DB) * (Vol. 12) 1925 Rang 254 (255) : 3 Rang 158 (DB) * ('69) 5 Mad HCR 98 (99) (DB).

2. Stay of execution, if can be ordered before the granting of certificate.—[1] Under the old Code on the basis of the words "Court admitting the appeal" in para 1 of the corresponding S. 608 which have now been omitted it was held that an application for stay of execution could not be granted before the appeal in the Privy Council was finally admitted. ('90) 1890 All WN 92 (92) * ('01) 5 Cal WN 562 (568) [DB] * ('71) 16 Suth WR 289 (289) (DB) * ('10) 20 Mad L. Jour 140 (141) (DB).

[But see ('95) 19 Bom 10 (11, 12) (DB). (High Court could stay execution of its decree although the appeal had not yet been admitted).]

[2] The omission of the words "admitting the appeal" in this rule does not affect its construction and even now no stay can be ordered under this rule before the certificate is granted. ('12) 6 Sind L R 86 (87) (DB).

[3] The High Court has inherent power to stay execution in appropriate cases even before the certificate is granted. (Vol. 12) 1925 Sind 216 (217) (DB). (But inherent power is to be used sparingly.) * ('13) 40 Cal 955 (961, 963, 965) (DB). (Stay under inherent power granted in a case where application for special leave is pending.)

3. Taking such security from the respondent.—[1] Under cl. (b) of the rule the Court may allow execution of the decree directing the respondent to furnish security for the due performance of any order which the Judicial Committee may make on appeal. (Vol. 12) 1915 Lah 270 (271) (DB).

[2] The object of the security is to indemnify the appellant for any loss that may be occasioned by the execution being taken out. ('70) 14 Suth WR 410 (411) (DB).

[3] Where the High Court orders execution to proceed on the decree-holder furnishing security and the latter does not do so, the order operates in fact as a stay of execution. The failure of the respondent decree-holder to give security will not therefore deprive him of the benefit of S. 15 Limitation Act so as to bar a fresh application for execution after the Privy Council appeal is dismissed. (Vol. 7) 1920 Pat 354 (356) : 5 Pat L. Jour 39 (DB).

4. Stay of execution on taking security from the appellant—Clause (c).—[1] The grant of an order for stay of execution of the decree pending appeal is in the discretion of the Court and the appellant should show "special cause" for the exercise of the discretion in his favour. As a general rule, execution ought not to be stayed unless it would so upset things that in the event of the appeal being successful the *status quo ante* could not be restored or could be restored only with great difficulty. ('12) (1912) Pun L. R. No. 234 p. 740 (742) (DB) * ('97) 2 Cal WN lix (lix, lx) (PC). (Stay not granted as no sufficient cause was made out).

[2] The principle underlying the granting of stay of execution is that "the successful party in litigation"

O. 45 R. 13 (contd.)

i. e., the ultimately successful party is to reap the fruits of that litigation, and not obtain merely a barren success." ('01) 5 Cal WN 781 (797, 798) (SB) * ('79) 4 Cal L. Rep 125 (129) * ('70) 14 Suth W R 361 (361) (DB), (Security for future mesne profits generally taken for three years.)

[3] Proceedings between a preliminary and final decree; as for instance, in partition suits being proceedings in the suit and not in execution. The High Court has no power to stay such proceedings under this rule. The Privy Council which has seisin of the appeal can alone stay such proceedings. ('09) 9 Cal L Jour 561 (562) (SB) * (Vol. 6) 1919 All 14 (15) : 42 All 170 (DB).

[See (Vol. 21) 1934 Lah 238 (238, 239).]

[4] Proceedings in a Revenue Court to eject the defendant, instituted after obtaining possession in execution of the decree of the High Court, are not proceedings in execution of the decree within the meaning of this rule. ('22) 64 Ind Cas 152 (152) (DB) (All).

[5] Where the Court orders security to be furnished, it is advisable to specify definitely the time within which the security must be tendered, and to give such further directions as may be necessary to ensure the intention of the Court being carried out. (Vol. 7) 1920 Cal 644 (646) (SB).

[6] This clause refers only to the stay of execution of the decree appealed from. Where pending an appeal to the Privy Council from the preliminary decree in a mortgage suit, a final decree is passed and the appellant to the Privy Council applies for stay of execution of the final decree, this clause will not enable the High Court to grant the stay. But under cl. (d) of the rule the High Court can pass necessary orders in order to safeguard the rights of the applicant. (Vol. 26) 1939 Mad 50 (51) ; I L R (1939) Mad 135 (DB). (Stay granted on giving security.)

5. Stay of execution in view of application for special leave.—[1] The High Court of Calcutta has held that it has inherent power to order stay of execution of its decree in view of an application for special leave to appeal to the Judicial Committee. (Vol. 29) 1942 Cal 488 (491) ; I L R (1942) 1 Cal 67 (DB) * (Vol. 26) 1939 Cal 308 (309) (DB).

6. Stay of execution after Special leave to appeal is granted by the Privy Council.—[1] In view of the Privy Council decision in 38 Cal 335 (338) ; 38 Ind App 74 (PC) that the High Court has power to stay execution of a decree although an appeal against that decree has been admitted by special leave of the Privy Council the contrary view taken in the under mentioned earlier decisions is no longer good law. (1900) 27 Cal 1 (4) ; 26 Ind App 281 (PC). (Decision under S. 608 of the Code of 1882 which limited the power to the "Court admitting the appeal.") * ('09) 10 Cal L Jour 326 (323, 329) (DB). (Application for the appointment of a receiver) * ('10) 7 Ind Cas 188 (189) (DB) (All).

[See ('66) 6 Suth W R Misc 111 (113) (FB). (A case of restitution).]

7. Stay of execution by Privy Council.—[1] As a general rule, in appeals pending before the Privy Council an application to stay proceedings in execution ought always to be made in the first instance to the High Court which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of the details which the Judicial Committee cannot possess on an interlocutory

application. ('06) 29 Mad 379 (381) : 33 Ind App 132 (PC). (Stay granted by Privy Council.)

[2] If the High Court refuses to grant stay, the Privy Council may, if it thinks fit, order stay itself. ('95) 22 Cal 1 (8) : 21 Ind App 170 (PC).

[3] Where the High Court refused to grant stay the Privy Council can direct the appellant to apply again to the High Court with its opinion as to the advisability of granting stay. (1863) 10 Moo Ind App 196 (202), (PC) * ('87) 14 Cal 290 (295) : 14 Ind App 1 (PC).

8. Security after execution.—[1] The High Court can under sub-rule (1) direct the respondent to furnish security for the due performance of any order which may be made by His Majesty in Council, even in cases where the decree has been executed. (Vol. 13) 1926 Bom 425 (426, 427) : 50 Bom 453 (DB) (If no security is given as ordered, the Court can appoint a receiver and take the property in its own charge.) * ('96) 19 Mad 140 (142) (DB). (Such an order is not *ultra vires*).

[See however (1865) 2 Suth W R Misc 23 (23) (DB.)] *Held*, High Court has no such power under S. 4, Regulation XVI of 1797 * ('67) 8 Suth W R 144 (146) (FB) (Do) * ('66) 5 Suth W R Misc 37 (37) (DB) (Do).]

[2] But the party seeking to obtain such security must show *special cause* such as waste or improper dealing with the property, on the part of the respondent. ('72) 17 Suth W R 521 (521) * ('69) 12 Suth W R 296 (298) * (1857) 6 Moo Ind App 309 (329) (PC).

9. To give such other directions.—[1] High Court ordering mortgage suit decreed *ex parte* to be re-heard—Pending appeal to Privy Council against that order one of parties applying for stay—High Court held had power under this rule as well as *inherent power* to stay further proceedings in the suit. (Vol. 18) 1931 Cal 79 (80, 81) (DB).

[2] Where during the pendency of an appeal to the Privy Council from the preliminary decree in a mortgage suit, a final decree is passed in the suit and the appellant to the Privy Council applies for stay of execution of the final decree, the High Court can pass necessary orders for safeguarding the rights of the appellant. (Vol. 26) 1939 Mad 50 (51) ; I L R (1939) Mad 135 (DB).

[3] Income of property in suit accruing after decree, lying in deposit in High Court pending appeal—Order for its preservation may be passed after and before application for leave to appeal to Privy Council is filed—Such income forms part of the subject-matter of the appeal to the Privy Council. (Vol. 29) 1942 Cal 488 (491) : I L R (1942) 1 Cal 67 (DB).

10. "By the appointment of a receiver."—[1] The principles on which a receiver should be appointed under cl. (d) of sub-rule (2) are the same as those contained in O. 40. In the absence of any allegation of waste or risk of loss, no receiver ought to be appointed under this clause. ('11) 12 Ind Cas 198 (198) (Upp Bur).

[2] The High Court has power to appoint a receiver even in cases where special leave to appeal is granted by the Judicial Committee. (Vol. 7) 1920 Pat 345 (346) : 4 Pat L Jour 482 (DB).

11. Powers of the High Court pending appeal to the Privy Council.—[1] The High Court has power to amend the decree even after leave to appeal is granted

14. (1) Where at any time during the pendency of the appeal the security furnished by Increase of security either party appears inadequate, the Court may, on the application of the found inadequate. other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

- (a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security ;
- (b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit.

[1882—S. 609.]

15. (1) Whoever desires to obtain execution of any order of His Majesty in Council shall Procedure to enforce apply by petition, accompanied by a certified copy of the decree passed or orders of King in order made in appeal and sought to be executed, to the Court from which Council. the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same ; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order a[* * *] for the adjustment of financial transactions between the Imperial and the Indian Governments.

O. 45 R. 13 (contd.)

and before the records are transmitted to the Privy Council. ('10) 11 Cal L Jour 155 (157) (DB) * (Vol. 16) 1929 Lah 427 (427) (DB).

[2] The High Court has no power to direct the addition of parties after leave to appeal to the Privy Council is granted. ('11) 12 Ind Cas 69 (69) (DB) (Mad) * (Vol. 13) 1926 Rang 9 ('10) : 3 Rang 474 (DB).

[3] Where legal representatives have to be brought on record on the death of a party pending appeal to the Privy Council, the practice of the Judicial Committee is that, on an application, the High Court will make an inquiry, take evidence and transmit the same to the Privy Council with its own opinion as to the substitution of parties. ('89) 16 Cal 184 (185, 186) : 15 Ind App 109 (PC). (The Privy Council will act on the report of the High Court.)

[See also ('09) 10 Cal L Jour 331 (333, 334) (DB).]

[4] The above rule of practice would appear to hold good in the case of abatement. ('09) 10 Cal L Jour 330 (331) (DB).

[See also (Vol. 11) 1924 Rang 217 (218) : 2 Rang 91 (DB).]

[5] This rule has no application where the party applies for stay of proceedings in the Court below as distinct from the stay of the execution of a decree. (Vol. 21) 1934 All 585 (586) : 56 All 907 (DB). (Nor has the Court inherent jurisdiction to do so) * (Vol. 21) 1934 Cal 823 (824) (DB). (But High Court has inherent power to do so) * (Vol. 21) 1934 Lah 238 (239, 239) : (DB).

[6] Where after the certificate has been granted and the appeal declared to have been admitted, the parties compromise the suit and apply to the High Court to pass a decree in accordance therewith. (Vol. 20) 1933 Bom 244 (244, 245) : 57 Bom 369 (DB).

12. Letters Patent Appeal.—An order refusing to stay execution in the exercise of discretion under this rule is not a "Judgment" under clause 15 of the Letters Patent and is not appealable. ('01) 24 Mad 358 (359) (DB) * ('94) 21 Cal 473 (475) (SB).

[See also ('72) 17 Sath WR 464 (464) (DB). (Order of District Judge releasing surety, held not appealable)].

ORDER 45 RULE 15—SYNOPSIS.

1. "Whoever desires to obtain execution."
2. "Shall apply by petition."
3. "Accompanied by a certified copy."
4. "To the Court from which the appeal to His Majesty was preferred."
5. Decree on appeal from another High Court—Jurisdiction to execute.
6. Functions under the rule merely ministerial.
7. To what Court order should be transmitted.
8. "Shall give such directions," etc.
9. Application by assignee of Order in Council.
10. Liability of surety.
11. Restitution.
12. Mesne profits.

^b [(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.]

[1882—S. 610; 1877—S. 610.]

[a] The words "by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury" were *repealed* by A.O.

[b] *Inserted* by the Indian Limitation and Code of Civil Procedure (Amendment) Act, 1920 (26 [XXVI] of 1920), section 5.

PROVINCIAL AMENDMENTS.

ALLAHABAD

For Rule 15 (1) *substitute* the following :

"R. 15 (1) Whoever desires to obtain —

(a) execution of any order of His Majesty in Council, or

(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs,

shall apply to the said Court by a petition, accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof."

BOMBAY

For sub-rule (1) *substitute* the following :

"15. (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by the original decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred, provided that the Court may in its discretion, if for special reasons it thinks fit to do so, act on a certified copy of the decree passed or order made in appeal."

[27-11-1936.]

O. 45 R. 15 (*contd.*)

13. Interest.

14. Costs.

15. Rate of exchange—Sub-rule (3).

16. Letters Patent appeal.

17. Dismissal for want of prosecution.

18. Limitation.

1. "Whoever desires to obtain execution."—[1] It is not necessary in all cases that each person interested should obtain a separate transmission of the order when it has been already transmitted to lower Court at the instance of one of the successful parties. (Vol. 19) 1932 Mad 440 (442, 443) : 55 Mad 856 (DB) * (Vol. 11) 1924 Mad 95 (96) (DB).

[2] It is open to some of the decree-holders to execute the decree on behalf of all the decree-holders. (Vol. 7) 1920 Pat 672 (673) (DB).

[3] Where the decree is in favour of several persons declaring that each is entitled to a *separate and distinct share*, each plaintiff is bound to apply separately and an order of transmission obtained by some of the plaintiffs alone cannot be taken advantage of by the others. (Vol. 4) 1917 Pat 253 (256) : 2 Pat L Jour 496 (DB).

[4] Where a party having obtained an Order in Council delays or refuses to lodge the order, the opposite party can apply under this rule asking for a summary order against that party to lodge the order so that execution might follow in terms of the judgment

of the Board. (Vol. 13) 1926 PC 31 (31) : 5 Pat 461 ; 53 Ind App 89 (PC).

[5] The application to enforce the order was to be made to the Court from which the appeal to the Privy Council had been preferred and the proper course for such Court was to transmit the Order in Council to the trial Court to be carried out. (Vol. 24) 1937 PC 165 (164, 165) : 1 L R (1937) Lah 502 ; 31 Sind L R 367 : 64 Ind App 191 (PC).

2. "Shall apply by petition."—[1] The rule is mandatory and an execution application filed without having filed a petition for transmission is incompetent. (Vol. 23) 1936 Oudh 185 (188) : 12 Luck 52 (DB).

(See however (Vol. 25) 1938 Oudh 250 (251) : 14 Luck 243 (DB).)

[2] Where no objection was taken in previous execution proceedings it cannot be allowed to be taken at a later stage to the application filed without a petition for transmission. (Vol. 11) 1924 Pat 576 (579) : 3 Pat 596 (DB).

3. "Accompanied by a certified copy."—[1] A certified copy of the *decree* sought to be executed should be filed along with the petition. ('80) 5 Cal 329 (330) (DB).

[2] A production of a copy of the *judgment* is not enough. ('78) 20 Suth W R 444 (445) (DB).

[3] The rule should not be construed as restricting the only possible evidence of the decree or order to the certified copy. (Vol. 5) 1918 Mad 626 (626) (DB) * ('83) 9 Cal 482 (492) : 10 Ind App 4 (PC).

O. 45 R. 15 (contd.)

[4] The practice in regard to Privy Council decrees is that the original decree is given to the successful party or to one of the successful parties and it is the duty of that person to file that original decree in the High Court. ('83) 9 Cal 482 (492): 10 Ind App 4 (PC) * (Vol. 13) 1926 P C 31 (31): 5 Pat 461: 53 Ind App 89 (PC).

[5] The trial Court cannot take any action under this rule until the receipt of the Order in Council. (Vol. 23) 1936 Oudh 185 (188): 12 Luck 52 (DB).

4. "To the Court from which the appeal to His Majesty was preferred."—[1] An application made to any other Court except the one from whose decree the appeal was preferred is not competent. ('74) 22 Suth W R 102 (102) * ('72) 1872 Pan Re. No. 3, page 27 (35, 36) (PC) * ('67) 7 Suth W R 225 (225).

5. Decree on appeal from another High Court—Jurisdiction to execute.—[1] The High Court of Patna has no jurisdiction to execute an Order in Council passed in an appeal from the Calcutta High Court. The proper Court to which an application for execution of the Order should be made is the High Court of Calcutta. (Vol. 5) 1918 Pat 333 (333): 2 Pat L Jour 684.

6. Functions under the rule merely ministerial.—[1] The duties of the High Court in receiving and transmitting Orders of His Majesty in Council under this rule are purely ministerial. ('95) 22 Cal 960 (971, 972) * ('81) 6 Cal 594 (604, 605) (SB) * (1880) 4 App Cas 482 (483, 484), *Pitts v. La Fontaine* * (Vol. 1) 1914 Mad 222 (224): 38 Mad 832 (DB) * (Vol. 17) 1930 Lah 674 (675): 11 Lah 365 (DB) * (Vol. 7) 1920 Pat 672 (673) (DB).

7. To what Court order should be transmitted.—[1] The High Court should transmit the order for execution to the Court which passed the decree. Where, such Court ceases to have territorial jurisdiction over the matter, the order can be transmitted to the Court which has jurisdiction to execute it. ('93) 20 Cal 105 (106) (DB) * (Vol. 2) 1915 Mad 602 (602).

[See ('73) 20 Suth W R 419 (419) (DB)]

8. "Shall give such directions," etc.—[1] Under sub-r. (2) of the rule it is the High Court that can give necessary directions in regard to execution. (Vol. 9) 1922 Oudh 34 (37) (DB) * ('12) 17 Suth W R 340 (341).

[See (Vol. 25) 1938 Oudh 250 (251): 14 Luck 243 (DB).]

The Privy Council itself gave direction in the following cases: ('74) 22 Suth W R 104 (104) (DB) * ('66) 5 Suth W R 271 (275) (DB).

[2] Neither the High Court nor the subordinate Court has power to stay execution or adjourn an application for execution on the ground that an application for review of the decree was pending before the Privy Council. (Vol. 18) 1931 Pat 203 (203) (DB).

9. Application by assignee of Order in Council.—[1] Where an order of the Privy Council is transmitted under this rule to the District Court as the Court which passed the first decree, the District Court has jurisdiction to entertain an application made by an assignee of the decree under O. 21 R. 16 to recognize the assignment, and to allow him to execute the decree. (Vol. 1) 1914 Mad 222 (224): 38 Mad 832 (DB).

10. Liability of surety.—[1] The surety is not precluded from questioning the validity of the security bond in execution proceedings, ('98) 26 Cal 246 (249) (DB).

11. Restitution.—[1] Defendant's right to restitution is not affected by the fact that the auction-purchaser is not a party to the Privy Council appeal. ('06) 28 All 337 (339) (DB).

[2] The fact that the party applying for restitution is not a party to the Privy Council appeal does not disentitle him to apply for restitution if the order of the Privy Council ensures to his benefit. (Vol. 11) 1924 Mad 95 (96) (DB).

[3] The word "execution" as used in O. 45 R. 15 is intended to cover a case for restitution also and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the Court indicated by Rule 15. (Vol. 23) 1936 Oudh 185 (188): 12 Luck 52 (DB).

[4] Application under this rule is not necessary—High Court is not competent to direct application for restitution to be made in a particular Court. (Vol. 24) 1937 All 515 (523, 524): 1 L R (1937) All 766 (DB).

12. Mesne profits.—[1] A party who is dispossessed of immovable property in pursuance of a decree of the High Court is entitled to get back, by way of restitution, not merely the property of which he was dispossessed, but also mesne profits for the period for which he was out of possession. ('92) 15 Mad 203 (209) (DB) ('74) 21 Suth W R 195 (195) (DB). * ('79) 3 Cal L Rep 189 (191) (DB). * ('70) 13 Moo Ind App 490 (496) (PC).

13. Interest.—No interest on costs can be allowed by the High Court or the Court of the first instance, when the order of the Privy Council is silent as to interest. ('78) 3 Cal 161 (170, 171): 4 Ind App 137: 1877 Pan Re. No. 1 (PC). * ('05) 32 Cal 494 (501) (DB). * ('74) 21 Suth W R 147 (147) (DB). * ('74) 21 Suth W R 195 (196) (DB).

[2] If interest is awarded by the Privy Council but *no rate* is specified, the executing Court can grant interest at the rate granted in the decree of the High Court or at a reasonable rate. ('72) 18 Suth W R 103 (103) (DB).

14. Costs.—[1] When the successful party in an appeal before the Privy Council is awarded the costs of the appeal in England and also the costs incurred in the Indian Courts, he is entitled to get also the costs of translating the records of the appeal and of transmitting them to England. ('75) 23 Suth W R 463 (463) (DB). ('74) 21 Suth W R 411 (411) (DB) * ('85) 11 Cal 244 (249): 12 Ind App 7 (PC) * (Vol. 24) 1937 Pesh 3 (4) (DB).

[2] The amount of such costs is left to be ascertained by the High Court and is not assessed by the Privy Council office. ('84) 10 Cal 106 (108) (DB) * ('72) 18 Suth W R 89 (90) * ('71) 15 Suth W R 356 (357) (DB).

[3] Party awarded costs of Privy Council praying for preparation of memo of costs—Prayer includes prayer for transmission. (Vol. 25) 1938 Oudh 250 (251): 14 Luck 243 (DB).

15. Rate of exchange—Sub-rule (3).—[1] Calcutta view that the "rate of exchange" meant the rate at the time when the order in Council is made, is now recognized. ('96) 23 Cal 357 (359) (DB). * ('98) 25 Cal 283 (285) (DB).

16. Letters Patent Appeal.—[1] An order of a single Judge of the High Court refusing to transmit for execution the order of His Majesty in Council is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable. ('83) 9 Cal 482 (493, 494): 10 Ind App 4 (PC).

16. The orders made by the Court which executes the order of His Majesty in Council, Appeal from order relating to such execution, shall be appealable in the same manner and relating to execution. subject to the same rules as the orders of such Court relating to the execution of its own decrees.

[1882—S. 611.]

Appeals to Federal Court,

17. *Repealed by the Federal Court Act, 1941 (21 [XXI] of 1941), Section 2.*

PROVINCIAL AMENDMENTS.

Rule 17—NAGPUR.

After Rule 16 of Order XLV *add* the following as Rule 17 :

"17. The provisions of sub-rules (1) and (2) of Rule 15 and the provisions of Rule 16 shall apply *mutatis mutandis*, to the execution of decrees or orders for costs passed in accordance with the declaration or order made by the Federal Court in appeals from the High Court," [22-11-1946.]

ODDH.

Rule 17 is same as that of Nagpur with the changes as follows: (i) *Delete* the words "in accordance with the declaration or order made"; and (ii) *substitute* the words "Chief Court" for the words "High Court." [18-5-1946.]

ORDER XLVI.

REFERENCE.

1 Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may either of its own motion or on the application of any of the parties, draw up a statement of the fact, of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

[1882—S. 617; 1877—S. 617; 1861—S. 28.]

O. 45 R. 15 (*contd.*)

[See ('70) 13 Moo Ind App 490 (496) (PC).]

17. Dismissal for want of prosecution.—[1] Where an appeal preferred against a decree of the High Court is dismissed by the Judicial Committee for want of prosecution, the order is not a judicial determination at all and limitation for execution of the High Court's decree runs from the date of the *decree of the High Court*. (Vol. 1) 1914 P C 66 (67): 36 All 350 (PC) * (Vol. 1) 1914 P C 65 (66): 36 All 234: 41 Ind App 104 (PC).

18. Limitation.—[1] An application to execute the decree or order of the Privy Council under this rule is governed by Article 183 of the Limitation Act. ('82) 3 Cal 218 (223) (FB) * (Vol. 3) 1916 Pat 254 (255, 256): 1 Pat L J. ur 385 * (Vol. 3) 1916 Cal 488 (490, 492): 43 Cal 903 (FB).

ORDER 46 RULE 1—SYNOPSIS.

1. Scope of the rule.
2. Reference, when can be made.
3. "Decree not subject to appeal."
4. "Court," meaning of.
5. Reasonable doubt
6. Statement of facts and Court's opinion.

1. Scope of the rule.—[1] A right of reference is fundamentally distinct from a right of appeal: the former vests in the *Court*, and the latter vests in the *suitor*. (Vol. 15) 1928 All 871 (375): 50 All 839 (SB) * (Vol. 19) 1932 All 651 (653): 54 All 891.

[2] The object of the provision for reference is to enable the subordinate Courts to obtain, in non-appealable cases, the opinion of the High Court *in advance* on a question of law and hereby avoid the commission of an error which could not be remedied later on. (Vol. 28) 1941 Bom 865 (866) (DB) * (Vol. 8) 1921 Cal 262 (264): 48 Cal 766 (SB).

[3] The right of reference is subject to the conditions prescribed by this rule and unless they are fulfilled, the High Court cannot entertain a reference from a subordinate tribunal. ('03) 30 Cal 458 (462) (SB).

[See also (Vol. 20) 1933 All 597 (598): 55 All 648 (DB).]

2. Reference, when can be made.—[1] A reference can be made only in a *suit or appeal or in execution of a decree*. (Vol. 27) 1940 Sind 111 (111): 1 L R (1940) Kar 411 (DB) * ('01) 25 Bom 327 (329) (DB).

[2] A reference lies only on a matter about which the parties are *litigating*, that is, on a matter wherein the Court is called on to adjudicate on the opposite contentions of the parties. ('88) 12 Bom 78 (79, 80) (DB).

[3] No reference can be made under this rule in the following cases.

(a) In a proceeding against a pleader under the Legal Practitioners Act, 1879, ('88) 12 Bom 78 (79, 80) (DB).

(b) In an application for review. ('72) 17 Suth W R 94 (94) (DB) * ('72) 17 Suth W R 95 (96, 97) (DB).

O. 46 R 1. (*contd.*)

(c) In an application for a new trial. ('92) 15 Mad 179 (181) (DB).

[But see ('69) 11 Suth W R 525 (528) (DB)]

(d) In an application for sanction to prosecute. (Vol. 11) 1924 Lah 566 (567).

(e) In an enquiry as to the proper court-fee payable on a memorandum of appeal. ('06) 1906 All W N 180 (180).

(f) In an enquiry in an application under S 15 of the Calcutta Rent Act. (Vol. 12) 1925 Cal 391 (392) (DB)

(g) In an enquiry in an application under S. 93, Bengal Tenancy Act. (Vol. 21) 1934 Cal 566 (566) (DB).

(h) In an enquiry in a proceeding before a District Judge acting under S. 20, C P and Berar Relief of Indebtedness Act. (Vol. 29) 1942 Nag 8 (11): I L R (1941) Nag 588 (DB).

(i) In an enquiry in an application for execution of an award made under the Bombay Co-operative Societies Act. (Vol. 27) 1940 Sind 111 (112): I L R (1940) Kar 411 (DB).

[4] The question on which a reference can be made must have arisen *before* or *on* the hearing of a suit or an appeal or in a *pending* proceeding in execution of a decree. A question arising *subsequent* to the hearing of a suit or appeal cannot be the subject of a reference under this rule, unless it arises in execution of the decree. (Vol. 11) 1924 Lah 566 (567) * ('79) 1879 Pun Re No. 31, page 93 (94) (DB).

[5] The question must be one which *actually arises* for decision in the proceedings before the Court. ('01) 25 Bom 327 (329) (DB).

[6] The right of reference cannot be exercised in proceedings other than those referred to in the rule by the application of S 141 of the Code. (Vol. 29) 1942 Nag 8 (9, 11): I L R (1941) Nag 588 (DB) * (Vol. 27) 1940 Sind 111 (112): I L R (1940) Kar 411 (DB) * ('11) 36 Mad 16 (17) (DB) * (Vol. 12) 1925 Cal 391 (392) (DB).

3. "Decree not subject to appeal."—[1] No reference can be made in a suit or appeal unless the decree that might be passed therein is one against which *no appeal lies*. (Vol. 30) 1943 Bom 250 (252): I L R (1943) Bom 391 (DB) * (Vol. 28) 1941 Bom 69 (70): I L R (1941) Bom 131 (DB) * (Vol. 28) 1941 Oudh 85 (88, 84): 16 Luck 492 (DB) * (Vol. 14) 1927 Mad 1179 (1180) (DB) * (Vol. 20) 1933 Lah 402 (403) * (Vol. 18) 1931 Pat 353 (353): 10 Pat 471 (DB) * ('87) 11 Bom 57 (58) (DB) * (Vol. 4) 1917 Lah 135 (136): 1916 Pun Re No. 130 (DB) * (Vol. 3) 1916 Lan 350 (351) (DB) * ('85) 7 All 815 (816, 817) (DB) * ('78) 1878 Pun Re No. 40, page 162 (163) (DB) * ('80) 5 Cal 756 (758) (DB).

[2] No reference can be made in a proceeding in execution of a decree unless the *decree* is a non-appealable one. (Vol. 28) 1941 Bom 365 (366) (DB) * ('40) 72 Cal L Jour 522 (525) (DB) * ('88) 12 Bom 30 (31) (DB) * ('80) 1880 Pun Re No. 100 * ('93) 17 Bom 735 (736) (DB) * ('10) 5 Ind Cas 534 (534) (DB) (All.)

[3] In appealable cases a remedy to correct possible errors is provided by the appeal. ('80) 7 Cal L Rep 144 (144).

[4] The words "an appeal in which the decree is not subject to appeal" include not only a *first* appeal in

cases in which no second appeal is provided but also any appeal in which no further appeal is provided. (Vol. 28) 1941 Bom 365 (366) (DB).

[5] The words "not subject to appeal" mean only that the law provides no appeal in any circumstances. They do not mean that no appeal has been in *fact* preferred. (Vol. 28) 1941 Bom 365 (366, 367) (DB).

4. "Court" meaning of.—[1] The word "Court" in this rule means a Court of Civil Judicature. (Vol. 6) 1919 Oudh 18 (19): 22 Oudh Cas 319 (DB).

[2] A Collector executing a decree transferred to him under S 68 of the Code is not a Court. (Vol. 6) 1919 Oudh 18 (19): 22 Oudh Cas 319 (DB).

[3] A Registrar acting under the Registration Act is not a Court. ('96) 1896 Bom P J 219 (220) (DB).

[4] The Tribunal constituted under the Nagpur Improvement Trust Act is not a Court. (Vol. 32) 1945 Nag 146 (150): I L R (1945) Nag 399 (DB).

[5] Reference to the High Court under S 83 (2), C P Municipalities Act, is not one by a "Civil Court" and therefore does not come within the purview of O 46. (Vol. 32) 1945 Nag 75 (76): I L R (1944) Nag 827.

[6] Court refusing to entertain appeal on ground of want of jurisdiction cannot make reference on question of jurisdiction. ('82) 4 Mad 217 (218) (DB) * ('13) 18 Ind Cas 314 (315): 1913 Pun Re No. 61.

5. Reasonable doubt.—[1] A reference can be made on a question of law only if the Judge entertains a *reasonable* doubt about it. ('40) 72 Cal L Jour 522 (525) (DB) * ('06) 30 Bom 226 (223) (DB) * (Vol. 20) 1933 Lah 402 (402) * (Vol. 1) 1914 Lah 147 (147): 1914 Pun Re No. 8: (DB) * (Vol. 18) 1931 Mad 71 (72) (DB) * ('88) 15 Cal 507 (509).

[2] There cannot ordinarily be a reasonable doubt on a question clearly decided by the rulings of the High Court to which the Judge making the reference is subordinate, unless the authority of those rulings can be questioned in view of mere recent decision of the Privy Council. ('06) 30 Bom 226 (223, 229) (DB) * (Vol. 1) 1914 Lah 147 (147): 1914 Pun Re No. 8 (DB). ('89) 13 Bom 54 (55) (DB) * (Vol. 18) 1931 Mad 71 (72) (DB).

[See also (Vol. 14) 1927 Mad 1186 (1187) (DB).]

[3] Ruling of High Court doubted in later decision of same High Court and dissented from by other High Courts—There may be room for reasonable doubt (Vol. 18) 1926 All 204 (206, 208): 48 All 188 (FB).

[4] Decision of High Court on particular question in conflict with view of other High Courts—Court subordinate to former High Court cannot entertain doubt on that question. ('13) 15 Oudh Cas 380 (380) (DB).

[5] The Court cannot make a reference on a question on which it entertains no doubt merely because the *parties* apply for it. ('70) 14 Suth W R 248 (249) (DB).

[See (Vol. 10) 1923 Rang 193 (193): 1 Rang 220 (DB).]

[6] A reference is not bad merely because the question arises out of the action of a third person not a party to the suit. ('08) 32 Bom 157 (161) (DB).

6. Statement of facts and Court's opinion.—[1] Court making reference should draw up a statement of facts of case, formulate the question and give its opinion thereon. ('02) 1902 Pun L R No. 93, page

Court may pass decree contingent upon decision of High Court

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred; but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

[1882—S. 618;—1877—S. 619; 1861—S. 29.]

Judgment of High Court to be transmitted, and case disposed of accordingly.

3. The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

[1882—S. 619; 1877—S. 619; 1861—Ss. 32 and 33.]

Costs of reference to High Court.

4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

[1882—S. 620; 1877—S. 620; 1861—S. 34.]

Power to alter, etc., decree of Court making reference.

5. Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

[1882—S. 621; 1877—S. 621.]

Power to refer to High Court questions as to jurisdiction in small causes.

6. (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

[1882—S. 646A.]

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement, the High Court may make such order in the case as it thinks fit.

O. 46 R. 1 (contd.)

364 (365) (DB) * ('91) 15 Bom 376 (383) (DB) * ('96) 20 Bom 779 (783) (DB) (Do).

[2] No statement of case or of Court's opinion—No statement that question arose on trial of suit—Reference not answered and sent back for amendment. ('67) 7 Buth W R 165 (166) (DB).

ORDER 46 RULE 3—Note 1.

[1] Upon receipt of the decision of the High Court, it is the duty of the referring Court to dispose of the case in conformity therewith. ('97) 24 Cal 129 (132).

ORDER 46 RULE 4—Note 1.

[1] The costs of reference to the High Court cannot be dealt with separately but must be dealt with when awarding the costs of the suit. ('88) 15 Cal 507 (510).

[2] The award of the costs of the reference is in the discretion of the Court. ('89) 15 Cal 507 (510, 511).

ORDER 46 RULE 5—Note 1.

[1] Where the lower Court does not comply with the conditions laid down in Rule 1, the High Court can return the case for amendment in proper form. ('03) 30 Cal 458 (462) (SB).

[2] The rule is also wide enough to enable the High Court to quash the order of reference itself made by the lower Court. (Vol. 16) 1929 Bom 30 (31) (DB).

ORDER 46 RULE 6—Note 1.

[1] No reference can be made after the passing of the judgment in the case. (1900) 24 Bom 310 (314) (DB).

ORDER 46 RULE 7—Note 1.

[1] A reference under this rule is limited to those cases where the District Court is of the opinion that the subordinate Court has held that it has no jurisdiction over the suit, and that such order is erroneous ('90) 1890 Pun Re No. 91, page 275 (276) (DB). *('03) 95 All 135 (136) (DB). *('89) 11 All 304 (306) (DB).

(8) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

[1882—S. 646 B.]

PROVINCIAL AMENDMENTS

RULE 8—

ALLAHABAD

Add after R. 7 to O. 46 the following as R. 8 :

"R. 8. Rule 38 of Order 41 shall apply, so far as may be, to proceedings under this Order."

BOMBAY

The following shall be added as R. 8 in Order 46 :

Applicability of "R. 8. Rule 38 of Order 41 shall apply, so far as may be, to proceedings under R. 38 of O. 41. this Order." [15-10-1930.]

UDH

Add the following as Rule 8

"R. 8. Rule 38 of O. 41 shall apply, so far as may be, to proceedings under this Order."

SIND

Add the following as Rule 8 in Order 46 :

Applicability of "R. 8. Rule 38 of Order 41 shall apply, so far as may be, to proceedings under R. 38 of O. 41. this Order."

O. 46 R. 7 (contd.)

[2] The rule is only an enabling one and does not in any way cut down the jurisdiction of the Appellate Court. ('07) 30 Mad 41 (43).

[3] A District Judge has power under this rule to make a reference whether the case is, or is not, pending in appeal before him. (1900) 3 Oudh Cas 20 (21). * ('90) 13 Mad 344 (346) (DB).

[4] Where a District Munsif returned a plaint as being cognizable only by a Court of Small Causes and the latter Court returned it back as being cognizable only by the Munsif's Court, it was held that the correct procedure was either to proceed under Rule 6 of this Order itself or send the case to the District Judge for making a reference under this rule. (Vol. 5) 1918 Cal 1087 (1088) (DB) * (Vol. 20) 1933 Nag 221 (221) : 30 Nag L. R. 138 * (Vol. 21) 1934 Nag 257 (257, 258).

[5] The Court of Small Causes is a Court subordinate to the District Judge, and O. 46 R. 7 contemplates and allows a reference to be made by the District Judge in cases tried by the Court of Small Causes. (Vol. 3) 1916 Cal 422 (422) (DB).

[6] Before a reference can be made, it is necessary condition that it must appear to the District Court that the subordinate Court has erroneously held on the point of jurisdiction. ('89) 11 All 804 (306, 307) (DB).

[7] Where it does so appear, and a party requires the District Court to make a reference, it is bound to do so. ('90) 13 Mad 344 (346) (DB) * (Vol. 21) 1934 Nag 257 (258) * (Vol. 19) 1932 Nag 70 (71) : 28 Nag L. R. 54 (56) * ('94) 21 Cal 249 (251) (DB).

(Contra ('89) 11 All 804 (307) (DB).)

[8] A District Court should state its reasons for considering the opinion of the subordinate Court to be erroneous. ('06) 28 All 298 (294) (DB) * ('89) 11 All 804 (306) (DB).

[9] Where a revision application is preferred to the High Court, the latter is bound to set aside the decree of the Appellate Court as being passed in an appeal which was incompetent and therefore without jurisdiction. ('09) 33 Mad 323 (326) (FB). (Overruling 27 Mad 478). * (Vol. 4) 1917 All 159 (160) : 39 All 101 * ('01) 25 Bom 417 (418) (DB).

[See however (Vol. 25) 1938 Rang 35 (36, 37) : 1937 Rang L. R. 234. (Small Cause suit tried by regular Court—Proceedings are not a nullity.)

[10] The High Court can set aside the decree of both the Courts and return the plaint for presentation to the proper Court. (08) 26 Mad 176 (179) * (Vol. 2) 1915 Cal 619 (620) (DB).

[11] Where a reference is made under this rule, the High Court is not bound to set aside the proceedings in all cases but has full power to consider the matter of jurisdiction or to deal with the case on the merits so as to do substantial justice without putting the parties to the expense of a fresh trial. ('94) 21 Cal 249 (252) (DB). * (Vol. 20) 1933 Pat 31 (31) : 11 Pat 690 (DB).

[12] Where a suit cognizable by a Small Cause Court has been tried by a regular Court, the only procedure which can be taken to correct the error is for a party to the suit to require the District Court to make a reference under this rule. (Vol. 25) 1938 Rang 35 (36, 37) : 1937 Rang L. R. 234.

[13] Plaint returned by Sub-Judge and presented to Small Cause Court—Latter also returning it—Plaint presented again to former Court which rejected it—Appeal to District Judge against this order dismissed—High Court can revise the original order returning the plaint. (Vol. 21) 1934 Nag 257 (258).

[14] On a reference the High Court will not as a rule interfere with findings of fact arrived at by the first Court on the evidence before it. (Vol. 3) 1916 Cal 422 (423) (DB).

ORDER XLVII.

REVIEW

Application for review
of judgment.

1. (1) Any person considering himself aggrieved,—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[1882—S. 623; 1877—S. 623; 1859—S. 376. See sec. 114.]

ORDER 47 RULE 1—SYNOPSIS.

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28. Appeal by one party—Review application by another—Clause (2).

1. Scope.—[1] No Court has got a power of revising its own appellate orders nor the power to review unless granted by statute. (Vol. 4) 1917 Mad, 726 (726) (DB) * (Vol. 23) 1936 Mad 531 (540): 59 Mad 825 (FB).

[2] Section 141 does not confer a right of review in proceedings under special enactments as such a right is a substantive right and not a mere matter of *procedure*. (Vol. 23) 1941 Mad 272 (273). (Madras Village Courts Act makes no provision for reviews) * (Vol. 6) 1919 Mad 244 (246) (DB) (District Judge cannot review his own order passed under S. 10 of the Religious Endowments Act.)

[3] A right of review is exercisable only in the circumstances where it is distinctly provided by the statute. (Vol. 28) 1941 Rang 233 (234): 1941 Rang L R 382 (DB) * (Vol. 18) 1931 Pat 409 (409).

[See also (Vol. 29) 1942 All 82 (84).]

[4] This rule is in itself definitive of the limits within which a review is permitted by the Code. (Vol. 9) 1922 P C 112 (115): 3 Lah 127: 49 Ind App 144 (PC). * (Vol. 21) 1934 P C 213 (216, 217): 61 Ind App 373: 56 All 634 (PC). * (Vol. 13) 1926 Pat 218 (226, 227): 5 Pat 361 (FB).

[5] This rule gives a special privilege to an aggrieved litigant and must be strictly construed. (Vol. 32) 1945 Bom 40 (42): I. L. R. (1944) Bom 675.

[6] Where a case falls within the class of cases contemplated by this rule, the Court cannot have an inherent power of review apart from the provisions of the rule. (Vol. 14) 1927 Bom 232 (233) * (Vol. 14) 1927 Cal 920 (921) * (1913) 17 Cal L Jour 416 (420) (DB) * (Vol. 31) 1944 Mad 293 (294): I L R (1944) Mad 857 (DB) * (Vol. 16) 1929 Mad 404 (406) (DB) * (Vol. 13) 1926 Mad 980 (983): 50 Mad 67 (DB) * (Vol. 18) 1932 Nag 252 (253): 27 Nag L R 102 (FB) * (Vol. 12) 1925 Pat 36 (37): 3 Pat 778 (DB) * (Vol. 20) 1933 Lah 169 (171).

[7] Case falling outside this rule—Court has inherent powers to review its orders for ends of justice. (Vol. 21) 1934 All 250 (252) * (Vol. 16) 1929 Nag 185 (189) (DB) * (Vol. 17) 1930 Bom 294 (295): 55 Bom 368 * (Vol. 11) 1924 Pat 673 (677): 3 Pat 930 (DB).

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[8] The fact that an appeal can be filed against the decree does not afford any ground for refusing a review. (1909) 10 Cal L Jour 420 (433) (DB). (Right of review does not bar suit on same relief.) * (Vol. 20) 1933 Lah 226 (226) : 14 Lah 55, * (Vol. 18) 1931 Mad 828 (830). (But Court may refuse in its discretion an application for review.)

[9] An application for relief under the Bengal Money-lenders' Act by re-opening the decree and taking fresh accounts, is not an application for review under this Order. (Vol. 30) 1943 Cal 170 (171) : I L R (1942) 2 Cal 116 (DB) * (Vol. 29) 1942 Cal 121 : I L R (1941) 2 Cal 184 reversed.)

[10] Where a decision has been affirmed on appeal the Lower Court cannot thereafter review it even if asked to do so by the Appellate Court. (Vol. 30) 1943 Pat 353 (355) (DB).

[11] A Court cannot review its judgment *suo motu*. (Vol. 28) 1941 Lah 212 (214).

[12] No superior Court can direct an inferior Court to review its previous decision by sending a circular letter or any other order to it. (Vol. 30) 1943 Pat 353 (355) (DB).

2. Review and appeal—Distinction.—[1] A review is not the same thing as, or a substitute for, an appeal. (Vol. 18) 1931 Mad 608 (608) * (Vol. 9) 1922 Upp Bur 16 (17) : 4 Upp Bur Rul. 27.

[2] The two proceedings differ in the following particulars.

(a) A review is the reconsideration of the subject of the suit by the same Judge under certain conditions; while an appeal is a re-hearing by another tribunal. (Vol. 29) 1942 Pat 76 (77) (DB) * (1865) 3 Suth W R 45 (47, 48) (FC) * ('68) 9 Suth W R 181 (185) (FB) * (Vol. 21) 1934 All 175 (176).

(b) A point which may be a good ground of an appeal may not be a good ground for an application for review. (Vol. 18) 1931 Mad 608 (608) * ('83) 5 All 14 (16) (DB) * (Vol. 9) 1922 Pat 308 (309, 310) * (Vol. 13) 1926 Rang 89 (89) (DB) * (Vol. 22) 1935 Lah 330 (330) : 16 Lah 602 (DB) * (Vol. 17) 1930 Cal 701 (703). (Case of Erroneous view of evidence or Law).

(c) A review does not, of necessity, re-open questions already decided between the parties. The matter in issue is only re-opened when the application for review is accepted, while in the case of an appeal, the matter is re-opened as soon as an appeal is admitted. (Vol. 9) 1922 Oudh 148 (148) : 24 Oudh Cas 280.

[See also (Vol. 29) 1942 All 36 (38) (DB).]

3. Review and amendment—Distinction.—[1] A review and an amendment differ in the following particulars:

[a] In the case of a review the correctness of judgment and decree is questioned, while in the case of an amendment of a decree the correctness of the judgment is assumed, but the jurisdiction to amend arises from the fact that the decree is not in accordance with the judgment. (Vol. 4) 1917 Mad 290 (291, 292) (DB) * (Vol. 11) 1924 Mad 225 (226, 227) * ('81) 6 Cal 22 (25) (DB).

(b) Where an application for an amendment is allowed there is no need for a re-hearing of a suit, while if an application for review is allowed, a re-hearing of the suit becomes necessary. (Vol. 4) 1917 Mad 290 (291) (DB).

(c) Where an application for review is granted the result is a new decree superseding the original decree and not merely an amendment thereof. (Vol. 6) 1919 Nag 78 (79) : 15 Nag L R 65 * ('05) 28 All 240 (241) (DB).

4. Person considering himself to be aggrieved.—[1] A decree or order against a person not a party thereto is, on general principles of law, not binding on him. Such a person, therefore, cannot apply for a review of the decree or order under this rule. ('04) 8 Cal W N 468 (469) * ('21) 61 Ind Cas 534 (535) (Lah) * (Vol. 22) 1935 Rang 364 (365).

[See however (Vol. 16) 1929 Nag 185 (190) (DB).]

[2] A minor, who is aggrieved by a decree or order passed against him, may apply for a review under the same circumstances as an adult. ('71) 16 Suth W R 231 (232) (SB).

[3] Sanction granted to Public Prosecutor to prosecute attorney—Leave to appeal to Privy Council granted to attorney—Public Prosecutor can apply for review of order granting leave. (Vol. 1) 1914 Cal 557 (559) : 41 Cal 734 (DB).

5. "Decree or order.....from which no appeal has been preferred."—[1] Appeal from decrees ought to be reviewed already pending—Court has no jurisdiction to entertain an application for review. (Vol. 13) 1931 Bom 232 (233) (DB) * (Vol. 10) 1923 P C 128 (135) : 2 Pat 676 : 50 Ind App 183 (PC).

[2] Pendency of appeal does not affect jurisdiction to deal with application for review filed before the filing of appeal. ('09) 32 Mad 416 (420) (FB) * (Vol. 16) 1929 All 375 (376) * (Vol. 7) 1920 All 160 (161) : 42 All 317 (DB) * (Vol. 1) 1914 Bom 1 (2) : 38 Bom 416 (DB). (Per Shab, J., Hutton, J., dubitante) * (Vol. 7) 1920 Cal 584 (584) (DB) * (Vol. 4) 1917 Cal 29 (29) : 44 Cal 1011 (DB) * ('83) 10 Cal 103 (109) (SB) * ('66) 5 Suth W R 59 (60) (FB) * (Vol. 6) 1919 Nag 78 (79) : 15 Nag L R 65. * ('22) 65 Ind Cas 125 (125) (LB) (Pat) * ('04) 1904 Pan Re. No. 25, page 96 (97) (DB) * ('04) 7 Oudh Cas 299 (302) (DB).

[3] Appeal against decree disposed of on merits before hearing of review application pending before trial Court—Appellate decree supersedes that of trial Court—Court passing decree cannot proceed with review application. (Vol. 10) 1923 Cal 113 (115) (DB) * ('70) 5 Mad H C R 464 (466) * (Vol. 15) 1928 Cal 804 (805) (DB) * (1862) 1 Mad H C R 254 (255) (DB).

In the following cases the review application was filed after disposal of appeal.—(Vol. 19) 1932 Cal 171 (176) (DB) * ('09) 1 Ind Cas 136 (137) (DB) (Cal) * (Vol. 5) 1918 Lah 45 (46) : 1918 Pan Re. No. 40 (DB) * (Vol. 21) 1934 All 250 (251).

[4] Appeal against decree disposed of under O. 41 R. 11 before hearing of review application—Court before which review application is pending cannot proceed with it. (Vol. 18) 1931 All 704 (704) (DB) * (Vol. 9) 1922 Bom 180 (181) : 46 Bom 1 (DB) * ('06) 4 Cal L Jour 566 (567) (DB) * (Vol. 4) 1917 Cal 417 (419) (DB).

[5] Appeal against decree withdrawn—Subsequent application for review can be entertained and disposed of by court which passed the decree. ('72) 9 Bom H C R 89 (91) (FB) * ('06) 30 Fom 625 (630) (DB) * ('09) 32 All 71 (73) (DB) * (Vol. 10) 1923 All 541 (542) : 45 All 453 (DB) * (Vol. 24) 1937 Pat 523 (529) * (Vol. 8) 1921 All 197 (198) : 43 All 289

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(DB). (Fact that review application is filed first and then appeal is withdrawn does not make any difference.)

[See however (Vol. 18) 1931 Bom 232 (233) (DB). No jurisdiction to entertain review so long as appeal is pending—Fact that appeal is withdrawn subsequently will not cure initial defect].

[6] Application for review of judgment presented after filing appeal against that judgment—Appeal subsequently dismissed as time-barred consequent on rejection of application for extending delay in preferring appeal—Review application is incompetent (Vol. 32) 1945 Bom 40 (42, 43): 1 L R (1944) Bom (875).

6. Filing of appeal pending application for review.—[1] Application for review—Subsequent filing of appeal does not affect jurisdiction of court to deal with application—In such cases jurisdiction should be exercised with greatest care and only in a strong case. ('09) 32 Mad 416 (420) (FB). [Overruling 27 Mad 602 * (Vol. 25) 1938 Mad 307 (312) (DB). (If the review application is granted during pendency of appeal, the appeal becomes incompetent and must be dismissed) * ('37) 170 Ind Cas 653 (655) (Cal) * (Vol. 6) 1919 All 67 (68): 42 All 79 (DB) * (Vol. 1) 1914 Bom 1 (2): 38 Bom 416 (DB).

[2] Application for review pending—Appellate Court can grant in appeal the relief claimed in review application. (Vol. 16) 1929 Sind 32 (36) (DB).

7. Clause (b).—[1] Any decree or order from which no appeal is allowed is open to review. (Vol. 16) 1929 All 123 (124) (DB). (Order of dismissal for default) * (Vol. 22) 1935 All 435 (436): 57 All 781. (Decree of Small Cause Court).

[2] Decree of Small Cause Court—Revision against decree dismissed.—Application for review can be entertained by it. (Vol. 22) 1935 All 435 (436): 57 All 781.

8. Clause (c).—[1] The High Court has no power to review a judgment passed by it on a reference from a *Subordinate Judge* with small cause court powers. The rule allows a review of judgment on a reference only from a *Court of Small Causes*. ('86) 10 Bom 68 (69) (DB).

9. Discovery of new and important matter or evidence. [1] Where a review of a judgment is asked for by a party, the greatest care ought to be exercised by the Court in granting the review especially where the ground of review is the discovery of fresh evidence. (Vol. 5) 1918 Cal 618 (621): 45 Cal 60 (DB).

[2] A party applying for review on the ground of discovery of new evidence must show that there was no remissness on his part in adducing all possible evidence at the trial. (Vol. 29) 1942 All 82 (84). (A high degree of diligence on the part of the applicant is necessary—Mere absence of slackness is not enough.) * (Vol. 5) 1918 Cal 618 (625): 45 Cal 60 * ('07) 31 Bom 381 (388): 34 Ind App 115 (PC). (Reversing 7 Bom LR 119) * (Vol. 26) 1939 Cal 42 (44, 45): 1 L R (1938) 2 Cal 361 (DB).

[3] The new evidence ought to be adduced must be such as is *presumably to be believed* and such that, if adduced, it would *practically be conclusive*, i.e., evidence of such a class as to render it probable almost beyond doubt that the judgment would be *different*. (Vol. 29) 1942 All 82 (84) (Applicant ought to furnish Court with evidence he seeks to

have admitted, otherwise it is impossible to tell what its value really is.) * (Vol. 5) 1918 PC 184 (188) (PC) * ('87) 10 Mad 73 (77): 13 Ind App 155 (PC) * (Vol. 28) 1939 Cal 42 (44, 45): 1 L R (1938) 2 Cal 361 (DB).

[4] Where it is very *doubtful* whether the evidence, if produced, would have had any effect on the judgment, there is no ground for review. ('02) 5 Oudh Cas 59 (64) (DB) * (Vol. 4) 1917 Pat 201 (204) (DB).

[5] Where a suit was dismissed on two grounds, namely, want of notice as required by law and the plaintiff being illegitimate, and a review was applied for on the ground of discovery of new evidence tending to establish the legitimacy of the plaintiff, it was held that a review should not be granted inasmuch as the suit would still have to be dismissed on the question of notice. But the case would be different where the effect of the evidence, if adduced, would be to alter or (cancel) the decree. (Vol. 1) 1914 All 44 (45): 36 All 277 (DB).

[6] The discovery of a document containing an *admission of liability* by the defendant would be a ground for review. ('11) 1911 Pan L R No. 195, page 747 (750).

[7] Decree for restitution of conjugal rights—Subsequent discovery that parties as cousins rendering their marriage nullity—Review should be granted. (Vol. 17) 1930 Pat 63 (67).

[8] Where the parties were not aware of a *previous* judgment passed in another case between them, which if it had been placed before the Court would have resulted in a different judgment, there is a good ground for review. (Vol. 17) 1930 All 621 (622) (DB) * (Vol. 6) 1919 Cal 46 (46) (DB) * ('87) 10 Mad 357 (360) (DB) * ('98) 11 C P L R 41 (42, 43).

[9] Suit for rent decreed in spite of defendant's contention of payment—Subsequent production of papers filed in another suit and which could not be produced earlier and which proved payment—Review allowed. (Vol. 23) 1936 Pat 595 (600): 15 Pat 295 (DB).

[10] Appeal dismissed on preliminary ground as being barred by limitation—Discovery of fresh evidence showing that the appellant was entitled to more time as time requisite for obtaining copies—Review should be granted. (Vol. 23) 1936 Lah 650 (652) (DB).

[11] This rule does not authorize the review of a decree *which was right when it was made* on the ground of the happening of some *subsequent event*. ('01) 24 Mad 1 (10): 27 Ind App 197 (PC).

[But see ('07) 31 Bom 128 (136) (DB) * ('11) 33 All 566 (568) (DB) * ('13) 19 Ind Cas 214 (214) (Mad) * ('07) 1 Sind L R 227 (227, 228) (DB) * (Vol. 5) 1918 Pat 647 (648, 649): 3 Pat L Jour 372 (DB) * (Vol. 14) 1927 Rang 189 (189): 5 Rang 261.]

[12] Subsequent decision in another case between same parties which would have affected the judgment sought to be reviewed if it had been given earlier is no ground for review. (Vol. 30) 1943 Oudh 136 (138) (DB). (Subsequent decision by superior Court on the question of law decided) * (Vol. 29) 1942 Oudh 447 (447). (10 Surh W R 178 relied on) * ('21) 64 Ind Cas 324 (325) (Cal) * (Vol. 6) 1919 Cal 287 (290, 291) (DB) * (Vol. 17) 1930 Mad 579 (581) (DB) * (Vol. 19) 1932 Rang 129 (131).

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[See also (Vol. 30) 1943 Mad 377 (377). (Different view of law subsequently taken by the same Court is no ground of review).]

[13] The subsequent reversal of a decision on the basis of which a judgment was given is no ground for review under this rule. (Vol. 14) 1927 Cal 920 (920) * (Vol. 9) 1922 Mad 227 (227) * (Vol. 13) 1926 Nag 10 (10). (Decree on which decision based subsequently amended.)

[See (Vol. 20) 1933 Mad 485 (487)].

[See also (Vol. 21) 1934 Oudh 445 (446) (DB). (Appeal dismissed with observation that if decision of High Court in a similar case is reversed by the Privy Council appellant might apply for review—Such reversal by Privy Council happening—The new ground may be deemed to have been in contemplation at the date of decree.)]

[14] The word "evidence" in this rule is not confined to documentary evidence but includes *oral evidence*. (Vol. 15) 1928 Nag 279 (279).

[15] Under this rule the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is sought to be reviewed. (Vol. 26) 1939 Pat 678 (680): 19 Pat 159 (FB).

[16] Appeal to High Court dismissed for failure to file list of documents or to deposit printing cost—Application for re-admission of appeal on ground that there was sufficient cause for appellant's failure—Application cannot be treated as one for review. (Vol. 26) 1939 Pat 678 (680): 19 Pat 159 (FB). (Such an application can be entertained, however, under S. 151—(Vol. 13) 1926 Pat 27: 4 Pat 704 overruled.)

[17] Rejection of plaint for failure to pay court-fee within time—Order rejecting plaint was held open to review. (Vol. 28) 1936 Pat 310 (311) (DB).

[18] Application for review of compromise decrees on allegation that the applicant's lawyer had entered into compromise against specific instructions—Application is not based on discovery of new matter or evidence. (Vol. 28) 1941 Pat 574 (577) (DB).

10. Discovery of important matter of law.—

[1] The words "new and important matter" in this rule refer to evidence or other matter *in the nature of evidence*, and not to a legal authority in existence at the date of the judgment but not brought to the notice of the Court. (99) 21 All 152 (153) (DB).

[2] No review can be asked for on the ground of the discovery of new authorities which show that the decision is not correct. (Vol. 12) 1925 Sind 53 (53, 54): 19 Sind L R 80 * (Vol. 33) 1946 Pat 188 (189) (DB). (Binding authority not brought to Court's notice) * (Vol. 11) 1924 Pat 250 (253): 3 Pat 134 (DB) * (Vol. 12) 1925 Nag 384 (385). (Judgment based on precedent which owing to a subsequent decision was no longer good law—Review not permissible) * (Vol. 12) 1925 Nag 266 (267, 268): 20 Nag L R 115 (DB). * (Vol. 18) 1931 All 91 (92) (DB) * (Vol. 8) 1921 Pat 139 (140) (DB) * ('28) 112 Ind Cas 277 (278) (Lah). * (1913) 17 Cal L Jour 416 (420) (DB) * (Vol. 13) 1926 Mad 764 (764).

[But see ('06) 1906 Pan Re No. 124, page 467 (469) (DB).]

11. Exercise of due diligence.—[1] The rule enjoins on the Court to require the facts as to the absence

of negligence to be strictly proved before granting an application for review on ground of discovery of fresh evidence. ('07) 31 Bom 381 (388): 34 Ind App 115 (PC). (Reversing 7 Bom L R 119.)

[2] Applications for review on the ground of discovery of fresh evidence ought to be refused when such evidence could have been produced if reasonable care and diligence had been exercised. (Vol. 27) 1940 Pat 197 (198) * ('87) 10 Mad 73 (77): 13 Ind App 155 (PC) * (Vol. 20) 1933 Oudh 328 (328) (DB) * (Vol. 22) 1935 Rang 184 (185).

[3] There must be strong evidence of diligence in getting all the available evidence. (Vol. 29) 1942 All 82 (84) * (Vol. 20) 1933 Sind 110 (111) * ('11) 9 Ind Cas 266 (267) (DB) (All).

[4] Exercise of due diligence depends upon facts of particular case—Burden of proof is on petitioner. (Vol. 20) 1933 Sind 110 (111, 112).

[5] Trial lasting for three years—No reason shown as to why new evidence was not produced in time—Review refused. (Vol. 2) 1915 P C 78 (78) (PC).

[6] The fact that evidence was found subsequently cannot itself be taken to show that due diligence could not have been exercised; otherwise there cannot be any case coming within this rule. (Vol. 17) 1930 Pat 63 (67).

[7] The grounds for granting a review on account of the discovery of fresh evidence, may in certain cases, be grounds for extending the time under S. 5 of the Limitation Act, for the application for review. (Vol. 8) 1921 Nag 174 (176).

[See (Vol. 14) 1927 Dom 232 (234).]

12. "Was not within his knowledge or could not be produced by him at the time."—[1] It must be shown that after the exercise of due diligence the evidence was not within the applicant's knowledge or could not be produced by him at the time. (Vol. 4) 1917 All 107 (108) * ('73) 20 Suth W R 426 (426) (DB) * (Vol. 23) 1936 Pat 595 (600): 15 Pat 295 (DB). (Plaintiff failing to produce papers called for by defendant on false pretext—Subsequent tracing of papers by defendant after decree—Held, defendant was entitled to review.)

[2] The words "or could not be produced by him at the time" really mean "and could not be produced by him at the time" so that the whole clause means that the new matters alleged were not within the applicant's knowledge and, *therefore*, could not have been produced at the trial. Hence, the mere fact that the applicant for review *could* not produce the evidence in spite of his best efforts is no ground for allowing review under this clause. (Vol. 11) 1924 Pat 809 (810) (DB) * (Vol. 22) 1935 Mad 768 (769).

[But see ('74) 22 Suth W R 446 (446).]

13. Mistake or error apparent on the face of the record.—[1] In order that an error may be a ground for review, it must be one *apparent on the face of the record*, i. e., an evident error which does not require any extraneous matter to show its incorrectness. (Vol. 16) 1929 Rang 70 (70): 6 Rang 794 * (Vol. 25) 1938 Nag 221 (224) (DB) * (Vol. 26) 1939 All 619 (621) (DB) * (Vol. 25) 1938 Bom 422 (423) (DB) * (Vol. 26) 1939 Pat 678 (680): 19 Pat 159 (FB) * ('28) 1928 Mad W N 595 (598) (DB) * (Vol. 20) 1935 Lah 223 (223). (Decision based on wrong authority is not mistake apparent on face of record) * (Vol. 22) 1935 Rang 32 (33, 34): 13 Rang 220. Judge failing to refer to an authority binding on him is not error apparent on face of record).

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[See (Vol. 21) 1934 Nag 111 (111) (DB). (Mistake only clerical and not affecting decision of the case, is not a ground for review) * ('77) 1 Bom 543 (546) (DB) * ('71) 15 Suth W R 1 (2) (FB) * ('04) 8 Cal W N 473 (475) (DB) * (Vol. 28) 1941 Rang 233 (234) : (1941) Rang LR 332.]

[2] The word "error" is not limited to errors of fact but includes also errors of law. (Vol. 28) 1941 Mad 918 (919) * ('68) 10 Suth W R 143 (144) (DB) * (Vol. 32) 1945 All 284 (285) : I L R (1945) All 680 * ('05) 27 All 695 (696) (DB). (Suit dismissed on the ground that the stamp paid was insufficient—Review may be granted on the ground that the stamp was sufficient—This is "other sufficient reason.") * (Vol. 20) 1933 Rang 85 (87) * (Vol. 26) 1939 Mad 293 (294) * ('87) 1937 Oudh W N 496 (497) (DB) * (Vol. 24) 1937 Rang 56 (57) (DB). (Incorrect interpretation of complicated law is not apparent mistake) * (Vol. 26) 1939 Sind 137 (140) : I L R (1939) Kar 330 (DB) * (Vol. 23) 1936 Lah 486 (488, 489). (Obvious misapprehension of nature or attachment is sufficient reason for review).

[See however (Vol. 22) 1935 Rang 32 (33) : 13 Rang 220. (Judge failing to consider precedent bearing on question is not error apparent on face of record).]

[But see (Vol. 31) (1944) Nag 371 (376). (Mistake of law is no ground for review—Review may be justified on ground of mistake of fact).]

[3] The law error of which is sought to be reviewed must be definite and capable of ascertainment. ('92-96) 1892-1896 Upp Bur Rul 287 * ('02) 2 Upp Bur. Rul. Civ. Pro. Code, page 3.

[4] The following are not mistakes or errors apparent on the face of the record.

[a] Erroneous view of law on a debatable point. (Vol. 23) 1941 Rang 233 (234) : 1941 Rang L R 332 (DB) * (Vol. 31) 1944 Oudh 198 (199) * (Vol. 16) 1929 Mad 209 (210, 212) (DB) * (Vol. 17) 1930 Bom 317 (318, 319) (DB) * (Vol. 14) 1927 Nag 252 (253) * (Vol. 26) 1939 Sind 137 (140) : I L R (1939) Kar 330 (DB) * (Vol. 25) 1938 All 308 (310) * (Vol. 26) 1939 All 619 (621) (DB).

[b] Wrong exposition of the law. (Vol. 16) 1929 Nag 251 (253) : 27 Nag L R 102 (FB) * (Vol. 20) 1933 Lah 169 (170) * (Vol. 22) 1935 Pesh 22 (23) * (Vol. 9) 1922 Pat 308 (308) * (Vol. 19) 1932 Pat 275 (276) : 11 Pat 519 (DB) * (Vol. 17) 1930 Bom 317 (318, 319) (DB) * (Vol. 24) 1937 Rang 56 (57) (DB) * (Vol. 25) 1938 All 308 (310) * (Vol. 24) 1937 Lah 791 (792) * (Vol. 25) 1938 Nag 221 (223) (DB).

[But see (Vol. 16) 1929 Cal 17 (19) (DB). (Error of law by reason of which Court declines to enter into merits of case is error apparent on face of record).]

[c] Wrong application of the law. ('43) 208 Ind Cas 35 (36) (DB) Oudh * (Vol. 29) 1942 Oudh 210 (212) : 18 Luck 48 * (Vol. 14) 1927 Nag 252 (253) * (Vol. 25) 1938 All 308 (310).

[d] Failure to apply the appropriate law. (Vol. 25) 1938 Nag 145 (147) : I L R (1938) Nag 151 (DB). Omission to raise a point of law is not sufficient ground for allowing a review * (Vol. 25) 1938 Nag 221 (225) (DB) differing from (Vol. 15) 1928 Nag 305 * ('37) 1937 Oudh W N 342 (343). (Omission to mention and discuss a certain decision in the judgment is not an error apparent on the face of the record).

[5] A review has been held to be permissible in the following cases—

(a) Where judgment is passed without notice to parties. (Vol. 19) 1932 Oudh 63 (65, 66) : 7 Luck 350 (DB) * (Vol. 15) 1928 Rang 177 (178) : 6 Rang 254. (Suit dismissed on a date when parties had not been directed to be present) * (Vol. 16) 1929 Rang 70 (71) : 6 Rang 794 * (Vol. 13) 1926 All 334 (336) : 48 All 281. (Amendment without notice) * (Vol. 19) 1932 Cal 265 (266). (Order setting aside sale without notice).

(b) Where judgment is in a form not legally correct. (Vol. 1) 1914 Oudh 332 (333). (Appellate Court's unexecutable decree refused to be executed by lower Court—Remedy is to apply for review of appellate decree and not revision against lower Court's refusal to amend.)

(c) Where suit is dismissed for default in presence of plaintiff's pleader. (Vol. 16) 1929 Sind 38 (39) (DB) * (Vol. 16) 1929 All 811 (812) (DB).

(d) Suit dismissed for non-joinder of parties. (1900) 5 Cal W N 83 (85) (DB).

(e) Where a suit based on plaintiff's title is decreed simply on ground that defendant has not proved his title. (Vol. 12) 1925 Oudh 329 (330).

(f) Where woman is arrested in execution of decree. ('88) 12 Bom 228 (230) (DB).

(g) Where decision of judge is based on obvious misapprehension of nature of attachment. (Vol. 23) 1936 Lah 486 (489).

(h) Where Court fails to notice provisions of S. 21 or of S. 98 of the Code. (Vol. 16) 1929 Nag 73 (74) : 25 Nag L R 104. (Section 21 not noticed. Note—Overruled in (Vol. 24) 1937 Nag 335 : I L R (1938) Nag 395 on another point) ('69) 11 All 176 (182) (SB). (Section 98 not noticed.)

(i) Where the Court fails to notice bar of limitation applicable to facts appearing on record. (Vol. 16) 1929 Nag 185 (190) (DB) * ('94) 16 All 390 (394) (DB) * (Vol. 15) 1928 Lah 919 (919) : 10 Lah 184 (DB).

(j) Where adjudication is annulled in absence of prayer by either party. (Vol. 20) 1933 Mad 631 (636) (FB).

(k) Where want of jurisdiction is apparent on face of record. (Vol. 5) 1918 Cal 946 (946) (DB) * (Vol. 26) 1939 Mad 293 (294) * ('11) 1911 Pan L. R. No. 195, page 747 (750).

(l) Where parties invite jurisdiction of Court deliberately, they cannot turn round and object to it when the judgment is unfavourable to them. (Vol. 3) 1916 Oudh 104 (105) (DB) * ('82) 1882 Pan Re No. 94, page 269, (270) * ('71) 6 Beng L R App 141 (141) * (Vol. 6) 1919 Cal 525 (526) (DB). (Defendants in partition suit preferring appeal against preliminary decree and plaintiff preferring cross-objections—Appeal dismissed and cross-objections allowed—Defendants applying for review on ground that their appeal was incompetent under section 97, so that cross-objections should not have been allowed—*Held*, review not to be allowed, as owing to applicant's own negligence, their appeal was argued and cross-objections allowed.) * ('78) 2 Mad 58 (60) (DB).

(m) Where the Appellate Court reverses finding of lower Court without coming to a conclusion as to incorrectness thereof. (Vol. 17) 1930 Lah 37 (38) : 11 Lah 158 (DB) * (Vol. 22) 1935 Cal 153 (153).

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(n) Where Judge erroneously comes to the conclusion that he was bound by finding of facts of lower Court. (Vol. 26) 1939 Rang 59 (64) (DB).

(o) Where judgment was not clear as to whether defendants were liable individually or not. (Vol. 13) 1926 Lah 236 (236) (DB).

(p) Where suit was, by mistake, dismissed while it ought to have been decreed on findings of Court. (12) 13 Ind Cas 646 (646, 647) (DB) (All). (High Court giving two inconsistent judgments by mistake in same case, one before and one after remand—Review for correction lies.)

(q) Where calculation of amount is wrongly made. (76) 25 Sath W R 63 (64).

[See however (12) 39 Cal 1037 (1041) (DB). (It was held that there was no error and therefore there was no ground for review).]

(r) Where judgment used certain expressions wrongly when it plainly meant something different. (08) 30 All 309 (309, 310) (DB). (Review allowed to expunge wrong words from judgment.)

(s) Where law was indisputable that certain property was not exempt from liability for suit claim and defendants did not claim any such exemption but judgment without any discussion on the point, exempted property from liability. (Vol. 16) 1929 Lah 424 (425) (DB). (Liability of legal representative of deceased Hindu debtor.)

(t) Appealable order—Revision filed and dismissed—Point escaping every one's notice—Review sought for treating it as appeal—Good ground for interference in appeal—Review was justified. (Vol. 20) 1933 Lah 476 (477) : 14 Lah 453 (DB).

(u) Decree in previous suit based on mistake cannot be rectified, but the mortgage deed on which the decree is based can be rectified—Proper remedy is to get plaint amended and then to apply for review of the decree. (Vol. 19) 1932 Mad 275 (279) (DB).

(v) Omission to consider important facts on record is a ground for a review. (Vol. 19) 1932 Nag 177 (179) : 28 Nag L R 221.

(w) Ignoring positive law may be ground for review. (Vol. 25) 1938 Nag 221 (224) (DB).

[6] In the undermentioned cases it was held that there was no error apparent on the record. (Vol. 27) 1940 All 519 (520) * (Vol. 26) 1939 Lah 460 (462) * (Vol. 22) 1935 All 642 (642) * (Vol. 26) 1939 Pat 678 (680) : 19 Pat 159 (FB).

[7] Where the Court granted a claim for personal relief, a prayer for which could not, on a proper construction of a doubtfully worded clause in the plaint, be made out, the error is not one apparent on the face of the record justifying a grant of review. (Vol. 19) 1932 Pat 275 (276) : 11 Pat 519 (DB).

[8] Failure to give a formal finding on an issue tried and decided is not error apparent on face of record. (78) 2 Mad 58 (60) (DB).

[9] Allowing the petitioner to prove fraud which was not pleaded is not error apparent on face of record. (Vol. 18) 1931 Mad 608 (608).

[10] The consideration of evidence by Court in Second appeal does not amount to error apparent on face of the record. (Vol. 20) 1933 Pat 433 (433)

[11] The fact that the Court had overlooked a previous ruling of the High Court on a point of law, may be an error apparent on the face of the record. (Vol. 28) 1941 Mad 918 (919, 920) * (Vol. 11) 1924, Mad 98 (99) : 46 Mad 955 (DB) * (69) 6 Bom H C R (A C) 238 (240).

[But see (Vol. 14) 1927 Mad 998 (1000) where * (Vol. 11) 1924 Mad 98 : 46 Mad 955 and (Vol. 12), 1925 Cal 304, (dist) * (Vol. 22) 1935 Rang 32 (33, 34) : 13 Rang 220 * (28) 1928 Mad W N 595 (598) (DB) * (Vol. 20) 1933 Lah 223 (223)].

[12] Where the view of the law on which a judgment is based is subsequently overruled or modified, by a superior Court, it cannot be mistake or error apparent on the face of the record. (Vol. 28) 1941 Mad 918 (920) * (Vol. 12) 1925 Sind 53 (54) : 19 Sind L R 30 * (Vol. 11) 1924 Pat 250 (253) : 3 Pat 134 (DB) * (Vol. 23) 1936 Sind 34 (38) * (Vol. 31) 1944. Oudh 198 (199).

[But see (Vol. 12) 1925 Cal 304 (305) (DB).]

[13] The fact that a Court takes a different view of law in a subsequent case is no ground for reviewing the judgment in a prior case. (Vol. 30) 1943 Mad 377 (377).

[14] Appeal dismissed for failure to take certain steps required by rules—Application for re-admission of appeal on ground of there having been sufficient cause for the failure—Application cannot be treated as one for review under this rule. Error due to Court not being apprised of real causes for appellant's failure to take steps in question is not error apparent on face of record. (Vol. 26) 1939 Pat 678 (681) : 19 Pat 159 (FB). (Overruling (Vol. 13) 1926 Pat 27.)

[15] Where a case is heard by a Bench of two judges and two separate judgments are delivered, in one of which there is a mistake apparent on the face of the record, review should be granted. (Vol. 24) 1937 Rang 56 (61) (DB).

[16] Court overlooking amendment of law and deciding case under old law—Held there was mistake or error apparent on face of record justifying review. (Vol. 31) 1944 Lah 442 (443).

14. "Any other sufficient reason."—[1] The expression "any other sufficient reason" should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. (Vol. 9) 1922 P C 112 (115) : 3 Lah 127 : 49 Ind App 144 (PC) * (Vol. 29) 1942 Oudh 210 (212) : 18 Luck 48 * (Vol. 21) 1934 P C 213 (217) : 56 All 634 : 61 Ind App 378 (PC) * (Vol. 20) 1933 All 778 (779) * (Vol. 14) 1927 Nag 368 (368) * (Vol. 26) 1939 Cal 628 (629) (DB) * (Vol. 26) 1939 Pat 678 (680) : 19 Pat 159 (FB) * (Vol. 26) 1939 Lah 460 (462) * (Vol. 15) 1928 Rang 31 (32) : 5 Rang 675. (The word "analogous" as used by Privy Council in (Vol. 9) 1922 P C 112 : 3 Lah 127 : 49 Ind App 144 (PC) is wider than the expression "ejusdem generis".)

[2] The discretion in determining what is sufficient reason is not so rigidly circumscribed that an analogy must be discovered between the grounds specified immediately previously. (Vol. 11) 1924 Cal 872 (874) (DB).

15. Cases where review was allowed on ground of sufficient reason.—[1] A review can be granted in the following cases :—

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(a) Where the decree or order has been passed under a misapprehension of the true state of circumstances. (Vol. 12) 1925 Rang 314 (317) : 3 Rang 261 (DB) * (Vol. 11) 1924 Cal 872 (874) (DB) * (Vol. 11) 1924 All 518 (520) (DB) * (Vol. 13) 1926 Cal 941 (943) (DB) * ('86) 13 Cal 62 (66) (DB) * (1912) 15 Cal L Jour 339 (DB) * ('11) 9 Ind Cas 273 (274) (Mad) * ('87) 1887 All W N 105 (105) (DB) * (Vol. 27) 1940 Mad 17 (18) * (Vol. 33) 1946 Sind 99 (101) : O L R (1945) Kar 455. (Legitimate misapprehension created by other side in mind of applicant is sufficient reason.)

(b) Where a party has not had a fair opportunity of producing his evidence. (Vol. 15) 1928 Rang 31 (32) : 5 Rang 675 * (Vol. 9) 1922 All 366 (367) (DB) * (Vol. 12) 1925 Oudh 266 (266) : 28 Oudh Cas 4 * ('72) 3 Sath W R 47 (47) (DB).

(c) Where the Court has failed to consider important evidence. ('78) 1 Mad 396 (401) (DB).

(d) Where the Court has failed to consider important facts on the record. (Vol. 19) 1932 Nag 177 (179) : 23 Nag L R 221.

(e) Where the Court has failed to consider an important plea or issue. ('69) 12 Sath W R 223 (224) (DB) * ('69) 12 Sath W R 223 (224) (DB) * ('71) 16 Sath W R 134 (134) (DB) * ('71) 16 Sath W R 150 (151) (DB) * ('11) 1911 Pun L R No. 26, page 147 (148) (DB).

(f) Where the case is an exceptional one, as where the point involved is one of general importance. (Vol. 13) 1926 Mad 764 (764) * ('13) 6 Sind L R 127 (135) * ('91) 15 Bom 267 (274) * (Vol. 14) 1927 Rang 20 (23) : 4 Rang 265 (DB). (Per Brown, J. Note—Overruled in (Vol. 27) 1940 Rang 12 : 1939 Rang L R 668 (FB) on another point.)

[But see (Vol. 31) 1944 Nag 371 (377) (DB). (That case is of public importance is no ground for review.)]

(g) Where the Court has omitted to notice certain provisions of the Code. (Vol. 6) 1919 Cal 94 (94) (DB).

[2] In cases of hardship worked out by strict application of O. 21 R. 92, Court may remedy injustice by its power of review. (Vol. 29) 1942 Lah 153 (160) : I L R (1942) Lah 559 (FB).

[3] Taking too strict view of title of suit and its prayer and overlooking substantial rights is good ground for review. (Vol. 17) 1930 Rang 162 (164).

[4] Court ordering personal attendance of plaintiff—Pleader not refusing nor unable to answer questions under O. 10 R. 4—Suit dismissed for default of appearance of plaintiff—Review lies. (Vol. 20) 1933 All 517 (519) : 56 All 975 (DB).

[5] Order summarily rejecting appeal filed out of time—Delay caused by wrong information given by copying department in copy of judgment supplied—Held it was sufficient reason for granting review. (Vol. 22) 1935 Nag 109 (110, 111).

[6] Ordering a thing not prayed for by either party is good ground for review. (Vol. 20) 1933 Mad 631 (635) (FB).

[7] Discovery of a reasonable ground for adjournment is a sufficient ground for reviewing an order refusing to grant an adjournment. (Vol. 20) 1933 Mad 5 (6).

[8] Appeal dismissed under O. 41 R. 11 without notice to appellant as required by that rule—Review lies. (Vol. 12) 1925 Oudh 643 (643, 644). (Appeal dismissed under O. 41 R. 11 without notice to appellant as required by that rule—Review lies.)

[9] Onus of proof wrongly placed—Review lies. ('78) 20 Sath W R 459 (464, 465) (PC). (Onus of proof placed wrongly—Review lies.)

[10] Case disposed of on new point—Party surprised—Review lies. ('84) 11 Cal 379 (385) : 12 Ind App 47 (PC).

[11] Court overlooking amendment and deciding case under old provision—Held sufficient reason for granting review. (Vol. 31) 1944 Lah 442 (443) (DB).

16. Cases where review was not allowed on the ground that there was no sufficient reason.—[1] Review cannot be granted in the following cases:—

(a) Where the review is asked for to enable the applicant to raise points which he could and ought to have raised at the former hearing. (Vol. 27) 1940 Rang 144 (144) * ('86) 13 Cal 62 (65) (DB) * (Vol. 21) 1934 Cal 181 (182, 183) * (Vol. 20) 1933 Mad 290 (290) * (Vol. 9) 1922 Pat 119 (120) : 5 Pat L Jour 344 (DB) * (Vol. 13) 1926 Lah 655 (656) * ('92-98) 1892-1896 Upp Bur Rul 284 * (Vol. 15) 1928 Nag 144 (144) (DB) * (Vol. 9) 1922 Bom 114 (115) : 46 Bom 79 (DB) * (Vol. 12) 1925 All 552 (553) : 47 All 881 (DB) * (1926) 13 Oudh L Jour 507 (509) (DB) * (Vol. 4) 1917 Pat 201 (204) (DB) * (1910) 14 Cal W N 86 (96) (PC) * (13) 19 Ind Cas 659 (659) (DB) (All) * ('86) 1886 Bom P Jn 95 (95) (DB) * ('28) 108 Ind Cas 750 (751) (Nag) * (Vol. 23) 1936 Lah 301 (303) * (Vol. 25) 1938 Nag 41 (41) : I Lk (1937) Nag 392.

[But see (Vol. 4) 1917 Lah 13 (14) (DB).]

(b) Where the review is asked for on the ground that if another opportunity were given to the applicant to establish his case he could prove the judgment of the Court to be wrong. (Vol. 2) 1915 All 250 (251) : 37 All 440 (DB) * (Vol. 7) 1920 Nag 159 (160) * (Vol. 6) 1919 Mad 111 (112) * (Vol. 11) 1924 Cal 774 (775, 776) : 61 Cal 70 (DB) * (Vol. 1) 1914 All 57 (58) * (Vol. 15) 1928 Rang 34 (35, 36) : 5 Rang 699 * ('12) 14 Ind Cas 837 (839) (Upp Bur) * ('70) 14 Sath W R 334 (335) (DB). (Per *Buzley, J.*, *Mitter, J.*, dissenting.)

[But see (Vol. 4) 1917 Pat 198 (199) (DB).]

(c) Where the review is asked for on the ground that the case has been mismanaged by the party's counsel. (Vol. 5) 1918 Oudh 305 (306) (DB) * (Vol. 21) 1934 Nag 143 (144) : 81 Nag L R 21 * (Vol. 16) 1929 Nag 89 (90) * (Vol. 13) 1926 Mad 980 (983) : 50 Mad 67 (DB) * (Vol. 8) 1921 Nag 3 (4) (Do.).

[But see (Vol. 18) 1931 Sind 3 (4) : 25 Sind L R 242 (DB).]

(d) Where review of an *ex parte* decree or an order of dismissal for default is sought for on the ground that the case ought not to have been decided *ex parte* or dismissed for default. ('12) 13 Ind Cas 318 (318) (Lah) * (Vol. 31) 1944 Mad 293 (294) : I L R (1944) Mad 857 (LB) * (Vol. 21) 1934 Cal 116 (117) : 60 Cal 1331 * (Vol. 20) 1933 Mad 345 (345, 346) * (Vol. 22) 1935 Oudh 405 (406) * (Vol. 10) 1923 All 576 (577) (DB) * (Vol. 15) 1928 Mad 964 (965, 967) (DB) * (Vol. 14) 1927 Mad 355 (355, 356) (DB).

[See however ('87) 9 All 61 (63, 64) (FB).]

[But see (Vol. 19) 1932 Oudh 63 (65) : 7 Luck 350 (DB).]

(e) Where the Court has proceeded on a wrong exposition of the law or has wrongly decided on a question of law. (Vol. 30) 1943 Oudh 136 (138) (DB) * ('43) 208 Ind Cas 85 (86) (DB) (Oudh) : (Vol. 29) 1942 Oudh 210 (212) : 18 Luck 48 * (Vol. 9) 1922 P C 112 (113, 114) : 3 Lah 127 : 49 Ind App 144 (PC) * (Vol. 20) 1933 Mad 662 (664) * (Vol. 22) 1935 Pesh 22 (23) * (Vol. 9) 1922

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Upp Bar 16 (17, 18) : 4 Upp Bar Rul 27 * (Vol. 20) 1933 Lah 169 (170) * (Vol. 19) 1932 Lah 596 (597) : 13 Lah 546 (DB) * (Vol. 12) 1925 Pat 368 (369) (DB) * ('68) 9 Suth W R 161 (161) (DB) * ('76) 1 Cal 184 (185, 186) (DB) * (Vol. 25) 1938 Nag 145 (147) : I L R 1938 Nag 151 (DB) * (Vol. 25) 1938 Nag 221 (224) (DB).

[2] Execution against surety—Failure to give notice to surety to show cause why decree should not be executed against him is no ground for reviewing order for execution. (Vol. 18) 1931 Mad 828 (829, 830).

[3] Rulings discovered by Court *suo motu*—No opportunity given to party to explain—No review. (Vol. 19) 1932 Pat 275 (275, 276) : 11 Pat 519 (DB).

[4] Application to set aside *ex parte* decree—Negligence of agent—No review. (Vol. 12) 1925 Rang 187 (188) : 2 Rang 655.

[5] Abandonment of question involved in specific issue raised at applicant's instance as result of erroneous view of pleader—Review not granted. (Vol. 27) 1940 Mad 203 (205).

[6] Consent decree impeached on ground of fraud—No sufficient reason for review. (Vol. 26) 1939 Cal 658 (660) (DB).

17. Review on the ground of subsequent events.—[1] The happening of a *subsequent* event is not a valid ground for review. (Vol. 27) 1940 All 519 (519) * ('08) 4 Mad L Tim 86 (87) (DB) * (Vol. 5) 1918 Lah 10 (12) (DB).

[2] A subsequent legislation altering the law is no ground for review. (Vol. 15) 1923 Bom 303 (310) : 52 Bom 434 (DB) * (Vol. 11) 1924 Nag 70 (71).

[3] A subsequent admission of a party as to the matter litigated is not a ground for review. (Vol. 31) 1944 Mad 238 (239). (Madras Agriculturists' Relief Act as amended by Act of 1943—Passing of amendment is not sufficient to reopen matters decided before amendment) * (1910) 11 Cal L Jour 26 (28) (DB).

[4] Suit decreed conditionally—Condition to be fulfilled within certain time—Time found insufficient—Court can review judgment and enlarge time. (Vol. 12) 1925 All 364 (365) : 47 All 361 (DB) * (Vol. 13) 1926 Mad 1059 (1060) * (Vol. 19) 1932 Mad 223 (224) * (Vol. 12) 1925 Pat 452 (453).

18. No review on ground of decision being erroneous on merits.—[1] A review cannot be granted on the ground that the decision is erroneous on the merits, such a ground being appropriate for an appeal and not for an application for review. ('68) 9 Suth W R 589 (589) * (Vol. 17) 1930 Oadh 392 (394) * ('75) 24 Suth W R 410 (411) (DB) * (Vol. 3) 1916 Lah 261 (262) * ('80) 2 All 497 (505) (FB) * (Vol. 1) 1914 All 57 (58) * (Vol. 9) 1922 Upp Bar 16 (17, 18) : 4 Upp Bar Rul 27 * (Vol. 26) 1939 Lah 460 (462) * (Vol. 23) 1936 Lah 301 (303) * (Vol. 22) 1935 Nag 245 (245) : 31 Nag L R 372.

19. No review of fact after decision in second appeal.—[1] After the disposal of a second appeal, no review thereof will lie on the ground of a discovery of new and important evidence as to a question of fact. (Vol. 27) 1940 Pat 197 (193) (*Obiter.*) * (Vol. 10) 1923 All 541 (542) : 45 All 453 (DB) * ('09) 32 All 71 (73) (DB) * (Vol. 16) 1929 Bom 225 (226) * (Vol. 9) 1922 Cal 165 (165) (DB) * (Vol. 2) 1915 Cal 71 (71) : 41 Cal 609 (Do.) * ('70) 5 Mad H C R 464 (465, 466) (DB) * ('95) 18 Mad 480 (481) (DB).

[But see (1900) 10 Mad L Jour 134 (135) (DB) * ('82) 1882 Pan Re No. 145, page 432 (443) (FB).]

20. Application of the rule to miscellaneous proceedings under the Code.—[1] The rule applies to all decrees and orders under the Code under the circumstances mentioned in the rule. (Vol. 27) 1940 Lah 276 (277). (Order of Court cancelling arbitration and fixing case for evidence.) * (Vol. 4) 1917 Cal 548 (548) : 44 Cal 950 (DB) * ('92) 16 Bom 511 (513) * ('68) 10 Suth W R 345 (346) (DB).

[See also ('72) 18 Suth W R 292 (292) (DB).]

[2] The rule applies to following orders and decrees:—

(a) Order rejecting p'aint. (Vol. 10) 1923 Pat 354 (355) : 2 Pat 504 (DB) * Order refusing to admit appeal—('72) 17 Suth W R 484 (484) (DB) * ('78) 10 Beng L R 155 (156) (DB).

(b) Order rejecting memorandum of appeal for deficient stamp. (Vol. 7) 1920 Pat 608 (609) (DB).

(c) Order dismissing appeal for default. (Vol. 3) 1916 Cal 227 (227) (DB) * ('97) 24 Cal 350 (354) (FB).

(d) Order in execution proceedings. ('76) 3 Ind App 230 (236) (PC) * ('67) 4 Bom H C R A C 37 (90) * (Vol. 2) 1915 Lah 293 (294, 295) * ('10) 5 Ind Cas 148 (149) (DB) (Cal) * (1862) 1862 Suth W R 66 (66) (FB) * ('08) 1903 Pun Re No. 76, page 318 (320) (DB) * (Vol. 5) 1918 Pat 395 (396) : 3 Pat L Jour 571 (DB). [See however ('79) (1879) Pun Re No. 143 page 417 (FB)].

(e) Orders as to costs. (Vol. 9) 1922 Pat 1 (2) : 6 Pat L Jour 284 (DB).

(f) Order refusing application to sue in *form a pauperis*. ('96) 20 Bom 86 (90) (DB) * ('80) 4 Bom 414 (415) * ('70) 5 Beng L R App 29 (30).

[But see ('68) 1868 Pan Re No. 73, p. 187 (DB) * (Vol. 20) 1933 Mad 5 (6).]

(g) Order on application for leave to appeal to Privy Council. (Vol. 1) 1914 Cal 557 (559) : 41 Cal 734 (DB) * ('12) 39 Cal 1037 (1041) (DB) * ('89) 16 Cal 292n (293n) (DB).

[See also ('66) 6 Suth W R Misc 120 (120).]

[But see ('66) 6 Suth W R Misc 97 (98).]

(h) Decree based on award. (Vol. 6) 1919 Cal 522 (522, 523) * ('81) 1881 Pun Re No. 111, page 286 (287) (DB).

(i) Dismissal for want of prosecution or for splitting up cause of action. ('73) 5 N W P H C R 74 (76) * ('75) 7 N W P H C R 126 (130) (DB) * ('72) 1872 Pun Re No. 36 page 80 (DB).

(j) Order in revision. ('98) 1898 Pan Re. No. 23, page 66 (68) : ('01) 1901 Pan Re No. 54, page 172 (174) (rB).

(k) Order allowing withdrawal of appeal. ('91) 15 Bom 370 (374) (DB).

(l) Order *ex parte* admitting appeal after time. ('86) 9 Mad 450 (451) (DB).

21. Review in proceedings under other Acts.—[1] This rule does not apply to the following cases :

(a) A decision which becomes final under section 5 of the Court-fees Act, 1870. (Vol. 30) 1943 Bom 441 (442).

[See ('90) 12 All 129 (156, 157) (FB).]

(b) A judgment delivered in an income-tax case on a case stated by the Commissioner of Income-tax. The reason is that it is neither a decree nor an order. (Vol. 17) 1930 All 211 (211) (DB).

(c) Orders under the U. P. Land Revenue Act. (Vol. 19) 1932 All 293 (301) : 54 All 646 (FB).

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(d) Orders in proceedings under Chapter 7, Presidency Small Cause Courts Act. (Vol. 8) 1921 Bom 180 (181) : 45 Bom 972 (DB).

(e) Proceedings under the Guardians and Wards Act appointing or refusing to appoint guardians (Vol. 9) 1922 Lah 395 (396) * ('12) 1912 Pun Re No. 116 : 15 Ind Cas 559 (559) * ('06) 1906 Pun Re No. 143, page 514 (DB).

(f) Proceedings under section 8 of the Presidency Towns Insolvency Act. (Vol. 16) 1929 Rang 229 (231, 232) : 7 Rang 201 * (Vol. 19) 1932 Bom 569 (570).

[See also (Vol. 28) 1941 Sind 1 (6) : I L R (1940) Kar 513.]

(g) Proceedings under the Bengal Estates Partition Act. (Vol. 17) 1930 Pat 130 (133) : 8 Pat 830 (DB).

(h) Orders under Madras Village Courts Act of 1889. (Vol. 28) 1941 Mad 272 (273).

(i) Orders passed by the Commissioner under the Workmen's Compensation Act of 1923. (Vol. 22) 1935 All 408 (409).

22. Review petitions by minors.—[1] Minor's guardian conducting case with negligence—Minor can apply for review of judgment on this ground. (Vol. 29) 1942 Cal 99 (118) : I L R (1941) 2 Cal 477 (DB). (*Obiter.*) * (Vol. 3) 1916 All 324 (325) : 38 All 452 (DB) * ('02) 29 Cal 735 (737) * ('12) 16 Ind Cas 543 (544, 545) (DB) (Cal).

[See also ('84) 10 Cal 357 (367) (DB) * ('95) 22 Cal 8 (13) (DB).]

[But see (Vol. 13) 1926 Mad 1079 (1080) (DB).]

[2] Minor can apply for review on ground that guardian did not obtain Court's sanction for compromise. (Vol. 7) 1920 Pat 750 (751) : 5 Pat L Jour 379 (DB) * ('89) 13 Bom 137 (146) * ('06) 3 Cal L Jour 119 (130) (DB).

[3] Minor applying for review is bound by provisions of this rule. ('71) 16 Suth W R 231 (232) (SB).

[4] Decree against minor—No provision in decree reserving to minor right of questioning decree on attaining majority—Absence of provision is no ground for review. ('95) 19 Bom 571 (575, 576).

[5] Adjustment of decree effected by next friend of minor decree-holder during execution proceedings without sanction of Court sought to be set aside—Proper remedy is by application for review or under S. 151. (Vol. 23) 1936 Pat 506 (508) (DB).

23. Consent decree.—[1] An application for review is a proper mode of raising the question whether the compromise should be treated as a *nullity* or not. (Vol. 2) 1915 Cal 622 (623) (DB) * (1912) 15 Cal L Jour 408 (410) (DB) * ('05) 2 Cal L Jour 508 (509) (DB).

[See also ('71) 15 Suth W R 23 (24) (PC).]

[2] A compromise decree entered into by a vakil or agent might be set aside on the ground that the vakil or agent had no power to do so. (Vol. 20) 1933 Bom 205 (206, 207) : 57 Bom 206 (DB) * (Vol. 13) 1926 Oudh 315 (315, 316) : 1 Luck 341 (DB).

[See also ('02) 6 Cal W N 82 (85) (DB). (*Obiter.*)]

[But see (Vol. 15) 1928 Oudh 418 (423) : 4 Luck 76 (DB).]

[3] There is a conflict of decisions as to whether the discovery of fraud or undue influence in obtaining a consent decree is a valid ground of review :

(a) The following cases hold that it is a valid ground. (Vol. 16) 1929 Cal 513 (513) * (Vol. 7) 1920 Cal 808 (808) (DB) * (Vol. 2) 1915 Cal 622 (623) (DB) * ('06) 10 Cal W N 286 (286) (DB) * ('84) 10 Cal 612 (615) (DB) * (Vol. 9) 1922 Mad 446 (446) (DB) * ('78) 1878 Pun Re No. 58, page 206 (212) (LB).

[See (Vol. 2) 1915 Mad 281 (282) (DB).]

(b) The following cases hold that it is not a valid ground. (Vol. 28) 1941 Pat 574 (576, 577) (DB) * (Vol. 16) 1929 Cal 470 (472) : 57 Cal 154 (DB) * ('33) 144 Ind Cas 82 (82) (DB) (Cal) * (Vol. 31) 1944 Mad 570 (571) (Party consenting to compromise owing to error of fact of his own making.) * ('06) 3 Cal L Jour 119 (130) (DB) * (1909) 10 Cal L Jour 420 (433) (DB) * ('91) 15 Bom 594 (593) (DB) * (Vol. 13) 1926 All 50 (52 to 54) : 48 All 160 (DB) * (Vol. 26) 1939 Cal 653 (660) (DB) * (Vol. 23) 1936 Rang 389 (390).

[See (Vol. 11) 1924 All 593 (400) : 46 All 245].

[See also (Vol. 6) 1919 Pat 232 (232, 233) : 4 Pat L Jour 205 (DB).]

(c) In such a case the proper remedy is by way of suit though motions for a new trial may be convenient in some cases. (Vol. 28) 1941 Pat 574 (575) (DB).

[4] Consent decree sought to be impeached on ground of clerical error or on ground that it does not represent what Court intended to decide—Application for review may be made. (Vol. 5) 1913 P O 184 (188) (PC) * (1909) 10 Cal L Jour 420 (442) (DB).

[See also ('91) 15 Bom 594 (599) (DB).]

24. Ex parte decrees and orders of dismissal for default.—[1] The rule applies to all cases whether they are disposed of in the presence of the parties or *ex parte* in the absence of the defendants. ('83) 13 Cal L Rep 254 (255) (DB) * (Vol. 12) 1925 Cal 1023 (1024) (DB) * (Vol. 16) 1929 Cal 322 (325) : 56 Cal 21 (DB) * ('09) 12 Suth W R 195 (196) (DB) * ('73) 20 Suth W R 284 (284) (DB) * ('27) 21 Bom 328 (330) (DB) * (Vol. 16) 1929 Sind 110 (111) (DB) * ('34) 6 All 65 (66) (DB) * ('87) 9 All 36 (42) (DB).

[2] An application to set aside an *ex parte* decree cannot by itself be treated as one for review. (Vol. 12) 1925 Rang 187 (188) : 2 Rang 655.

[See however ('10) 1910 Pun L R No. 7, page 18 (19).]

[3] A dismissal for default other than the failure to appear, is open to review. (Vol. 7) 1920 Sind 34 (35) : 14 Sind L R 239 (DB) * ('97) 24 Cal 350 (354) (FB) * (1912) 22 Mad L Jour 146 (149) (DB).

[See however (Vol. 23) 1936 Mad 503 (503) : 59 Mad 975 (DB).]

[4] Dismissal for default of appearance—Failure to apply under O. 9 R. 9 or under O. 41 R. 19 will not bar application for review. ('97) 1897 Pun Re No. 15, page 54 (55, 56) (DB) * (Vol. 6) 1919 Mad 844 (844) * ('99) 26 Cal 598 (601) (DB) * ('13) 1913 Pun Re No. 109 : 19 Ind Cas 481 (485).

[See ('10) 1910 Pun L R No. 71, page 18 (19) * (Vol. 14) 1927 Mad 355 (356) (DB) * (Vol. 15) 1928 Mad 964 (965) (DB).]

[But see (Vol. 10) 1923 All 576 (577) (DB) * (Vol. 4) 1917 Pat 673 (673, 674) : 1 Pat L Jour 547 (DB) * (Vol. 7) 1920 Pat 491 (491, 492) * (Vol. 30) 1945 Sind 132 (134) : I L R (1943) Kar 409 (DB).]

2. An application for review of a decree or order of a Court, not being a High Court, upon

To whom applications some ground other than the discovery of such new and important matter for review may be made. or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

[1882—S. 624; 1877—S. 624.]

O. 47 R. 1 (contd.)

[5] Application for restoration made and dismissed—Application for review does not lie. ('78) 1873 Pun Re No. 52, p. 77 * (Vol. 12) 1925 Lah 517 (518).

[But see (Vol. 20) 1933 Nag 39 (40): 28 Nag L R 295].

25. Review of decision before signing decree.—

[1] Wherein order to be consistent in the decree finally passed, the Court has to pass orders under O. 41 R. 33, the same relief can be given in a petition put in by way of review before the decree has been signed. (Vol. 10) 1923 Mad 392 (402) (DB).

26. Commissioner cannot review.—[1] A Commissioner appointed for taking accounts has no power to review but may, in his discretion and on proper grounds, re-open the inquiry into any one or more of the items, before his report is made. (Vol. 11) 1924 Bom 231 (231, 232): 47 Bom 593.

[See (Vol. 22) 1935 All 408 (409).]

27. Limitation.—[1] There is nothing in this order to suggest that the application for review must be made within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of suit which has been dismissed for default of appearance. (Vol. 16) 1929 Sind 38 (39) (DB).

28. Appeal by one party—Review application by another—Sub-r. (2).—[1] The fact that an appeal has been preferred by one party does not preclude the other parties from applying for review. ('87) 7 Suth W R 166 (167) (DB).

[2] Appeal by some defendants dismissed under O. 41 R. 11—Review application can be entertained at instance of defendants who did not prefer appeal. (Vol. 4) 1917 Cal 417 (419) (DB).

[3] Where the applicant has the opportunity to present his case before the Appellate Court, the lower Court has no jurisdiction to proceed with the application. (Vol. 3) 1916 Lah 173 (174) (DB) * ('11) 14 Oudh Cas 108 (110) * ('21) 63 Ind Cas 841 (841) (DB) (All) * ('04) 7 Oudh Cas 299 (302) (DB).

[4] A respondent in an appeal has the right to apply for review of the Appellate Court's judgment. ('09) 3 Ind Cas 204 (205) (DB) (Mad).

[5] The expression "party" in sub-rule (2) means a party to the decree. (Vol. 22) 1935 Rang 364 (365).

ORDER 47 RULE 2—Note 1.

[1] This rule must be read as a proviso to rule 1. ('85) 8 Mad 567 (568) (DB) * ('92) 16 Bom 603 (605) (DB).

[2] The policy underlying the rule is that an application for review should be entertained and considered by the very Judge who made the decree or order. ('65) 3 Suth W R 45 (48) (PC).

[3] Every application for review on which notice has been ordered to issue by the Judge who passed the decree or made the order may be disposed of by his

successor in office. ('92) 16 Bom 603 (605) (DB) * (Vol. 1) 1914 Cal 146 (147) (DB) * (Vol. 12) 1925 Lah 377 (377) (DB) * (Vol. 20) 1933 Lah 130 (131) * ('90) 13 Mad 178 (187, 188) (FB) * (Vol. 1) 1914 All 57 (58) * (Vol. 2) 1915 Mad 1068 (1069) * (1900) 3 Oudh Cas 363 (365).

[4] An application based on the ground of the discovery of new and important matter or evidence, can be entertained and disposed of by the successor in office. ('11) 33 All 566 (568) (DB) * ('89) 13 Bom 330 (335) (DB) * ('13) 19 Ind Cas 214 (214, 215) (Mad) * (Vol. 11) 1924 Pat 809 (810) (DB).

[5] The successor in office can entertain and dispose of an application on the ground of existence of a clerical or an arithmetical mistake or error apparent on the face of the decree. Under this rule, an application for review on the ground of an error apparent on the face of the decree can be made to the successor of the Judge who passed the decree, while an application on the ground of an error apparent on the face of the record can only be made to the Judge by whom the decree was passed. (Vol. 13) 1926 Mad 1033 (1034) * (Vol. 11) 1924 Nag 190 (191) * (Vol. 24) 1937 Oudh 267 (268): 13 Luck 112 (DB).

[6] An application made both under O. 9 R. 13 and O. 47 R. 1 and registered as one under O. 47 R. 1, may, however, be changed by the successor as one made under O. 9 R. 13 of the Code and disposed of on that basis. (Vol. 9) 1922 Pat 376 (377): 1 Pat 48 (DB).

[7] An application based on any other grounds than the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree can be entertained only by the Judge who made the order or passed the decree. (Vol. 11) 1924 Pat 809 (810) (DB) * ('78) 10 G P L R 62 (64) * (Vol. 22) 1935 Mad 295 (296) * (1913) 17 Cal W N 403 (404) (DB) * (Vol. 9) 1922 Upp Bur 16 (17): 4 Upp Bur Rul 27 * (Vol. 29) 1942 Pat 234 (235) (DB) * ('70) 2 N W P H C R 230 (234) (DB).

[8] Successor in office cannot grant review of the decree or order passed by his predecessor in-office on the ground that such decree or order is incorrect. ('80) 5 Cal 110 (112) (DB) * (Vol. 18) 1931 All 605 (606) (DB).

[9] Notice of hearing not given—Successor cannot grant review. ('90) 14 Bom 101 (102) (DB) * ('06) 1906 Pun Re No. 82, page 301 (303).

[10] Guardian ad litem of minor had no sanction to refer the matter to arbitration—Successor cannot grant review. ('08) 8 Cal L Jour 294 (293) (L.B).

[11] Case wrongly dismissed by predecessor for default—Successor cannot grant review. ('09) 1909 Pun Re No. 33, page 95 (96) (DB).

[12] Right to proceed against other properties not reserved by original Judge—Successor cannot grant review. (1910) 11 Cal L Jour 161 (163) (DB).

[13] Mistake of law on the face of the record—Successor cannot grant review. (Vol. 24) 1937 Cal 425 (426) (DB).

Form of applications for review.

3. The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review.

[1882—S. 625; 1877—S. 625.]

Application where rejected.

4. (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application where granted.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same :

Provided that—

- (a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for: and
- (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

[1882—S. 626; 1877—Ss. 626, 629; 1859—S. 373.]

O. 47 R. 2 (contd.)

[14] District Judge cannot transfer a review petition filed before a Subordinate Judge to his own file, or transfer an application for review filed before him to a subordinate Judge. (1864) 1864 Suth W R Gap Miso 29 (29) (DB) * (Vol. 6) 1919 Nag 143 (143).

[15] A successor in office of a transferred, retired or dead Judge cannot entertain application for review. ('82) 4 All 278 (280, 281) (DB) * ('82) 1892 All W N 96 (96) (DB) * (1929) 6 Oudh W N 707 (708) (DB).¹

¹ [16] Review admitted on one ground cannot be argued on another ground. (Vol. 14) 1927 Oudh 181 (181) (DB).

[17] Court abolished and suits transferred to another Court—transfer Court cannot grant a review except on grounds mentioned in this rule. ('85) 8 Mad 567 (568) (DB).

[18] Judge of Additional Sub-Court, transferred as Sub-Judge of Principal Sub-Court can review his order passed when Additional Subordinate Judge. (Vol. 14) 1927 Cal 312 (318) : 54 Cal 374 (DB).

[But see (Vol. 12) 1925 All 804 (806) : 47 All 751 (DB).]

[19] An application for review made to the successor will not be proper although it is *heard and disposed of* by the Judge who passed the decree. ('97) 10 O P L R 62 (64).

[20] The rule has no application to the High Court. (Vol. 4) 1917 Cal 184 (185) : 44 Cal 28 (Assumed.)

[21] The rule has no application to Courts of Small Causes. ('05) 1905 Pun Re No. 63, page 216 (216).

[22] "Judge who passed the decree," means the Judge who *decided* the case and not the Judge who merely *signed* the decree. (Vol. 4) 1917 Cal 673 (678) (DB).

ORDER 47 RULE 3—Note 1.

[1] Applications for review should be drawn up like appeals and should set forth concisely the grounds of objections, numbered consecutively, without argument or narrative. (1862) 1 Bom H C R 185 (186) (DB).

[2] The Court should not travel beyond the grounds mentioned in the application. (1900) 5 Cal WN 485 (486) * (Vol. 20) 1933 Rang 151 (153) (DB) * ('11) Ind Cas 427 (428) : ('11) 1911 Pun Re No. 73 (DB) * (Vol. 15) 1928 Cal 73 (75) (DB).

[3] It is not necessary that the application for review should be accompanied by the copy of the decree, order or judgment sought to be reviewed. ('95) 17 All 213 (216) (FB) * (Vol. 25) 1938 Lah 295 (295).

[But see ('80) 4 Bom 414 (415).]

[4] The application should be presented to Judge and not to the *munsarim*. ('90) 12 All 57 (59) (DB).

[5] The informalities in presenting a review petition cannot be raised after the decree is passed in terms of review. ('97) 1897 Pun Re No. 17, page 63 (65) (DB) * (Vol. 12) 1925 All 777 (778) (DB).

[6] Rule does not extend the right of a party who goes for a review, and give him a right of appeal against an order refusing to restore an application for review by reason of the fact that an appellate order under such circumstances is appealable under O. 43 R. 1 (2). (Vol. 12) 1925 All 57 (58) : 47 All 1 (DB).

[7] An application for execution after ninety days from the date of the decree and not explaining delay, cannot be treated as an application for review. (Vol. 18) 1931 All 218 (219) (DB).

[8] Application for review need not necessarily be accompanied by affidavit. (Vol. 25) 1938 Lah 295 (295).

[9] The legal representative of a deceased party can apply for a review in the circumstances in which the party himself could have applied. ('06) 9 Oudh Cas 35 (37).

[10] An applicant for review is entitled to the benefit of S. 12, sub-s (2) of the Limitation Act, if he obtains a copy of the judgment. (Vol 21) 1934 All 367 (368) : 56 All 591 (DB).

[11] A pauper may apply for review of judgment with the same indulgence under S. 5 of the Limitation Act as to delay in making the application as person who is not a pauper. ('79) 2 Mad 230 (231, 232) (DB).

[12] The time occupied in prosecuting a prior application for review cannot be deducted in calculating the period of limitation. ('02) 26 Bom 485 (480).

[13] Time taken in prosecuting an appeal against the decree cannot be deducted in computing limitation for the application for review of the decree. ('84) 8 Bom 260 (263) (DB).

ORDER 47 RULE 4—Note 1.

[1] The fact that the Judge has issued notice to the other side does not preclude him from rejecting the application under sub-rule (1). (Vol. 27) 1940 Rang 144 (144).

5. Where the Judge or Judges, or any one of the Judges, who passed the decree or made Application for review in the order, a review of which is applied for, continues or continue Court consisting of two or attached to the Court at the time when the application for a review is more Judges. presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

[1882—S. 627.]

PROVINCIAL AMENDMENT.

BOMBAY

For the word "six", the word "two" shall be substituted.

[21-12-1927]

O. 47 R. 4 (contd.)

[2] Application for review on any ground specified in R. 1—Court of opinion that review should be granted—It should be granted. (Vol. 4) 1917 Lah 379 (380): 1916 Pun Re No. 115 (DB).

[3] Court considering grounds to be sufficient and granting review Provision of rule are not contravened within R. 7 because grounds are really not sufficient. (Vol. 27) 1940 Pat 7 (9): 18 Pat 777.

[4] Application for review admitted—Dismissal of application is wrong. (Vol. 10) 1923 Oudh 93 (94, 95): 26 Oudh Cas 24 (DB).

[5] Application for review granted without notice to opposite party—Order granting review is nullity. (Vol. 2) 1915 Cal 666 (667): 42 Cal 433 (DB) * (Vol. 20) 1933 Pat 643 (644) * (Vol. 10) 1923 Rang 49 (50): 1 Low Bar Rul 394 * (104) 14 Mad L Jour 7 (7, 8) (PC) * (87) 11 Bom 591 (594, 595) (DB) * (13) 1913 Pun L R No. 237, page 791 (792) * (67) 8 Suth W R 304 (304) (DB) * (Vol. 13) 1926 Mad 133 (134).

[See (Vol. 25) 1938 Mad 573 (575) (DB).]

[See however (37) 1937 Oudh W N 497 (498, 499) (DB).]

[6] Notice must be served on all defendants and not on opposing defendants only. (13) 17 Cal L Jour 416 (420) (DB).

[7] Expression "opposite party" includes all parties interested in supporting order or decree sought to be set aside. (Vol. 9) 1922 Pat 281 (283): 6 Pat L Jour 625 (DB).

[8] Where an appeal is dismissed under O. 41 R. 11, or a suit is dismissed before summons to the defendant, or an application for execution is summarily dismissed before notice to judgment-debtor—the respondent, defendant, or judgment-debtor as the case may be, is not an "opposite party" within the meaning of this rule. (Vol. 9) 1922 Cal 234 (235) * (Vol. 12) 1925 Cal 114 (114): 61 Cal 943 (DB) * (Vol. 3) 1916 Cal 741 (742): 43 Cal 178 (DB) * (72) 18 Suth W R 475 (476) (DB) * (Vol. 2) 1915 Cal 63 (68) (DB) * (Vol. 6) 1919 Cal 502 (502) * (Vol. 11) 1924 Lah 350 (351).

[See (Vol. 10) 1923 Lah 303 (304).]

[But see (Vol. 13) 1926 Mad 980 (981, 982): 50 Mad 67 (DB) * (Vol. 9) 1922 Pat 281 (283): 6 Pat L Jour 625.]

[9] *Pro forma* defendant proceedings *ex parte* against him—His interest sufficiently guarded by plaintiff—He is not opposite party and notice to him is not necessary. (Vol. 25) 1938 Lah 22 (23).

[10] The expression means the same thing as the expression "new and important matter or evidence" in R. 1. (Vol. 7) 1920 Cal 467 (468, 471): 47 Cal 563 (SB).

[11] No application for review should be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be produced by him when the decree or order was passed or made, without *strict proof* of such allegation. (Vol. 15) 1928 Mad 56 (56) * (107) 31 Bom 381 (388, 389): 34 Ind App 115 (PC). (Reversing 7 Bom L R 119) * (Vol. 20) 1933 Mad 217 (218) * (Vol. 4) 1917 All 107 (108) * (Vol. 3) 1916 All 286 (286, 287): 38 All 280 (DB) * (Vol. 14) 1927 Bom 232 (234) * (Vol. 19) 1932 Cal 265 (266) * (Vol. 7) 1920 Cal 467 (469, 471): 47 Cal 563 (SB) * (11) 9 Ind Cas 320 (321) (Cal) * (73) 20 Suth W R 84 (85) (FB) * (Vol. 5) 1918 Upp Bar 27 (28): (1916) 2 Upp Bar Rul 126 * (93-1900) 1893-1900 Low Bar Rul 527.

[12] Court granting review without calling for strict proof of allegation acts without jurisdiction. (Vol. 12) 1925 Mad 578 (578) (DB) * (Vol. 7) 1920 Cal 467 (469, 471): 47 Cal 563 (SB).

[13] "Strict Proof" means evidence in legal form sufficient to convince Court—Proof refers to formality of evidence. (Vol. 3) 1916 Cal 521 (523, 524) * 42 Cal 830 (DB) * (Vol. 5) 1918 Cal 618 (620, 622, 625): 45 Cal 60 (DB) * (Vol. 5) 1918 Bom 228 (230) * 42 Bom 295 (DB) * (Vol. 7) 1920 Cal 920 (920) (DB) * (Vol. 7) 1920 Cal 467 (469): 47 Cal 563 (SB) * (Vol. 5) 1918 Cal 888 (888, 889) (DB) * (Vol. 20) 1933 Mad 217 (218) * (Vol. 26) 1939 Mad 289 (290).

[But see (Vol. 29) 1942 Mad 511 (512).]

[14] It is within the jurisdiction of the appellate Court to say whether strict proof is according to law or not. (Vol. 3) 1916 Cal 521 (524): 42 Cal 830 (DB) * (Vol. 5) 1918 Cal 618 (625): 45 Cal 60 (DB) * (11) 9 Ind Cas 320 (321) (Cal) * (Vol. 7) 1920 Cal 920 (920) (DB) * (Vol. 12) 1925 All 552 (552, 553): 47 All 881 (DB).

[15] The question of the *sufficiency* or importance of evidence is for the Court admitting the review. (Vol. 3) 1916 Cal 521 (524): 42 Cal 830 (DB) * (Vol. 5) 1918 Cal 618 (620, 624, 625): 45 Cal 60 (DB) * (Vol. 17) 1930 Cal 420 (425) (DB).

[See also (11) 9 Ind Cas 532 (533) (Cal).]

[16] Order granting review only holds judgment in suspense—Death of party thereafter does not cause suit or appeal to abate. (Vol. 11) 1924 Bom 310 (310): 48 Bom 210 (DB).

ORDER 47 RULE 5—Note 1.

[1] This rule will apply only in the case of Court consisting of more than one Judge. (Vol. 20) 1933 Lah 130 (131).

[2] A review heard and granted by two Judges of a Court one of whom only was the Judge who passed the decree, is illegal. (Vol. 9) 1922 PC 112 (114): 3 Lah 127: 49 Ind App 144 (PC).

[3] Where one Judge of Bench of two Judges who disposed of an appeal leaves the Court on a *month's*

Application where rejected. **6.** (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

[1882—S. 628; 1877—S. 627; 1859—S. 379.]

Order of rejection not appealable. Objections to order granting application. **7.** (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

(a) in contravention of the provisions of rule 2,

(b) in contravention of the provisions of rule 4, or

(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

[1882—S. 629; 1877—S. 629.]

PROVINCIAL AMENDMENT.

MADRAS

In sub rule (1) *substitute* the word “order” for the word “application” occurring after the words “on the ground that the.” [P. Dis. No. 134 of 1929.]

O. 47 R. 5 (contd.)

leave, the other Judge has no jurisdiction to hear an application for review. (Vol. 6) 1919 Cal 1033 (1034) (SB).

[4] Bench of two Judges passing decree or making order—One of the Judges absent on leave for a period of six months from date of application for review—The other Judge is competent to hear the application. (Vol. 29) 1942 Mad 23 (24) * ('89) 16 Cal 788 (793) (DB) * (Vol. 14) 1927 Rang 20 (21): 4 Rang 265 (SB) (Overruled in (Vol. 27) 1940 Rang 12: 1939 Rang LR 663 (FB) on another ground.) * (Vol. 14) 1927 Bom 232 (234) * ('97) 24 Cal 350 (354) (FB).

[5] Review allowed by single Judge of a Bench which disposed of the appeal on the other Judge's absence for over six months. Matter should be re-heard by a Bench of two Judges. ('89) 16 Cal 788 (790) (DB) * ('11) 9 Ind Cas 532 (533) (Cl) * ('09) 2 Ind Cas 204 (204, 205) (DB) (Mad) * (Vol. 14) 1927 Rang 20 (23): 4 Rang 265 (SB) (Overruled in (Vol. 27) 1940 Rang 12: 1939 Rang LR 663 (FB) on another ground).

[6] A District Judge cannot transfer an application for review to the Additional Judge. (Vol. 17) 1930 All 785 (786) (DB).

[7] A Judge who is absent on leave and for whom another is officiating, is not “attached to the Court” and the review application may be disposed of by the remaining Judge who heard the appeal originally. ('89) 16 Cal 788 (793) (DB).

ORDER 47 RULE 7—SYNOPSIS.

1. Scope and applicability of the rule.
2. Order rejecting review not appealable.
3. Order granting review, appeal against.
4. Application being in contravention of Rule 2.
5. “In contravention of the provisions of Rule 4.”
6. “After the expiry of the period of limitation.”
7. Second appeal from order granting review.
8. Letters Patent appeal.
9. Objections to order granting review may be taken in appeal from the final decree.
10. Order granting or refusing review in insolvency proceedings, if appealable.
11. Dismissal of application for review for default—No appeal.
12. Appeal from decree passed on review.
13. Second application for review.
14. Revision.

1. Scope and applicability of the rule.—[1] Rule being inconsistent with S. 176 of the Agra Tenancy Act is not applicable to an order passed by an Assistant Collector, Second Class, relating to the trial of any suit or application under that Act. ('15) 31 Ind Cas 912 (912) (All).

[2] This rule does not apply to the Provincial Small Cause Courts. (Vol. 6) 1919 Mad 111 (112).

O. 47 R. 7 (contd.)

[3] Where the Court actually granted a review though it purported to act under S. 152, it was held that it must be treated as an order under this Order and that an appeal lay against the order. (Vol. 8) 1921 Lah 250 (251)

2. Order rejecting review not appealable.—[1] An order rejecting an application for review is not appealable. (Vol. 30) 1943 Oudh 214 (215) (DB) * ('04) 26 All 572 (573) (DB) * (Vol. 22) 1935 Pat 177 (178) (DB) * ('99) 4 Cal W N 39 (40) (DB) * ('73) 20 Suth W R 84 (85) (FB) * ('70) 13 Suth W R 167 (168) (DB) * (1864) 1864 Suth W R Misc 20 (21) (DB) * (1862-64) 1862-64 Suth W R Sup 11 (12) (SB) * ('85) 9 Mad 253 (254, 256) (DB) * ('06) 30 Bom 56 (60, 61) (DB) * ('06) 26 Mad 599 (602) * (Vol. 21) 1934 Lah 301 (303).

3. Order granting review, appeal against.—[1] Reading O. 47 R. 7 and O. 43 R. 1 (W) together it follows, that there is no appeal even from an order granting a review in cases other than those specified in this rule. (Vol. 17) 1930 All 126 (127) (DB) * (Vol. 19) 1932 Oudh 63 (64, 65) : 7 Luck 350 (DB) * ('12) 14 Ind Cas 39 (39) (DB) (Cal) * (Vol. 28) 1941 Nag 308 (309, 310) : I L R (1942) Nag 487 * (Vol. 20) 1933 All 773 (778, 779) * (Vol. 20) 1933 Bom 183 (185) * (Vol. 20) 1933 Cal 727 (727) * (Vol. 21) 1934 Lah 575 (575) * (Vol. 18) 1926 All 492 (492) (DB) * ('09) 12 Oudh Cas 151 (151) * (Vol. 17) 1930 Cal 424 (424, 425) (DB) * (Vol. 16) 1929 Mad 261 (264) (DB) * (Vol. 14) 1927 Mad 641 (642) : 50 Mad 891 (DB) * (Vol. 16) 1929 Rang 105 (106) : 7 Rang 187 * (Vol. 6) 1919 Upp Bur 19 (20) : 3 Upp Bur Kail 104 * (Vol. 26) 1939 Rang 59 (66) (DB) * (Vol. 27) 1940 Pat 7 (9) : 18 Pat 777 (DB) * (Vol. 23) 1936 Pat 310 (311) (DB) * (Vol. 23) 1936 Oudh 409 (410) : 12 Luck 362 (DB) * (Vol. 24) 1937 Oudh 513 (517) : 13 Luck 597 (DB) * (Vol. 24) 1937 Nag 385 (385) : I L R (1938) Nag 395 (DB) * (Vol. 16) 1929 Nag 73 : 25 Nag L R 104 overruled * (Vol. 30) 1943 Lah 310 (311) (DB).

[But see (Vol. 13) 1926 Bom 121 (121) (DB) * (Vol. 13) 1926 Cal 217 (218) (DB)].

[2] Where a Court grants review on the ground of "after sufficient reason" the order is not open to appeal. (Vol. 12) 1925 All 364 (365) : 47 All 361 (DB) * (Vol. 9) 1922 All 366 (367) (DB) * ('97) 24 Cal 878 (880) (DB) * (Vol. 15) 1928 Cal 73 (73) (DB) * (Vol. 16) 1929 Lah 26 (27) * (Vol. 15) 1928 Lah 755 (756, 757) * (Vol. 13) 1926 Mad 1033 (1034) * (Vol. 3) 1916 Mad 544 (544) (DB) * (Vol. 19) 1932 Oudh 63 (64, 65) : 7 Luck 350 (DB) * (Vol. 22) 1935 Rang 501 (502) * (Vol. 30) 943 Oudh 136 (139) (DB).

[3] Similarly an order granting review on the ground that there is an error in the judgment apparent on the face of the record is not appealable. ('89) 5 Bihar R. 530 (531) (DB) * (Vol. 21) 1934 Lah 575 (575).

[4] In Bombay O. 43 R. 1 (w) has been deleted by a rule made by the High Court under S. 122 of the Code, an order granting a review is in any view appealable if it fails under this rule. (Vol. 16) 1929 Bom 183 (184, 185) (DB) * (Vol. 20) 1933 Bom 183 (184) * (Vol. 14) 1927 Bom 599 (600) (DB).

[5] Where a decree passed on review cannot be attacked on a ground recognized under this rule, the case cannot be certified as fit case for appeal under section 109, clause (c) of the Code. (Vol. 13) 1926 Oudh 17 (18) (DB).

[6] The mere fact that an appeal is permitted under this rule will not make it a fit case for appeal to His Majesty in Council. (Vol. 19) 1932 All 318 (319) : 54 All 401 (DB).

[7] It is open to the appellant to prefer an appeal against an order granting a review, without taking any steps regarding the decree itself. (Vol. 19) 1932 Cal 552 (554) (DB).

[8] Appeal will lie also from an order granting a review of an order passed in execution proceedings. ('10) 5 Ind Cas 483 (484) (DB) (Cal).

[9] Where an application for review of an order for the stay of execution proceedings is granted, the order is appealable as a decree, the grounds of appeal against which need not be confined to those mentioned in this rule. (Vol. 26) 1939 Cal 628 (631) (DB).

[10] Where the order which is reviewed is clearly and demonstrably wrong the Appellate Court will not interfere with the order granting review and restore the wrong decision merely because the lower Court in granting review has proceeded on an incorrect basis or reasoning. (Vol. 28) 1941 Mad 918 (920) * (Vol. 30) 1943 Oudh 136 (138) (DB).

4. Application being in contravention of Rule 2.

[1] An appeal will lie from an order granting a review on the ground that there is a contravention of rule 2. ('10) 11 Cal L Joar 161 (163) (DB) * ('13) 17 Cal W N 403 (404, 405).

5. "In contravention of the provisions of rule 4."

[1] An appeal will lie from an order granting review without notice to the opposite party or without calling for strict proof of the allegations referred to. (Vol. 7) 1920 Cal 467 (470, 471) : 47 Cal 568 (DB) * (Vol. 20) 1933 Mad 217 (218) * (Vol. 11) 1924 Pat 250 (252, 253) : 3 Pat 134 (DB).

6. "After the expiry of the period of limitation."

[1] An Appellate Court cannot entertain an appeal from an order granting review simply on the ground that the application was time-barred unless there is also want of sufficient cause for the delay. (Vol. 5) 1918 All 229 (231) : 40 All 68.

[2] When an application made beyond the prescribed period is admitted without the Court satisfying itself that there is sufficient cause for the delay, the Court acts without jurisdiction. (Vol. 17) 1930 All 815 (816) * (Vol. 18) 1931 All 218 (218, 219) (DB) * (Vol. 15) 1928 Bom 308 (310) : 52 Bom 434 (DB) * ('75) 2 Ind App 53 (68, 69) (PC) * ('73) 11 Beng L R 427 n (428n) (DB) * ('69) 11 Suth W R 22 (22) (DB) * ('69) 12 Suth W R 94 (95) (DB) * ('76) 1876 Pan Re. No. 101, page 215 (217) (SB) * ('71) 1871 Pan Re. No. 51, page 115 (122, 123) (SB).

[See however ('13) 18 Ind Cas 309 (311) (Lah)].

[3] The Appellate Court can look into the sufficiency of the cause alleged for the delay. (Vol. 29) 1942 Mad 511 (512) * ('74) 2 Ind App 53 (69) (PC) * ('76) 25 Suth W R 343 (344) (DB) * ('75) 24 Suth W R 294 (295) (DB) * ('71) 1871 Pan Re. No 51, page 115 (122, 123) (SB) * ('01) 5 Cal W N 485 (486) * (Vol. 19) 1932 Cal 552 (555) (DB).

7. Second appeal from order granting review.

[1] No second appeal lies from the order of an Appellate Court, whether it confirms or reverses the order of the Court of first instance granting an application for review. ('89) 11 All 333 (335) (DB) * (Vol. 5) 1918 All 229 (229) : 40 All 68 * ('89) 13 Bom 496 (499) (DB) (But where the lower Appellate Court's order is against the decretal order as amended in review second appeal lies) * ('97) 24 Cal 319 (319) (DB) * ('85) 11 Cal 296 (298) (DB) * ('89) 12 Mad 125 (126) (DB) * (Vol. 5) 1918 Mad 1011 (1012) (DB). (Question left open.)

O. 47 R. 7 (contd.)

[But see ('82) 1882 Pan Re. No. 133, page 396 (396) (DB). (Under the Punjab Courts Act, a second appeal lies.)]

8. Letters Patent appeal.—[1] An order refusing an application for review is not a "judgment" within the meaning of cl. 15 of the Letters Patent and is not appealable. (Vol. 29) 1942 Nag 18 (19): 1 L R (1942) Nag 41 (DB) * (Vol. 10) 1923 All 356 (357): 45 All 535 (DB) * ('85) 9 Mad 253 (256) * (Vol. 4) 1917 Cal 88 (89) (DB) * ('05) 9 Cal W N 502 (503) (DB) * ('69) 12 Suth W R 459 (460) (SB).

[2] An order *granting* an application for review may amount to a "judgment" within that Clause but an appeal will lie on the grounds specified in this rule. (Vol. 16) 1929 Mad 261 (263) (DB) * ('89) 16 Cal 788 (793) (DB) * ('70) 13 Suth W R 439 (440) (DB).

[3] Where a single Judge disposed of an application for review when the other Judge was on a month's leave it was held that the order was without jurisdiction and that an appeal lay under Clause 15 of the Letters Patent. (Vol. 6) 1919 Cal 1033 (1034) (SB) * ('76) 25 Suth W R 324 (325) (DB) * ('74) 22 Suth W R 183 (183) (DB).

9. Objections to order granting review may be taken in appeal from the final decree.—[1] The propriety of an order granting review can also be questioned in the appeal against the final decree but only on the grounds specified in this rule. (Vol. 1) 1914 Cal 146 (147) (DB) * (Vol. 18) 1931 All 329 (330, 331) * ('13) 10 Ind Cas 481 (435): 1913 Pan Re. No. 109 (DB) * ('95) 1895 Pan Re. No. 52, page 317 (318) * (Vol. 16) 1929 Mad 261 (264) (DB) * ('08) 31 Mad 49 (50) (DB) * (1859) 7 Moo Ind App 233 (307, 308) (PC) * ('76) 2 Cal 131 (141): 3 Ind App 221 (PC) * ('84) 6 All 292 (294) (DB).

10. Order granting or refusing review in insolvency proceedings if appealable.—[1] A Court exercising powers under its insolvency jurisdiction has the same powers as any other Court under the Code. (Vol. 22) 1935 Pat 177 (178) (DB) * (Vol. 9) 1922 All 206 (207): 44 All 605 (DB).

[But see (Vol. 24) 1937 Lah 568 (569)].

[2] The Madras High Court has held that an order in insolvency proceedings rejecting an application for review is appealable under the provisions of S. 75 of the Provincial Insolvency Act and that such provisions are not controlled by this rule. (Vol. 28) 1941 Mad 588 (589).

11. Dismissal of application for review for default—No appeal.—[1] Though an order refusing to re-admit an application for review, dismissed for default, is not appealable, the High Court can interfere in revision. (Vol. 14) 1927 Kang 204 (205): 5 Rang 121 (DB) * (Vol. 12) 1925 Cal 430 (431) (DB) * (Vol. 12) 1925 All 57 (58): 47 All 1 (DB).

12. Appeal from decree passed on review.—[1] Appeal lies against the decree passed on review. ('12) 34 All 282 (283, 284) * ('70) 13 Suth W R 138 (139) (DB) * ('89) 13 Bom 496 (499) (DB) * ('14) 20 Ind Cas 647 (648) (DB) (All).

[2] In appeal the Court has full power to go into the merits of the case and see whether the decree was properly passed. (Vol. 5) 1918 Cal. 618 (624): 45 Cal. 60 (DB) * (Vol. 11) 1924 Mad 602 (602, 603) * (Vol. 16) 1929 Mad 261 (264) (DB).

[3] It can be urged in appeal that the Court which admitted the application for review had no jurisdiction to do so. ('04) 27 Mad 602 (607) (DB) * ('11) 14 Oudh Cas 108 (110).

13. Second application for review.—[1] There is nothing in the Code of Civil Procedure preventing a second application for review where a previous application for review was made and rejected, provided such second application is based on grounds different from those taken in the first application. (Vol. 14) 1927 Lah 200 (211): 8 Lah 54 (DB) * (Vol. 3) 1916 All 286 (286): 33 All 280 (DB) * ('02) 26 Bom 435 (490, 491) * ('88) 15 Cal 432 (435, 436) (DB) * ('68) 10 Suth W R 415 (415) (DB) * ('66) 5 Suth W R 93 (95) (FB) * ('92) 1892 Pan Re. No. 57, page 207 (209) (DB) * ('83) 1893 Pan Re. No. 107, p. 333 (334) (DB).

[See however ('89) 16 Cal 749 (752): 16 Ind App 104 (PC)].

14. Revision.—[1] An order rejecting an application for review on the merits is not open to revision. (Vol. 30) 1943 Mad 377 (377) * ('04) 26 All 572 (573) (DB) * (Vol. 11) 1924 Bom 344 (345) (DB). (On the ground that the additional evidence could have been adduced earlier) * (Vol. 5) 1918 Cal 701 (701) (DB) * (Vol. 13) 1926 Cal 773 (775): 53 Cal 679 (DB) * (Vol. 10) 1923 Oudh 153 (153) * (Vol. 12) 1925 Oudh 594 (594).

[But see (Vol. 21) 1934 All 971 (971)].

[2] The order is revisable if the Court has erroneously thought that it has no jurisdiction to deal with application. (Vol. 16) 1929 Sind 38 (39) (DB) * ('11) 1911 2 Mad W N 252 (253) * (Vol. 8) 1921 All 197 (198): 43 All 288 * (Vol. 7) 1920 All 160 (161): 42 All 317 (DB) * (Vol. 16) 1929 Cal 513 (513) * (Vol. 11) 1924 Lah 400 (400).

[2a] The Court has declined to hold a proper inquiry. (Vol. 15) 1928 Nag 279 (279) * (Vol. 16) 1929 Nag 305 (311) * (Vol. 1) 1914 Cal 854 (854) (DB) * (Vol. 12) 1925 Pat 323 (325) (DB).

[2b] The Court has rejected it under the erroneous view that the court-fee paid is not sufficient. ('07) 29 All 468 (470) * ('13) 21 Ind Cas 943 (944) (DB) (Cal).

[3] An order *granting* review is revisable under S. 115 when the order is one without jurisdiction or has been made in the exercise of jurisdiction illegally or with material irregularity. (Vol. 27) 1940 Mad 203 (205) * (Vol. 21) 1934 All 250 (252) * ('04) 27 Mad 602 (608) (DB) * (Vol. 14) 1927 Oudh 131 (131) (DB) * ('13) 17 Cal L Jour 416 (420) (DB) * ('74) 14 Beng L R 373 (382): 2 Ind App 53 (PC) * (Vol. 29) 1942 Oudh 210 (212): 18 Luck 48 * (Vol. 26) 1939 Lah 460 (461, 462) * (Vol. 13) 1926 All 50 (52): 48 All 160 (DB).

[4] But the High Court will not interfere in revision against an order granting a review simply because the judge did not say that the additional evidence is important. (Vol. 14) 1927 Mad 641 (642): 50 Mad 891 (DB).

[5] Where the order granting review was substantially just and passed in the exercise of discretion it is not a case for interference. (Vol. 11) 1924 Mad 586 (586) (DB) * (Vol. 2) 1915 Mad 1068 (1069) * ('12) 16 Ind Cas 995 (996): 1913 Pan Re. No. 11 (DB) * (Vol. 15) 1928 All 392 (394): 50 All 801 (DB) * (Vol. 12) 1925 Pat 452 (453).

[6] The High Court will not interfere with the order of an Appellate Court dismissing an appeal against the grant of review unless there is a want of jurisdiction or an illegality or material irregularity in passing such an

Registry of application granted, and order for re-hearing.

8. When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

[1882—S. 630; 1877—S. 630; 1859—S. 380.]

O. 47 R. 7 (*contd.*)

order. (Vol. 12) 1925 Oudh 223 (223, 224) * ('89) 11 All 383 (384, 385) (DB).

[7] Where the first Appellate Court allows an appeal against an order granting revision on the grounds other than those mentioned in this rule, it acts without jurisdiction and the order is liable to be set aside in revision. (Vol. 29) 1942 Oudh 210 (211): 18 Luck 48 * (Vol. 19) 1932 Nag 177 (179): 28 Nag L R 221 * (Vol. 13) 1926 Mad 1083 (1084) * ('13) 24 Mad L Jour 93 (95, 96) (DB) * ('99) 21 All 152 (154) (DB) * (Vol. 16) 1929 Rang 105 (106, 107): 7 Rang 187 * (Vol. 12) 1925 All 395 (396) * (Vol. 3) 1916 Mad 544 (544) (DB).

[8] Where a Court subordinate to the High Court rejected an application for review of judgment refusing to consider the grounds of the same the High Court could direct such Court to proceed according to law. ('78) 1 All 296 (297) (DB) * (Vol. 21) 1934 All 971 (971) * (Vol. 12) 1925 Cal 480 (481) (DB) * (Vol. 14) 1927 Rang 204 (205): 5 Rang 121 (DB) * (Vol. 23) 1936 Lah 301 (303).

ORDER 47 RULE 8—Note 1.

[1] There are three stages in the proceedings for review. An *ex parte* application and notice thereon. The hearing of the application after such notice. Re-hearing of the case after granting the application for review. (Vol. 10) 1923 Cal 113 (113, 114, 115) (DB) * (Vol. 19) 1932 Mad 689 (670): 55 Mad 871 * ('13) 20 Ind Cas 647 (648) (DB) (All) * ('05) 30 Bom 56 (60, 61) (DB) * ('11) 14 Cal L Jour 103 (104, 105) (DB) * ('10) 13 Oudh Cas 248 (249) (DB) * (Vol. 25) 1938 Mad 573 (574, 575) (DB).

[2] The Court ought to make a record of the fact that review has been granted. (1911) 14 Cal L Jour 103 (105) (DB) * (Vol. 17) 1930 All 815 (816) * ('30) 3 All 316 (320) (DB).

[See (Vol. 10) 1923 Oudh 93 (94, 95): 26 Oudh Cas 24 (DB).]

[3] The Court can after making a note in the register proceed to re-hear the case *at once* or may make such order as to re-hearing as it thinks fit. (Vol. 2) 1915 Mad 1068 (1069) * (Vol. 22) 1935 All 435 (436): 57 All 781.

[4] A Court, in granting a review, can make a qualified order as to the *extent* to which the review should be carried out. (67) 11 Moo Ind App 487 (499) (PC) * ('88) 10 Cal 108 (109) (SB) * (Vol. 14) 1927 Cal 21 (22): 53 Cal 856 (DB).

[5] Court is not bound to hear the whole case. ('82) 9 Cal 209 (211) (DB).

[6] Court is not restricted to the particular ground on which the application was granted. (Vol. 30) 1943 Mad 235 (236) * ('73) 10 Bom H C R 360 (361) (DB) * (Vol. 1) 1914 Cal 146 (148) (DB) * ('82) 12 Cal L Rep 64 (79) (SB).

[But see ('75) 24 Suth W R 427 (427) (DB) * ('64) 1864 Suth W R Gap 141 (142) (DB) * ('81) 5 Cal 86 (89) (FB).]

[7] Whether case should be re-tried in whole or in part depends on each case. (1912) 15 Cal L Jour 339 (348) (DB).

[8] On review application order dismissing appeal under O. 41 R. 11 set aside—Whole appeal may be heard. (Vol. 5) 1916 Cal 741 (743): 43 Cal 178 (DB).

[9] Grounds not mentioned in the memorandum of appeal cannot be heard. (Vol. 7) 1920 Cal 106 (106, 107) (DB) * ('70) 13 Suth W R 52 (55) (DB).

[But see ('71) 15 Suth W R 1 (5) (FB) * ('77) 1 Bom 543 (546) (DB).]

[10] Party raising a question in appeal and abandoning it in argument cannot be allowed to agitate the question again on review. ('78) 2 Mad 53 (60) (DB).

[11] The Court has a discretion to receive at the hearing after review, documents which had not been tendered at the original hearing. (Vol. 15) 1928 Cal 416 (416) (DB) * ('69) 12 Suth W R 223 (224) (DB).

[12] Party obtained review on ground that upon the record he was entitled to full relief he sought—Other side cannot be allowed to adduce evidence. ('73) 20 Suth W R 225 (225) (DB).

[13] Documents admitted as evidence whether so admissible or not—Point cannot be argued on review. ('75) 24 Suth W R 186 (187).

[14] Application for review *rejected*—Original decree stands. ('13) 20 Ind Cas 647 (648) (DB) (All) * ('05) 30 Bom 56 (60) (DB) * ('73) 20 Suth W R 450 (452) (PC) * (Vol. 25) 1938 Mad 573 (575) (DB).

[See also ('66) 6 Suth W R Misc 102 (103) (FB) * (Vol. 9) 1922 Oudh 148 (148): 24 Oudh Cas 280.]

[15] Application for review *granted*—Decree previously made is vacated. (Vol. 10) 1923 Cal 113 (115) (DB) * (Vol. 20) 1933 Mad 276 (277) (DB) * ('13) 20 Ind Cas 647 (648) (DB) (All) * (Vol. 16) 1929 Bom 183 (185) (DB).

[See also (Vol. 30) 1943 Mad 515 (517).]

[See however (Vol. 11) 1924 Bom 310 (310): 43 Bom 210 (DB).]

[16] Review granted—Appeal preferred against decree cannot, after the review be prosecuted further. (Vol. 25) 1938 Mad 307 (312) (DB) * ('05) 28 All 240 (241) (DB) * (Vol. 16) 1929 Bom 183 (184, 185) (DB) * (Vol. 4) 1917 Cal 29 (30): 44 Cal 1011 (DB) * (Vol. 13) 1926 Oudh 55 (56) * (Vol. 7) 1920 Lah 18 (18, 19): 1919 Pun Re. No. 166 * (Vol. 7) 1920 Lah 333 (333): 1919 Pun Re. No. 140 (DB) * (Vol. 6) 1919 Nag 78 (79, 80): 15 Nag L R 65 * (Vol. 18) 1931 Cal 323 (326) (DB) * ('12) 34 All 282 (283) (DB) * (Vol. 23) 1936 Mad 464 (465).

[See also (Vol. 23) 1936 Sind 53 (54): 29 Sind L R 445 (DB).]

[17] After hearing on review decree passed modifying or confirming original decree—*Decree* can be appealed against within the period prescribed for appeal. (Vol. 15) 1928 Cal 418 (419) * ('80) 6 Cal 22 (25) (DB).

[18] Order granting review—No leave to appeal to Privy Council can be granted. (Vol. 19) 1932 All 318 (318): 54 All 401 (DB).

Bar of certain applications.
entertained.

9. No application to review an order made on an application for a review or a decree or order passed or made on a review shall be

[1882—S. 629, last para; 1877—S. 629.]

PROVINCIAL AMENDMENTS.

RULE 10— ALLAHABAD

Add the following as Rule 10 :

" R. 10, Rule 38 of Order 41 shall apply, so far as may be, to proceedings under this Order."

BOMBAY

The following shall be added as Rule 10 :

Applicability of " R. 10, Rule 38 of Order 41, shall apply, so far as may be, to proceedings under this Rule 38 of Order 41. Order." [15-10-1930.]

UDH

Add the following as Rule 10 :

" R. 10, Rule 38 of Order 41 shall apply, so far as may be, to proceedings under this Order."

SIND

Add the following as Rule 10 :

Applicability of " R. 10, Rule 38 of Order 41 shall apply, so far as may be, to proceedings under this Rule 38 of Order 41. Order."

ORDER XLVIII.

MISCELLANEOUS.

Process to be served at expense of party issuing.

1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Cost of service.

(2) The Court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

[1882—S. 93; 1877—S. 93; 1861—S. 2.]

PROVINCIAL AMENDMENTS.

ALLAHABAD

Before the words "every process issued" prefix the words "Except as provided in Order 4 Rule 1 (2)."

CALCUTTA

Substitute for sub-rule (2), the following :

"(2) The court-fee chargeable for such service shall be paid when the process is applied for, or within such time, if any, as the Court may, when ordering its issue, fix for the purpose."

[17-1-1934.]

NAGPUR

Substitute the following for the words "the court-fee" occurring in sub-rule (2) :—

"Except as provided in Order 4 Rule 1 (2), the court-fee."

[29-6-1913.]

UDH

In Rule 1, before the words "Every process issued," prefix the words "Except as provided in Order 41 Rule 1 (2)."

Orders and notices how served.

2. All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

[1882—S. 94 c.f. S. 122]

ORDER 47 RULE 9—Note 1.

[1] A second review of the decree or order originally passed is barred under this rule as it is practically for the review of the order passed on review. ('89) 16 Cal 749 (752) : 16 Ind App 104 (PC) * ('11) 10 Ind Cas 679 (681) : 1911 Pun W R No. 25 (DB). (Practically overruled 1908 Pan W R No. 211.)

ORDER 48 RULE 1—Note 1.

[1] Party applying for process should pay expenses thereof—But Court can, under special circumstances direct any other party to bear them. ('98) 26 Cal 124 (126, 127) (DB).

[2] The words "unless the Court otherwise directs" should not be construed as giving the Court any power to remit the fees leviable under the Court-fees Act. ('98) 26 Cal 124 (126) (DB) * (Vol. 14) 1927 Pat 318 (318).

[3] Time fixed must be reasonable so as to enable litigant to obey order—Order to pay process at once is against the spirit of rule. (Vol. 11) 1924 Nag 271 (275) : 20 Nag L R 145.

[4] Notice required to be given under O. 45 R. 8 (b) is not process—Notice is not liable to any process fee under this rule. (Vol. 33) 1946 Bom 168 (168).

[5] Rule does not apply to filing of process forms in the manner provided by High Court Rules. (Vol. 8) 1921 Pat 428 (429) (DB).

ORDER 48 RULE 2—Note 1.

[1] Notice of order under O. 21 R. 46-A against firm—Service should be in accordance with O. 30 R. 3 and as directed by Court. (Vol. 30) 1943 Sind 188 (190) : I L R (1943) Kar 255.

Use of forms in appendices.
therein mentioned.

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes

[1882—S. 644; 1877—S. 644.]

PROVINCIAL AMENDMENTS.

CALCUTTA

Insert the following words *after* the word "appendices":

"or such other forms as may be prescribed by the High Court of Judicature at Fort William in Bengal,"
[18-4-1935.]

Rule 4—OUDH

The following is *added* as Rule 4:

"R. 4. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

ORDER XLIX.

CHARTERED HIGH COURTS.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, Who may serve processes of High Courts. issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

[1882—S. 636, See Ss. 116 to 120.]

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

[See S. 157.]

3. The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

(1) rule 10 and rule 11, clauses (b) and (c), of Order VII;

(2) rule 8 of Order X;

(3) rule 2 of Order XVI;

(4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII;

(5) rules 1 to 8 of Order XX; and

(6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum);

and rule 85 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

[Cf. 1882—S. 638; See Ss. 177 and 120.]

PROVINCIAL AMENDMENTS.

BOMBAY

(1) In Rule 3, the following clause shall be *inserted* as clause (1), namely:

"(1) Rule 21A of Order 5;"

(2) For the existing clause (1), the following shall be *substituted*, namely:

"(1a) Rule 10 and Rule 11, clauses (b) and (c), and Rules 19 to 26 of Order 7;"

ORDER 48 RULE 3—Note 1.

[1] It is fair to presume that the forms given in the appendices do not exceed that which is permissible. ('97) 24 Cal 766 (772).

ORDER 49 RULE 1—Note 1.

[1] Persons employed by attorneys are persons in their regular service and not persons engaged for a

special purpose. (Vol. 13) 1926 Cal 977 (978).

ORDER 49 RULE 4 (Calcutta).

[1] Order 49, Rule 4 (Calcutta) of the Code is not *ultra vires*.—Hence the judgment of a judge of High Court on leave or during his absence can be delivered by his colleague who sat with him on the Division Bench. (Vol. 29) 1942 Cal 498 (502) (SB).

(3) *Below* clause (1a), the following shall be *inserted*, namely :

" (1b) Rules 11 and 12 of Order 8 ; "

[15-10-1930]

(4) The word "and" immediately preceding paragraph (6) shall be *omitted* and the following paragraph shall be *inserted* between paragraphs (5) and (6), namely :

" (5a) Rule 72A of Order 21 ; and "

[16-1-1929.]

(5) *For* the word and figures " Rule 35 " occurring below item (6) of Rule 3, the words and figures " Rules 31 and 35 " shall be *substituted*.

[21-12-1927.]

(6) *Below* clause (6), the following shall be *inserted*, namely :

" (7) Rule 38 of Order 41."

Rule 4—BOMBAY

The following shall be *added* as Rule 4 :

" R. 4. Under Section 128, paragraph 2, clause (1) of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay ;

Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prescribed by the law for the time being in force relating to court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part, as the case may be, of such court-fees and may admit the appeal to the register even though the subsequent payment of court-fee may have been made after the time prescribed for presentation of the appeal."

[9-9-1910.]

CALCUTTA

Add the following as new Rule 4 :

R. 4. A Judge of the High Court may pronounce the written judgment or opinion of any other Judge of the said Court signed by him when such Judge continues to be a Judge of such Court but is prevented by absence or any other reason from pronouncing that judgment or opinion in open Court."

[8-8-1940.]

ORDER L.

PROVINCIAL SMALL CAUSE COURTS

1. The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, ^a[or under the Berar Small Cause Courts Law, 1905] or to Courts exercising the jurisdiction of a Court of Small Causes ^b[under the said Act or Law] that is to say—

(a) so much of this schedule as relates to :—

(i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits ;

(ii) the execution of decrees against immoveable property or the interest of a partner in partnership property ;

(iii) the settlement of issues ; and

(b) the following rules and orders.—

Order II, rule 1 (frame of suit) ;

Order X, rule 3, (record of examination of parties) ;

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment ;

Order XVIII. rules 5 to 12 (evidence) ;

Orders XLI to XLV (appeals) ;

Order XLVII, rules 2, 3, 5, 6, 7 (review) ;

Order LI.

[See S.—7 and O. 20 R. 4.]

[a] These words were *inserted* by Berar Laws Act, 1941 (4 [IV] of 1941), Section 2 and Schedule II.

[b] *Substituted. ibid.*, for " under that Act."

ORDER L I.

PRESIDENCY SMALL CAUSE COURTS.

1. Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and Presidency Small Cause rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

PROVINCIAL AMENDMENTS.

**ORDER 52—
ALLAHABAD**

Add the following as Order 52 Rule 1 :

"ORDER LII

R. 1. Rule 38 Order 41 shall apply, so far as may be, to proceedings under Section 115 of the Code."

BOMBAY

The following shall be added as Order 52 :

"ORDER LII*Applicability of Rule
38 of Order 41 to proce-
dings under Section 115.*

R. 1. Rule 38 of Order 41 shall apply, so far as may be, to proceedings under Section 115 of the Code."

[15-10-1930.]

PODH

After Order 51 add the following as Order 52 :

"ORDER LII

Rule 38 of Order 41 shall apply, so far as may be, to proceedings under section 115 of the Code."

SIND

Add the following as Order 52 :

"ORDER LII*Applicability of Rule
38 of Order 41 to proce-
dings under Section 115.*

R. 1. Rule 38 of Order 41 shall apply, so far as may be, to proceedings under Section 115 of the Code."

APPENDIX A.**PLEADINGS.****(1) TITLES OF SUITS.****IN THE COURT OF**

A. B. (add description and residence)	Plaintiff.
against					
C. D. (add description and residence)	..	..	..	..	Defendant.

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES.*[The Secretary of State or the Federation of India or the Province of, as the case may be.]*

The advocate General of

The Collector of

The State of

The A, B, Company, Limited, having its registered office at

A. B., a public officer of the C.D. Company.

A. B. (add description and residence), on behalf of himself and all other creditors of C. D. late of (add description and residence).

A. B. (add description and residence), on behalf of himself and all other holders of debentures issued by the Company, Limited.

The Official Receiver.

A. B., a minor (add description and residence), by C. D. [or by the Courts of Wards], his next friend.

A. B. (add description and residence), a person of unsound mind [or of weak mind], by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (add description and residence), by his constituted attorney C. D. (add description and residence).

A. B. (add description and residence), Shebait of Thakur.

A. B. (add description and residence), executor of C. D., deceased.

A. B. (add description and residence), heir of C. D., deceased.

[a] Substituted by A.O. for "The Secretary of State for India in Council."

(3) PLAINTS.

No. 1.

MONEY LENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , he lent the defendant rupees repayable on the day of .
2. The defendant has not paid the same, except rupees paid on the day of 19 .

[If the plaintiff claims exemption from any law of limitation, say:—]

3. The plaintiff was a minor [or insane] from the day of till the day of .

4. [Facts showing when the cause of action arose and that Court has jurisdiction.]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of court-fees is rupees.

6. The plaintiff claims rupees, with interest at per cent, from the day of 19 .

No. 2.

MONEY OVERPAID.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the defendant for such assay, and E. F., declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which facts the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

[As in paras. 4 and 5 of Form No. I, and Relief claimed.]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , E. F., sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].

2. The defendant promised to pay rupees for the said goods on delivery [or on the day of , some day before the plaint was filed].

3. He has not paid the same.

4. E. F., died on the day of 19 . By his last will he appointed his brother, the plaintiff, his executor.

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff as executor of E. F. claims [Relief claimed],

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. I, and Relief claimed.]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 , E. F. agreed with the plaintiff that the plaintiff should make for him *[six tables and fifty chairs]* and that E. F. should pay for the goods on delivery _____ rupees.
2. The plaintiff made the goods, and on the _____ day of _____ 19 offered to deliver them to E. F., and has ever since been ready and willing so to do.
3. E. F. has not accepted the goods or paid for them.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 , the plaintiff put up at auction sundry *[goods]*, subject to the condition that all goods not paid for and removed by the purchaser within *[ten days]* after the sale should be re-sold by auction on his account, of which condition the defendant had notice.
2. The defendant purchased *[one crate of crockery]* at the auction at the price of _____ rupees.
3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for *[ten days]* after.
4. The defendant did not take away the goods purchased by him, nor pay for them within *[ten days]* after the sale, nor afterwards.
5. On the _____ day of _____ 19 , the plaintiff re-sold the *[crate of crockery]*, on account of the defendant, by public auction, for _____ rupees.
6. The expenses attendant upon such re-sale amounted to _____ rupees.
7. The defendant has not paid the deficiency thus arising, amounting to _____ rupees.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 7.

SERVICES AT A REASONABLE RATE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Between the _____ day of _____ 19 , and the _____ day of _____ 19 , at _____ , plaintiff *[executed sundry drawings, designs and diagrams]* for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.
2. The services were reasonably worth _____ rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 , at _____ , the plaintiff built a house [known as No. _____] in _____ , and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.
2. The work done and materials supplied were reasonably worth _____ rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 9.

USE AND OCCUPATION.

(Title.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased, states as follows:—

1' That the defendant occupied the [house No. _____, Street], by permission of the said X. Y., from the _____ day of _____ 19, until the _____ day of _____ 19, and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth _____ rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff as executor of X. Y. claims [Relief claimed.]

No. 10.

ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19, the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G. H., and the original document is annexed hereto.

2. On the _____ day of _____ 19, the arbitrators awarded that the defendant should [pay the plaintiff _____ rupees].

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19, at _____, in the State [or Kingdom] of _____, the _____ Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff _____ rupees, with interest from the said date.

2. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19, E. F. hired from the plaintiff for the term of _____ years, the [house No. _____, Street], at the annual rent of _____ rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to E. F., to guarantee the punctual payment of the rent.

3. The rent for the month of _____ 19, amounting to _____ rupees has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety add :—]

— 4. On the _____ day of _____ 19, the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[or, on the _____ day of _____ 19, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of _____ for _____ rupees.]

2. On the _____ day of _____ 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant]; tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

PROVINCIAL AMENDMENT.

CALCUTTA

Cancel the words "bighas" and substitute therefor the words "acres"
"bighas"

No. 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A, B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the _____ day of _____ 19 , and that the plaintiff should pay therefor _____ rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 15.

WRONGFUL DISMISSAL.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 . the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services _____ rupees [monthly].

2. On the _____ day of _____ 19 , the plaintiff entered upon the services of the defendant and has ever since, been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the _____ day of _____ 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16.

BREACH OF CONTRACT TO SERVE.

(Title.)

A, B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of _____ rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the _____ day of _____ 19 , offered so to do.]

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the _____ day of _____ 19 , he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [Or state the tenor of the contract.]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner.]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff took E. F. into his employment as a clerk.

2. In consideration thereof, on the _____ day of _____ 19____, the defendant agreed with the plaintiff that if E. F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding _____ rupees.

[Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of _____ rupees, subject to the condition that if E. F. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[Or, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the _____ day of _____ 19____, and the _____ day of _____ 19____, E. F., received money and other property, amounting to the value of _____ rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the defendant, by a registered instrument, let to the plaintiff [the house No. _____ Street] for the term of _____ years, contracting with the plaintiff that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the _____ day of _____ 19____, during the said term, E. F., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend _____ rupees in moving, and lost the custom of G. H., and I. J., by such removal.]

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant, being partners in trade under the style of A. B. and C. D., dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the _____ day of _____ 19____, [a judgment was recovered against the plaintiff and defendant by E. F., in the High Court of Judicature at _____, upon a debt due from the firm to E. F., and on the _____ day of _____ 19____] the plaintiff paid _____ rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 21.

PROCURING PROPERTY BY FRAUD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth _____ rupees over all his liabilities].
2. The plaintiff was thereby induced to sell [and deliver] to the defendant, [dry goods] of the value of _____ rupees.
3. The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so.
4. The defendant has not paid for the goods. [Or, if the goods were not delivered.] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended _____ rupees

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, the defendant represented to the plaintiff that E. F., was solvent and in good credit, and worth _____ rupees over all his liabilities [or that E. F., then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit]
2. The plaintiff was thereby induced to sell to E. F. [rice] of the value of _____ rupees [on _____ months credit].
3. The said representations were false and were then known by the defendants to be so, and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].
4. E. F. [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 23.

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was possessed of certain land called _____ and situate in _____ and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.
2. On the _____ day of _____ 19____, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.
3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called _____, situated in _____
2. Ever since the _____ day of _____ 19____, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.
3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A. B., the above-named plaintiff, states as follows :

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of _____].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house for himself and his servants [with vehicles, or on foot] at all times of the years.

3. On the _____ day of _____ 19, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, or on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (State special damage if any).

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 26.

OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 27.

DIVERTING A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the _____ day of _____ 19, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is and was at the time herein after mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the _____ day of _____ 19, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[As in paras. 4 and 5 of Forms No. 1, and Relief claimed.]

No. 29.

[INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19, the defendants were common carriers of passengers by railway between _____ and _____

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [or near the station of
or between the stations of and], a collision occurred on the said railway caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage, if any, as], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[As in paras. 4 and 5 of Forms No. 1, and Relief claimed.]

[Or thus :—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., as in para 3.]

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at
The defendant is a merchant of

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling, the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 31.

FOR MALICIOUS PROSECUTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant obtained a warrant of arrest from

[a Magistrate of the said city, or as the case may be] on a charge of
, and the plaintiff was arrested thereon, and imprisoned for
[days. or hours, and gave bail in the sum of
rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 . the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him ; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F. ; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 32.

MOVABLES WRONGFULLY DETAINED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods], the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the _____ day of 19____, the plaintiff demanded the same from the defendant, but he refused to deliver them.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) delivery of the said goods, or _____ rupees in case delivery cannot be had ;
- (2) _____ rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(Title.)

4. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the defendant C. D., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth _____ rupees over all his liabilities].

2. The plaintiff was hereby induced to sell and deliver to C. D. [one hundred boxes of tea], the estimated value of which is _____ rupees.

3. The said representations were false, and were then known by C. D. to be so [or at the time of making the said representations, C. D. was insolvent, and knew himself to be so].

4. C. D. afterwards transferred the said goods to the defendant E. F. without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) delivery of the said goods, or _____ rupees, in case delivery cannot be had ;
- (2) _____ rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

4. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situate at _____ contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of _____ rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the _____ day of _____ 19____, the plaintiff paid the defendant _____ rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) _____ rupees, with interest from the _____ day of _____ 19____ ;
- (2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(Title.)

4. B., the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [describe the property.]

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed.]

No. 86.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No. , Street, Calcutta].
2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street].
3. On the day of 19 , the defendant erected upon his said plot a slaughter house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff.]
4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate General [or of the Collector or other officer appointed in this behalf] to the institution of this suit.

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

- (1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road ;
- (2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stone wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather which was executed by an eminent painter], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money.]

2. On the day of 19 , he deposited the same for safe keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

- (1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting] ;
- (2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff [*describe the property*] for [safe keeping].
2. The defendant C. D. claims the same [under an alleged assignment thereof to him from G. H.]
3. The defendant E. F. also claims the same [under an order of G. H. transferring the same to him].
4. The plaintiff is ignorant of the respective rights of the defendants.
5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.
6. The suit is not brought by collusion with either of the defendants.

[*As in paras. 4 and 5 of Form No. 1.*]

9. The plaintiff claims—

- (1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;
- (2) that they be required to interplead together concerning their claims to the said property ;
- [(3) that some person be authorized to receive the said property pending such litigation ;]
- (4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND
ALL OTHER CREDITORS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. E. F., late of _____, was at the time of his death, and his estate still is indebted to the plaintiff in the sum of _____, [*here insert nature of debt and security, if any*].
2. E. F., died on or about the _____ day of _____ . By his last will, dated the _____ day of _____ he appointed C. D. his executor [*or devised his estate in trust, etc., or died intestate, as the case may be*].
3. The will was proved by C. D. [*or letters of administration were granted, etc.*].
4. The defendant has possessed himself of the movable [and immovable, or the proceeds of the immovable] property of E. F., and has not paid the plaintiff his debt.

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff claims that an account may be taken of the movable [and immovable] property of E. F., deceased, and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

[*Alter Form No. 41 thus*].—

- [*Omit paragraph 1 and commence paragraph 2*] E. F., late of _____, died on or about the _____ day of _____ . By his last will, dated the _____ day of _____ he appointed C. D. his executor, and bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4 substitute—

The defendant is in possession of the movable property of E. F., and, amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

_(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] E. F., late of
died on or about the day of
will, dated the day of he appointed C. D. his executor, and
bequeathed to the plaintiff a legacy of rupees.
In paragraph 4 substitute "legacy" for "debt."

Another form.

(Title.)

E. F., the above-named plaintiff states as follows:—

1. *A. B* of *K.* in the _____ died on the _____ day of _____ .
By his last will, dated the _____ day of _____ , he
appointed the defendant and *M. N.* [who died in the testator's lifetime] his executors, and bequeathed his
property, whether movable or immovable, to his executors in-trust, to pay the rents and income thereof to the
plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a
daughter who should attain that age or marry, upon trust as to his immovable property for the person who
would be the testator's heir-at-law, and as to his movable property for the persons who would be the testator's
next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as
aforesaid.

2. The will was proved by the defendant on the _____ day of _____, 19____. The plaintiff has not been married.

3. The testator was at his death entitled to movable and immovable property; the defendant entered into the receipt of the rents of the immovable property and got in the movable property; he has sold some part of the immovable property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims —

(1) to have the movable and immovable property of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken ;

(2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of _____ made upon the marriage *E. F.* and *G. H.*, the father and mother of the defendant [*or* an instrument of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*].

2. A. B., has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the movable and immovable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, or of part of the said, immovable property, or movable, or the proceeds of the sale of, or of part of, the said movable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.*, and such other persons so interested as the Court may direct, or that *C. D.*, may show good cause to the contrary.

[*N.B.*—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.]

No. 45.

FORECLOSURE OR SALE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :—

(a) (date);

(b) (names of mortgagor and mortgagee);

(c) (sum secured) ;

- (d) (rate of interest);
- (e) (property subject to mortgage);
- (f) (amount now due);
- (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add)

8. The plaintiff took possession of the mortgaged property on the _____ day of _____ and is ready to account as mortgagee in possession from that time.
[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) payment, or in default [sale or] foreclosure [and possession];
[Where Order 34, Rule 6, applies.]
- (2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

- 1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.
- 2. The following are the particulars of the mortgage:—

- (a) (date);
- (b) (names of mortgagor and mortgagee);
- (c) (sum secured);
- (d) (rate of interest);
- (e) (property subject to mortgage);
- (f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add)

- 3. The defendant has taken possession (or has received the rents) of the mortgaged property.
[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof].

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part, of which the defendant has had notice.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer. [Or the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer.
 5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

- (1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement] ;
 (2) rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and C. D., the defendant, have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles :—

- (1)
 (2)
 (3)]

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

- (1) dissolution of the partnership ;
 (2) that accounts be taken ;
 (3) that a receiver be appointed.

(N.B.—In suits for the winding-up of any partnership, omit the claim for dissolution ; and instead insert a paragraph stating the facts of the partnership having been dissolved.)

(4) WRITTEN STATEMENTS.

General defences.

Denial.

The defendant denies that (set out facts).

The defendant does not admit that (set out facts).

The defendant admits that _____ but says that _____

Protest.

The defendant denies that he is a partner in the defendant firm of _____

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation.

The suit is barred by article _____ or article of the second schedule to the Indian Limitation Act, 1877*.

Jurisdiction.

The Court has no jurisdiction to hear the suit on the ground that (set forth the grounds).

On the _____ day of _____ a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency.

The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority.

The defendant was a minor at the time of making the alleged contract.

Payment into Court.

The defendant, as to the whole claim (or as to Rs. _____ part of the money claimed, or as the case may be) has paid into Court Rs. _____ and says that this sum is enough to satisfy the plaintiff's claim [or the part aforesaid].

Performance remitted.

The performance of the promise alleged was remitted on the _____ (date).

Rescission.

The contract was rescinded by agreement between the plaintiff and defendant.

Res judicata.

The plaintiff's claim is barred by the decree in suit (give the reference).

Estoppel.

The plaintiff is estopped from denying the truth of (insert statements as to which estoppel is claimed) because (here state the facts relied on as creating the estoppel).

Ground of defence subsequent to institution of suit.

Since the institution of suit, that is to say, on the _____

day of _____

(set out facts).

[a] See now the Indian Limitation Act, 1908 [9 [IX] of 1908].

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

[or]

4. }
5. } Except as to Rs.
6. }

, same as {
1.
2.
3.

7. The defendant [or A. B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

1907, January, 25	...	...	...	...	...	Rs. 150
" February, 1st	...	...	...	...	...	50
					Total ...	200

2. As to the whole [or as to Rs. the defendant made tender before suit of Rs. Court.

, part of the money claimed] and has paid the same into

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said
2. The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.
3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.
4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [or matters] complained of.

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.

2. The goods were detained for a lien to which the defendant was entitled. Particulars are as follows:—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta :—
45 maunds at Rs. 2 per maund

Rs. 90

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author [*assignee, etc.*].
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [*or deny his other alleged prescriptive rights.*]
2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.
3. The defendant denies that he or his servants pollute the water [*or do what is complained of.*]

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so and must state the grounds of the claim, i.e., whether by prescription, grant or what.*]

4. The plaintiff has been guilty of latches of which the following are particulars:—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to past damage.*]

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff [*if more than one transfer is alleged, say which is denied.*]
3. The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

4. The following payments have been made, viz:—

(Insert date)———, Rs.

1,000

(Insert date)———, Rs.

500

5. The plaintiff took possession on the _____ of _____, and has received the rents ever since.

6. That plaintiff released the debt on the _____ of _____

7. The defendant transferred all his interest to A, B, by a document, dated [a] See now the Indian Limitation Act, 1908 (9 [IX] of 1908).

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877.

2. The plaintiff transferred all interest in the property to A, B.

3. The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage debt and property comprised in the mortgage to A, B.

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

[*If the defendant admits possession for a time only, he should state the time and deny possession beyond what he admits.*]

[a] See now the Indian Limitation Act, 1908 (9 [IX] of 1908).

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A. B. was not the agent of the defendant (*if alleged by plaintiff*).
3. The plaintiff has not performed the following condition—(*conditions*).
4. The defendant did not—(*alleged acts of part performance*).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(*state, why*).
6. The agreement is uncertain in the following respects—(*State them*).
7. (*or*) The plaintiff has been guilty of delay.
8. (*or*) The plaintiff has been guilty of fraud (*or misrepresentation*).
9. (*or*) The agreement is unfair.
10. (*or*) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) (*or as the case may be*).
12. The agreement was rescinded under Conditions of Sale, No. 11 (*or by mutual agreement*).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever ground of defence he intends to rely on e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.*)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. and the testator had some movable property which the defendant got in, and which produced the net sum of Rs.
2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.
3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.
4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [*or of the Hindu Wills Act, 1870*].^a
2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [*and others acting with him whose names are at present unknown to the defendant*].
4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being [*state the nature of the fraud*].
5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or of the contents of the residuary clause in the said will, as the case may be*].
6. The deceased made his true last will, dated the 1st January, 1878, and thereby appointed the defendant sole executor thereof.

The defendant claims—

- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff;
- (2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1878, in solemn form of law.

[^a] See now the Indian Succession Act, 1925 (39 [XXXIX] of 1925).

No. 16.

PARTICULARS. (O. 6, r. 5.)

(*Title of suit.*)

The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the
Particulars. of
 (*Here set out the particulars ordered in paragraphs if necessary.*)

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS _____ has instituted a suit against you for _____ you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the _____ day of _____ 19____, at _____ o'clock in the _____ noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

Notice.—1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

PROVINCIAL AMENDMENTS.

BOMBAY

The following note shall be inserted in red ink in Forms Nos. 1, 2, 3, 5 and 6 :—

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out." [15-10-1930.]

CALCUTTA

Insert the following Form and number it as 1A :—

"No. 1A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT
WILL BE CONTESTED. (O. 5, rr. 1 and 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS _____ has instituted a suit against you for _____ you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit on the _____ day of _____ 19____, at _____ o'clock in the _____ noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part, directions may be given to you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to rely.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Seal.

Judge.

Notice.—If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit, to avoid execution of any decree which may be passed against your person or property, or both." [25-8-1927.]

MADRAS

(i) Insert the following "Note":—

"Note.—Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out." [Dis. No. 369 (E) of 1916.]

(ii) After Form 1, insert the following as Form No. 1A :—

"No. 1A.

**SUMMONS FOR ASCERTAINING WHEATHER A SUIT IS CONTESTED OR NOT,
AND IF NOT CONTESTED FOR ITS IMMEDIATE DISPOSAL.**

(O. 5. rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit (or who shall be accompanied by some person able to answer all such questions) on the day of 19, at o'clock in the noon and to state whether you contest or do not contest the claim and, if you contest, to receive directions of Court as to the date on which you have to file the written statement, the date of trial and other matters.

Take notice that in the event of the claim not being contested the suit shall be decided at once.

Take further notice that in default of your appearance on the day and hour before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .
Seal.

Judge.

Notice.—If you admit the claim you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both."

[P. Dis. No. 7 of 1927.]

SIND

Insert the following note in red ink in Forms Nos. 1, 2, 3, 5 and 6:—

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out."

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions on the day of 19, at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

Notice.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

PROVINCIAL AMENDMENTS.

BOMBAY

See the Local Amendment of Bombay for Form No. 1, Appendix B.

SIND

See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, r. 3.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for

you are hereby

summoned to appear in this Court in person on the _____ day of _____, 19____, at _____ o'clock in the _____ noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____, 19____.

Judge.

PROVINCIAL AMENDMENTS.

BOMBAY

See the Local Amendment of Bombay for Form No. 1, Appendix B.

SIND

See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

(O. 37, r. 2.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS _____ has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. _____, balance of principal and interest due to him as the _____ of a _____, of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. _____ and the sum of Rs. _____ for costs [together with such interest, if any, from the date of the institution of the suit as the Court may order].

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this _____ day of _____, 19____.

Judge.

[a] Inserted by the Negotiable Instruments (Interest) Act, 1926 (30 [XXX] of 1926), s. 4.

PROVINCIAL AMENDMENT.

BOMBAY

(i). Substitute the following as Form 4 :—

"No. 4.

SUMMONS IN SUMMARY SUIT.

(O. 37, r. 2.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS _____ has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for (possession of _____ and for Rs. _____ for _____ and interest, or as the case may be) you are hereby summoned within ten days from the service hereof to cause an appearance to be entered for you, in default whereof the plaintiff will be entitled after the expiration of such ten days to obtain a decree for possession and for as the case may be for any sum not exceeding the sum of Rs. _____ and the sum of Rs. _____ for costs together with such interest, if any, as the Court may order.

If you cause an appearance to be entered for you, the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to ask the Court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the Court by affidavit or otherwise that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to defend.

Given under my hand and the seal of the Court, this _____ day of _____, 19____.

Judge."

(ii). Insert the following as Form 4A :—

"No. 4A.
SUMMONS FOR JUDGMENT IN SUMMARY SUIT,
[O. 37, r. 3 (1)]

In the Court.
Suit No. of 19 .

versus

Plaintiff;

Defendant.

Upon reading the affidavit of (the plaintiff or as may be).

Let all parties concerned attend the (Judge or Subordinate Judge, as may be) on

day of 19 . at o'clock
in the noon on the hearing of an application on the part of the plaintiff that he be at liberty to sign
judgment in this suit against the defendant (or if against one or some of several insert names) for (possession
and/or for Rs. for and interest, or as the case
may be) and costs.

Dated the day of 19 .

This summons was taken out by of

Pleader for

To

. "[29-9-1936.]

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD
BE ADDED AS CO-PLAINTIFF.

(O. 1, r. 10.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

for has instituted the above suit against
that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to
adjudicate upon and settle all the questions involved : and whereas it appears necessary

Take notice that you should on or before the day of 19 ,
signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this

19 .

day of

Judge.

PROVINCIAL AMENDMENTS.

BOMBAY

See the Local Amendment of Bombay for Form No. 1, Appendix B.

SIND

See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT.

(O. 22, r. 4.)

(Title.)

To

WHEREAS the plaintiff day of 19 , instituted a suit in this Court on the
day of 19 , against the defendant

who has since deceased, and whereas the said plaintiff has made
an application to this Court alleging that you are the legal representative of the said
, deceased, and desiring that you be made the defendant in his
stead :

You are hereby summoned to attend in this Court on the day of
19 , at A.M. to defend the said suit

and in default of your appearance on the day specified, the said suit will be heard and determined in your
absence.

GIVEN under my hand and the seal of the Court, this

19 .

day of

Judge.

PROVINCIAL AMENDMENTS.

BOMBAY

See the Local Amendment of Bombay for Form No. 1, Appendix B.

SIND

See the Local Amendment of Sind for Form No. 1, Appendix B.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION
OF ANOTHER COURT (O. 5, r. 21.)

(Title.)

WHEREAS it is stated that
 in the above suit is at present residing in
 that a summons returnable on the _____ day of _____ 19 ,
 to the _____ Court of _____ for service on the said _____
 with a duplicate of this proceeding.
 The court-fee of _____ chargeable in respect to the summons has been
 realized in this Court in stamps.
 Dated _____ 19 .

defendant

witness

: It is ordered

19 , be forwarded

defendant

witness

PROVINCIAL AMENDMENT.

Judge.

ALLAHABAD

Form No. 7.—An order for transmission of summons for service in the jurisdiction of another Court
 (O. 5 R. 21) is cancelled.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER.

(O. 5, r. 24.)

(Title.)

To _____
 The Superintendent of the Jail at _____
 Under the provision of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in
 duplicate is herewith forwarded for service on the defendant
 who is _____ a prisoner in Jail. You are requested to cause a copy
 of the said summons to be served upon the said defendant and to return the original to this Court signed by the
 said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC
SERVANT OR SOLDIER. (O. 5, rr. 27, 28.)

(Title.)

To _____
 Under the provisions of Order V, rule 27 (or 28 as the case may be), of the Code of Civil Procedure, 1908,
 a summons in duplicate is herewith forwarded for service on the defendant
 who is stated to be serving under you. You are requested to cause a copy of the said summons to be served
 upon the said defendant and to return the original to this Court signed by the said defendant, with a
 statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURNS TO SUMMONS OF ANOTHER COURT. (O. 5, r. 23.)

(Title.)

Read proceeding from the _____ forwarding _____ for
 service on _____ in suit No. _____
 of 19 , _____ of that Court.
 Read Serving Officer's endorsement stating that the _____ and proof of
 the above having been duly taken by me on the oath of _____ and
 it is ordered that the _____
 be returned to the _____ with a copy of this
 proceeding.

Judge.

Note.—This form will be applicable to process other than summons, the service of which may have to be
 effected in the same manner.

PROVINCIAL AMENDMENTS.

ALLAHABAD

Form No. 10.—A form to accompany return of summons of another Court (O. 5, R. 23) is *cancelled*.

BOMBAY

Form No. 10 shall be *amended* to read as follows :—

“No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT. (O. 5. r. 23.)

Read proceeding from the (Title) forwarding for service on
in suit No. of 19 , of that Court.
Read Serving Officer's endorsement stating that the and proof of the above
having been duly taken by me on the oath of and
it is ordered that the be returned
to the with this proceeding.
I hereby declare that the said summons on has been duly
served. Judge.

Note.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner.” [9-9-1919.]

CALCUTTA

Insert the words “(or proof of the above having been duly made by the declaration of)” *after* the words “proof of the above having been duly taken by me on the oath of .” [25-7-1928.]

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN
OF A SUMMONS OR NOTICE. (O. 5, r. 13.)

(Title.)

The affidavit of , son of

I

make oath
affirm

and say as follows :—

(1) I am a process-server of this Court.

(2) On the day of 19 , I received a summons issued by the Court of notice in suit No. of 19 , in the said Court dated the day of 19 , for service on

(3) The said summons on him was at the time personally known to me, and I served the said notice on her on the day of 19 , at about o'clock in the noon at

by tendering a copy thereof to him and her

requiring his signature to the original summons her signature to the original notice.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

or

(3) The said

not being personally known to me accompanied me to

and pointed out to me a person whom he stated to be the said

, and I served the said

summons him
on the
notice her

day of

19 , at about

o'clock in the

noon at

by

tendering a copy thereof to him and requiring his signature to the original summons.
her her notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

or,

(3) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the day of 19 . at about

o'clock in the

noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(b) Signature of process-server.

or,

(3) One accompanied me to and there pointed out to me which he said was the house in which ordinarily resides. I did not find the said there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(b) Signature of process-server.

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn

by the said

before me this

Affirmed

day of

19 .

Empowered under Section 139 of the Code of Civil Procedure, 1908, to administer the oath to deponents.

PROVINCIAL AMENDMENTS.

CALCUTTA

Substitute the following for the existing form No. 11 :—

“No. 11.

DECLARATION OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O. 5, R. 18.)

(Title.)

I,

, a process-server of this Court, declare :—(1) On the day of 19 , I received a

summons issued by the Court of
notice

in suit No.

of 19 , in the

said Court, dated

day of

19 , for service on .

(2) The said

was at the time personally known to me and I served the said

summons him
on the
notice her

day of

19 , at about

o'clock

in the

noon at

by tendering a copy thereof to him
her

and requiring his signature to the original summons
her notice.

(a)
(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

(2) The said _____, or, _____, not being personally known to me _____, and I served the said _____ summons _____ him _____, said _____ on _____ on the _____ day of _____ 19 _____, at about _____ notice _____ her _____

o'clock in the _____ noon at _____ by tendering a copy
 him _____ his _____ summons.
 thereof to—and requiring _____signature to the original_____.
 her _____ her _____ notice

(a)
(b)

(2) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

(2) The said _____, or, _____, and the house in which he ordinarily resides being personally known to me, I went to the said house, in _____ and there on the _____ day of _____ 19____, at about _____ o'clock in the _____ noon, I did not find the said _____.

(a)
(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, Rules 15 and 17.

(b) Signature of process-server.

(2) One _____ at _____ or, _____ pointed out to me _____ which he said was the house in which _____ ordinarily resides. I did not find the said _____ there.

(a)
(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, Rules 15 and 17.

(b) Signature of process-server.

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service."

[25-7-1928.]

LAHORE

Substitute the following form as amended:—

"No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS
OR NOTICE. (O. 5, R. 18.)

(Title.)

The affidavit of
make oath
_____and say as follows:—
affirm

(1) I am a process-server of this Court.

(2) On the _____ day of _____ 19____ I received a
summons _____ issued by the Court of _____ in suit No. _____
notice _____

of 19 , in the said Court, dated the day of
19 , for service on :

(3) The said summons him said _____ on _____ on the _____ day of _____ 19 _____ at about _____ notice her _____ o'clock in the _____ noon at _____ by tendering _____

by tendering

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this 19 .

day of

Judge.

PROVINCIAL AMENDMENT.

MADRAS

[24-11-1921]

Insert the following as Form No. 12A:—

“No. 12A.

NOTICE TO THE PROPOSED GUARDIAN OF A MINOR DEFENDANT (O. 32, rr. 3 and 4.)
RESPONDENT
(Title.)

To

[Name, description and place of residence of proposed guardian.]

plaintiff
Take notice that X in
appellant

has presented a petition to the Court praying

that you be appointed guardian *ad litem* to the minor defendant(s), and that
the same will be heard on the respondent(s) day of 19 .

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said defendant(s) you are required to sign (or affix your
respondent(s) mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in manner indicated above, take further notice that the Court may proceed under O. 32 R. 4, Code of Civil Procedure, to appoint some other suitable person or defendant(s) one of its officers as guardian *ad litem* of the minor respondent(s) aforesaid.

Dated the

day of

19 .

(Signed)

(To be printed on the reverse.)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the defendant(s) minor respondent(s) therein mentioned.

(Signed) Y. Z.”

Witnesses :

- 1.
- 2.

No. 13.

SUMMONS TO WITNESS. (O. 16, rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to

on behalf of the

in the above suit, you are hereby required [personally] to
appear before this Court on the day of 19 , at
o'clock in the forenoon, and to bring with you [or to send to this
Court].

A sum of Rs. , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this

day of

19 .

Judge.

Notice.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

PROVINCIAL AMENDMENT.

MADRAS

(i) *Add* the following to Notice (1) in the above form :—

"If the document you are summoned to produce is an entry in a letter-book, or a shop-book, or other account in current use, and you are desirous of receiving back the document, you may furnish along with the document a copy of the entry." [P. Dis. No. 669 of 1938]

(ii) *Insert* the following as Form No. 13A :—

"No. 13A.

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED
AS A WITNESS IN A SUIT TO WHICH THE CROWN IS A PARTY.

(O. 16, r. 4A)

(Cause title.)

This is to certify that
Government servant from the province of _____ (name) _____ (designation) being a
his official capacity on behalf of the _____ (name) was summoned to give evidence in
plaintiff _____ in the above _____ and was in attendance in this Court from the _____ day of
defendant _____ to the _____ day of

19 (inclusive) and that a sum of Rupees _____ has been paid into Court by the
plaintiff _____ towards his travelling and subsistence allowance for _____ days according to
defendant _____

the scale prescribed by the Government of the province of _____ has been _____ (name) and that the said amount
has been _____ remitted to the Government treasury at _____ will be

Miscellaneous Fees and Fines'

Dated the _____

to be credited to Government under the head 'XXI-D—

day of _____ 19 .
Presiding Judge or Chief Ministerial Officer." [2-3-1942.]

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16. r. 10.)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law; and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the _____ day of _____ 19 _____ at _____ o'clock in the forenoon and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, r. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the _____ day of _____ 19 _____ at _____ o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge.

No. 16.
WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS.
(O. 16, r. 10.)
(Title.)

To The Bailiff of the Court.
WHEREAS the witness _____ has not, after the expiration of the period limited in the proclamation issued for his attendance, appeared in Court; You are hereby directed to hold under attachment property belonging to the said witness to the value of _____ and to submit a return, accompanied with an inventory thereof, within _____ days.
Given under my hand and the seal of the Court, this _____ day of 19 .
Judge.

No 17.
WARRANT OF ARREST OF WITNESS. (O. 16, r. 10.)
(Title.)

To The Bailiff of the Court.
WHEREAS _____ has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons]; You are hereby ordered to arrest and bring the said _____ before the Court.
You are further ordered to return this warrant on or before the _____ day of 19 _____ with an endorsement certifying the day on and the manner in which it has been executed, or the reason why it has not been executed.
GIVEN under my hand and the seal of the Court, this _____ day of 19 .
Judge.

No 18
WARRANT OF COMMITTAL. (O. 16, r. 16.)
(Title.)

To The Officer-in-charge of the Jail at _____
WHEREAS the plaintiff (or defendant) in the above-named suit has made application to this Court that security be taken for the appearance of _____ day of 19 _____ to give evidence (or to produce a document), on the _____; and whereas the Court has called upon the said _____ to furnish such security, which he has failed to do; This is to require you to receive the said _____ into your custody in the civil prison and to produce him before this Court at _____ on the said day and on such other day or days as may be hereafter ordered.
Given under my hand and the seal of the Court, this _____ day of 19 .
Judge.

No. 19.
WARRANT OF COMMITTAL. (O. 16, r. 18.)
(Title.)

To The Officer-in-charge of the Jail at _____
WHEREAS _____, whose attendance is required before this Court in the above-named case to give evidence (or to produce a document), has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (or defendant), the said _____ cannot give such evidence (or produce such document); and whereas the Court has called upon the said _____ to give security for his appearance on the _____ day of 19 _____ at _____ which he has failed to do; This is to require you to receive the said _____ into your custody in the civil prison and to produce him before this Court at _____ on the _____ day of 19 .
GIVEN under my hand and the seal of the Court, this _____ day of 19 .
Judge.

PROVINCIAL AMENDMENT.

ALLAHABAD

Add the following as Form No. 20 :—

"No. 20.

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS.

No. of suit.

Names of parties.
In the Court of the
Date fixed for hearing.

1	2	3	4		5		6
Number of witnesses to be summoned.	Name and full address of each person to be summoned.	Rank or occupation.	Distance of residence from Court.		Cash paid for		Name and address of person to whom unexpended travelling expenses and diet money should be returned.
			Rail.	Road.	Travel- ling ex- penses.	Diet ex- penses.	

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, r. 1.)

In the Court of

Civil suit No.

of

19 .

A. B.

..

..

..

..

..

..

..

..

..

Plaintiff.

against

C. D., E. F. and G. H.

..

..

..

..

..

..

..

Defendants.

Upon hearing

and upon reading the affidavit of

filed the

day of

19 ;

It is ordered that the be at

liberty to deliver to the

interrogatories in writing, and that the said

do answer the interrogatories as prescribed by Order XI, rule 8, and that the

costs of this application be

No. 2.

INTERROGATORIES. (O. 11, r. 4.)

(Title as in No. 1, supra.)

Interrogatories on behalf of the above-named [plaintiff or defendant C. D.] for the examination of the above-named [defendants E. F. and G. H. or plaintiff].

1. Did not, etc.

2. Has not, etc.

etc.

etc.,

etc.

[The defendant E. F. is required to answer the interrogatories numbered

[The defendant G. H. is required to answer the interrogatories numbered

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, r. 9.)

(Title as in No. 1, supra.)

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows :—

1. }

2. }

Enter answers to interrogatories in paragraphs numbered consecutively.

3. I object to answer the interrogatories numbered
that [state grounds of objection].

on the ground

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 12.)

(Title as in No. 1, *supra*.)

Upon hearing _____; It is ordered that
 the _____ do within _____ days from the date of this order,
 answer on affidavit stating which documents are or have been in his possession or power relating to the matter in
 question in this suit, and that the costs of this application be _____

No. 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 13.)

(Title as in No. 1, *supra*.)

I, the above-named defendant *C.D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto [*State grounds of objection*].

3. I have had but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on [*state when and what has become of them and in whose possession they now are*].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, r. 14.)

(Title as in No. 1, *supra*.)

Upon hearing _____ and upon reading the affidavit of
 filed the _____ day of _____ 19; it is ordered that the _____ do, at
 all reasonable times, on reasonable notice, produce at _____, situate at _____
 the following documents, namely _____, and that the _____
 be at liberty to inspect and peruse the documents so produced, and to make notes of their contents.
 In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be _____

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, r. 16.)

(Title as in No. 1, *supra*.)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the _____ day of _____ 19].

[Describe documents required.]

X. Y., Pleader for the

To Z, (Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

(Title as in No. 1, *supra*.)

Take notice that you can inspect the documents mentioned in your notice of the _____ day of _____ 19 [*except the documents numbered* _____ in that notice] at [*insert place of inspection*] on Thursday next, the _____ instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of documents mentioned in your notice of the _____ day of _____ 19, on the ground that [*state the ground*]:—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3.)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff [*or defendant*] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his pleader or agent, at _____

between the hours of _____

; and the _____

defendant [or plaintiff], is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader [or agent] for plaintiff
[or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

[Here describe the documents and specify as to each document whether it is original or a copy.]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, r. 5.)

(Title as in No. 1, supra.)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [or plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit,

G. H., pleader [or agent] for plaintiff [or defendant]

To E. F., pleader [or agent] for defendant [or plaintiff].

The facts, the admission of which is required, are

1. That M. died on the 1st January 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April 1896.
5. That O. was never married.

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, r. 5.)

(Title as in No. 1, supra.)

The defendant [or plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit:

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by anyone other than the plaintiff [or defendant or party requiring the admission].

E. F., pleader [or agent] for defendant [or plaintiff].

To G. H., pleader [or agent] for plaintiff [or defendant].

Facts admitted.

Qualifications or limitations, if
any, subject to which they
are admitted.

- | | | | |
|---|-----|-----|--|
| 1. That M. died on the 1st January 1890 | ... | ... | 1. |
| 2. That he died intestate | ... | ... | 2. |
| 3. That N. was his lawful son | ... | ... | 3. But not that he was his only lawful son. |
| 4. That O. died | ... | ... | 4. But not that he died on the 1st April 1896. |
| 5. That O. was never married | ... | ... | 5. |

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, r. 8.)

(Title as in No. 1, supra.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letter, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G. H., Pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, rr. 6, 7.)

(Title.)

Claim for

This suit coming on this day for final disposal before
in the presence of

for the plaintiff and of

for the defendant, it is ordered and decreed that
and that the sum of Rs. _____
be paid by the _____ to the _____ on
account of the costs of this suit, with interest thereon at the rate of _____
per cent. per annum from this date to date of realization.

GIVEN under my hand and the seal of the Court, this
19 .

day of
Judge.

Costs of Suit

PLAINTIFF				DEFENDANT.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibits ..				Pleader's fee ..			
4. Pleader's fee on Rs. ..				Subsistence for witnesses ..			
5. Subsistence for witnesses ..				Service of process ..			
6. Commissioner's fee ..				Commissioner's fee ..			
7. Service of process ..							
Total ..				Total ..			

PROVINCIAL AMENDMENTS.

CALCUTTA

Cancel the table under the head "Costs of Suit" in Form No. 1 and substitute therefor the following:—
[11-11-1927]

PLAINTIFF				DEFENDANT.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				1. Stamp for power ..			
2. Stamp for power ..				2. Stamp for petitions and affidavits ..			
3. Stamp for petitions and affidavits ..				3. Cost of exhibits including copies made under the Banker's Books Evidence Act, 1891 ..			
4. Cost of exhibits including copies made under the Banker's Books Evidence Act, 1891 ..				4. Pleader's fee ..			
5. Pleader's fee on Rs. ..				5. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) ..			
6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) ..				6. Process-fees ..			
7. Process-fees ..				7. Commissioner's fees ..			
8. Commissioner's fees ..				8. Demi-paper ..			
9. Demi-paper ..				9. Costs of transmission of records ..			
10. Costs of transmission of records ..				10. Other costs allowed under the Code and General Rules and Orders ..			
11. Other costs allowed under the Code and General Rules and Orders ..				11. Adjournment costs not paid in cash (to be deducted or added as the case may be) ..			
12. Adjournment costs not paid in cash (to be added or deducted as the case may be) ..							
Total ..				Total ..			

PATNA

Substitute the following for the schedule of "Costs of Suit" in the form:—

PLAINTIFF				DEFENDANT			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				1. Stamp for power ..			
2. Stamp for power ..				2. Stamp for petition or affidavit ..			
3. Stamp for petition or affidavit ..				3. Costs for exhibits ..			
4. Costs for exhibits ..				4. Pleader's fee ..			
5. Pleader's fee on Rs. ..				5. Subsistence ..			
6. Subsistence ..				(a) for defendant or his agent ..			
(a) for plaintiff or his agent ..				(b) for witnesses ..			
(b) for witnesses ..				6. Commissioner's fee ..			
7. Commissioner's fee ..				7. Service of process ..			
8. Service for process ..				8. Copying or typing charge ..			
9. Copying or typing charge ..							
Total ..				Total ..			

No. 2.

SIMPLE MONEY DECREE. (Section 94.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before
in the presence offor the plaintiff and of
for the defendant, it is ordered that the

do pay to the
with interest thereon at the rate of per cent. per annum
to the date of realization of the said sum and do also pay
the costs of his suit, with interest thereon at the rate of
per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this

day of

19

Judge.

Costs of Suit.

PLAINTIFF.				DEFENDANT.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint	..			Stamp for power	..		
2. Do. for power	..			Do. for petition	..		
3. Do. for exhibits	..			Pleader's fee	..		
4. Pleader's fee on Rs.	..			Subsistence for witnesses	..		
5. Subsistence for witnesses	..			Service of process	..		
6. Commissioner's fee	..			Commissioner's fee	..		
7. Service of process	..						
Total	..			Total	..		

PROVINCIAL AMENDMENT.

CALCUTTA

Cancel the table under the head "Costs of suit" in Form No. 2, and substitute therefor the following:—
(Came into force on 1-1-1928).

PLAINTIFF.				DEFENDANT.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint	..			1. Stamp for power	..		
2. Stamp for power	..			2. Stamp for petitions and affidavits	..		
3. Stamp for petitions and affidavits	..			3. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891	..		
4. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891	..			4. Pleader's fee	..		
5. Pleader's fee on Rs.	..			5. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge)	..		
6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge)	..			6. Process fees	..		
7. Process fees	..			7. Commissioner's fees	..		
8. Commissioner's fees	..			8. Demi-paper	..		
9. Demi-paper	..			9. Cost of transmission of records	..		
10. Cost of transmission of records	..			10. Other costs allowed under the Code and General Rules and Orders	..		
11. Other costs allowed under the Code and General Rules and Orders	..			11. Adjournment costs not paid in cash (to be added or deducted as the case may be)	..		
12. Adjournment costs not paid in cash (to be added or deducted as the case may be)	..						
Total	..			Total	..		

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE.

(Order XXXIV, rule 2—Where accounts are directed to be taken.)

(Title.)

This suit coming on this

day, etc.; It is hereby ordered and decreed that it be referred

to

as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal, or where no such rate is fixed at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the _____ day of _____, or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs. _____ for the costs of the suit awarded to the plaintiff;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under Rs. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

[a] Forms 3 to 11 were substituted by the Transfer of Property (Amendment) Supplementary Act, 1929 (21 [XXI] of 1929), S. 8 and Schedule.

No. 3A.

PRELIMINARY DECREE FOR FORECLOSURE.

(O. 34, R. 2—Where the Court declares the amount due.)

(Title.)

This suit coming on this _____ day, etc., It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the cost of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs. _____ for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. _____

2. And it is hereby ordered and decreed as follows:—

- (i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court of the said sum of Rs. _____

- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thereupon stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 4.

FINAL DECREE FOR FORECLOSURE.

(O. 34, R. 3.)

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgagee:

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; * [and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

* Words not required are to be deleted.

No. 5.

PRELIMINARY DECREE FOR SALE.

(O. 34 R. 4—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc.; It is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with the interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of _____ Rs. _____ for the costs of the suit awarded to the plaintiff;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the mortgage and clear of and from all encumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 5A.

PRELIMINARY DECREE FOR SALE.

(O. 34, R. 4.—When the Court declares the amount due.)

(Title.)

This suit coming on this	_____ day, etc.; It is hereby declared that the
amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this	_____ day of _____
_____ day of _____	is the sum of Rs. _____
principal, the sum of Rs. _____	for interest on the said principal, the sum
of Rs. _____	for costs, charges and expenses (other than the costs of
the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon,	_____
and the sum of Rs. _____	for the costs of the suit awarded to the plaintiff,
making in all the sum of Rs. _____	

2. And it is hereby ordered and decreed as follows :—

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, the said sum of Rs. _____;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the

defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is given to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 6.

FINAL DECREE FOR SALE. (O. 34, R. 5).

(Title.)

Upon reading the preliminary decree passed in this suit on the day of _____ and further orders (if any) dated the day of _____ and the application of the plaintiff dated the day of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage;

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under Rule 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

No. 7.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O. 34, R. 7.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this day of _____
decreed that it be referred to
accounts following:—

day, etc.; It is hereby ordered and
as the Commissioner to take the

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent, per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which, without the wilful default of the defendant or such person, might have been so received;

- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (i) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (ii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed :

- (i) that the plaintiff do pay into Court on or before the _____ day of _____, or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. _____ for the costs of the suit awarded to the defendant;
- (ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7A.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 34, R. 7.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc.; It is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following :—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent, per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (i) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. _____ for the costs of the suit awarded to the defendant;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realized by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realized by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7B.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(O. 34, R. 7.—Where the Court declares the amount due.)

(Title.)

This suit coming on this _____ day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. _____ for the costs of the suit awarded to the defendant, making in all the sum of Rs. _____

2. And it is hereby ordered and decreed as follows:—

- (i) that the plaintiff do pay into Court on or before the day of _____ or any later date up to which time for payment may be extended by the Court the said sum of Rs. _____ ;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such direction as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7C.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(O. 34, R. 7.—Where the Court declares the amount due.)

(Title.)

This suit coming on this _____ day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. _____ for the costs of this suit awarded to the defendant, making in all the sum of Rs. _____.

2. And it is hereby ordered and decreed as follows:—

- (i) that the plaintiff do pay into Court on or before the day of _____ or any later date up to which time the payment may be extended by the Court the said sum of Rs. _____ ;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the

suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7D.

FINAL DECREE FOR FORECLOSURE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.

(O. 34, R. 8.)

(Title.)

Upon reading the preliminary decree in this suit on the
day of _____ and further orders (if any) dated the
day of _____, and the application of the defendant
dated the _____ day of _____ for a final decree and after
hearing the parties, and it appearing that the payment as directed by the said decree and orders has
not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the
mortgage:

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be
and they are hereby absolutely debarred and foreclosed and from all right of redemption of and in the
property in the aforesaid preliminary decree mentioned* [and (if the plaintiff be in possession of the said
mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said
mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to
this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged
and extinguished.

* Words not required are to be deleted.

No. 7E.

FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.

(O. 34, R. 8.)

(Title.)

Upon reading the preliminary decree passed in this suit on the
day of _____ and further orders (if any) dated the
day of _____, and the application of the defendant, dated the
day of _____ for a final decree and after hearing the parties and it appearing
that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his
behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned
or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the
Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into
Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount
payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been
passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for
such costs of this suit including the costs of this application and such costs, charges and expenses as may be
payable under R. 10, together with the subsequent interest as may be payable under R. 11 of O. 34 of the First
Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or
other persons entitled to receive the same.

No. 7F.

FINAL DECREE IN A SUIT FOR FORECLOSURE, SALE OR REDEMPTION WHERE
THE MORTGAGOR PAYS THE AMOUNT OF THE DECREE.

(O. 34, rr. 3, 5 and 8.)

(Title.)

This suit coming on this _____ day for further consideration and it appearing that
on the _____ day of _____ the mortgagee or
_____ the same being a person entitled to redeem, has paid into Court all amounts due to the
mortgagee under the preliminary decree dated the _____
day of _____; It is hereby ordered and decreed that:—

- (i) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor * [or, as the case may be, _____ who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour;
- (ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

- (i) the said sum of Rs. _____ be paid out of Court to the mortgagee;
- (ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor * [or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor * [or other person making the payment], the said deed of re-conveyance or the acknowledgment in the office of the Sub Registrar of _____ and _____;
- (iii) * [if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property mentioned in the aforesaid preliminary decree to the mortgagor * [or such person as aforesaid who has made the payment].

* Words not required are to be *deleted*.

No. 8.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF
THE MORTGAGED PROPERTY.

(O. 34, rr. 6 and 8 A.)

(Title.)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be) and reading the final decree passed in the suit on the _____ day of _____
and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs. _____ and have been paid to the applicant out of the Court on _____
the _____ day of _____ and that the balance now due to him under the aforesaid decree is Rs. _____;

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally;

It is hereby ordered and decreed as follows:—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs. _____ with further interest at the rate of six per cent per annum from the _____ day of _____ (the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application.

No. 9.

PRELIMINARY DECREE FOR FORECLOSURE OR SALE.

(O. 34, rr. 2 and 4.)

(Title.)

[Plaintiff	...	...	...	vs.	...	...	...	1st Mortgagee,
Defendant No. 1	...	...	...	...	...	...	...	Mortgagor.
Defendant No. 2	...	...	...	...	...	...	...	2nd Mortgagee.]

The suit coming on the _____ day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage-security with interest thereon and the sum of Rs. _____ for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. _____.

(Similar declarations to be introduced with regard to the amount due to defendant No. 3 in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit.)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2 * [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively :—]

3. And it is hereby ordered and decreed as follows :—

(i) (a) that defendants or one of them do pay into Court on or before the day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to the plaintiff; and

(b) that defendant No. 1 do pay into Court on or before the day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to defendant No. 2; and

(ii) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant No. _____ (who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No. _____ (who has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared to be due to defendant No. 2 with such variation as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree—

(i) * [in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and no sale] that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the plaintiff quiet and peaceable possession of the said property; or

(ii) * [in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(iii) * [in the case where a sale is ordered under clause 4 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if any balance be left, it shall be paid to the defendant No. 1 or other persons entitled to receive the same; and

(iv) that if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2 the plaintiff or defendant No. 2 or both of them, as the case may be shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

(a) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (in the same manner as the plaintiff might have done under clause 4 above)—

* [(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property;] or

* [(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property ;] and

(o) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed * [*in the case where a sale is ordered under clause 5 above*]

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connexion therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No. 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under R. 10 together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same ; and

(ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No. 2's mortgage, defendant No. 2 shall be at liberty where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgage property.

* Words not required are to be *deleted*.

No. 10.

PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE.

[Plaintiff	..	..	..	..	..	..	..	..	2nd Mortgagee,
	
Defendant No. 1	..	..	..	..	..	..	..	..	Mortgagor,
Defendant No. 2	..	..	..	..	..	..	..	..	1st Mortgagee.]

(O. 34, Rr. 2, 4 and 7.)

(Title.)

The suit coming on this day, etc. ; It is hereby declared that the amount due to defendant No. 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage-security with interest thereon and the sum of Rs. for the costs of this suit awarded to defendant No. 2. making in all the sum of Rs.

(Similar declarations to be introduced with regard to the amount due from defendant No. 1 to the plaintiff in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit).

2. It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff * [or (if there are several subsequent mortgages that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively :—]

3. And it is hereby ordered and decreed as follows :—

(i) (a) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to defendant No. 2 ; and

(b) that defendant No. 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs. due to the plaintiff ; and

- (ii) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all encumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage).

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree:—

- (i) **[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale] that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the property; or*
- (ii) **[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and*
- (iii) **[in the case where a sale is ordered under clause 4 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and*
- (iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed.—

- (a) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgage alive for his benefit and to apply for a final decree *(in the same manner as the defendant No. 2 might have done under clause 4 above)*—

**[(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or*

**[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property;] and*

- (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished,

6. And it is hereby further ordered and decreed *(in the case where a sale is ordered under clause 5 above)*—

(i) that the money realized by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(ii) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

* Words not required are to be deleted.

No. 11.

PRELIMINARY DECREE FOR SALE.

[Plaintiff	..	..	..	..	..	Sub or derivative mortgagee
				vs.		
Defendant No. 1	..	..	..	..	..	Mortgagor.
Defendant No. 2	..	..	..	..	..	Original mortgagee.]

(O. 34, r. 4.)

(Title.)

This suit coming on this day, etc.; It is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs. for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs.

(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage.)

2. And it is hereby ordered and decreed as follows:—

(i) that defendant No. 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. due to defendant No. 2.

(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount.)

(ii) that on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1 or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No. 1 quiet and peaceable possession of the said property; and

(iii) that, upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2 the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable

under R. 10, together with such subsequent interest as may be payable under R. 11 of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No. 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc. [as in sub-clause (u) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under R. 10 together with such subsequent interest as may be payable under R. 11, of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to the defendant No. 2; and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitle to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(*declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder*).

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

19 It is hereby declared that the , dated the day of
 , does not truly express the intention of the parties to such
 And it is decreed that the said be rectified by

"No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

It is hereby declared that the , dated the day of
 19 , and made between and
 is void as against the plaintiff and all other the creditors, if any, of the defendant

"No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title.)

Let the defendant ; his agents, servants and workmen, be
 perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B
 in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house
 and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title.)

Let the defendant , his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title.)

Let the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff, as a carriage-way for the passage of carts, carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(Title.)

It is ordered that the following accounts and inquiries be taken and made; that is to say:—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next of-kin [or one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the movable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the movable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the movable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the movable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

(a) an inquiry what immovable property the deceased was seized of or entitled to at the time of his death;

(b) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof;

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immovable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immovable property, and shall prepare the conditions and contracts of sale subject to the approval of the
 *and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the
 *shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the
 *to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the
 , and that the
 *do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed and have his certificate in that behalf ready for the inspection of the parties on the
 day of

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree, to the
 day of

[Such part only of this decree is to be used as is applicable to the particular case.]

*Here insert name of proper officer.

No. 18.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

(Title.)

1. It is ordered that the defendant do, on or before the
 day of , pay into Court the sum of Rs. , the balance by
 the said certificate found to be due from the said defendant on account of the estate of , the balance by
 , the testator, and also the sum of Rs. for interest
 at the rate of Rs. per cent. per annum, from the day of
 to the amounting together to the sum
 of Rs.

2. Let the *of the said Court tax the costs of the plaintiff and
 defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum
 of Rs. ordered to be paid into Court as aforesaid, as
 follows:—

(a) The costs of the plaintiff to Mr. , his attorney [or
 pleader] or and the costs of the defendant to Mr. , his
 attorney [or pleader].

(b) And (if any debts are due) with the residue of the said sum of Rs.
 after payment of the plaintiff's and defendant's costs as aforesaid,
 let the sums, found to be owing to the several creditors mentioned in the
 schedule to the certificate, of the
 *, together with subsequent interest on such of the debts as bear interest, be paid; and,
 after making such payments, let the amount coming to the several legatees mentioned
 in the schedule, together with subsequent interest (to be verified as
 aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

* Here insert name of proper officer.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(Title.)

1. It is declared that the defendant is personally liable to pay the legacy of Rs.
 bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said
 legacy;

3. And it is also ordered that the defendant do, within _____ weeks after the date of the certificate of the _____ * pay to the plaintiff the amount of what the _____ * shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

* Here insert name of proper officer.

No. 20.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

(Title.)

1. Let the _____ * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to plaintiff out of the sum of Rs. _____, the balance by the said certificate found to be due from the said defendant on account of the personal estate of E. F., the intestate, within one week after the taxation of the said costs by the said _____ * and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. _____ after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

- (a) Let the defendant, within one week after the taxation of the said costs by the _____ * as aforesaid, pay one-third share of the said residue to the plaintiffs A. B. and C. D., his wife, in her right as the sister and one of the next-of-kin of the said E. F., the intestate.
- (b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E. F., the intestate. §
- (c) And let the defendant, within one week after the taxation of the said costs by the _____ * as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin of the said E. F., the intestate.

* Here insert name of proper officer.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the _____ day of _____, and it is ordered that the dissolution thereof as from that day be advertised in the _____ Gazette, etc.

And it is ordered that _____ be the receiver of partnership estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership;
2. An account of the debts and liabilities of the said partnership;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the _____ * may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed before the _____ day of _____ and that the _____ * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the _____ day of _____

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of .

* Here insert name of proper officer.

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting in the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs.

[These costs must be ascertained before the decree is drawn up.]

3. In payment of the sum of Rs. partnership assets, of the sum of Rs. said sum of Rs. assets.

to the plaintiff as his share of the , being the residue of the now in Court, to the defendant as his share of the partnership-assets.

[Or, and that the remainder of the said sum of Rs. to the said plaintiff (or defendant in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.)

be paid

4. And that the defendant [or plaintiff] do on or before the the sum of Rs. Rs.

day of pay to the plaintiff [or defendant] being the balance of the said sum of due to him, which will then remain due.

* Here insert name of proper officer.

No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(Title.)

It is hereby decreed as follows:—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

2. That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

3. That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

Schedule.

PROVINCIAL AMENDMENTS.

Form No. 24

MADRAS

Add the following as Form No. 24, viz:—

"No. 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR A LUNATIC.

(Title.)

This suit coming on this day for final disposal in the presence of etc., and C. D., the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the day of

and made between A. B., the plaintiff, of the one part, and the said C. D. by the said guardian *ad litem* of the other part, (or on the terms hereafter set forth) and, it appearing to this

Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(Set out the terms of the compromise.)”

[Dis. No. 1647 of 1910.]

SIND

Add the following as Form No. 24:—

“No. 24.

DEGREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF
OF A MINOR OR LUNATIC.

(Order 32, sub-rule (1A) of Rule 7.)

(Title.)

This suit coming on this day for final disposal in the presence of &c., A.B., the plaintiff, a minor by G. D., his next friend (or E. F., the defendant, a minor by G. H., his guardian *ad litem*) applying that this suit may be compromised in the terms of an agreement in writing dated the

19 , and made between A. B., the plaintiff (by the said next friend) of the one part, and the said E. F., (by the said guardian *ad litem*) of the other part (or, on terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto:

It is ordered as follows:—

(Set out the terms of the compromise).”

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD
NOT BE RECORDED AS CERTIFIED.

(O. 21, R. 2.)

(Title.)

To Whereas in execution of the decree in the above-mentioned suit applied to this Court that the sum of Rs. has recovered under the decree has been paid and should be recorded as certified, this is to give you notice that you are to appear before this Court on the adjusted day of 19 , to show cause why the payment aforesaid should not be recorded as adjustment certified.

Given under my hand and the seal of the Court, this 19 .

day of

Judge.

No. 2.

PRECEPT.

(Section 46.)

(Title.)

Upon hearing the decree-holder it is ordered that this precept be sent to the Court of at under Section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Dated the

Schedule.
day of

19 Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT.

(O. 21, r. 6.)

(Title.)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of _____ at _____ for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under O. 21, R. 6 of the Code of Civil Procedure, 1908, it is

Ordered :

That a copy of this order be sent to _____ with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the _____ day of _____ 19 .

Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE.

(O. 21, r. 6.)

(Title.)

Certified that no* satisfaction of the decree of this Court in suit No. _____ of 19 , a copy of which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the _____ day of _____ 19 .

Judge.

* If partial, strike out "no" and state to what extent.

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT.

(O. 21, r. 6.)

(Title.)

Number of suit and the Court by which the decree was passed.	Names of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service thereof.	Costs of execution.	Amount realized.	How the case is disposed of.	Remarks.
1		3	4	5	6	7	8	9
			.		Rs. A. P.	Rs. A. P.		

Signature of Muharrir in charge.

Signature of Judge.

No. 6.

APPLICATION FOR EXECUTION OF DECREE.

(O. 21, r. 11.)

In the Court of

I

, decree-holder, hereby apply for execution of the decree herein-

below set forth :—

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A. B.—Plaintiff C. D.—Defendant	October 11, 1897	No	None	Rs. 72-4-0 recorded on application, dated the 4th March 1899	Rs. 814-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment]	Rs. A. P. As awarded in the decree . . . 47 10 4 Subsequently incurred . . . 8 2 0 Total . . . 55 12 4	Against the defendant C. D.	<p>[When attachment and sale of movable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's movable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immovable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.</p>

I
knowledge and belief.

declare that what is stated herein is true to the best of my

Dated the

day of

Signed

, decree-holder,

19 .

[When attachment and sale of immovable property is sought.]

Description and specification of property.

The undivided one-third share of the judgment-debtor in a house situated in the village of
, value Rs. 40 and bounded as follows :—

East by G's house; west by H's house; south by public road; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed

, decree-holder,

PROVINCIAL AMENDMENT.

SIND

Add the following as column No. 6-A to Form No. 6 ;—

"6-A. What interest, if any, in the decree transferred by original decree-holder, and date of transfer and name and address of parties thereto."

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

* [(O. 21. R. 16.)]

(Title.)

To

WHEREAS

has made application to this Court for execution of decree in suit No.

of 19 , on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the day of 19 . to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this
19 .

day of

Judge.

[a] Substituted by the Repealing and Amending Act, 1914 (10 [X] of 1914), s. 2 and Sch. I, for "O. 21 r. 22)."

No. 8.

WARRANT OF ATTACHMENT OF MOVABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY,

(O. 21, r. 80.)

(Title.)

To

The Bailiff of the Court

WHEREAS

day of

was ordered by decree of this Court passed on the
19 , in Suit No. of

19 , to

pay to the plaintiff the sum of Rs. as noted in the margin ; and whereas the said sum of Rs. has not been paid ; These are to command you to attach the movable property of the said as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said

unless the said , and shall pay to you the said sum of Rs. together with Rs. , the costs of this attachment, to hold the same until further orders from this Court.

Decree.			
Principal . .			
Interest . .			
Costs . .			
Costs of execution.			
Further interest.			
Total . .			

You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this

day of

19 .

Schedule.

Judge.

PROVINCIAL AMENDMENTS.

ALLAHABAD

Between the words "command you to attach" and the words "the movable property of the said" add the words "on or before the day of 19 ." [8-10-1942.]

MADRAS

Same as Allahabad.

OUDE

Insert the words "on or before" after the word "attach" in the first paragraph,

[15-4-1944.]

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVABLE PROPERTY ADJUDGED

BY DECREE.

(O. 21, r. 31.)

(Title.)

To

The Bailiff of the Court.

Whereas _____ day of _____ 19____, in Suit No. _____ of _____ 19____, to deliver to the plaintiff the movable property (or a _____ share in the movable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered;

These are to command you to seize the said movable property (or a _____ share of the said movable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this _____ day of _____

19____.

*Schedule.**Judge.*_____
No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT.

(O. 21, r. 34.)

(Title.)

To

Take notice that on the _____ day of _____ 19____, the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of _____, whereof a draft is hereunto annexed, of the immovable property specified hereunder, and that the _____ day of _____ 19____, is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of Property.

Given under my hand and the seal of the Court, this _____ 19____,

day of _____

*Judge.*_____
No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC.

(O. 21, r. 35.)

(Title.)

To

The Bailiff of the Court.

Whereas the undermentioned property in the occupancy of _____ has been decreed to _____, the plaintiff in this suit; You are hereby directed to put the said _____ in possession of the same, and you are hereby authorized to remove any _____ person bound by the decree who may refuse to vacate the same.

Given under my hand and the seal of the Court, this _____ day of _____

19____.

*Schedule.**Judge.*

No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.

(O. 21, r. 37)

(Title.)

To Whereas Court for execution of decree in Suit No. of 19 has made application to this Court by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19, to show cause why you should not be committed to the civil prison in execution of the said decree

Given under my hand and the seal of the Court, this day of 19.

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION (O. 21, r. 38.)

(Title)

To The Bailiff of the Court, Whereas in Suit No. of 19, dated the was adjudged by a decree of the Court day of

Decree.			
Principal	..		
Interest	..		
Costs	..		
Execution			
Total	..		

the decree-holder the sum of Rs. 19, to pay to as noted in the margin, and whereas the said sum of Rs. has not been paid to the said decree-holder in satisfaction of the said decree; These are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed

You are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the day on which and manner in which it has been executed or the reason why it has not been executed.

Given under my hand and the seal of the Court, this day of 19.

Judge.

PROVINCIAL AMENDMENT.

MADRAS

Between the words "the cost of executing this process" and the words "to bring the said defendant," add the words "or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in O. 21, R. 25 (2)."

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL.

(O. 21, r. 40.)

(Title.)

To The Officer in charge of the Jail at

WHEREAS been brought before this Court this day of 19 who has under a warrant in execution of a decree which was made and pronounced by the said Court on the day of 19, and by which decree it was ordered that the said

should pay ; And whereas the said has not obeyed the decrees nor satisfied the Court that he is entitled to be discharged from custody ; You are hereby in the name of the King Emperor of India, commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908; and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said during his confinement under this warrant of committal.

Given under my signature and the seal of the Court, this
day of 19 .

Judge.

PROVINCIAL AMENDMENT.

MADRAS

Insert the following as Form No. 14A :

"No. 14A

ORDER OF ENTRUSTMENT OF JUDGMENT-DEBTOR TO THE CUSTODY OF AN OFFICER OF COURT.

(O. 21, r. 40, sub-rule (2) and the proviso to sub-rule (3).)

In the Court of the of
To The Bailiff of the Court,

WHEREAS who has been brought before this Court, this day of 19 , under warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree it was ordered that the said judgment-debtor should pay Rs.

And whereas the judgment-debtor has been ordered to be kept in the custody of an officer of the Court, pending the enquiry under O. 21, R. 40, sub-rule (2).

And whereas the said judgment-debtor has to be given an opportunity of satisfying the decree and for this end this Court is of opinion that the said judgment-debtor may be left in the custody of an officer of Court.

You are hereby in the name of the King-Emperor of India commanded and required to take and receive the said judgment-debtor into your custody and keep him in that custody for a period of days or until further orders of this Court. You are hereby further informed that he is not to be allowed to go anywhere except in your company. You are further required to produce the said judgment-debtor before this Court at the expiration of the period specified, if the decree be not sooner satisfied.

Given under my hand and the seal of the Court, this
19 .

day of

(By order)

Central Nasr."

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE.

(Sections 58, 59.)

(Title.)

To The Officer in charge of the Jail at

Under orders passed this day, you are hereby directed to set free
judgment-debtor now in your custody.

Dated

Judge.

PROVINCIAL AMENDMENTS.

CALCUTTA

Insert the following as Form No. 15A :

"Form No. 15A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF ANY PERSON AND SURETIES.

(Order 21A, rules 3 (a) and 5.)

In the Court of _____ at _____

Civil Suit No. _____ of _____

A. B. of _____

against _____

C. D. of _____

Know all men by these presents that we, I. J. of _____

etc. and M. N. of _____

etc. and K. L. of _____

etc. are jointly

and severally bound to the Judge of the Court of _____

in Rupees _____

to be paid to the said Judge, for which payment to be made we bind ourselves, and each

of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 19 _____

And whereas the movable property/live-stock specified in the Schedule hereunto annexed has been
attached under a warrant from the said Court dated the _____ day of _____

19 _____ in execution of a decree in favour of _____

in Suit No. _____

of _____

19 _____

on the file of _____

and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for any loss
which the owner of the property/live-stock may suffer due to wilful negligence of the bounden and produce when
required before the said Court all and every the property/live stock aforesaid (and shall properly maintain and
take due care of the live-stock aforesaid) and shall obey any further order of the Court in respect thereof, then
this obligation shall be void; otherwise it shall remain in full force and be enforceable against the above bounden
I. J. in the execution proceedings.

I. J.

K. L.

M. N.

Signed and delivered by the above bounden
in the presence of _____

[3-11-1933 and 29-5-1941]

LAHORE

Add the following form Nos. 15A and 15B :—

"Form No. 15A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF PERSON INTERESTED AND SURETIES.

(O. 21, r. 43.)

In the Court of _____ at _____

of _____

Civil Suit No. _____

A. B. of _____

against _____

C. D. of _____

Know all men by these presents that we, I. J. of _____

etc.,

and K. L. of _____

, etc., and M. N. of _____

etc., are jointly and severally bound to the Judge of the Court of _____

in Rupees _____

to be paid to the said Judge, for which payment to be made, we

bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and
severally by these presents.

Dated this _____

day of _____

19 _____

And whereas the movable property specified in the Schedule hereunto annexed has been attached under a warrant from the said Court, dated the _____ day of _____ 19____, in execution of a decree in favour of _____ of _____ 19____ in Suit No. _____ of _____ and the said property has been left in the charge of the said I. J. the file of _____

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force,

I. J.
K. L.
M. N.

Signed and delivered by the above bounden _____ in the presence of _____

Form No. 15B.

**BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF ANY PERSON AND SURETIES.**

[O. 21. r. 43 (1) (c).]

In the Court of _____ at _____ Civil Suit No. _____
of _____ A. B. of _____
against _____

C. D. of _____

Know all men by these presents that we, I. J. of _____ etc., and K. L. of _____

etc., and M. N. of _____

etc., are jointly and severally bound to the Judge of the Court of _____

in Rupees _____ to be paid to the said Judge for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 19____.

And whereas the movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the _____ day of _____ 19____, in execution of a decree in favour of _____ in suit No. _____ of _____

19____ on the file of _____

and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void: otherwise it shall remain in full force and be enforceable against the above bounden I. J. in accordance with the procedure laid down in Section 145, Civil Procedure Code, as if the aforesaid I. J. were a surety for the restoration of property taken in execution of a decree,

I. J.
K. L.
M. N.

Signed and delivered by the above bounden _____ in the presence of _____ " [13-10-1928.]

MADRAS

(i) For the word "dated" substitute the words "Given under my hand and the seal of the Court, this _____ day of _____." [Dis. No. 212 of 1912.]

(ii) Add the following Form:—

"Form No. 15A.

**BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF PERSON INTERESTED AND SURETIES.**

[O. 21, r. 43.]

In the Court of _____ at _____ Civil Suit No. _____
of _____ A.B. of _____
against _____

C.D. of _____

Knew all men by these presents that we I. J. of etc., and K. L. of
 etc., and M. N. of etc., are jointly and severally bound to the Judge of the
 Court of in Rupees to be paid to the said
 Judge, for which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs,
 executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

And whereas the movable property specified in the schedule hereunto annexed has been attached under a
 warrant from the said Court, dated the day of 19 ,
 in execution of a decree in favour of in Suit No. of 19 ,
 on the file of and the said property has been left in the charge of the said
 I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and
 produce when required before the said Court all and every the property aforesaid and shall obey any
 further order of the Court in respect thereof, then this obligation shall be void ; otherwise it shall remain in
 full force.

I. J.
 K. L.
 M. N.

Signed and delivered by the above bounden in the presence of .'' [Dis. No. 116 of 1913.]

No. 16.

ATTACHMENT IN EXECUTION.
 PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF
 MOVABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT
 TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE
 IMMEDIATE POSSESSION THEREOF. (O. 21, r. 46.)

(Title.)

To WHEREAS has failed to
 satisfy a decree passed against on the
 day of 19 , in Suit No.
 in favour of for Rs. of 19 ,
 defendant be, and is hereby, prohibited and restrained until the further order of this Court, from receiving
 from the following property in the possession
 of the said , that is to say, , to which the defendant
 is entitled, subject to any claim of the said , and the said
 is hereby prohibited and restrained, until the further order of this Court, from delivering the
 said property to any person or persons whomsoever.

Given under my hand and the seal of the Court, this day of
 19 .

Judge.

No. 17.

ATTACHMENT IN EXECUTION.
 PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF
 DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS.

(O. 21, r. 46.)

(Title.)

To WHEREAS has failed to
 satisfy a decree passed against on the
 day of 19 , in Suit No. of 19 , in favour of
 for Rs. ; It is ordered that the defendant be, and

is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely,

and that you, the said
 , be, and you are hereby, prohibited and restrained, until the further
 order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or
 otherwise than into this Court.

Given under my hand and the seal of the Court, this
 day of 19 .

Judge.

 No. 18.

ATTACHMENT IN EXECUTION.
 PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS
 OF SHARES IN THE CAPITAL OF A CORPORATION.

(O. 21, r. 46.)

(Title.)

To _____
 Defendant and to
 Corporation,
 , Secretary of
 WHEREAS
 against _____ has failed to satisfy a decree passed
 day of 19 , in Suit No. on the
 of 19 , in favour of _____, for Rs. ;
 It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained until the further
 order of this Court, from making any transfer of _____ shares in the aforesaid
 Corporation, namely, _____, or from receiving payment of any dividends
 thereon; and you, _____, the Secretary of the said Corporation, are hereby
 prohibited and restrained from permitting any such transfer or making any such payment.

Given under my hand and the seal of the Court, this
 19 .

day of

Judge.

 No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF
 RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48.)

(Title.)

To _____
 WHEREAS
 the above-named case, is a (*describe office of judgment debtor*) receiving his salary (*or allowances*) at your
 hands; and whereas _____, judgment-debtor in
 the said case, has applied in this Court for the attachment of the salary (*or allowances*) of the said _____, decree-holder in
 to the extent of _____ due to him under
 the decree; You are hereby required to withhold the said of _____ in monthly
 from the salary of the said _____ and to remit the said sum (*or monthly instalments*)
 instalments of _____
 to this Court.

Given under my hand and the seal of the Court, this
 19 .

day of

Judge.

 No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT.

(O. 21, r. 51.)

(Title.)

To The Bailiff of the Court.
 WHEREAS an order has been passed by this Court on the
 day of _____

19 , for the attachment of
 ; You are hereby directed to seize the said
 and bring the same into Court.

Given under my hand and the seal of the Court, this
 19 .

day of

Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY
OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF A JUSTICE
OR * [PUBLIC OFFICER]. (O. 21, r. 52.)

(Title.)

To

Sir,

The plaintiff having applied, under R. 52 of O. 21 of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed on what account, etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,
Sir
Your most obedient servant,

Dated the day of 19 .

Judge.

[a] *Substituted* by A.O., for "Officer of Government."

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT.

(O. 21, r. 53.)

(Title.)

To

The Judge of the Court of

Sir,

I have the honour to inform you that the decree obtained in your Court on the
day of 19 , by
in suit No. of 19 , in which he was and

was
has been attached by this Court on the
application of , the in the
suit specified above. You are therefore requested to stay the execution of the decree of your Court
until you receive an intimation from this Court that the present notice has been cancelled or until execution
of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor,

I have the honour, etc.

Dated the day of 19 .

Judge.

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.

(O. 21, r. 53.)

(Title.)

To

Whereas an application has been made in this Court by the decree-holder in the above suit for the
attachment of a decree obtained by you on the day
of 19 , in the Court of of 19 , in
in Suit No. which was and

was ; It is ordered that you, the said
prohibited and restrained, until the further order of this Court, from transferring or charging the same in
any way, , be, and you are hereby,

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 24.
ATTACHMENT IN EXECUTION.
PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVABLE PROPERTY.
(O. 21, r. 54.)
(Title.)

To

Defendant.

Whereas you have failed to satisfy a decree passed against you on the
day of _____ 19 , in Suit No.

for Rs.

ordered that you, the said

you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging
the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and
that they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

Given under my hand and the seal of the Court, this
19 .

day of

Schedule.*Judge.*

No. 25.
ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE
HANDS OF A THIRD PARTY. (O. 21, r. 56.)
(Title.)

To

Whereas the following property
of a decree in Suit No. _____
the _____ day of _____

has been attached in execution
of _____ 19 , passed on
19 , in favour of _____

for Rs. _____
that the property so attached, consisting of Rs.
Rs. _____

; It is ordered
in money and
in currency-notes or a sufficient part thereof

to satisfy the said decree, shall be paid over by you, the said
to _____

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 26.
NOTICE TO ATTACHING CREDITOR. (O. 21, r. 58.)
(Title.)

To

Whereas
this Court for the removal of attachment on
instance in execution of the decree in Suit No. _____
you notice to appear before this Court on _____

has made application to
placed at your
of 19 , this is to give
_____ , the
19 , either in

day of _____
person or by a pleader of the Court duly instructed to support your claim, as attaching creditor.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 27.
WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 66.)
(Title.)

To

The Bailiff of the Court.

These are to command you to sell by auction, after giving
_____ days' previous notice, by affixing the same in this Court-house, and after making due
proclamation, the _____

property attached under a warrant from this Court, dated the
_____ 19 , in execution of a decree in
favour of _____ in Suit No. _____
of 19 , or so much of the said property as shall realize the sum of Rs.
_____ , being the _____

of the said decree and costs still remaining unsatisfied.
You are further commanded to return this warrant on or before the _____

day of

19 .

with an endorsement certifying the manner in which it has been executed, or the reason why it has not been
executed.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION. (O. 21. r. 66.)

(Title.)

To

Judgment-debtor.

Whereas in the above-named suit
for the sale of

, the decree-holder has applied
; You are hereby informed
day of

that the

19 , has been fixed for settling the terms of the proclamation

of sale.

Given under my hand and the seal of the Court, this—
19 .

day of

Judge.

No. 29.

PROCLAMATION OF SALE. (O. 21. r. 66.)

(Title.)

Notice is hereby given that, under r. 64 of O. 21 of the Code of Civil Procedure, 1908, an order has been
(1) *Suit No. of 19 , decided* passed by this Court for the sale of the attached property mentioned in the
by the of in which was annexed Schedule, in satisfaction of the claim of the decree-holder in the suit
plaintiff and was defendant. (1) mentioned in the margin, amounting with costs and interest up to date of
sale to the sum of

The sale will be by public auction, and the property will be put up for sale in the lots specified in the
schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule
below ; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are
those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by

at the monthly sale commencing
at
o'clock on the

. In the event, however, of the debt above specified and of the costs of the
sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorised agent. No
bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any
sale to them be valid without the express permission of the Court previously given. The following are the
further

Conditions of sale.

1. The particulars specified in the schedule below have been stated to the best of the information
of the Court but the Court will not be answerable for any error, mis-statement or omission in this
proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting
the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once
be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is
legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the
sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make
it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it
subject always to the provisions of r. 69 of O. 21.

5. In the case of movable property the price of each lot shall be paid at the time of sale or as
soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be
again put up and re-sold.

6. In the case of immovable property, the person declared to be the purchaser shall pay
immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the
officer conducting the sale, and in default of such deposit the property shall forthwith be put up again
and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on
the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or
other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property
shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the
sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all
claim to the property or to any part of the sum for which it may be subsequently sold.

Given under my hand and the seal of the Court, this

day of

19 .

Judge.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any encumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

PROVINCIAL AMENDMENTS**ALLAHABAD**

In form No. 29 (Proclamation of Sale), *delete* the sentence "No bid by previously given" in the paragraph *above* "Conditions of Sale."

MADRAS

Add the following as a "Note" to Form No. 29 (Proclamation of Sale):—

"Note:—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title deeds, or mortgages not disclosed in the encumbrance certificate." (Dis. No. 2134 of 1918.)

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE. (O. 21, r. 66.)
(*Title.*)

To

The Nazir of the Court.

Whereas an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the

day of 19, has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the

day of
Schedule.

19.

Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT. (O. 21, r. 71.)
(*Title.*)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of the purchaser, there was a deficiency in the price of the said property amounting to Rs. and that the expenses attending such re-sale amounted to Rs. making a total of Rs. , which sum is recoverable from the defaulter.

Dated the

day of

19.

Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVABLE PROPERTY SOLD IN EXECUTION. (O. 21, r. 79.)
(*Title.*)

To

Whereas

has become the purchaser at a public sale in execution of the decree in the above suit of

now in your possession, you to any

are hereby prohibited from delivering possession of the said person except the said

Given under my hand and the seal of the Court, this day of 19.

Judge.

No. 33.
PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION
TO ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)
(Title.)

To _____ and to _____ has become the
purchaser at a public sale in execution of the decree in the above suit of
you _____ being debts due from
are hereby, prohibited from receiving, and you _____ be, and you
debt to any person or persons except the said _____ from making payment of, the said
Given under my hand and the seal of the Court, this 19 .
day of _____ Judge.

No. 34.
PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD
IN EXECUTION. (O. 21, r. 79.)
(Title.)

To _____ and _____, Secretary of
Corporation.
Whereas _____ has become the purchaser at a
public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is
to say, of _____ standing in the name of you _____ ; it is ordered that
you _____
be, and you are hereby, prohibited from making any transfer of the said shares to any person except
the said _____, the purchaser aforesaid, or from
receiving any dividends thereon; and you _____
making any such payment to any person except the said _____, Secretary of the said Corporation, from permitting any such transfer or
the purchaser aforesaid.
Given under my hand and the seal of the Court, this _____ day of
19 . _____ Judge.

No. 35.
CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE,
LEASE OR SELL PROPERTY. (O. 21, r. 88.)
(Title.)

Whereas in execution of the decree passed in the above suit an order was made on the
day of _____ 19 , for the sale of
the under-mentioned property of the judgment-debtor _____
and whereas the Court has, on the application of the said
judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease
or private sale of the said property or of some part thereof:
This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed
mortgage, lease or sale within a period of _____
from the date of this certificate; provided that all monies payable under such mortgage, lease or sale shall
be paid into this Court and not to the said judgment-debtor.
Given under my hand and the seal of the Court, this _____ day of
19 . _____
Description of property. _____ Judge.

No. 36.
NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, rr. 90, 92.)
(Title.)

To _____ Whereas the under-mentioned property was sold on the
day of _____ 19 , in execution of the decree passed in the
above-named suit, and whereas _____ the decree-holder [or
judgment-debtor], has applied to this Court to set aside the sale of the said property on the ground of a
material irregularity [or fraud] in publishing [or conducting] the sale namely, that
Take notice that if you have any cause to show why the said application should not be granted, you
should appear with your proofs in this Court on the _____ day of _____
and determined. _____ 19 , when the said application will be heard

Given under my hand and the seal of the Court, this
19 .

day of

Description of property.

Judge.

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, rr. 91, 92.)
(Title.)

To

Whereas , the purchaser of the under-mentioned property sold on the day of 19 , in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that , the judgment-debtor had no saleable interest therein:

Take notice that if you have any cause to show why the said application should not be granted you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined.

Given under my hand and the seal of the Court, this
19 .

day of

Description of property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)
(Title.)

This is to certify that purchaser at a sale by public auction on the 19 , of

has been declared the day of

in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

PROVINCIAL AMENDMENTS

NAGPUR

In form No. 38, insert the words "for Rs between the words, "the purchaser" and "at a sale."

PATNA

Substitute the following for Form No. 38:—

"Form No. 38.
CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)

District

In the Court of
Execution case No.

at
of 19 .

Decree-holder,

versus

Judgment-debtor.

This is to certify that caste , by occupation , Thana , District , has been declared the purchaser at a sale by public auction on the day of 19 , of the property specified below in execution of the decree in suit No. of this Court* and that the said sale has been duly confirmed by this Court.

Given under my hand and the seal of the Court, this
day† of 19 .

Judge."

Specification and price of properties.‡

* If the decree has been received by transfer from other Court enter name of that Court.

† The date when the sale became absolute.

‡ Particulars sufficient to identify the property including the name of each registration sub-district in which any part of the property is situated should be fully stated.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION.
(O. 21, r. 95.)
(Title.)

To

The Bailiff of the Court.

Whereas
fied purchaser of

has become the certi-
at a sale in execution of

decree in suit No. _____ of _____
 ordered to put the said _____
 as aforesaid, in possession of the same.

19 ; you are hereby
 the certified purchaser.

Given under my hand and the seal of the Court, this
 day of _____ 19 .

Judge.

PROVINCIAL AMENDMENT

MADRAS

Substitute the following for Form No. 39:—

"No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION. (O. 21, r. 95.) (Title.)

To

The Bailiff of the Court.

Whereas
 at a sale in execution of decree in suit No. _____
 ordered to put the said _____
 of the same ; and you are hereby further required to state in your return, whether there are crops on the land
 and whether you have delivered them to _____, the certified purchaser.

has become the certified purchaser of

of

19 ; you are hereby

Given under my hand and the seal of the Court, this

day of

19 .

Judge."

(P. Dis. No. 607 of 1931.)

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE. (O. 21, r. 97.) (Title.)

To

Whereas

the decree-holder
 in the above suit, has complained to this Court that you have resisted [or obstructed] the officer charged with
 the execution of the warrant for possession :

You are hereby summoned to appear in this Court on the
 day of _____ 19 , at _____

A. M., to answer the said

complaint.

Given under my hand and the seal of the Court, this
 day of _____ 19 ,

day of

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, r. 98.) (Title.)

To

The Officer in charge of the Jail at

Whereas the under-mentioned property has been decreed to _____, the
 plaintiff in this suit, and whereas the Court is satisfied that _____ without any
 just cause resisted [or obstructed] and is still resisting [or obstructing] the said
 in obtaining possession of the property, and whereas the said
 has made application to this Court that the said _____ be
 committed to the civil prison ;

You are hereby commanded and required to take and receive the said

into the civil prison and to keep him imprisoned therein for the period
 days.

of

Given under my hand and the seal of the Court, this
 day of _____ 19 .

day of

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (Section 72.) (Title.)

To

, Collector of

SIR,

In answer to your communication No.

in this suit of

, representing that the sale in execution of the decree
 land situate within your district is objectionable I have
 the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in
 the manner recommended by you.

I have the honour to be,

Sir,

Your obedient servant,

Judge.

PROVINCIAL AMENDMENT

ALLAHABAD

Add the following as Form No. 43:—

"Form No. 43.

The security to be furnished under Section 55 (4) shall be, as nearly as may be, by a bond in the following form:—

In the Court
Sui. No.

at
of 19

A. B. of

plaintiff.

against

C. D. of

Defendant.

Whereas in execution of the decree in the suit, afore-said, the said C. D. has been arrested under warrant and brought before the Court of ; and whereas the said C. D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No. III of 1907, to be declared an insolvent, and the said Court has ordered that the said C. D. shall be released from custody if the said C. D. furnish good and sufficient security in the sum of Rs. that he will appear when called upon and

that he will within one month from this date apply under section 5 of Act No. III of 1907, to be declared an insolvent;

Therefore I, E. F., inhabitant of , have voluntarily become security and do hereby bind myself, my heirs, and executors to as Judge of the said Court and his successors in office that the said C. D. will appear at any time when called upon by the said Court, and will apply in the manner and within the time herein before set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors to pay to the said Court on its order, the sum of Rs.

Witness my hand at

this

day of
(Signed) E. F.,

19

Witnesses,

Surety."

APPENDIX F. SUPPLEMENTAL PROCEEDINGS.

No. 1

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r. 1.)

(Title.)

To

The Bailiff of the Court.

Whereas

, the plaintiff in the above suit, claims the

Principal	.	.	.	_____	_____
Interest	.	.	.	_____	_____
Costs	.	.	.	_____	_____
Total	.	.	.	_____	_____

sum of Rs. as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant is about to ;

These are to command you to demand and receive from the said the sum of Rs. as sufficient to satisfy the

plaintiff's claim, and unless the said sum of Rs. behalf of the said , to take the said before this Court, in order that he may show cause why he should not furnish security to the amount of Rs.

for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT. (O. 38, r. 2.)

(Title.)

Whereas at the instance of

, the plaintiff in the above suit,

the defendant has been arrested and brought before the Court:

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security:

Therefore, I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at
19 .

this

day of

(Signed.)

Witnesses.

- 1.
- 2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE. (O. 38, r. 3.)
(Title.)

To
Whereas 19 , who became surety on the day of
for your appearance in the above suit, has applied to this Court
to be discharged from his obligation :

You are hereby summoned to appear in this Court in person on the
day of 19 , at

A.M. when the said

application will be heard and determined.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, r. 4.)
(Title.)

To
Whereas , plaintiff in this suit, has made application to the Court
that security be taken for the appearance of , the defendant, to answer any
judgment that may be passed against him in the suit; and whereas the Court has called upon the
defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has
failed to do; it is ordered that the said defendant be committed to the
civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction
of the decree.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 5.

**ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR
FULFILMENT OF DECREE. (O. 38, r. 5.)**
(Title.)

To
The Bailiff of the Court.
Whereas has proved to the satisfaction of the Court that

the defendant in the above suit
These are to command you to call upon the said defendant on or before
the sum of rupees day of 19 , either to furnish security for the
required to produce and place at the disposal of this Court when
or the value thereof, or such portion of the value
as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why
he should not furnish security; and you are further ordered to attach the said
and keep the same under safe and secure custody until the further order of the Court ;
and you are further commanded to return this warrant on or before the day
of 19 , with an endorsement certifying the date on which and the manner in
which it has been executed, or the reason why it has not been executed.

Given under my hand and the seal of the Court, this
19 .

day of

Judge.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5.)
(Title.)

Whereas at the instance of , the plaintiff in the above suit;

the defendant has been directed by the Court to furnish security in the sum of
Rs. specified in the Schedule hereunto annexed; to produce and place at the disposal of the Court the property

Therefore, I have voluntarily become surety and do hereby bind
myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at
the disposal of the Court, when required, the property specified in the said Schedule or the value of
the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so
doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum or
Rs. or such sum not exceeding the said sum as
the said Court may adjudge.

plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases]

C. D., his servants, agents, or workmen, from printing, publishing or vending a book, called _____, to restrain the defendant
 _____, or any part thereof,
 until the, etc.

[Where part only of a book is to be restrained.]

to restrain the defendant C. D., his servants, agents or workmen,
 from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition
 and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely,
 that part of the said book which is entitled _____

and also that part which is entitled _____
 [or which is contained in page _____ to page _____
 both inclusive] until _____, etc.

[In Patent cases]

to restrain the defendant C. D., his agents,
 servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the
 principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement, etc.]
 mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of
 the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting,
 imitating or resembling the same inventions, or either of them, or making any addition thereto, or
 subtraction therefrom, until the hearing, etc.

[In cases of Trade marks]

to restrain the defendant
 C. D., his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any compo-
 sition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the
 plaintiff A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc.] men-
 tioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the
 composition or blacking sold by the defendant to be the same as the composition or blacking manufactured
 and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any
 composition or blacking sold or proposed to be sold by the defendant is the same as the composition or
 blacking manufactured or sold by the plaintiff A. B., until the, etc.

[To restrain a partner from in any way interfering in the business]

to restrain the defendant C. D., his agents and servants, from entering
 into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or
 written security in the name of the partnership firm of B and D., and from contracting any debt, buying
 and selling any goods, and from making or entering into any verbal or written promise, agreement or
 undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said
 partnership firm of B. and D., or whereby the said partnership firm can or may in any manner become,
 or be made liable to or for the payment of any sum of money, or for the performance of any contract,
 promise or undertaking until the, etc.

No. a[9].

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.)

(Title.)

To

Whereas _____ has been attached in execution of a decree
 passed in the above suit on the _____ day of _____ 19 _____, in favour of
 _____; You are hereby (subject to your giving security to the satisfaction of the Court)
 appointed receiver of the said property under Order 40 of the Code of Civil Procedure, 1908, with full
 powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disbursements in
 respect of the said property on _____ . You will be entitled
 to remuneration at the rate of _____ per cent. upon your receipts under the
 authority of this appointment.

Given under my hand and the seal of the Court, this
 day of _____ 19 _____.

Judge.

[a] The number of the form, originally misprinted as 6, was corrected by the Repealing and Amending
 Act, 1914 (10 [x] of 1914), S. 2 and Sch. I.

PROVINCIAL AMENDMENT

MADRAS

Substitute the following for Form No. 9:—

“No. 9.

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.)

(Title.)

Whereas it appears to the Court that in the above suit it is just and convenient to appoint a
 receiver of the properties specified below (or whereas the properties specified below have been attached
 in execution of a decree passed in the above suit on the _____ day of _____
 19 _____, in favour of _____).

It is hereby ordered that A. B. be appointed (subject to his giving security to the satisfaction of
 the Court) the receiver of the said property and of the rents, issues and profits thereof under Order 40 of
 the Code of Civil Procedure, 1908, with all powers under the provisions of that Order, except that he shall
 not without leave of the Court, (1) grant leases for a term exceeding three years, or (2) institute suits in

any Court (except suits for rent), or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000, or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which property to be repaired would be let when in a fair state of repair provided that such amount shall not exceed Rs. 1,000.

And it is further ordered that the ^{parties}~~defendants~~ to the above suit and all persons claiming under them do deliver up quiet possession of the properties, movable and immovable, specified below together with all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, movable and immovable, and collect the rents, issues and profits of the said immovable property, and that the tenants and occupiers do attend and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do, out of the first money to be received by him, pay the debts due from the said and shall be entitled to retain in his hands
the sum of Rs. for current expenses, but subject thereto shall pay his net
receipts, as soon as the same come to his hands, into Court to the credit of the suit. He shall once
in every months file his accounts and vouchers in Court, the first account to be filed on the
day of and to be passed on the day of

He shall be entitled to the commission at the rate of Rs. per cent. on the
net amounts collected by him or to the sum of Rs. per month (or 1/12 the case may be) as
his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment:—

(Here enter specification of property.)

Given under my hand and the seal of the Court, this day of 19 ."
[Dis. No. 649 of 1914.]

No. of 19 .

BOND TO BE GIVEN BY RECEIVER. (O. 40, r. 3) (Title.)

Know all men by these presents, that we, and
and , are jointly and severally bound to in Rs.
of the Court of to be paid to the
said or his successor in office for the time being. For which payment
to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and
administrators, jointly and severally, by these presents.

Dated this day of 19 ."
Whereas a plaint has been filed in this Court by against
for the purpose of *[here insert the object of suit]*:

And whereas the said has been appointed, by order of the abovementioned
Court to receive the rents and profits of the immovable property and to get in the outstanding movable
property of in the said plaint
named:

Now the condition of this obligation is such, that if the above-bounden
shall duly account for all and every the sum and sums of money
which he shall so receive on account of the rents and profits of the immovable property, and in respect
of the movable property, of the said at such periods as the said Court
shall appoint and shall duly pay the balances which shall from time to time be certified to be due from him as
the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall
remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition
of the bond.

[a] The number of the form, originally misprinted as 7, was corrected as 10 by the Repealing and Amend-
ing Act, 1914 (10 [X] of 1914), S. 2 and Schedule I.

PROVINCIAL AMENDMENTS

MADRAS—For the space and the words "or his successor in office for the time being" substitute the
word "Court." [12-12-1940.]

Forms Nos. 11 & 12

ALLAHABAD—Add the following as Form Nos. 11 and 12:—

"No. 11.

The security to be furnished under O. 38, R. 9, shall be, as nearly as may be, by a bond in the following
form:

In the Court of at Suit No. of 19 ."
Plaintiff.
Defendant.

Amount of suit, Rupees

Whereas in the suit above specified the plaintiff
said Court that the said defendant,
sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure
so to do, certain property of the said defendant,

And whereas, on the failure of the said defendant
cause why it should not be furnished, the property aforesaid of the said defendant,
, has been attached by order of the said Court:

Therefore, I,
become security and hereby bind myself, my heirs and executors, to
Judge of the said Court, and his successors in office, that the said defendant
produce and place at the disposal of the said Court, when required, the property herein-below specified
namely (*here give description of the property or refer to an annexed Schedule*), or the value of the same, or
such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the
attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to
as Judge of the said Court and his successors in office on its order, such sum to the extent of rupees (*here*
enter a sufficient sum to cover the amount of suit with costs and the costs of attachment) as the said Court
may adjudge against the said defendant.

Witness my hand at this day of
19 . (Signed)
Surety.

Witnesses:

No. 12

The security to be furnished under O. 39, R. 2 (2) shall be, as far as may be, by a bond in the following
form:—

In the Court of at
Suit No of 19 .
Plaintiff.
Defendant.

Whereas, in the suit above specified, instituted by the said plaintiff,
restrain the said defendant, from (*here state the breach of contract or other*
injury), the said Court has, on the application of the said plaintiff,
injunctio to restrain the said defendant from the repetition (*or the continuance*) of the said breach of contract
(*or wrongful act complained of*) and required security from the said defendant against such repetition (*or*
continuance):

Therefore I, , inhabitant of , have voluntarily
become security and do hereby bind myself, my heirs and executors, to
, as Judge of the said Court and his successors in office that the said defendant,
shall abstain from the repetition (*or continuance*) of the breach of contract aforesaid (*or*
wrongful act, or from the commission of any breach of contract or injury of a like kind, arising out of the same
contract, or relating to the same property or right), and in default of his so abstaining, I bind myself, my heirs
and executors to pay into Court, on the order of the Court, such sum to the extent of rupees

Witness my hand at this day of
19 . (Signed)
Surety.

Witnesses:

APPENDIX G.

APPEAL, REFERENCE AND REVIEW

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)
(Title.)

The

above-named appeals to the
Court at

in Suit No. of , from the decree of
day of 19 , dated the
to the decree appealed from, namely:— , and sets forth the following grounds of objection

No 2

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE,
(O. 41, r. 5.)
(Title.)

To

This security bond on stay of execution of decree executed by
witnesseth:—

That , the plaintiff in Suit No. of 19 ,
having sued the defendant, in this Court and a decree having been passed on
the day of 19 , in favour of the plaintiff,

and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of

19

Schedule.

(Signed)

Witnessed by

1.

2.

PROVINCIAL AMENDMENT

MADRAS

In the second para. *after* the words "be confirmed or varied by the Appellate Court" *insert* the words "or in further appeal or appeals from the decree of the said Court."

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, r. 6.)

(Title.)

To

This security bond on stay of execution of decree executed by witnesseth:—

That , the plaintiff in Suit No. of 19 .
having sued , the defendant, in this Court and a decree having been passed
on the day of 19 in favour of the
plaintiff, and the defendant having preferred an appeal from the said decree in the
Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. , mortgaging the properties specified in the Schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(Signed)

Witnessed by

1.

2.

PROVINCIAL AMENDMENT

MADRAS

In the second para. *after* the words "be reversed or varied by the Appellate Court" *insert* the words "or in further appeal or appeals from the decree of the said Court."

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, r. 10.)

(Title.)

To

This security bond for costs of appeal executed by witnesseth:—

This appellant has preferred an appeal from the decree in Suit No. of 19 , against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the Schedule hereunto annexed. I shall not transfer the said properties or any part thereof, and in the event of any default on the part of the appellant, I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of

19

Schedule.

(Signed)

Witnessed by

- 1.
- 2.

No. 5.
INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, r. 13.)
(Title.)

To _____
You are hereby directed to take notice that _____ the
in the above suit, has preferred an appeal to this Court from the decree
passed by you therein on the _____ day of _____

You are requested to send with all practicable despatch all material papers in the suit.
Dated the _____ day of _____ 19 .

Judge.

No. 6.
NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL,
(O. 41, r. 14.)
(Title.)

Appeal from the _____
dated the _____ day of _____ 19 .
To _____ of the Court of _____

Respondent.

Take notice that an appeal from the decree of _____ in this
case has been presented by _____ and registered in this Court, and that the
_____ day of _____ 19 has been fixed by this
Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized
to act for you in this appeal, it will be heard and decided in your absence.

Given under my hand and the seal of the Court, this
day of _____ 19 .

Judge.

[Note.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]
Forms Nos. 6A & 6B

PROVINCIAL AMENDMENT

MADRAS

(i). Insert the following "Note" namely:—

"Note.—Also take notice that if an address for service is not filed before the aforesaid date, this
appeal is liable to be heard and decided as if you had not made an appearance."

[Dis. No. 369E of 1916.]

(ii). Insert the following as Forms Nos. 6A and 6B:—

"No. 6A.
NOTICE TO RESPONDENT. (O. 41A, r. 2.)
(Cause Title)

Appeal from the _____ dated the _____ of the Court of _____
To _____ day of _____

Respondent.

Take notice that an appeal from the above decree (order) has been presented by the above-named
appellant and registered in this Court, and that if you intend to defend the same you must enter an
appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after the
service of this notice on you.

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to
act for you in this appeal, it will be heard and decided in your absence.

The address for service of the appellant is that of his pleader Mr. A. B. of (insert address)

Madras.

(If the appellant appears in person, insert his address for service.)

Given under my hand and the seal of the Court, this _____ day of _____
19 .

Registrar.

Interlocutory application No. _____ of 19 _____ has been made by appellant, and
execution has been stayed (or other order made) by order dated the _____ day of _____
19 .

No. 6B.
MEMORANDUM OF APPEARANCE. (O. 41A, r. 3.)
(Cause Title.)

Take notice that the _____ respondent intends to appear and defend
the above appeal, and that his address for service of all notices and process is (insert address).

The said respondent requires a list of the papers which the appellant proposes to translate and print.

Dated the _____ day of _____

19 .
(Signed) C. D.,
Vakil for Respondent.To
The Registrar, High Court of Judicature, Madras."

(18-10-1917.)

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT JOINED
BY THE COURT AS A RESPONDENT. (O. 41, r. 20.)
(Title.)

To
Whereas you were a party in suit No. _____ of 19 _____, in the Court
of _____, and whereas the _____ has preferred an appeal
to this Court from the decree passed against him in the said suit and it appears to this Court that you are
interested in the result of the said appeal:

This is to give you notice that this Court has directed you to be made a respondent in the said appeal
and has adjourned the hearing thereof till the _____ day of
19 _____, at _____ A. M. If no appearance is made on your
behalf on the said day and at the said hour the appeal will be heard and decided in your absence.

Given under my hand and the seal of the Court, this
day of _____ 19 _____.

Judge.

No. 8.

MEMORANDUM OF CROSS-OBJECTION. (O. 41, r. 22.)

(Title.)

Whereas the _____ Court at _____ has preferred an appeal to the _____
in Suit No. _____ from the decree of
_____ of 19 _____, dated the _____
day of _____ 19 _____, and whereas notice of the day fixed for hearing the appeal was
served on the _____ day of _____ 19 _____, the
_____ files this memorandum of cross-objection under R. 22 of O. 41, of the Code
of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from,
namely:—

No. 9.

DECREE IN APPEAL. (O. 41, r. 35.)

(Title.)

Appeal No. _____ of 19 _____ from the decree of the Court of
dated the _____ day of _____ 19 _____
Memorandum of Appeal.

Plaintiff.
Defendant.

The _____ above-named appeals to the _____ Court at
the _____ from the decrees of _____ in the above suit, dated
namely:— _____ day of _____ 19 _____, for the following reasons,

This appeal coming on for hearing on the _____ day of _____
19 _____, before _____, in the presence of _____
for the appellant and of _____ for the respondent,
it is ordered—

The costs of this appeal, as detailed below, amounting to Rs. _____, are to
be paid by _____. The costs of the original suit are to be paid by _____
Given under my hand this _____ day of _____ 19 _____.

Judge.

Costs of Appeal

Appellant.	Amount.			Respondent.	Amount.		
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for memorandum of appeal				Stamp for power			
2. Do. for power				Do. for petition			
3. Service of processes				Service of process			
4. Pleader's fee on Rs.				Pleader's fee on Rs.			
TOTAL				TOTAL			

PROVINCIAL AMENDMENTS

CALCUTTA—*Cancel* the words from “Memorandum of Appeal” to “the following reasons, namely:—”

(Rule No. 11 of 1910)

MADRAS—*Substitute* the following for Form No. 9:—

“No. 9.
DECREE.
ORDER.”

IN THE COURT OF THE

Present:

day, the

day of

Judge.

19 .

Appeal Suit }
Civil Miscellaneous Appeal Suit } No.

of 19 .

Between :

} Appellant .

and

} Respondent .

On appeal from the Decree/Order of the Court of
dated the day of 19

and made in

Original Suit }
Execution Petition } No. of 19 .
Interlocutory Application }

Between :

} Plaintiff —Petitioner .

and

} Defendant —Respondent .

Particulars of valuation.

Rs. A. P.

1. Valuation in appeal
2. Do. suit

DECREE—ORDER:—This appeal coming on this day for hearing having been heard on the day of 19, upon perusing the grounds of appeal, the Decree/Order and judgment of the lower Court and the material papers in the case and upon hearing the arguments of Mr.

for the Appellant and of Mr.

for the Respondent, and the appeal having stood over to this day for consideration, this Court doth order and decree that the decree/order of the lower Court be and hereby is confirmed and this appeal.

This Court doth further order and decree that the Appellant () do pay to the Respondent () Rs. for costs in this appeal and do bear

own costs Rs.

Particulars of costs.

Appellants.

Amount.
Rs. A. P.

Respondents.

Amount.
Rs. A. P.

1. Stamp on Appeal Memo.
2. Stamp on vakalat
3. Stamp on copies of lower Court decree/
order and judgment including copying fee.
4. Stamp on petitions
5. Process fees
6. Fee for preparation of process
7. Pleader's fee on Rs.

1. Stamp for power
2. Stamp for petition
3. Service of process
4. Pleader's fee on Rs.

Total

Total

Given under my hand and the seal of the Court, this day of

19 .

Judge.
COURT

Appeal Suit }
Civil Miscellaneous Appeal Suit } No.

of 19 .

DECREE—ORDER”

PATNA

In the schedule of costs in Form No. 9 add “Copying or typing charges” below the item “Pleader's fee on Rs.” in the columns for Appellant, and Respondent, and number the new entry in the first column as “5”.

No. 10.

APPLICATION TO APPEAL *IN FORMA PAUPERIS*. (O. 44, r. 1.)

(Title.)

I the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the movable and immovable property belonging to me with the estimated value thereof.

Date the day of 19 .

(Signed)

Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.

No. 11.

NOTICE OF APPEAL *IN FORMA PAUPERIS*. (O. 44, r. 1.)

(Title.)

Whereas the above-named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 and whereas the day of 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

Given under my hand and the seal of the Court, this day of 19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED. (O. 45, r. 3.)

(Title.)

To

Take notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils the requirements of Section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The day of 19 is fixed for you to show cause why the Court should not grant the certificate asked for.

Given under my hand and the seal of the Court, this day of 19 .

Registrar.

PROVINCIAL AMENDMENT

Forms Nos. 12A, 12B and 12C.

MADRAS

Insert the following as new Forms after Form No. 12:—

“ No. 12-A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, r. 7.)

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the Courts are not concurrent.)

Read petition presented under O. 45, R. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree

of this Court in Suit No. of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of for the

respondent (if he appears) this Court doth certify that the amount of the subject-matter of the suit value

Rs. 10,000 in the Court of first instance is and the amount of the subject-matter in dispute on appeal upwards of Rs. 10,000 to His Majesty in Council is also of the value of Rs. 10,000

upwards of Rs. 10,000

or that the decree appealed from involves directly some claim or question to the final order indirectly respecting

property of the value of Rs. 10,000 and that the decree appealed from does not affirm the decision of the lower Court." upwards of Rs. 10,000 final order

"No. 12B.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, r. 7.)

(In cases where the subject-matter is of sufficient value and the findings of the Court are concurrent.)

Read the petition presented under O. 45, R. 3 of the Code of Civil Procedure, praying for a grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree

final order of this Court in

Suit No.

of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he

appears) this Court doth certify that the amount of the subject-matter of the suit in the value

Court of first instance is Rs. 10,000 and the amount of the subject-matter in dispute upwards of Rs. 10,000 value

on appeal to His Majesty in Council is also of the value of Rs. 10,000 or that the upwards of Rs. 10,000

decree appealed against involves directly some claim or question to property of final order indirectly respecting

the value of Rs. 10,000 and that the affirming decree appealed from involves upwards of Rs. 10,000 final order

the following substantial question (s) of law, viz. :—

- (1)
- (2)

"No. 12C.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL (O. 45, r. 7.)

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O. 45, R. 3 of the Code of Civil Procedure, praying for the decree grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the final order of this Court in

Suit No.

of 19 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of

for the respondent (if he appears) this Court doth certify that the amount of the subject-matter of value below Rs. 10,000 in value

the suit both in the Court of the first instance and in this Court is incapable of money valuation

Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, viz. :—

- (1)
- (2)

[9-8-1922.]

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL.

(O. 45, r. 8.)

(Title.)

To

Whereas

in the above case, has furnished the security and made the deposit required by O. 45, R. 7 of the Code of Civil Procedure, 1908:

Take notice that the appeal of the said

Council has been admitted on the

day of

to His Majesty in 19 .

Given under my hand and the seal of the Court, this

day of

19 .

Registrar.

No. 11.
NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED. (O. 17, r. 1.)
(Title.)

To _____ has applied to this Court for a review of its decree
passed on the _____ day of _____ 19 _____ in the above case.
The _____ day of _____ 19 _____, is fixed for you to show cause why the
Court should not grant a review of its decree in this case.
Given under my hand and the seal of the Court, this
day of _____ 19 _____.

Judge.

APPENDIX H.
MISCELLANEOUS

No. 1.
AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, r. 6.)
(Title.)

Whereas we, the parties in the above suit, are agreed as to the question of fact [or of law]
to be decided between us and the point at issue between us is whether a claim founded on a bond,
dated the _____ day of _____ 19 _____ and
filed as Exhibit _____ in the said suit, is or is not beyond the statute of
limitation (or state the point at issue whatever it may be):

We therefore severally bind ourselves that, upon the finding of the Court in the negative
[or affirmative] of such issues, _____ will pay to the said _____
_____ the sum of Rupees _____ (or such sum as the Court shall hold
to be due thereon), and I, the said _____ will accept the said sum of
Rupees _____ (or such sum as the Court shall hold to be due) in
full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said,
will do or abstain from doing, etc., etc.]

Plaintiff.
Defendant.

Witnesses:—

1.
2.

Dated the _____ day of _____ 19 _____.

No. 2.
NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT
FOR TRIAL. (Section 24.)

In the Court of the District Judge of _____
No. _____ of 19 _____
Whereas an application, dated the _____ day of _____ 19 _____
_____ has been made to this Court by _____ the _____ in
Suit No. _____ of 19 _____ now pending in the Court of the _____
at _____, in which _____ is plaintiff and
_____ is defendant, for the transfer of the suit for trial to the Court of
the _____ at _____ :—
You are hereby informed that the _____ day of _____ 19 _____ has been
fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.
Given under my hand and the seal of the Court, this _____ day of _____
19 _____.

Judge.

No. 3.
NOTICE OF PAYMENT INTO COURT. (O. 24, r. 2.)
(Title.)

Take notice that the defendant has paid into Court Rs. _____
and says that that sum is sufficient to satisfy the plaintiff's claim in full.

X. Y., Pleader for the defendant.

To Z., Pleader for the plaintiff.

No. 4.
NOTICE TO SHOW CAUSE. (GENERAL FORM)
(Title.)

To _____ has made
application to this Court that _____;
You are hereby warned to appear in this Court in person or by a pleader duly instructed
on the _____ day of _____.

19 , at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*.
 Given under my hand and the seal of the Court, this 19 . day of

Judge.

PROVINCIAL AMENDMENT

ALLAHABAD

Substitute the following for Form No. 4:—

"Form No. 4.

Notice to show cause. (General form).

In the Court of

Civil Suit No.

Miscellaneous No.

at

of 19 .

of 19 .

district.

resident of

versus

resident of

To

WHEREAS the above-named has made application to this Court that ; you are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application; failing wherein, the said application will be heard and determined *ex parte*, and it will be presumed that you consent to be appointed guardian for the suit.

GIVEN under my hand and the seal of the Court, this 19 . day of

Judge."

No. 5.

LIST OF DOCUMENTS PRODUCED BY — — (O. 13, r. 1.)
 plaintiff
 defendant

(Title.)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

PROVINCIAL AMENDMENT

ALLAHABAD

Substitute the following for Form No. 5:—

"Form No. 5.

LIST OF DOCUMENTS PRODUCED BY — — (O. 13, R. 1.)
 plaintiff
 defendant

In the Court of

Suit No.

at

District.

of 19 .

Plaintiff.

versus

Defendant.

List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant.)

This list was filed by this 19 . day of

1	2	3	4
Serial No.	Description, and date, if any, of the document.	What became of the document.	Remarks.
		If brought on the record the exhibit mark put on the document.	If rejected, date of return to party and signature of party or pleader to whom the document was returned.
			If it remains on the record after decision of the case and is enclosed in an envelope, under Rule 24, Chap. III, the date of enclosure in the envelope.

Signature of party or pleader producing the list."

No. 6.
NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS
ABOUT TO LEAVE THE JURISDICTION. (O. 13, R. 16.)
(Title.)

Plaintiff (or Defendant).

To
Whereas in the above suit application has been made to the Court by
that the examination of _____, a witness required
by the said _____, in the said suit may be taken immediately;
and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's
jurisdiction (*or any other good and sufficient cause to be stated*).
Take notice that the examination of the said witness _____ will be
taken by the Court on the _____ day of _____ 19 _____.
Dated the _____ day of _____ 19 _____.
Judge.

No. 7.
COMMISSION TO EXAMINE ABSENT WITNESS (O. 26, rr. 4, 18.)
(Title.)

To
Whereas the evidence of _____ is required by the _____ in
the above suit; and whereas _____; you are requested to take the evidence
on interrogatories [*or viva voce*] of such witness _____, and you are
hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties
or their agents if in attendance, who will be at liberty to question the witness on the points specified, and
you are further requested to make return of such evidence as soon as it may be taken.
Process to compel the attendance of the witness _____ will be issued by any Court having jurisdiction on
your application.
A sum of Rs. _____, being your fee in the above, is herewith forwarded.
Given under my hand and the seal of the Court, this _____
day of _____ 19 _____.
Judge.

PROVINCIAL AMENDMENT

PATNA

Add the following "Note" at the foot:—

"Note.—The Commissioner has power under Chapter X of the Indian Evidence Act to control
the examination of witnesses."

No. 8.
LETTER OF REQUEST. (O. 26, r. 5.)
(Title.)

(Heading.—To the President and Judges of, etc., etc., *or as the case may be.*)

Whereas a suit is now pending in the _____ in which A. B. is
plaintiff and C. D. is defendant; and in the said suit the plaintiff claims _____
(*Abstract of Claim.*)

And whereas it has been represented to the said Court that it is necessary for the purposes of justice
and for the due determination of the matters in dispute between the parties, that the following persons
should be examined as witnesses upon oath touching such matters, that is say:

E. F., of _____
G. H., of _____
I. J., of _____

and

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court.

Now I _____, as the _____ of the said Court, have the honour
to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you,
as the President and Judges of the said _____, or
some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents
of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time
and place as you shall appoint before some one or more of you or such other person as according to the
procedure of your Court is competent to take the examination of witnesses, and that you will cause such
witnesses to be examined upon the interrogatories which accompany this letter of request [*or viva voce*]
touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of
them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said
witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such
examination to be duly marked for identification, and that you will be further pleased to authenticate such
examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and
to return the same, together with such request in writing, if any, for the examination of other witnesses
to the said Court.

(Note.—If the request is directed to a foreign Court, the words "through His Majesty's Secretary of
State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the
last line of this Form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS. (O. 26, rr. 9, 11.)
(Title.)

To
Whereas it is deemed requisite, for the purposes of this suit, that a commission should be issued; You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, r. 13.)
(Title.)

To
Whereas it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of

19 ; You are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorised to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. , being your fee in the above, is herewith forwarded.

Given under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, r. 3.)
(Title.)

To
Minor Defendant.
Natural Guardian.

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you*

, are hereby required to take notice that unless within days from the service upon you of this notice, an application is made to this Court for the appointment of you* or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of the Court, this
day of 19 .

Judge.

* Here insert the name of the guardian.

PROVINCIAL AMENDMENTS

ALLAHABAD

In Appendix H for Form No. 11, under the heading "Notice to minor defendants and guardian" substitute the following:—

"No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN.

In the Court of at 19 . District.
resident of Suit No. Plaintiff.

resident of versus Defendant.

To (1) minor defendant;
and
(2) or natural guardian
certificated

the person in whose care the minor is alleged to be. Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor
defendant, you said minor, and you (*)

the natural certificated
guardian or the person in whose care the minor is alleged to be are hereby required to take notice that unless within _____ days from the service upon you of this notice, an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit, the Court will proceed to appoint the person named below or some other person to act as the guardian of the minor for the purposes of the said suit. *Proposed guardian* son of
resident of

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge."

* Here insert the name of the guardian.

† Note:—Cut out the word "natural" if the certificated guardian is named: Cut out the word "certificated" if the natural guardian be intended; Cut out both "natural" and "certificated" and the word "or" if the guardian be of neither class but one with whom the minor lives.

MADRAS

(i) *Substitute* the following for Form No. 11:—

"No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR. [(O. 32, r. 3 (5).]
(Title.)

To _____ Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

Whereas an application has been presented on the part of the _____ in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within _____ days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said his minor to act as _____ guardian for the purpose of the said suit, the Court will proceed to appoint some other person to act as _____ guardian of the said minor for the purposes of the said

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

Judge."

(ii) *Insert* the following as Form No. 11A:—

"No. 11A.

NOTICE TO PROPOSED GUARDIAN OF A MINOR DEFENDANT
RESPONDENT

[O. 32, r. 3 (9).]

To _____ (Y Z)
(Name, description and place of residence of proposed guardian.)
Take notice that X plaintiff in _____ has presented a petition to the Court praying
appellant

that you be appointed guardian *ad litem* to the minor _____ and that the same will be heard
defendant (s)
respondent (s)
on the _____ day of _____ 19 .

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said _____ you are requested to
defendant (s)
respondent (s)

sign (or affix your mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in the manner indicated above, take further notice that the Court may proceed under O. 32, R. 3, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the
defendant (s)

minor _____ aforesaid.
respondent (s)

Dated this _____ day of _____ 19 .

(Sd.)

(To be printed on the reverse.)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian

of the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ therein mentioned.

Signature
Y. Z.

Witnesses

1.

2.

[P. Dis. No. 1049 of 1931.]

NAGPUR—For Form No. 11 substitute the following:—

“No. 11.
NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, r. 4A.)
(Title.)

To

Minor defendant,
Legally appointed
Guardian.
Actual
Guardian.

Whereas an application has been presented $\frac{\text{Proposed}}{\text{on the part of the plaintiff}}$ for the appointment
of you $\frac{\text{on behalf of the minor defendant}}{\text{as the guardian for the suit of the minor}}$
defendant (you the said minor*) you
his legally appointed $\frac{\text{actual}}{\text{guardian and you}}$ the proposed guardian for the

suit are hereby required to take notice that unless you, the proposed guardian, appear before this Court on or before the day appointed for the hearing of the case and stated in the appended summons, and express your consent to your appointment or unless an application is made to this Court for the appointment of some other person to act as guardian of the minor for the suit, the Court will proceed to appoint an officer of the Court or a pleader or some other person to act as a guardian to the minor for the purposes of the said suit of which summons in the ordinary form is herewith appended.

Given under my hand and the seal of the Court, this day of 19 Judge.” [29-6-1943.]

* The portion in brackets should be scored out if no notice is to issue to the minor defendant.

OUDH

Same as the one substituted in Allahabad.

[15-4-1944.]

PATNA—(i). For Form No. 11, substitute the following:—

“Form No. 11.
NOTICE TO MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT
OF THE GUARDIAN TO BE GUARDIAN FOR THE SUIT. (O. 32, r. 3.)
(Title.)

To

Minor defendant.

Guardian (appointed by authority, or natural, or the person in whose care the minor is, as the case may be).

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of you† as guardian for the suit to the minor defendant, you the said minor and you† are hereby required to take notice that unless within 21 days from the service upon you of this notice you† give your consent to be appointed to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint an officer of the Court to act as guardian to you the minor for the said suit.

Given under my hand and the seal of the Court, this day of 19 Judge.”

(ii). Add the following as Forms Nos. 11A and 11B:—

“Form No. 11A.

NOTICE TO THE MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT
OF ANOTHER PERSON TO BE GUARDIAN FOR THE SUIT. (O. 32, r. 3.)

Minor defendant.

To

Guardian (appointed by authority or natural, or the person in whose care the minor is.)

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of,

as guardian for the suit to the minor defendant, you the said minor and you§

are hereby required to take notice that unless within 21 days from the service upon you of this notice you§ make an application for the appointment of yourself or of some friend of you, the minor to act as guardian, the Court will proceed, subject to the decision of any objection

that may be raised, to appoint†

or § 1

officer of the Court to act as guardian to you the minor for the said suit.

Given under my hand and the seal of the Court, this day of

19 .

Judge.

† Here insert name of guardian.

‡ Here insert name of guardian upon whom the notice is to be served.

§ Here insert the name and description of proposed guardian.

Form No. 11B.

NOTICE TO THE PROPOSED GUARDIAN FOR THE MINOR DEFENDANT, WHEN THE
PERSON PROPOSED IS NOT THE GUARDIAN APPOINTED BY AUTHORITY OR THE
NATURAL GUARDIAN OR THE PERSON IN WHOSE CARE THE MINOR IS. (O. 32, 1. 4.)
(Title.)

District

In the Court of

Suit No.

at

of 19 .

Plaintiff

versus

Defendant.

To

, Proposed Guardian

Whereas an application has been presented by the plaintiff in the above case for the appointment
of you* as guardian for the suit to the

minor defendant, you are hereby required to take notice that unless within
days from the service upon you of this notice you make an application to the Court intimating your
consent to act as guardian for the suit, the Court will proceed to appoint some other person to act as a
guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of this Court, this
day of 19 .

Judge."

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE
OF PAUPERISM. (O. 33, r. 6.)
(Title.)

To

Whereas has
applied to this Court for permission to institute a suit against in
forma pauperis under O. 33 of the Code of Civil Procedure, 1908; and whereas the Court sees no
reason to reject the application; and whereas the day of
19 has been fixed for receiving such evidence as the applicant may
adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof
thereof:

Notice is hereby given to you under R. 6 of O. 33 that in case you may wish to offer any
evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the
said day of

19 .
Given under my hand and the seal of the Court, this
day of 19 .

Judge,

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE (Section 145.)
(Title.)

To

Whereas you did on become
liable as surety for the performance of any decree which might be passed against the said
defendant in the above suit; and whereas a decree was
passed on the day of 19 against the said
defendant for the payment of , and whereas application has
been made for execution of the said decree against you:

Take notice that you are hereby required on or before the
day of 19 . to show cause why the said decree should not be executed
against you, and, if no sufficient cause shall be, within the time specified, shown to the satisfaction of the
Court, an order for its execution will be forthwith issued in the terms of the said application.

Given under my hand and the seal of the Court, this
day of 19 .

Judge.

* Here insert the name of proposed guardian.

PROVINCIAL AMENDMENTS

CALCUTTA

Cancel columns 20-27 and substitute the following:—

[1-2-1931.]

Execution.		Return of Executions.									
No. of execution application—register and the date of application.	21	22	23	24	25	26	27	28	29	30	31
Relief sought. If money, amount claimed.		Order and date thereof. If portion of relief not granted, what portion	Against whom order made.	For what amount to be satisfied.	Amount of costs.	Adjustments and satisfaction reported, if any.	Amount paid into Court.	Persons arrested.	Whether judgment-debtor committed to jail, if not, why not. If committed to jail, the period of stay in it.	Time of other return, other than arrest and payment	Amount or relief still due and why execution petition is closed.
											If petition infructuous, why and to what extent.
											Appeal, if any, against order in execution and if so, the result.
40	31	32	33	34	35	36	37	38	39	40	41

MADRAS—(Forms No. 11 to 25 omitted)

PATNA—Substitute the following Form for Form No. 14:—

"No. 14.—REGISTER OF CIVIL SUITS. (O. 4, r. 2.)

REGISTER OF CIVIL SUITS IN THE YEAR 19

Court of the of at

Date of presentation of plaint.		Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			Serial number of suit dealt with under the S. C. C. powers.			Name			Description.			Place of residence.			Serial number of suit.			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Note 1.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register.

Note 2.—Cases remanded by Appellate Courts to lower Courts under O. 41, R. 23, Civil Procedure Code, will be re-admitted and entered in the general register of suits under their original numbers. In each case the letter R will be affixed to the number to be entered in column 2.

Note 3.—In column 14 should be indicated whether the decision was *ex parte* on compromise or on contest against all or any of the defendants.

Note 4.—When the Court of execution is other than the Court which passed the decree, the name of the executing Court should be given in column 20.

[20-2-1930.]

SIND

Substitute the following columns for the columns relating to "Execution" and "Return of Execution" in Form No. 14 (Register of Civil Suits)
In Appendix H:—

EXECUTION.				RETURN OF EXECUTION.					
No. of execution application as per execution application register and the date of application.	Relief sought. If money, add amount claimed.	Order and date thereof. If portion of relief not granted, what portion.	Against whom order made.	For what, amount to be stated.	Amounts of costs.	Adjustments and satisfaction reported if any.	Amount paid into Court.	Persons arrested.	Whether judgment-debtor committed to jail; if not, why not. If committed to jail, the period of stay in it.
							Minute of other return, other than arrest and payment.	Amount or relief still due and why execution petition is closed.	If petition infructuous, why and to what extent.
									Appeal, if any, against order in execution and, if so, the result.

No. 15.

REGISTER OF APPEALS. (O. 41, r. 9.)

COURT (OR HIGH COURT) AT
REGISTER OF APPEALS FROM DECREES IN THE YEAR 19 .

Date of memorandum.	Appellant.			Respondent.		Decree appealed from.			Appearance.		Judgment.						
	Number of appeal.	Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Of what Court.	Number of Original Suit.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed, reversed or varied.	For what or amount.

PROVINCIAL AMENDMENT

Form Nos. 16 to 18

ALLAHABAD

Add the following as Forms Nos. 16 to 18:—

"Form No. 16.

The security to be furnished under O. 25, R. 1, shall be, as nearly as may be, by bond in the following form:—

In the Court of

Suit No.

at

of 19

Plaintiff

versus

Defendant.

Whereas a suit has been instituted in the said Court by the said plaintiff

to recover from the said defendant

and the said plaintiff

the sum of Rupees

is residing out of British India (or is a woman) and does not possess any sufficient immovable property within British India independent of the property in the suit:

Therefore I, inhabitant of

, have voluntarily become security, and do hereby

bind myself, my heirs and executors, to

as Judge of the said Court and to his

successors in office that the said plaintiff

, his heirs and executors, shall, whenever

called on by the said Court, pay all costs that may have been or may be incurred by the said defendant,

, in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at

this

day of

19 .

(Signed)

Witness:

Surety.

Form No. 17.

Address for service.

Under O. 7, Rr. 19-26; O. 8, Rr. 11 and 12; O. 41, R. 38; O. 46, R. 8; O. 47, R. 10; O. 52, R. 1.
 In the Court of the

of

Original—suit—No.
 or case

of 19 .

versus

Plaintiff

Defendant.

THE SECOND SCHEDULE.

Repealed by the Arbitration Act, 1940 (10 [X] of 1940), S. 49 and Sch. III.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

Powers of Collector. 1. Where the execution of a decree has been transferred to the Collector under section 68, he may—

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

[1882—S. 321. See Sections 42 and 68 to 72.]

Procedure of Collector in special cases. 2. Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided.

[1882—S. 322]

Notice to be given to decree-holders and to persons having claims on property.

3. (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immovable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property or pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder."

Schedule III, Para 1—Note 1.

[1] The provisions of S. 41, Madras Court of Wards Act, do not affect the duties of the executing Court or the functions of the Collector under this rule. (Vol 5) 1918 Mad 848 (849): 41 Mad 508 (SB).

[2] The Collector's powers of execution are limited by this paragraph to the three courses specified in this paragraph. ('83) 7 Bom 832 (835) (DB).

[3] Collector has no power to inquire into objections, to attachment or sale. (Vol 8) 1921 Bom 45 (46): 45 Bom 812 (DB).

[4] Collector cannot entertain applications for rateable distribution. (Vol 7) 1920 Bom 35 (37) (DB).

[5] Collector has no power to decide whether decree was satisfied. (Vol 11) 1924 All 307 (308): 46 All 414 (DB) * ('13) 87 Bom 32 (35) (DB).

[6] Collector cannot deal with property not covered by order of sale. (Vol 9) 1922 Nag 243 (244): 18 Nag L R 181.

[7] Collector cannot set aside acts of owner of property before transfer was made. ('85) 1885 All W N 305 (308).

[8] Within the limits of the paragraph the Collector has absolute jurisdiction to find out the best method of execution allowed to him by law. (Vol 11) 1924 All 307 (308): 46 All 414 (DB).

[9] Decree against Hindu father transferred to Collector for execution—Collector is seized of all joint family property and can sell the same in execution. (Vol 18) 1931 All 541 (542, 544) (DB).

[10] Collector can dismiss execution application for default—He can also restore same in proper case. (Vol 9) 1922 Nag 267 (270, 272): 18 Nag L R 152.

[But see (Vol 6) 1919 Nag 91 (98).]

[11] Collector set aside order passed under mistake on discovery of mistake. ('06) 28 All 671 (673) (DB).

[12] In all matters arising in execution, but not covered by the provisions of this Schedule, the Civil Court continues to have jurisdiction. (Vol 4) 1917 Oudh 92 (95) (DB) * ('87) 1887 All W N 267 (267) (DB) * (Vol 20) 1933 Sind 112 (114, 115): 26 Sind L R 506 (DB).

[13] Collector failing to effect sale and returning papers to Court—Court can send back papers without fresh application. (Vol 7) 1920 Oudh 75 (76).

[14] Execution transferred to Collector—Court cannot entertain application to add legal representatives. ('88) 1888 All W N 164 (164) (DB).

[15] Court can reconsider its order directing sale, if there is no bar of *res judicata*. (Vol 23) 1936 Bom 227 (241): 60 Bom 516 (DB).

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

[1882—S. 322A.]

4. (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immovable property, and may, from time to time, adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

[1882—S. 322B.]

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immovable property so far as they are known to the Collector or appear in the records of

Where District Court may issue notices and hold inquiry.

Sch. III, Para 1 (contd.)

[16] Collector selling property is ministerial officer—Sale is not complete until Court formally accepts bid and declares purchaser under O. 21. R. 84. (Vol 22) 1935 Oudh 191 (182): 10 Luck 557 (DB).

[See also (Vol 30) 1943 Lah 849 (361): ILR (1944) Lah 222 (FB).]

[17] In Allahabad Collector has powers similar to those of Civil Court in matter of setting aside sales—Order passed by Collector in such matter is judicial order—Collector has inherent power to set aside sale if he is satisfied that it was vitiated by fraud. (Vol 22) 1935 All 868 (871): 53 All 249 (DB).

[18] Court transmitting decree or order to Collector for execution can recall its own records transmitted to Collector. ('83) 7 Bom 332 (336) (DB) * ('87) 11 Bom 478 (482) (DB).

[See also ('85) 7 All 407 (409) (DB) * ('82) 5 All 314 (315, 316) (FB).]

[19] Power to recall records ought not to be exercised unless moved by party. ('94) 8 Bom 301 (302) (DB).

[20] It is open to the executing authority to effect a mortgage of part of the property to satisfy a mortgage decree. (Vol 12) 1925 Bom 277 (278) (DB).

[21] Collector should let out land on premium and not on yearly rental. (Vol 20) 1933 Bom 369 (369) (DB).

Schedule III, Para 2—Note 1.

[1] A decree for sale of ancestral land or of an interest in such land in enforcement of a hypothecation on such land is a "decree for the recovery of money" within the N.W.P. Government Notification No. 671 of 30th August 1880. ('82) 4 All 115 (115) (FB).

Schedule III, Para 3—Note 1.

[1] The holder of a decree for money passed *after* the property comes under the management of the Collector is not entitled to be placed on the list of creditors framed under Para 4, Sch. III ('96) 13 All 313 (316).

[2] The Collector is not authorized to hear any objection to the sale of the property advertised for sale. He can only call for claims. ('98) 20 All 428 (429) (DB).

[3] Arrangement by Collector to satisfy claims made in pursuance of his calling for a statement of such claims in the property of judgment-debtor—Person omitting to file such statement cannot ask for setting aside the arrangement. ('91) 4 C P L R 118 (118, 119).

Schedule III, Para 4—Note 1.

[1] Person obtaining money decrees *after* management of debtor's property has been placed in the hands

his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

[1882—S. 322C.]

6. The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be
Effect of decision of Court as to dispute. appealable as a decree.

[1882—S. 322D.]

Scheme for liquidation of decrees for payment of money.

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or
 - (ii) by mortgaging the whole or any part of such property; or
 - (iii) by selling part of such property; or
 - (iv) by letting on farm, or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or
 - (v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the [Provincial Government].

[1882—S. 323]

[a] Substituted by A. O., for "Local Government."

Sch. III, Para 4 (contd.)

of the Collector is not entitled to be placed in the statement prepared under this paragraph. ('96) 18 All 818 (815, 816).

[3] Person, claiming to be owner of the property proceeded against, objecting to its being sold—Collector should proceed under paragraph 4, sub-paragraph 8 and not simply inform the objector that he should apply to Court which passed the decree. (Vol 23) 1986 Oudh 195 (196): 87 Cr L Jour 1087.

Schedule III, Para 6—Note 1.

[1] District Judge to whom a dispute was referred

by the Collector, wrongly sent back the same to the Collector and he decided it—*Hild* that remedy of aggrieved party was to have *appealed* against order of the District Judge and not to sue Collector for a declaration of his right. ('96) 1896 All WN 69 (70) (DB)

Schedule III, Para 7—Note 1.

[1] Decree transferred to Collector for execution—He has absolute jurisdiction to decide and find out best method of execution allowed to him by law. (Vol 11) 1924 All 807 (808): 46 All 414 (DB).

8. Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property: and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

[1882—S. 324.]

9. (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to a [the Crown] in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

- (a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and
- (b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct; or
- (c) where the Collector has proceeded under paragraph 2,—
 - (i) in keeping down the interest on incumbrances on the property;
 - (ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and
 - (iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

1882—S. 324A]

[a] Substituted by A. O. for "the Government."

Sch. III Para 7 (contd.)

[2] Properties sold by Collector but whole of sale amount not deposited by auction-purchaser—It is entirely in the discretion of Collector to decide whether he would re-sell the property or not in order to realize the balance of the purchase-money. (Vol 11) 1924 All 704 (705): 46 All 562 (DB).

[3] Collector granting lease to decree-holder in satisfaction of his decree—He cannot subsequently resile from it nor can Court grant fresh lease. (09) 38 Bom 448 (449) (DB) * (10) 8 Ind Cas 410 (410, 411) (Oudh).

[4] Decree transferred to Collector for making suggestions for satisfaction of decree—Collector suggesting that half the attached land should be farmed out to decree-holder for a certain period in

satisfaction of decree—Latter not prepared to take such lease—Executing Court thereupon merely filing proceedings—Held that procedure was wrong and proceedings could be filed only if all the lawful means for satisfying decree had been tried and found to be impracticable. (Vol 16) 1929 Lah 195 (195).

[5] Order of Collector under this Paragraph disallowing application of decree-holder that amount of decree may be satisfied by temporary alienation instead of by a sale is not appealable. (88) 5 All 314 (316) (FB).

Schedule III, Para 9—Note 1.

[1] Decree sent to Collector for execution—He is bound to render to the Court, an account of all monies coming into his hands, and must hold the

10. Where the Collector sells any property under this schedule, he shall Sales how to be put it up to public action in one or more lots, as he thinks fit, conducted. and may—

- (a) fix a reasonable reserved price for each lot;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;
- (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

[1882—S. 325.]

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

[1882—S. 325A.]

Sch. III, Para 9 (contd.)

balance of the amount after deducting necessary charges, at the disposal of the Court. ('94) 16 All 1 (3) (DB) * (Vol 18) 1931 All 700 (701), (DB) * ('12) 96 Bom 519 (523) (DB) * ('04) 6 Bom L R 825 (830, 831) (DB) * ('90) 3 C P L R 147 (149).

[2] Paragraph does not require Collector to pay the balance into Court. ('44) 6 Bom L R 825 (831) (DB).

[3] Provisions for maintenance of judgment-debtor's family is a matter for determination by Court and not by Collector. ('04) 6 Bom L R 822 (824) (DB) * ('04) 6 Bom L R 825 (831) (DB).

[4] Collector is entitled to recover as expenses of sale, fees on the scale prescribed for sales under the Land Revenue Code. Poundage fee may also be allowed in addition to such expenses. (Vol 14) 1927 Bom 17 (18, 19) (DB) * (Vol 13) 1926 Bom 335 (336) (DB).

[5] Person claiming rateable distribution—Omission to invite attention of Collector to his own right of rateable distribution does not deprive him of the right to claim such distribution in a regular suit—Fact that decree which is noted to be satisfied will have to be re-opened does not affect the question. (Vol 20) 1933 All 666 (669) (DB).

Schedule III, Para 10—Note 1.

[1] Sale confirmed—Collector is *functus officio*—His only duty is to return papers to Civil Court. ('87) 11 Bom 478 (482) (DB).

[2] According to Bombay Civil Circulars application by decree-holder for permission to bid at auction held by Collector must be made to Collector. (Vol 5) 1918 Bom 216 (217); 42 Bom 621 (DB).

Schedule III, Para 11—Synopsis

1. Incompetency to transfer.
2. Alienation subsequent to adjustment.
3. Permission of the Collector.
4. Power of Civil Court to issue process.
5. Termination of the Collector's power.
6. Limitation.

1. Incompetency to transfer.—[1] This Paragraph imposes a *personal disqualification* on the judgment-debtor and his representatives whilst the properties are under the management of the Collector. (Vol 30) 1943 Nag 166 (167); I L R (1943) Nag 199 * ('07) 3 Nag L R 171 (176) * (Vol 26) 1939 Bom 277 (278); I L R (1939) Bom 120 (DB).

[2] Alienation made in contravention of this paragraph is wholly void and incapable of ratification or of enforcement in equity. (Vol 29) 1942 Pat 213 (219); 20 Pat 904 (DB) (*Obiter*) * (Vol 28) 1941 Nag 12 (13); I L R (1941) Nag 214 * (Vol 27) 1940 P C 204 (210); I L R (1940) Kar P C 419; 67 Ind App 431 (PC) * (Vol 5) 1918 P C 168 (169); 46 Cal 188; 45 Ind App 219; 14 Nag L R 181 (PC) (*Overruling* 36 Bom 510—The decision in 4 C P L R 156 is also no longer good law) * (Vol 4) 1917 Nag 215 (223); 13 Nag L R 180 (FB).

[3] Mortgagee under a void mortgage paying off a prior mortgage has no right to be subrogated to the rights of the prior mortgage. (Vol 11) 1924 Oudh 302 (303); 27 Oudh Cas 56 (DB).

[4] A transfer by judgment-debtor of property excluded from management of Collector is not within the prohibition of this Paragraph. (Vol 15) 1928 P C 165 (167, 168); 24 Nag L R 186 (PC) * (Vol 32) 1945 Nag 289 (241, 242); I L R (1945) Nag 555.

[5] Disability to transfer property in respect of which the Collector has assumed management will not affect validity of any agreement to pay money recoverable from person or other property of the judgment-debtor. (Vol 20) 1933 All 468 (472) (DB) * (Vol 24) 1937 Oudh 87 (99); 12 Luck 435 (DB).

[6] Although a mortgage granted in violation of this Paragraph is void, the personal covenant to repay is not made void by the mere operation of this paragraph. (Vol 30) 1943 P C 29 (32); 70 Ind App 1; 13 Luck 180 (PC) (Vol 24) 1937 Oudh 410; 13 Luck 581 reversed) * (Vol 27) 1940 P C 204 (211); I L R (1940) Kar P C 419; 67 Ind App 431 (PC).

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraph 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Provincial Government, may by general rule or special order direct.

[1882—S. 325B.]

[a. Substituted by A. O., for "Local Government."

Sch. III Para 11 (contd.)

[7] A member of joint Hindu family against manager of which a decree has been obtained as representing family is incompetent to alienate any portion of properties in the management of Collector. (Vol 15) 1928 P C 165 (166); 24 Nag L R 186 (PC).

[8] Lessee from Collector can alienate his interest in the lease. (Vol 6) 1919 Nag 29 (29, 30); 16 Nag L R 64 (DB).

[9] Disability to alienate begins from date of the order of transfer to the Collector and continues so long as any of the debts, for the satisfaction of which the property was taken under the management of the Collector remains unpaid. (Vol 28) 1936 Oudh 280 (284); 12 Luck 185 (DB) * (Vol 13) 1926 Nag 246 (247) * ('07) 29 All 415 (417) (DB) * ('99) 1839 Pun Re No. 42, page 203 (206) (DB) * (Vol 24) 1937 Oudh 410 (412); 13 Luck 531 (DB).

[10] Disability continues until decree is satisfied and proceedings in appeal and revision therefrom are completed. (Vol 11) 1924 Nag 216 (219, 220).

[11] Sale taking place in contravention of this Paragraph without either party knowing that he was violating the law—Vendor will be compelled to refund purchase-money received by him. (Vol 11) 1924 Nag 132 (133); 20 Nag L R 87.

[12] Suit brought by mortgagee on a mortgage executed by judgment-debtor in contravention of this Paragraph—Latter not raising any plea as to void character of mortgage—Decree passed—He cannot raise such objection in execution of decree. (Vol 18) 1931 All 38 (40) (DB).

[13] A contract of sale does not create a charge within the meaning of this Paragraph. (Vol 9) 1922 Nag 81 (81).

[14] The word "alienate" does not contemplate a device, such as a will or a *donatio mortis causa*. ('10) 33 All 233 (235) (DB) * (Vol 14) 1927 Nag 177 (178).

[15] A family settlement based on the assumption of antecedent title in the parties is not an alienation. (Vol 22) 1935 Oudh 245 (249); 10 Luck 690 (DB).

[16] A judgment-debtor can grant leases in ordinary course of village management for effective cultivation of the lands of the village. ('42) 1942 Nag L Jour 299 (301).

2. Alienation subsequent to adjustment.—[1] Adjustment certified and recorded by Collector—It is competent to judgment-debtor to mortgage, sell or otherwise alienate his property thereafter. ('11) 35 Bom 516 (525) (DB).

[2] Mortgage made in contravention of this Paragraph—Decree satisfied out of mortgage amount—Mortgage is not void. (Vol 20) 1933 Nag 233 (239, 240).

[See also (Vol 21) 1934 Nag 33 (35) * (1935) 18 Nag L Jour 134 (137).]

3. Permission of the Collector.—[1] The permission of Collector need not take any special form—Every detail of the transaction need not be sanctioned by Collector—Whole transaction permitted by Collector—Permission in respect of each deed not necessary. (Vol 8) 1921 Oudh 176 (181, 182) (DB).

[2] Collector can delegate his power under this Paragraph. (Vol 31) 1944 Oudh 60 (62); 19 Luck 463 (DB).

[3] Permission to alienate can be inferred from written words employed by Collector from time to time (Vol 17) 1930 Oudh 510 (518); 6 Luck 106 (DB) * (Vol 16) 1929 Oudh 441 (443); 5 Luck 335 (DB) * (Vol 25) 1938 Nag 309 (310, 311); 1 L R (1938) Nag 573.

[See also 1935) 18 Nag L Jour 134 (136).]

[4] It was held in the following cases that where a sale or mortgage of property which is under the Collector's management under Schedule III is effected without his written permission, the sale is a nullity and the fact that the property has ceased to be under his management on the date on which the instrument of sale is registered will not make it valid. (Vol 25) 1938 Nag 253 (254); 1 L R (1938) Nag 652 (DB).

[5] A contrary view was held in the following cases. (Vol 5) 1918 Nag 107 (107) * (1935) 18 Nag L Jour 134 (137).

[6] A judgment-debtor is not bound to inform the Collector of all the steps that his creditors are taking against him. ('86, 19 Nag L Jour 94 (98) (DB).

[7] Collector permitting a mortgage under this Paragraph without any conditions—Permission is not impliedly revoked merely because contemplated mortgage does not materialise and Collector again orders sale of the property. (Vol 21) 1934 Nag 285 (287).

[8] A sale by a judgment-debtor with the permission of the Collector under this Schedule has not the same effect as a sale by a Collector himself in execution, but amounts only to a private sale. (Vol 12) 1925 Nag 341 (342).

4. Power of Civil Court to issue process.—

[1] Collector holding judgment-debtor's property under his control by virtue of powers conferred on him by S. 68—A new process cannot be issued by a Civil Court in execution of a decree for payment of money. (Vol 30) 1943 Nag 166 (168); 1 L R (1943) Nag 199 * (Vol 13) 1926 Oudh 318 (319) (DB) * ('11) 35 Bom 516 (524) (DB) * (Vol 8) 1921 Oudh 176 (186) * (1935) 18 Nag L Jour 138 (140).

[2] Any attachment, effected before the papers which had been returned by the Collector are sent back to the Collector, will be valid. (Vol 8) 1921 Oudh 176 (187, 188) (DB).

13. In exercising the powers conferred on him by paragraphs 1 to 10 the Powers of Collector Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

[1882—S. 325C.]

THE FOURTH SCHEDULE.

(See Section 155.)

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	<p>In Article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted.</p> <p>From Article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely:—</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."</p>

THE FIFTH SCHEDULE —[Enactments repealed.]

Repealed by the Second Repealing and Amending Act, 1914 (17 [XVII] of 1914), Section 3 and Schedule II.

Sch. III, Para 11 (contd.)

[3] An attachment before judgment can be effected since it is not a process in execution. (Vol 9) 1922 Nag 288 (288).

[4] The surplus sale proceeds after satisfaction of a mortgage decree may be attached in execution. (Vol 14) 1927 Oudh 216 (217) (DB).

[5] No receiver can be appointed to take an account of annual income of the property within the control of the Collector. (Vol 12) 1925 Oudh 448 (451): 28 Oudh Cas 880 (DB).

[6] The prohibition to issue process does not apply to a mortgage decree in which the Court has ordered the sale of specific property. (Vol 18) 1931 All 88 (40) (DB).

5. Termination of Collector's powers.—[1] The powers of the Collector under this Schedule terminates as soon as the decree is certified as satisfied. (Vol 28) 1941 Nag 12 (13): 1 L R (1941) Nag 214 * (11) 85 Bom 516 (525) (DB) * (Vol 21) 1934 Nag 285 (287) * (Vol 24) 1937 Nag 217 (220) (DB).

[2] Property sold and fetching more than the decretal amount—Management of Collector does not end—His powers continue to exist till confirmation of the sale. (Vol 7) 1920 Nag 254 (255): 16 Nag LR 194.

[3] Collector's powers are presumed to continue until they are proved to have ceased. (Vol 18) 1931 All 541 (548) (DB).

[4] Civil Court drawing up "Form C" in respect of the properties attached by it, and sending the same to Collector—Latter returning it to Civil Court for some corrections to be made therein—Pro-

ceedings before Collector must be deemed to be pending even during period of pendency of the "Form C" in the Civil Court for correction. (Vol 9) 1922 Nag 267 (268): 18 Nag L R 152.

6. Limitation.—[1] This Paragraph expressly excludes from calculation the period during which the decree is before the Collector for execution. But the exclusion is permissible only, in cases where a provision has been made under paragraph 7 for the satisfaction of the decree and where the decree-holder has in consequence been deprived of his remedy. (1911) 21 Mad L Jour 464 (464) (DB) * (Vol 14) 1927 Bom 128 (124, 125): 51 Bom 143 (DB) * (95) 19 Bom 261 (267) (DB) * (98) 20 All 883 (885) (DB).

[2] No provision made under paragraph 7 for satisfaction of decree—Period during which decree is before Collector cannot be excluded. (Vol 8) 1921 Nag 64 (65) * (Vol 2) 1915 Nag 103 (106): 11 Nag L R 25.

[3] Sale held by Collector—No bidders appearing—Collector sending papers back to Civil Court—Civil Court returning papers again to Collector—Period from date of original application will be excluded for purpose of section 48 of the Code. (Vol 13) 1926 All 331 (331) (DB) * (Vol 7) 1920 Oudh 75 (76).

[4] Decree transferred to Collector and execution application consigned to records in 1913—No sale by Collector—Collector, as Court of Wards, making payments till 1938—Subsequent application by decree-holder to recover balance—Application not barred under S. 48 and Sch 3 para 11 (3) nor under Art. 182 Limitation Act. (Vol 32) 1945 Oudh 110 (111) (DB).

[THE] COAL GRADING BOARD ACT, 1925 (ACT XXXI OF 1925)

CONTENTS

1. Short title and extent.
2. Definitions.
3. Constitution of Coal Grading Board.
 1. Power to grade collieries, to revise grading and to grant certificates.
 5. Maintenance and publication of grade list.
 6. Grant of export certificate.
 7. Powers of inspection.
 8. Grant of rebate and preference.
 9. Application of fees.
10. Validity of acts of Board.
11. Protection for acts done under Act.
12. Power of the Central Government to make rules.

STATEMENTS OF OBJECTS AND REASONS.

The object of this Bill is to carry out the most important recommendations of the Indian Coal Committee in Chapter IX of its Report. Since the war, the market for Indian coal both in Indian and in foreign ports has been greatly decreased, and the first finding of the Committee is that the problem of the recovery of these markets can be summed up in the two words 'quality' and 'price.' As regards quality, the Committee summarised its recommendations as below:—

It would be very difficult for individual exporters of coal to re-establish themselves in overseas markets owing to the bad repute into which Indian coal has fallen and a Grading Board should, therefore, be immediately established which would grade collieries which produce coal for export and would arrange the issue of a certificate for each consignment of coal exported. (Paragraphs 101 and 102 of the Report.)

Any system of grading and certificates should be such as to command the confidence of buyers overseas and not to relieve the exporter of any responsibility as to quality. (Paragraph 103).

It would take too long and it would be too expensive to establish immediately a new organisation for the grading of Indian coal. (Paragraph 104).

The organisation of the Chief Mining Engineer to the Railway Board should be utilised for the purpose of grading coal. (Paragraph 104).

The most suitable constitution for the Grading Board would be the Chief Mining Engineer as Chairman, a representative of the Indian Mining Association, a representative of the Indian Mining Federation, a nominee of the Bengal Chamber of Commerce and a nominee of the Bengal National Chamber of Commerce. The last two members would represent the consumer's interests on the Board. (Paragraph 104).

The general outline is given of a scheme for classifying all Indian coals, and it is suggested that a grading list should be published by the Grading Board as soon as possible, classifying the different collieries and seams on this system and giving the analysis for their coal. (Paragraph 105).

The names of collieries should not be included in the grading list without their consent. (Paragraph 105).

The decision of the Grading Board as to the classification of any colliery or seam in the grading list should be final. (Paragraph 105).

Any coal should be eligible for inclusion in the grading list. (Paragraph 105).

2. The question of price is largely one for the collieries themselves but the Committee has recommended that certain concessions should be given by the Railways concerned and by the Port Commissioners of Calcutta. These concessions take the form of an additional rebate on railway freight and a reduction of river duties on coal certified for export.

3. These recommendations have been agreed to by the Government of India, the Railway Administrations concerned and the Port Commissioners of Calcutta. The Committee suggested that they should be given effect to in the manner suggested at the end of paragraph 105 of its Report. But the Government of India have been unable to accept this proposal and have decided that the recommendations can be properly given effect to only by means of legislation. Hence they have embodied the recommendations of the Committee in this Bill.

THE COAL GRADING BOARD ACT, 1925.

(ACT XXXI OF 1925.) a

[23rd September, 1925.]

An Act to provide for the grading of coal and for the grant of certificates for coal intended for export.

WHEREAS it is expedient to provide for the grading of coal and for the grant of certificates for coal intended for export; It is hereby enacted as follows:—

[a] For Report of Select Committee, *see* Gazette of India, 1925, Part V, p. 210.

- Short title and extent. 1. (1) This Act may be called the Coal Grading Board Act, 1925.
(2) It extends to the whole of British India.
- Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—
- (a) "Board" means the Coal Grading Board constituted under section 3;
 - (b) "export" means the shipment of coal as cargo from a port in British India;
 - (c) "graded colliery" means a colliery the grade of all or any of the seams or of a part of any seam of which has been determined under the provisions of section 4 and is entered in the grade list maintained in accordance with the provisions of section 5;
 - (d) "prescribed" means prescribed by rules made under this Act; and
 - (e) "secretary" means the secretary of the Board appointed under sub-section (4) of section 3.

Constitution of Coal Grading Board.

3. (1) As soon as may be after the commencement of this Act, the a[Central Government] shall cause to be constituted^b a Board consisting of the following members, namely:—

- (a) the Chief Mining Engineer to the Railway Board c[or, after the establishment of the Federal Railway Authority, to that Authority]; and
- (b) four persons nominated respectively by the Indian Mining Association, the Indian Mining Federation, the Bengal Chamber of Commerce and the Bengal National Chamber of Commerce:

Provided that, if within the period prescribed in this behalf any such body fails to make any nomination which it is entitled to make under this sub-section, the a[Central Government] may d[itself] appoint a member or members, as the case may be, to fill the vacancy or vacancies.

(2) The Board so constituted shall be a body corporate by the name of the Coal Grading Board, having perpetual succession and a common seal with power to acquire and hold property, both movable and immovable, and to contract and shall by the said name sue and be sued.

(3) The Chief Mining Engineer to the Railway Board c[or, after the establishment of the Federal Railway Authority, to that Authority], shall be *ex officio* President of the Board.

(4) The secretary of the Board shall be a person, not being a member of the Board, appointed by the Board.

[a] Substituted by A. O. for "Governor-General in Council."

[b] For constitution of the Board *see* Notification No. 47-T. (57), dated 20th January 1926, Gazette of India, 1926, Pt. I, p. 148.

[c] Inserted by A. O.

[d] Substituted by A. O. for "himself."

SECTION 3—Note 1.

"Clause 3 (4) has been amended to vest in the

Board the power to appoint its secretary as it is not necessary to retain this power in the hands of Government."—S O R.

Power to grade
collieries, to revise
grading and to
grant certificate.

4. (1) On the application of any colliery and on payment of the prescribed fee, the Board shall, in such manner as may be prescribed, determine the grade of coal of all or any of the seams or of a part of a seam of such colliery, and shall by notice in writing inform the colliery of the grade so determined.

(2) The colliery may, within thirty days from the receipt of the said notice, lodge with the Board an objection to the order passed under sub-section (1) determining the grade of any coal, and the Board shall, on payment of the prescribed fee and after further inspection and analysis, decide such objection; the decision of the Board shall be final and shall not be questioned in any Court.

(3) Where the grade of any coal has been determined under the provisions of this section, the Board shall, on the request of the colliery, furnish a certificate in the prescribed form, specifying the grade of such coal.

Maintenance and
publication of grade
list.

5. (1) The Board shall maintain a grade list, in such form and containing such particulars as may be prescribed, of coal the grade of which has been determined in accordance with the provisions of section 4, but shall not enter in such list any coal in respect of which the colliery has, after the determination or decision of the Board under sub-section (1) or sub-section (2) of section 4, given notice in writing that such coal should not be entered in the grade list.

(2) The grade list shall be published in such manner as may be prescribed.

Grant of export
certificate.

6. (1) On the application of any graded colliery desiring to export coal and on payment of the prescribed fee, the Board shall, if it is satisfied after such inspection as it may deem necessary with the quality and condition of the coal, grant a certificate of shipment in the prescribed form.

(2) Such fee shall not exceed one anna per ton of coal.

Powers of inspection.

7. Any member of the Board and any person authorised in this behalf by the Board may, for the purposes of this Act, enter at any time in and upon any colliery, storage bin, truck, vehicle, vessel or other place where there is coal and inspect, test and take sample of such coal.

Grant of rebate
and preferences.

8. Notwithstanding anything to the contrary in any law for the time being in force, a rebate of any charges, including freight, fees, tolls, dues or rates, may be granted in respect of coal of which a certificate of shipment has been granted under the provisions of section 6, and, subject to such restrictions as may be prescribed, preference may be given in the supply of wagons for forwarding coal for export from a graded colliery.

Application of
fees.

9. Subject to such conditions as may be prescribed, the proceeds of fees received by the Board shall be applied to meeting the expenses of the Board.

Validity of acts of
Board.

10. No act done or proceeding taken under this Act shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

SECTION 4—Note 1.

"In clause 4 (2) the limitation period for presenting an appeal should start from the date of the receipt and not the date of issue of notice. We have carefully considered the provisions of clause 4 (2) relating to appeals against the orders of the Board determining the grade of any coal. It is obvious that the only satisfactory method of dealing with such appeals is to make arrangement for new analysis. We are satisfied from the information at our disposal that these fresh analyses will be made in circumstances which will secure an independent test,

and we have altered the clause to make fresh inspection and analysis compulsory in the event of an appeal. We have also made provision in this clause for the grant of a certificate to the colliery on the determination of the grade of any coal."—S C R.

SECTION 8—Note 1.

"By clause 8 railway authorities have been allowed to give preference in the supply of wagons in favour of certified coal, but we are of opinion that this should be allowed only subject to such restrictions as may be prescribed by Government."—S C R.

Section 10 of
Acts done under Act.

11. No suit or other legal proceeding shall be instituted against any person in respect of anything which is in good faith done or intended to be done under this Act.

Power of the
Central Government
to make rules.

12. (1) The [Central Government] may, after previous publication, by notification in the [Official Gazette], make rules for the purpose of carrying into effect all or any of the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

- (a) for prescribing the time within which nominations shall be made under section 3, whether in the first instance or on the occurrence of vacancies;
- (b) for prescribing the term of office of members of the Board;
- (c) for prescribing the circumstances in which and the authority by which any member may be removed from the Board;
- (d) for regulating the appointment of officers of, and the keeping and publication of accounts by, the Board;
- (e) for prescribing the procedure on application under section 4 and the principles for grading coal;
- (f) for prescribing the form of and particulars to be entered in and manner of publication of the grade list;
- (g) for prescribing the procedure of the Board in deciding any objection lodged against any order passed under section 4 determining the grade of any coal;
- (h) for prescribing the form of certificate to be granted under section 6 and the procedure on application under that section;
- (i) for prescribing the restrictions subject to which preference may be given under section 8;
- (j) for prescribing the fees for any inspection or analysis required for the purposes of this Act or payable under any of the provisions of this Act; and
- (k) for prescribing the remuneration of members and regulating the expenditure of the Board.

[a] Substituted by A. O. for "Governor-General in Council".

[b] Substituted by A. O. for "Gazette of India."

[c] For such rules, see General Statutory Rules and Orders Vol V., p. 647

THE COAL MINES SAFETY (STOWING) ACT, 1939 (ACT XIX OF 1939)

CONTENTS.

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| <ol style="list-style-type: none"> 1. Short title, extent and commencement. 2. Definitions. 3. Constitution of Board. 4. Power to Board to co-opt members. 5. Imposition of excise duty. 6. Imposition of customs duty. 7. Payment to Board of sum equivalent to the net proceeds of the excise duty. | <ol style="list-style-type: none"> 8. Moneys received by the Board to be credited to the fund. 9. Powers of Inspectors. 10. Application of Act IV of 1923. 10A. Powers of Board in executing operations. 11. Committees for inquiry. 12. Powers to make rules. 13. Application to Crown mines. |
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STATEMENT OF OBJECTS AND REASONS.

"The Government of India have had under consideration for some time past the question *inter alia* of devising measures for the protection of miners against the dangers involved in the present methods of extraction in the main coalfields where a stage has been reached at which the continued extraction of the

large quantities of coal standing in pillars by ordinary methods is impossible in some cases and would, in other cases, involve serious danger to those engaged in the work and the likelihood of a great wastage of coal. They accordingly appointed a committee known as the Coal Mining Committee in

October, 1936, to inquire into the methods of extracting coal underground in Bengal, Bihar and the Central Provinces and to report on the measures which should be taken to secure the safety of the workers and to prevent avoidable waste of coal. The Committee have advocated the adoption of stowing, i. e., the filling with sand or other incombustible material of the space left by the extraction of coal, to start with, in areas where there is urgent and immediate danger to life or urgent danger of substantial loss of coal. The Committee have recommended that a cess of 8 annas per ton on coal, including soft coke, and 12 as per ton on hard coke should be imposed, to be used mainly to defray the

cost of stowing. The recommendations of the Committee have been examined by the Government of India in consultation with the Provincial Governments and the interests concerned. The Government of India feel that for the present at any rate the main objective of any proposals should be to secure the safety of the worker. Such proposals would incidentally result in certain amount of conservation but safety should be the primary objective. The Bill is designed to give effect to these proposals...."

—Gazette of India, 1939, Part V., Page 23

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act 11 of 1940: 8 of 1944.

—Amended by Ordinance No. XXV of 1942.

THE COAL MINES SAFETY (STOWING) ACT, 1939 (ACT XIX OF 1939)^a

[21st April, 1939.]

An Act to make further provision for safety in coal mines.

Whereas it is expedient to make further provision for safety in coal mines by taking measures to facilitate or require therein the carrying out of the operation known as stowing^b [and other operations], and to provide for the creation of a fund for the assistance of such^c [operations], in the manner hereinafter provided :

It is hereby enacted as follows—

[a] For the Statement of Objects and Reasons, see Gazette of India 1939, Pt. V, p. 23; for the Report of Select Committee, see *ibid.*, p. 37.

[b] Inserted by the Coal Mines Safety (Stowing) Amendment Act, 1940 (11 [XI] of 1940), s. 2.

[c] Substituted for "operation," *ibid.*

Short title
extent and
commence-
ment.

1. (1) This Act may be called the Coal Mines Safety (Stowing) Act, 1939.
- (2) It extends to the whole of British India except Assam and the Punjab.
- (3) It shall come into force on such date^a as the Central Government may, by notification in the official Gazette, appoint.

[a] The 27th May, 1939, see Gazette of India, 1939, Pt. I, p. 907.

Definition

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "agent," "mine" and "owner" have the meanings respectively assigned to them in section 3 of the Indian Mines Act, 1923;
- (b) "Board" means the Coal Mines Stowing Board constituted under section 3;
- (c) "Chief Inspector" and "Inspector" mean the persons respectively appointed to be Chief Inspector of Mines and Inspector of Mines under sub-section (1) of section 4 of the Indian Mines Act, 1923 and the provisions of that Act shall apply to the Chief Inspector and to all Inspectors while exercising their powers under this Act or the rules made thereunder;
- (d) "fund" means the Coal Mines Stowing Fund;
- (e) "prescribed" means prescribed by rules made under this Act;
- (f) "soft coke" means of coke which is unsuitable for metallurgical purposes, and "hard coke" means all coke which is not soft coke;
- (g) "stowing" means the operation of filling with sand or other incombustible material space left underground in a coal mine by the extraction of coal.

3. (1) The Central Government shall, as soon as may be after the commencement of this Act, constitute a Board to be called the Coal Mines Stowing Board to administer the fund, and such Board shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued.

(2) The Board shall consist of the following members, namely:—

- (i) a person a [* * *] appointed by the Central Government, as Chairman:
- (ii) the Chief Inspector, or an Inspector appointed by the Central Government in this behalf;
- (iii) two persons nominated by the Indian Mining Association:
- (iv) one person nominated by the Indian Mining Federation;
- (v) one person nominated by the Indian Colliery Owners' Association:

Provided that if, within the prescribed period, any body fails to make the nomination which it is entitled to make under this sub-section, the Central Government may itself nominate a person to fill the place on the Board.

(3) Where a nominated member dies, resigns, ceases to reside in British India or becomes incapable of acting, the Central Government shall, on the recommendation of the body which would have been entitled to make the nomination if it had been a first nomination under sub-section (2), or where such recommendation is not made within the prescribed period, may, on its own initiative, nominate a person to fill the vacancy.

(4) No act done by the Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

[a] *Omitted by the Coal Mines Safety (Stowing) Amendment Ordinance 1942 (No. XXV of 1942), s. 2, [22-5-1942].*

4. (1) The Board may, at any time and for such period as it thinks fit, co-opt as members of the Board any persons possessing such technical qualifications as may be prescribed.

(2) A member co-opted under sub section (1) shall exercise all the powers and functions of a member under this Act, except that he shall not be entitled to vote on any question coming before the Board.

5. With effect from such date^a as the Central Government may, by notification in the official Gazette, appoint in this behalf, there shall be levied and collected on all coal raised and despatched, and on all soft coke manufactured and despatched, from collieries in British India a duty of excise as may, by notification in the official Gazette, be fixed from time to time by the Central Government, subject to a maximum rate of three annas per ton; similarly there shall be levied and collected on such descriptions of hard coke as may be prescribed a duty of excise as may, by notification in the official Gazette, be fixed from time to time by the Central Government, subject to a maximum rate of one and a half times the rate of excise duty for the time being in force in respect of coal and soft coke.

[a] *i.e.*, 1st December 1939—See Department of Labour Notification No. M.—955 (1) of 17-10-1939 in the Gazette of India, dated 21-10-1939, Part I.

6. During the period in which a duty of excise is being levied under section 5, the Central Government may, by notification in the official Gazette, impose on all coal and soft coke and on such descriptions of hard coke as may be prescribed under section 5, imported into British India from any foreign country or brought into British India from the territory of any Indian State ^a[* * *], a duty of customs, ^b[(which shall be in addition to any duty of customs for the time being leviable under any other Act),] at rates equivalent to the rates of the duty of excise levied under section 5 of this Act.

[a] Certain words were omitted by the Coal Mines Safety (Stowing) Amendment Act, 1940 (11 [XI] of 1940), s. 8.

[b] *Inserted, ibid.*

7. The Central Government shall, as soon as may be in each financial year, pay to the Board a sum equivalent to the net proceeds ^a[determined in such manner as may be prescribed] of the duty of excise realised under section 5 during the preceding year.

[a] *Substituted* by the Coal Mines Safety (Stowing) Amendment Act, 1940 (11 [XI] of 1940), s. 4, for the original words.

8. (1) The sum referred to in section 7 and any other moneys received by the Board shall be credited to a fund to be called the Coal Mines Stowing Fund, which shall be applied by the Board in such manner and subject to such conditions as may be prescribed, to—

- (i) meeting the expenses in connection with the administration and the furtherance of the objects of this Act; ^a[*]
- (ii) the grant of stowing materials and other assistance for stowing operations to owners, agents or managers of coal mines:
- ^b [(iii) the execution of ^c[stowing and other operations] in furtherance of the objects of this Act; and
- (iv) the prosecution of research work connected with safety in mines].

(2) The Board shall keep accounts of the fund, and such accounts shall be examined and audited at the prescribed times by auditors appointed in this behalf by the Central Government.

[a] The word "and" was *omitted* by the Coal Mines Safety (Stowing) Amendment Act, 1940 (11 [XI] of 1940), s. 5.

[b] *Added, ibid.*

[c] *Amended, ibid.*, 1944 (8 [III] of 1944), s. 2.

9. (1) The Chief Inspector or any Inspector may make such examination and inquiries as he thinks fit in order to ascertain whether the provisions of this Act and of any rules and orders made thereunder are being complied with.

(2) The Chief Inspector or any Inspector may, with such assistance, if any, as he thinks fit, enter, inspect and examine at any time by day or night any coal mine in respect of which assistance is being, or has been, given under this Act, in order to ascertain the amount of sand or other incombustible material used in stowing in the mine or to ensure that stowing ^a[or any other operation towards which assistance may be granted under this Act], has been, or is being, done effectively:

Provided that the power conferred by this sub-section shall not be exercised in such a manner as unreasonably to impede or obstruct the working of the mine.

(3) Without prejudice to the provisions of section 19 of the Indian Mines Act, 1923, the chief Inspector or any Inspector may, by order in writing addressed to the owner, agent or manager of a coal mine, require him to take such protective measures, including stowing, in the mine as the Chief Inspector or the Inspector may think necessary, if in the opinion of the Chief Inspector or Inspector—

- (a) the extraction or reduction of pillars in any part of the mine is likely to cause crushing of pillars or the premature collapse of any part of the workings or otherwise endanger human life or the mine, or
- (b) adequate provision against the outbreak of fire or flooding has not been made by providing for the sealing off and isolation of any part of the mine or for restricting the area that might be affected by fire or flooding, as the case may be.

[a] *Inserted* by the Coal Mines Safety (Stowing) Amendment Act, 1940 (11 [XI] of 1940), s. 6.

10. The provisions of sub-sections (3) to (6) (both inclusive) of section 19 of the Indian Mines Act, 1923, shall apply to an order made under sub-section (3) of section 9 of this Act as they apply to an order made under sub-section (2) of section 19 of that Act, and all the provisions of the Indian Mines Act, 1923 (except sub-section (1) of section 11 thereof), affecting committees appointed for the purposes of that Act or relating to the disposal of references made to such committees, shall apply, *mutatis mutandis* and so far as may be, to a committee appointed to inquire into a reference under this Act and to the disposal of such reference. ^aProvided that the power conferred by the proviso to sub-section (6) of the said section 19 to suspend the operation of a requisition under sub-section (1) of that section shall include a power similarly to suspend the operation of an order made under sub-section (3) of section 9 of this Act.

^a Proviso was added by the Coal Mines Safety (Stowing) Amendment Act, 1944 (3 [III] of 1944), s. 3, [7-3-1944].

^a10A. Powers of Board in executing operations.—(1) If in the opinion of the Board it is necessary or desirable that any protective measures, including stowing, required in furtherance of the object of this Act, should be undertaken directly by the Board, the Board may execute or cause to be executed such measures under its own supervision.

(2) For the purposes of this section the Board shall have the right for itself and all persons employed in the execution of any work undertaken under this section to enter upon any property in which the work is to be done and to do therein all things necessary for the execution of the work.

(3) No person shall obstruct or interfere with the execution of any work undertaken under this section, and no person shall remove or tamper with any plant or machinery or any stowing or other material used in the execution of such work.

(4) Whoever contravenes the provisions of sub-section (3) shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.]

[^a Sec 10A was inserted by the Coal Mines Safety (Stowing) Amendment Act, 1944 (3 [III] of 1944), s. 4, [7-3-1944].

Committee of Inquiry. 11. (1) A committee appointed to inquire into a reference arising out of an order passed under sub-section (3) of section 9 shall consist of—

(a) the chairman of the Board as chairman;

(b) four members selected by the Chairman of the Board as follows:—

(i) two, from a panel of eight persons nominated by the Indian Mining Association;

(ii) one, from a panel of four persons nominated by the Indian Mining Federation;

(iii) one, from a panel of four persons nominated by the Indian Colliery Owners' Association; and

(c) one member appointed by the Central Government to represent the interests of persons employed in coal mines.

(2) No person shall be nominated to the panels referred to in clause (b) of sub-section (1) unless he possesses such technical qualifications as may be prescribed.

(3) If any body fails, within the prescribed period, to make any nomination which it is entitled to make under sub-section (1) or to fill any vacancy in a panel, the Central Government shall itself nominate a sufficient number of persons to complete the panel.

12. (1) The Central Government may, after previous publication, make rules^a to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions, such rules may provide for any or all of the following purposes, namely:—

- (a) the nomination, and term of office, of members of the Board appointed or nominated under section 3;
- (b) the powers and functions of, and the conduct of business by, the Board;
- b [(bb) the determination of the net proceeds of the duty of excise for the purposes of section 7];
- (c) prescribing the technical qualifications to be possessed by co-opted members of the Board and by persons nominated to the panels referred to in section 11;
- (d) prescribing the descriptions of hard coke on which a duty of excise may be levied under section 5;
- (e) regulating the levy, collection and payment of the duty of excise; and the imposition, collection and payment of the duty of customs;
- (f) prescribing the manner in which and the conditions under which sums at the credit of the fund may be applied;
- (a) prescribing the form in which the accounts of the fund shall be kept and the times at which such accounts shall be audited, and regulating the publication of the abstract of such accounts and the report of the auditors thereon, and prescribing the procedure in relation to any items of expenditure from the fund disallowed by the auditors;
- (h) any other matter which is to be or may be prescribed.

[a] For such rules see Department of Labour notification No. M.-955 (2) of 17-10-1939 in the Gazette of India, dated 21-10-1939, Part 1, as amended from time to time.

[b] Inserted by the Coal Mines Safety (Stowing) Amendment Act, 1940 (11 [XI] of 1940) s. 7.

Application to Crown mines. 13. This Act applies to coal mines belonging to the Crown.

[THE INDIAN] COCONUT COMMITTEE ACT, 1944.

(ACT X of 1944.)

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STATEMENT OF OBJECTS AND REASONS.

"Even before the outbreak of the present war the supply of coconuts and coconut products from indigenous sources was insufficient to meet India's growing requirements and a large balance had to be imported. With the enemy occupation of some of the world's principal coconut-growing countries an acute shortage has developed abroad and it has become necessary to secure an immediate increase in the production of coconuts in India in order to meet as far as possible from internal sources India's increased demand for coconut products for essential purposes,

military and civil. There is reason to believe that present production can be substantially increased in a comparatively short time by the adoption of better cultural and manurial practices and that the process of extracting the oil is similarly susceptible of considerable improvement. The time also appears opportune to provide for and initiate the agricultural and technological research necessary to render possible a general intensification of production, the better utilisation of the coconut and coconut products and the rehabilitation of the industry.

The Government of India consider that both the war-time and the long-term aspects of the problem can best be served by the immediate establishment of an all-India organisation on lines for which the Indian Central Cotton Committee and similar bodies concerned with coffee and lac afford precedent. The Bill accordingly seeks to establish an Indian Central Coconut Committee, with an independent source of income, for the improvement and development of the growing, marketing and manufacture of the coconut in India and for promoting and safeguarding the interests of all branches of its production and manu-

facture, from the producer to the consumer. An exception will be coir and coir manufactured goods, which will for the present be excluded from the purview of the proposed Committee in deference to the wishes of the Government of Travancore the largest producer of these commodities. Complete agreement has been reached with the Provincial and State Governments concerned as to the desirability of setting up such a Committee and as to its constitution, functions and pecuniary resources."

—Gazette of India, 1944, Part V., page 9.

EXTRACT FROM THE SELECT COMMITTEE REPORT.

"The rate of duty proposed by the Bill is a fixed rate of Rs. 3-2-0 per ton, working out approximately to Rs. 0-2-6 per cwt., and was fixed by reference to the sum estimated as necessary for the inauguration of the scheme set up by the Bill and for the initial stages of the working of the Act. We realize that as the work of the Committee develops more ample funds will be required, and we think that the best method to secure elasticity is to provide a maximum limit which the cess must not transcend, and give the Central Government power within the limit to fix the amount of the cess from time to time by notification. Accordingly we have laid down in clause 3 Rs. 0-4-0 per cwt. as that limit, but we are of opinion that on the Act coming into force the Central Government should in the first instance fix the rate of the cess at Rs. 0-2-6 per cwt., that is to say, the rate provided for in the Bill as introduced. Our amendment, in that it increases the rate of cess which the Bill proposed, requires the previous sanction of the Governor General before it could be moved, and we request that this previous sanction may be obtained.

In the constitution of the Committee provision is already made for the representation of the interests of growers of coconuts and persons engaged in the coconut oil industry. We consider that it is desirable

also to have persons to represent the interests of the general consumer. This, we consider, can best be done by providing for the appointment of additional members to be chosen by election from among the elected members of the Legislature. Accordingly, we have provided for the appointment of two such persons from the Legislative Assembly, and one from the Council of State; and in order that the three States primarily concerned with the subject-matter of the Bill may have similar representation, we have provided for nominations by the State Governments. We hope that the State Governments in making their nominations will find it suitable to base their choice on the principles which we have provided to be followed in British India.

We consider that a member elected by virtue of his being an elected member of the Legislature should remain on the Committee only so long as he continues to be an elected member of the Legislature, and we contemplated modifying the provisions of clause 6 to express this. But the effect can be achieved by the use of the rule-making power conferred by clauses (b) and (c), sub-clause (2) of clause 13, and we consider that the rules made under this clause should so provide."

—Gazette of India, 1944, Part V, page 34.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION,

—Amended by Acts 6 of 1945; 15 of 1946.

[THE INDIAN] COCONUT COMMITTEE ACT, 1944.

(ACT X of 1944)

[31st March, 1944.]

An Act to provide for the creation of a fund for the improvement and development of the cultivation, marketing and utilization of coconuts in India.

Whereas it is expedient to provide for the creation of a fund to be expended by a Committee specially constituted in this behalf for the improvement and development of the cultivation, marketing and utilization of coconuts in India;

It is hereby enacted as follows:—

Short title and extent. 1. (1) This Act may be called the Indian Coconut Committee Act, 1944.

[2] It extends to the whole of British India.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Collector" means the officer appointed by the Central Government^t to perform in any specified area the duties of a Collector under the provisions of this Act and the rules made thereunder, and includes any officer subordinate to that officer whom he may by order in writing authorise to perform his duties under those provisions:]

(b) "the Committee" means the Indian Coconut Committee constituted under this Act:

b[(bb) "Fund" means the Coconut Improvement Fund referred to in sub-section (2) of section 3:]

(c) "mill" means any place in which copra is crushed for the extraction of oil, which is a factory as defined in section 2 of the ^o["*"] Factories Act, 1934;

(d) "prescribed" means prescribed by rules made under this Act.

[a] Substituted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 2. for the original definition. [18-4-1946.]

[b] Inserted, *ibid.*

[c] The word 'Indian' was omitted by the Repealing and Amending Act, 1945 (6 [VI] of 1945), S. 3 and Sch. II.

3. a[(1)] There shall be levied and collected, as a cess for the purposes of this Act, on ^{Imposition of} all copra consumed in any mill in British India, whether produced in or ^{Coconut cess.} imported from outside British India, a duty of excise at such rate, not exceeding four annas per cwt., as the Central Government may, after consulting the Committee, by notification in the official Gazette, fix in this behalf.

a[(2)] On the last day of each month, or as soon thereafter as may be convenient, the proceeds of the duty recovered during that month shall, after deduction of the expenses, if any, of collection and recovery, be paid to the Committee, and the Committee shall credit the said proceeds and any other monies received by it to a fund called the Coconut Improvement Fund.]

[a] Section 3 was re-numbered as sub-section (1) and sub-section (2) was added by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 2. [18-4-1946.]

4. As soon as may be after the commencement of this Act, the Central Government ^{Con-stitution of} shall cause to be constituted a Committee consisting of the ^{Indian Coconut} following members, a[^{Committee.} to receive for credit to the Fund the proceeds of the duty and any other monies received by it and to administer the Fund,] namely:—

(a) the Vice-Chairman, Imperial Council of Agricultural Research;

(b) nine persons representing the growers of coconut in India, of whom two shall be nominated by the Government of Madras, two by the Government of the State of Travancore, and one each by the Government of Bombay, the Government of Bengal, the Government of Orissa, the Government of the State of Mysore, and the Government of the State of Cochin;

(c) five persons representing the coconut oil industry, nominated, respectively, by the Government of Madras, the Government of the State of Travancore, the Government of the State of Cochin, the Indian Merchants Association, Bombay, and the Bombay Chamber of Commerce, Bombay,

(d) three persons representing, respectively, the Provincial Government of Madras, the Government of the State of Mysore and the Government of the State of Travancore, appointed in each case by the Government concerned :

(e) one person nominated by the Travancore Chamber of Commerce :

(f) one person appointed by the Central Government ;

(g) six other persons, of whom two shall be persons elected from among themselves by the elected members of the Legislative Assembly of the Central Legislature, one shall be a person elected from among themselves by the elected members of the Council of State, and three shall be persons nominated respectively by the Government of the States of Travancore, Mysore and Cochin.

[a] Substituted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 4.
[18-4-1946]

5. The Committee shall be a body corporate by the name of the Indian Central Incorporation of Coconut Committee, having perpetual succession and a common seal the Committee. with power to acquire and hold property, both moveable and immovable, and to contract, and shall by the said name sue and be sued.

6. (1) If within the period prescribed in this behalf, or within such further period Vacancies. as the Central Government may allow, any authority or body fails to make any nomination, election or appointment which it is entitled to make under section 4, the Central Government may itself appoint a member to fill the vacancy in the Committee.

(2) Where a member of the Committee dies, resigns or is removed, or ceases to reside in India, or becomes incapable of acting, the Central Government may, on the recommendation of the authority or body which was entitled to make the first nomination, election or appointment under section 4, or where such recommendation is not made within a reasonable time, then on its own initiative, appoint a person to fill the vacancy.

(3) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of the Committee.

President of Committee, Secretary, sub-committees and staff. 7. (1) The Vice-Chairman, Imperial Council of Agricultural Research, shall be the President of the Committee.

(2) The Central Government shall appoint a person to be the Secretary of the Committee and such person shall be paid by the Committee such salary and such allowances as may be fixed by the Central Government.

(3) The Committee may appoint such sub-committees and staff as may be necessary for the efficient performance of its functions under this Act.

8. The Central Government may, on the recommendation of the Committee, appoint Appointment an officer or officers to discharge under the direction of the Committee such of Officers. duties as may be prescribed, and such officer or officers shall be paid by the Committee such salary and allowances as may be fixed by the Central Government.

Application of fund. *9. (1) The Committee shall apply the Fund to meeting the expenses of the Committee and the cost of such measures as it may consider necessary or expedient to take for the improvement and development of the cultivation and marketing of coconuts and of the production, utilisation and marketing of copra, coconut oil and coconut poonac.

(2) Without prejudice to the generality of the foregoing power, the Committee may utilise the Fund to defray expenditure involved in—

(a) undertakings, assisting or encouraging agricultural, industrial, technological and economic research :

(b) the supply of the technical advice to growers ;

(c) encouraging the adoption of improved methods in cultivation ;

(d) carrying on such propaganda in the interests of the coconut industry as may be necessary ;

(e) collecting statistics from growers, dealers, millers and other sources on all relevant matters bearing on the industry ;

(f) fixing grade standards of copra and its products ;

(g) recommending the maximum and minimum prices to be fixed for copra ;

(h) advising on all matters which require attention for the development of the industry ;

(i) improving the marketing of coconuts in India and abroad and suggesting suitable measures to prevent unfair competition ;

(j) assisting in the control of insects and other pests and diseases of coconut trees ;

(k) promoting and encouraging co-operative efforts among the coconut growers and in the coconut industries ;

(l) adopting such measures as may be practicable for assuring remunerative returns to growers ;

(m) maintaining and assisting in the maintenance of such institutes, farms and stations as it may consider necessary ;

(n) adopting any other measures or performing any other duties which it may be required by the Central Government to adopt or perform or which the Committee itself may think necessary or advisable in order to carry out the purposes of this Act.]

[a] Sec. 9 was substituted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 5, for the original section. [18-4-1946]

Delivery of monthly returns. 10. (1) The owner of every mill shall furnish to the Collector on or before the 7th day of each month, a return stating the total amount of copra consumed in the mill during the preceding month together with such further information in regard thereto as may be prescribed :

Provided that no return shall be required in regard to copra consumed before the commencement of this Act.

(2) Every such return shall be made in such form and shall be verified in such manner as may be prescribed.

Collection of cess by Collector. 11. (1) On receiving any return made under section 10 the Collector shall assess the amount of the duty payable under section 3 in respect of the period to which the return relates, and if the amount has not already been paid shall cause a notice to be served upon the owner of the mill requiring him to make payment of amount assessed within thirty days of the service of the notice.

(2) If the owner of any mill fails to furnish in due time the return referred to in sub-section (1) of section 10 or furnishes a return which the Collector has reason to believe is incorrect or defective, the Collector shall assess the amount, if any, payable by him in such manner, as may be prescribed, and the provisions of sub-section (1) shall thereupon apply as if such assessment had been made on the basis of a return furnished by the owner :

Provided that, in the case of a return which he has reason to believe is incorrect or defective, the Collector shall not assess the duty at an amount higher than that at which it is assessable on the basis of the return without giving to the owner a reasonable opportunity of proving the correctness and completeness of the return.

(3) A notice under sub-section (1) may be served on the owner of a mill either by post or by delivering it or tendering it to the owner or his agent at the mill.

Finality of assessment and recovery of unpaid duty.

a[12. (1) Any owner of a mill who is aggrieved by an assessment made under section 11 may, within three months of service of the notice referred to in sub-section (1) of that section, apply to the District Judge, or in a Presidency-town, to the Chief Judge of the Small Cause Court for the cancellation or modification of the assessment and, on such application, the said Judge may cancel or modify the assessment and order the refund to such owner of the whole or part, as the case may be, of any amount paid thereunder.

(2) The decision under sub-section (1) of the District Judge or the Chief Judge of the Small Cause Court, as the case may be, shall be final.]

(3) Any sum recoverable under section 11 may be recovered as an arrear of land revenue.

[a] Sub-sections (1) and (2) were substituted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 6, for the original sub-sections (1) and (2). [18-4-1946]

Power to inspect mills and take copies of records and accounts.

13. (1) The Collector or any officer empowered by general or special order of the Central Government in this behalf shall have free access at all reasonable times during working hours to any mill or to any part of any mill.

(2) The Collector or any such officer may at any time a [during working hours] with or without notice to the owner, examine the b [purchase, sale and stock] records and accounts of any mill and take copies of or extracts from all or any of the said records or accounts for the purpose of testing the accuracy of any return or of informing himself as to the particulars regarding which information is required for the purposes of this Act or any rules made thereunder.

c[Provided that nothing in this section shall be deemed to authorise the examination of any description or formulae of any trade process.]

d [* * * * *]

[a] Inserted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 7. (a) (1) [18-4-1946]

[b] Substituted, for "working records, sale", *ibid.*, S. 7. (a) (2).

[c] Proviso was added. *ibid.*, S. 7. (a) (3).

[d] Sub-section (3) was omitted, *ibid.*, S. 7. (b).

Information acquired to be confidential.

14. (1) All such copies and extracts and all information acquired by a Collector or any other officer from an inspection of any mill or warehouse or from any return submitted under this Act shall be treated as confidential.

(2) If the Collector or any such officer discloses to any person other than a superior officer any such information as aforesaid without the previous sanction of the Central Government, he shall be punishable with imprisonment which may extend to six months and shall also be liable to fine :

Provided that nothing in this section shall apply to the disclosure of any such information for the purposes of a prosecution in respect of the making of a false return under this Act.

Application of proceeds of duty.

[15. Omitted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1940), S. 8. [18-4-1946]

Keeping and auditing of accounts.

16. (1) The Committee shall publish an annual report and shall keep accounts of all duty received by it under this Act and of the manner in which it is expended and shall also publish a summary of the accounts along with the annual report.

(2) Such accounts shall be examined and audited annually in the prescribed manner and the auditors shall have power to disallow any item which has been, in their opinion, expended otherwise than in pursuance of the purposes of this Act.

(3) If any item is disallowed, an appeal shall lie to the Central Government whose decision shall be final.

Dissolution of Committee. 17. The Central Government may a[with the previous approval of both Chambers of the Central Legislature] by notification in the official Gazette, declare that, with effect from such date as may be specified in the notification, the Committee shall be dissolved, and on the making of such declaration all funds and other property vested in the Committee shall vest in His Majesty for the purposes of the Central Government and this Act shall be deemed to have been repealed.

[a] Inserted by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 9 [18-4-1946]

Power of the Central Government to make rules. 18. (1) The Central Government may make rules for the purpose of carrying into effect provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) for prescribing the time within which nominations or elections shall be made under section 4 whether in the first instance or on the occurrence of vacancies ;

(b) for prescribing the term of office of the members of the Committee ;

(c) for prescribing the circumstances in which and the authority by which any member may be removed ;

(d) for prescribing the quorum of the Committee ;

(e) for the holding of a minimum number of meetings of the Committee during any year ;

(f) for the maintenance by the Committee of a record of all business transacted and the submission of copies of such records to the Central Government ;

(g) for the definition of the powers of the Committee to enter into contracts which shall be binding on the Committee, and the manner in which such contracts shall be executed ;

(h) for the regulation of the travelling allowances of members of the Committee and of their remuneration, if any ;

(i) for the definition of the powers of the Committee, in respect of the appointment, promotion and dismissal of officers and servants of the Committee, and in respect of the creation and abolition of appointments of such officers or servants ;

(j) for the regulation of the grant of pay and leave to officers and servants of the Committee, and the payment of leave allowances to such officers and servants and the remuneration to be paid to any person appointed to act for any officer or servant to whom leave is granted ;

(k) for the regulation of the payment of pensions, gratuities, compassionate allowances and travelling allowances to officers and servants of the Committee ;

(l) for prescribing the establishment and maintenance of a provident fund for the officers and servants of the Committee, and for the deduction of subscriptions to such provident fund from the pay and allowances of such officers and servants, other than Government servants whose services have been lent or transferred to the Committee ;

(m) for prescribing the preparation of budget estimates of the annual receipts and expenditure of the a[Fund] and of supplementary estimates of expenditure not included in the budget estimates, and the manner in which such estimates shall be sanctioned and published ;

(n) for defining the powers of the Committee, the Standing Finance Sub-Committee, if any, and the President, respectively, in regard to the expenditure b[from the Fund] whether provision has or has not been made in the budget estimates or by re-appropriation for such expenditure, and in regard to the re-appropriation of estimated savings in the budget estimates of expenditure ;

(o) for prescribing the maintenance of accounts of the receipts and expenditure of the a[Fund] and providing for the audit of such accounts ;

(p) for prescribing the manner in which payments are to be made by or on behalf of the Committee, and the officers by whom orders for making deposits or investments or for withdrawals or disposal of the funds of the Committee shall be signed ;

(q) for determining the custody in which the current account of the ^a[Fund] shall be kept, and the bank or banks at which surplus monies at the credit of the ^a[Fund] may be deposited at interest, and the conditions on which such monies may be otherwise invested ;

(r) for prescribing the preparation of a statement showing the sums allotted to Departments of Agriculture or institutions not under the direct control of the Committee for expenditure on research, the actual expenditure incurred, the outstanding liabilities, if any, and the disposal of unexpended balances at the end of the year ;

^c[(rr) for prescribing the manner in which any amount of duty paid in excess may be refunded ;]

(s) for prescribing the duties of the officers appointed under section 8, and the powers and duties of the Secretary of the Committee ;

(t) any other matter which is to be or may be prescribed.

[a] Substituted for " committee " by the Indian Coconut Committee (Amendment) Act, 1946 (15 [XV] of 1946), S. 10 (a). [18-4-1946].

[b] Substituted, *ibid.*, S. 10 (b).

[c] Inserted, *ibid.*, S. 10 (c).

Power of the Committee to make regulations. **19.** The Committee may, with the previous sanction of the Central Government, make regulations consistent with this Act and with any rules made under section 18 to provide for all or any of the following matters, namely :—

(a) the appointment of a Standing Finance Sub-Committee or other Sub-Committee and the delegation thereto of any powers exercisable under this Act by the Committee ;

(b) the method of appointment, removal and replacement and the term of office of members of the Sub-Committees, and for the filling of vacancies therein ;

(c) the dates, times and places for meetings of the Committee and the Sub-Committees and the procedure to be observed at such meetings ;

(d) the circumstances in which security may be demanded from officers and servants of the Committee, and the amount and nature of such security in each case ;

(e) the times at which, and the circumstances in which, payments may be made out of the provident fund and the conditions on which such payments shall relieve the fund from further liability ;

(f) the contribution, if any payable from the funds of the Committee to the provident fund ;

(g) generally all matters incidental to the provident fund and the investment thereof.

Publication of rules and regulations. **20.** All rules made under section 18 and all regulations made under section 19 shall be published in the *Gazette of India*.

[THE] COFFEE MARKET EXPANSION ACT, 1942.

(ACT VII OF 1942)

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STATEMENT OF OBJECTS AND REASONS.

1. "After the outbreak of the present war the Indian coffee industry lost certain important foreign markets. There was therefore a great slump in the prices of coffee. A Coffee Control Conference consisting of the interests affected was held in September 1940 to consider the steps that could be taken to save the industry from collapse. After full consideration of the recommendations made at the Conference, the Coffee Market Expansion Ordinance, 1940, was promulgated providing for the necessary assistance to the Indian Coffee Industry by regulating the export of coffee from, and the sale of coffee in, British India, and other connected means.

2. The duration of the Ordinance was limited in order to make proposals for legislation after gaining experience and after ascertaining the wishes of the coffee interests in the matter.

3. A second Coffee Control Conference of the coffee interests was accordingly convened on the 20th October, 1941. The Conference recognised that the control scheme has been greatly beneficial to the

coffee industry in its present crisis and unanimously made the following recommendations :—

- (1) that the control scheme as generally embodied in the Ordinance should be continued by legislation and that its duration be for the period of the war and one coffee crop year thereafter, and
- (2) that the control should be limited to estates with area of 10 acres or more but provision should be made whereby control may be extended, if necessary, over estates with areas below 10 acres.

These recommendations were endorsed by the Standing Advisory Committee of the Legislature attached to the Commerce Department.

4. In view of the general agreement of all interests for the maintenance of the coffee control scheme it is proposed to continue control by legislation, and the present Bill is designed to achieve this object".

—*Gazette of India, 1942, Part V, page 18.*

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

Amended by Acts 7 of 1948; 2 of 1944; 16 of 1944; 4 of 1947.

THE COFFEE MARKET EXPANSION ACT, 1942

(ACT VII OF 1942)^a

[2nd March, 1942.]

An Act to continue the provision made under Ordinance No. XIII of 1940 for assistance to the coffee industry by regulating the export of coffee from and the sale of coffee in British India and by other means.

Whereas it is expedient to continue the provision made under the Coffee Market Expansion Ordinance, 1940 (XIII of 1940), for assistance to the coffee industry by regulating the export of coffee from and the sale of coffee in British India and by other means;

It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1942, Pt. V, p. 13.

Short title, extent and duration. 1. (1) This Act may be called the Coffee Market Expansion Act, 1942.

(2) It extends to the whole of British-India.

(3) a[* * * * *]

[a] Omitted by the Coffee Market Expansion (Amendment) Act, 1947 (IV of 1947), S. 2 [11-8-1947].

Declaration as to expediency of Central Government's control. 2. It is hereby declared that it is expedient in the public interest that the Central Government should take under its control the development of the coffee industry.

Definitions. 3. In this Act, unless there is anything repugnant in the subject or context,—

(a) “the Board” means the * [Indian Coffee Board] constituted under section 4;

[a] Substituted by the Coffee Market Expansion (Amendment) Act, 1948 (7 [VII] of 1948), S. 2 (a). [26-8-1948]

(b) “coffee” means the commodity derived from the fruit of the *rubiceous* plant known by that name, and includes raw coffee, cured coffee, uncured coffee, roasted coffee and prepared coffee;

(c) “Collector” means a Customs-collector as defined in clause (c) of section 3 of the Sea Customs Act, 1878, or a Collector of Land Customs as defined in clause (c) of section 2 of the Land Customs Act, 1924, as the case may be;

(d) “curing” means the application to raw coffee of mechanical processes other than pulping for the purpose of preparing it for marketing;

(e) “curing establishment” means any place to which raw coffee is sent by a registered owner for curing, and includes any estate which the Board may declare to be a curing establishment, for the purposes of this Act;

a[(ee) “dealer” means a person carrying on the business of selling coffee, whether wholesale or by retail.]

[a] Inserted by the Coffee Market Expansion (Amendment) Act, 1944 (2 [II] of 1944) S. 2. [27-2-1944]

(f) “estate” means an area administered as one unit which contains land planted with coffee plants;

(g) “Indian Coffee Cess Committee” means the Indian Coffee Cess Committee constituted under the Indian Coffee Cess Act, 1935;

(h) “internal sale quota” means that portion, stated in terms of bulk or weight, of the whole of the coffee produced by the estate in the year, which a registered estate is permitted under this Act to sell in the Indian market;

(i) “Owner” includes any agent of an owner, a[a mortgagee in possession or a lessee];

[a] Added, by the Coffee Market Expansion (Amendment) Act, 1948 (7 [VII] of 1948), S. 2 (b). [26-8-1948]

- (j) "Prescribed" means prescribed by rules made under this Act;
- (k) "registered estate" means an estate in respect of which an owner is registered under sub-section (1) of section 14, and includes also any estate in respect of which an owner is required to be registered under the provisions of that sub-section;
- (l) "registered owner" means an owner of a registered estate who has been or is required to be registered under sub-section (1) of section 14;
- (m) "surplus pool" means the stock of coffee accumulated by the Board out of the amounts delivered to the Board under section 25;
- (n) "year" means the period of twelve months beginning with the 1st day July and ending with the 30th day of June following.

Constitution of the Board. 4. (1) The Board constituted by the name of the Indian Coffee Market Expansion Board under section 4 of the Indian Coffee Market Expansion Ordinance, 1940, shall be the ^a[Indian Coffee Board] for the purposes of this Act.

^b [(2) The Board shall consist of—

- (a) (i) one person representing the Imperial Council of Agricultural Research, nominated by the Central Government;
- (ii) one person representing the Department of Industries and Supplies of the Central Government, nominated by that Government;
- (iii) one person representing Coorg, nominated by the Central Government;
- (iv) one person representing the Government of Madras, nominated by that Government;
- (v) three persons representing the Mysore State, nominated by the Government of that State;
- (vi) one person representing the Travancore State, nominated by the Government of that State;
- (vii) one person representing the Cochin State, nominated by the Government of that State;
- (b) four persons representing the coffee trade interests, nominated by the Central Government;
- (c) fourteen persons representing the coffee growing industry, namely—
 - (i) three persons nominated by the Government of Mysore;
 - (ii) three persons nominated by the United Planters' Association of Southern India;
 - (iii) one person nominated by the Coorg Planters' Association;
 - (iv) one person nominated by the Coorg Indian Planters' Association;
 - (v) one person nominated by the Mysore Planters' Association;
 - (vi) one person nominated by the Mysore Indian Planters' Association;
 - (vii) one person nominated by the Nilgiri *cum* Nilgiri-Wynaad Planters' Association;
 - (viii) one person nominated by the Malabar-Wynaad Coffee Growers' Association;
 - (ix) one person nominated by the Shevaroy Planters' Association;
 - (x) one person nominated by the Palni-Bodi-Sirmalai Coffee Growers' Association;
- (d) three persons representing labour, one each to be nominated in consultation with labour organisations by the Governments of Madras and Mysore and one to be nominated in consultation with labour organisations by the Chief Commissioner of Coorg.]

(3) Where a member of the Board dies, resigns or is removed, or ceases to reside in India, or becomes incapable of acting, the Central Government may, on the recommendation of the authority or body which was entitled to make the first nomination under sub-section (2), or where such recommendation is not made within a reasonable time, then on its own initiative, nominate a person to fill the vacancy.

c[(4)] No act done by the Board shall be questioned on the ground merely of the existence of any vacancy in, or any defect in the constitution of, the Board.

[a] Substituted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 3 (a) [26-3-1943]

[b] Substituted by the Coffee Market Expansion (Amendment) Act, 1947 (4 [IV] of 1947), S. 3 [11-3-1947]

[c] Renumbered, *ibid*, 1943, S. 3. [26-3-1943].

Incorporation of the Board. 5. The Board shall be a body corporate by the name of the a [Indian Coffee Board] having perpetual succession and a common seal, with power to acquire and hold property, both movable and immovable, and to contract, and shall by the said name sue and be sued.

[a] Substituted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 4 for "Indian Coffee Market Expansion Board". [26-3-1943]

Vesting of property in the Board. 6. So long as this Act remains in force all property, movable or immovable, of or belonging to the Indian Coffee Cess Committee shall vest in the Board and all debts and liabilities of the said Committee shall be transferred to the Board, and the officers and servants of the said Committee shall be officers and servants on the staff of the Board and the said Committee shall be suspended.

Chairman, committees, staff and agents. 7. (1) The chairman of the Board shall be elected by the Board from among the members of the Board :

Provided that the person who is, at the commencement of this Act, the chairman of the Indian Coffee Market Expansion Board constituted under the Coffee Market Expansion Ordinance, 1940, shall be the first chairman of the Board.

(2) The Board may appoint such committees for such purposes and may employ such staff as it thinks necessary for the efficient discharge of its functions under this Act.

(3) The Board may authorise agents to discharge on its behalf its functions in relation to the marketing, storing and curing of coffee.

Chief Coffee Marketing Officer and Deputy Chief Coffee Marketing Officer. a[8] (1) The Central Government shall appoint an officer, to be called the a[Chief Coffee Marketing Officer,] to exercise such powers and perform such duties under the direction of the Board as may be prescribed by the Central Government.

(2) The Central Government may appoint an officer, to be called the a[Deputy Chief Coffee Marketing Officer,] to exercise such powers and perform such duties of the a[Chief Coffee Marketing Officer] as may be delegated to him by the a[Chief Coffee Marketing Officer] with the previous sanction of the Central Government or as may be prescribed by the Central Government.

(3) The a[Chief Coffee Marketing Officer] and the a[Deputy Chief Coffee Marketing Officer,] may be either salaried or unsalaried : if salaried, they shall be paid by the Board such salaries as may be fixed by the Central Government.

(4) The Board shall pay to the a[Chief Coffee Marketing Officer] and the a[Deputy Chief Coffee Marketing Officer,] such allowances as may be fixed by the Central Government.

[a] The words 'Chief Coffee Marketing Officer' and 'Deputy Chief Coffee Marketing Officer' were substituted for the words 'Controller of Coffee' and 'Deputy Controller of Coffee' by the Coffee Market Expansion (Amendment) Act, 1947 [IV of 1947], S. 5. [11-3-1947]

Power of Board to make bye-laws. 9. The Board may, with the previous sanction of the Central Government, make bye-laws consistent with this Act and the rules made thereunder to provide for all or any of the following matters, namely :—

- (a) the procedure to be followed at meetings of the Board and at committees ;
- (b) the powers exercisable and the duties to be discharged by the chairman of the Board and the members of the staff of the Board ;
- (c) the travelling or other allowances which may be drawn by members of the Board ;
- (d) the appointment, promotion and dismissal of members of the staff of the Board, the creation and abolition of such appointments, and the terms of service of members of the staff of the Board ;

- (e) any other matter in respect of which bye-laws may be made under this Act or the rules made thereunder.

Dissolution of the Board.

10. When the Board is dissolved by reason of this Act having ceased to be in force, the unexpended balance of all money received by the Board under the Coffee Market Expansion Ordinance, 1940, or under this Act except money in the pool fund shall be disposed of in such manner as the Central Government may direct. The Central Government shall disburse the money in the pool fund in the same manner as the Board would have done had it continued to exist.

Duties of Customs and of Excise.

Duty of customs. 11. A duty of customs shall be levied on all coffee produced in India and exported from British India at the rate of one rupee per hundredweight or at such lower rate as the Central Government may, on the recommendation of the Board, by notification in the official Gazette provide.

Duty of excise. 12. A duty of excise shall be levied at such rate not exceeding one rupee per hundredweight as may be fixed by the Central Government on the recommendation of the Board by notification in the official Gazette on all coffee, except coffee sold and delivered before the estate became subject to the provisions of sub-section (1) of section 14, which a registered estate is permitted by the internal sale quota allotted to it to sell in the Indian Market, whether such coffee is actually sold or not, and on all coffee released for sale in India by the Board from the surplus pool.

Payment of proceeds of duties to the Board and manner of realisation by the Board.

13. (1) The proceeds of the duty of customs levied under section 11 and of the duty of excise levied under section 12 shall be paid to the Board for credit to the general fund of the Board.

(2) On the last day of each month, or as soon thereafter as may be convenient, the Collector shall pay to the Board the proceeds of the duty of customs recovered during that month after deduction of the expenses, if any, for collection and recovery.

(3) The Central Board of Revenue may make rules providing, on such conditions as may be specified in the rules, for—

(a) the refund of the duty of customs where coffee is exported by land and subsequently imported into India, and

(b) the export by land without payment of the duty of customs, of coffee which is subsequently to be imported into India.

(4) The duty of excise on coffee shall be payable by the registered owner of the estate producing the coffee and shall be realised by the Board by the deduction of the amount of the duty payable by such owner from any sum due to him on account of sales from the surplus pool. It shall be a first charge on such sum, and shall, if not capable of realisation by deduction as aforesaid, be paid to the Board by the registered owner within one month of demand by the Board or thereafter be recoverable from him as an arrear of land-revenue.

(5) The Board shall have power to adjudge by bulk the number of hundredweights contained in any quantity of uncured coffee.

(6) No action of the Board under this section shall be called in question by any Court.

Registration.

Registration of owners of coffee estates.

14. (1) Every person owning land planted with coffee plants aggregating not less than ten acres, whether such land is comprised in one estate or in more than one estate and whether it is situated wholly or only partly in British India, shall, unless it is already registered as required by this sub-section, before the expiration of one month from the date on which he first becomes subject to the provisions of this sub-section, apply to the registering officer appointed in this behalf by the Provincial Government to be registered as an owner and in respect of each estate owned by him.

(2) The Central Government may, by notification in the official Gazette, declare that the provisions of sub-section (1) shall apply to persons owning land planted with coffee plants aggregating less than ten acres.

(3) A registration once made shall continue in force until it is cancelled by the registering officer.

(4) If any question arises whether an owner of an estate is or is not required to be registered under this section, the question shall be decided by the Controller of Coffee, subject to revision by the Central Government.

Power of Provincial Government to make rules. 15. (1) The Provincial Government may, by notification in the official Gazette, make rules to carry into effect the provisions of section 14.

(2) Without prejudice to the generality of the foregoing power, such rules may prescribe the form of the application for registration and for cancellation of registration, the fee payable on such applications, the particulars to be included in such applications, the procedure to be followed in granting and cancelling registration, the registers to be kept by registering officers, and the supply by registering officers of information to the Board.

Control of sale, Export and Re-import of Coffee.

Fixation of prices for sale of coffee. ^a16. (1) The Central Government may, after consultation with the Board, by notification in the official Gazette, fix the price or prices at which coffee may be sold wholesale or retail in the Indian market.

(2) No registered owner or licensed curer or dealer shall sell coffee wholesale or retail in the Indian market at a price or prices higher than the price or prices fixed under this section].

[a] Substituted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 5 [26-3-1943]

Sale of coffee in excess of internal sale quota. 17. No registered owner shall, before the estate became subject to the provisions of sub-section (1) of section 14, sell or contract to sell in the Indian market coffee from any registered estate if by such sale the internal sale quota allotted to that estate is exceeded. ^a[Nor shall a registered owner sell or contract to sell in the Indian market any coffee produced on his estate in any year for which no internal sale quota is allotted to the estate].

Provided that nothing in this section shall apply to coffee sold from a registered estate in excess of the internal sale quota if such sale was in pursuance of a contract of sale entered into before the estate became subject to the provisions of sub-section (1) of section 14 and if after the estate became so subject no coffee has been sold from that estate in the Indian market except in pursuance of a contract of sale entered into before the estate became subject to the provisions of sub-section (1) of section 14.

[a] Added by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 6. [26-3-1943]

Sale of coffee, how made. 18. No registered owner shall sell coffee unless either—
(a) it has been cured at or is delivered to the buyer through a curing establishment licensed under section 28, or

(b) it is sold under and in accordance with the provisions of a licence procured from the Board under section 24.

Storage or sale of coffee on or from unregistered estate. 19. No owner of an estate not registered under this Act shall sell from or store on his estate or cause or permit to be sold from or stored on his estate any coffee not grown on the estate ^a[and no owner of a registered estate shall sell from or store on his estate or cause or permit to be sold from or stored on his estate any coffee grown on any state not registered under this Act.]

[a] Added by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 7 [26-3-1943]

Export of coffee. 20. No coffee shall be exported from British India otherwise than by the Board or under an authorisation granted by the Board in the prescribed manner and in the prescribed cases, and the provisions of the Sea Customs Act, 1878, shall have effect as if the provision made by this section had been made by notification issued under section 19 of that Act:

Provided that nothing herein contained shall apply to coffee dispatched out of British India by post, or carried in a passenger's luggage for his personal use:

Provided further that the Central Government may exempt from the operation of this section, either absolutely or subject to conditions, the export of coffee from British India to an Indian State or to any foreign settlement bounded by India.

Re-import of coffee exported from India. **21.** (1) No coffee which has been exported from India shall be re-imported into British India except under and in accordance with a permit granted by the Board.

(2) ^a[Unless with the previous sanction of the Central Government the Board decides that no internal sale quotas shall be allotted], the Board may in any fit case grant such a permit and no charge shall be made therefor.

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 8. [26-3-1943]*

Internal sale quota. **22.** (1) The Board shall, as soon as may be, allot to each registered estate an internal sale quota for the year.

(2) The internal sale quota shall be a fixed percentage, common to all registered estates, of the probable total production of the estate in the year as estimated by the Board.

(3) The Board may at any time vary the internal sale quota by varying the fixed percentage common to all registered estates, or may express the whole or any part of the internal sale quota of an estate in terms of bulk instead of in terms of weight.

Returns to be made by registered owners. **23.** (1) A registered owner shall furnish to the Board at the prescribed times and in the prescribed manner such returns as may be prescribed.

(2) If any registered owner fails to furnish the returns required under sub-section (1) in respect of any estate, the Board may ^a[without prejudice to any penalty to which the said owner is liable under section 37-A], refuse to allot an internal sale quota to that estate, or, where an internal sale quota has already been allotted, may cancel it.

(3) The Board may authorise an officer to visit any estate at any time to verify the accuracy of any return made under this section or to ascertain the productive capacity of the estate.

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 9 [26-3-1943]*

Licences for sale of uncured coffee. **24.** The registered owner of any estate may, subject to the prescribed conditions and so long as the internal sale quota allotted to that estate will not be exceeded by the proposed sale, obtain from the Board a licence for the sale from that estate of uncured coffee.

Surplus coffee and surplus pool. **25.** (1) All coffee produced by a registered estate in excess of the amount specified in the internal sale quota allotted to the estate ^a[or when no internal sale quotas have been allotted to estates, all coffee produced by the estate], shall be delivered to the Board for inclusion in the surplus pool by the owner of the estate or by the curing establishment receiving the coffee from the estate.

(2) Delivery shall be made to the Board in such places ^a[at such times], and in such manner as the Board may direct, and such directions may provide for partial delivery to the surplus pool at any time whether or not at that time the internal sale quota has been exceeded; and the coffee delivered shall be such as to represent fairly in kind and quality the produce of the estate. The Board may reject any consignment offered for delivery which does not satisfy this requirement, but shall not reject any consignment merely for a defect in curing.

(3) Coffee delivered for inclusion in the surplus pool shall upon delivery to the Board remain under the control of the Board which shall be responsible for storage, curing where necessary, and marketing of the coffee.

(4) The Board shall, with the concurrence of the ^b[Chief Coffee Marketing Officer,] ^a[from time to time] prepare a differential scale for the valuation of coffee, and shall in accordance with that scale classify the coffee in each consignment delivered for inclusion in the surplus pool according to its kind and quality, and shall make an assessment of its value based on its quantity, kind and quality.

(5) The Board may, with the consent of a registered owner, ^c[*****] treat as having been delivered for inclusion in the surplus pool any coffee from such estate which the registered owner may agree to have so treated.

(6) When coffee has been delivered or is treated as having been delivered for inclusion in the surplus pool, the registered owner whose coffee has been so delivered or is treated as having been so delivered shall retain no rights in respect of such coffee except his right to receive the payments referred to in section 34.

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 9 (a) (b) (c).*

[b] *Substituted by *ibid*, 1947 (IV of 1947), S. 5.*

[26-3-1943].

[11-3-1947].

[c] *Words omitted, *ibid*, 1943, S. 9 (d) 1943.*

Sales of coffee by the Board. 26. (1) The Board shall take all practical measures to market the coffee included in the surplus pool, and all sales thereof shall be conducted by or through the Board.

(2) The Board may purchase for inclusion in the surplus pool coffee not delivered for inclusion in it.

Curing of Coffee.

Coffee to be cured in licensed curing establishments. 27. No registered owner shall cause or allow coffee to be cured elsewhere than a licensed curing establishment, whether the curing establishment is maintained by himself or by another person.

Licensing of curing establishments. 28. Every establishment for curing coffee shall obtain from the Board a licence to operate as such.

29. (1) A registered owner when sending coffee to a curing establishment shall report to the Board, separately for each estate from which the coffee is sent, the amount of coffee sent; and the curing establishment shall, in accordance with such instructions as may be issued by the Board and having regard to the internal sale quota of the estate, ^a[where one has been allotted], apportion each such consignment into two parts, one part, consisting of coffee intended for internal sale and one part of coffee intended to be delivered for inclusion in the surplus pool and shall report to the Board the amount of coffee in each such part. ^b[Where no internal sale quotas have been allotted to estates, the curing establishment shall report merely the whole amount of coffee sent in each such consignment].

(2) A registered owner curing coffee in a curing establishment maintained by himself shall supply to the Board the information specified in sub-section (1).

(3) A curing establishment which buys or receives uncured coffee from any person shall ascertain the estate on which the coffee was produced and shall report to the Board the quantity of coffee so obtained and the estate or estates from which it came.

(4) Every curing establishment shall maintain accounts in such forms as may be required by the Board and such accounts shall be open to inspection at any time by the Board or by an officer authorised in this behalf by the Board.

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 11. [26-3-1943]*

[b] *Added, *ibid*.*

Finance.

Separate funds to be maintained by the Board. 30. The Board shall maintain two separate funds, a general fund and a pool fund.

31. (1) To the general fund shall be credited all proceeds of the duty of customs and the duty of excise levied under section 11 and section 12, respectively, and all receipts including receipts for licences issued by the Board, other than those to be credited under section 32 to the pool fund ^a[and any sums transferred to the general fund under the proviso to sub-section (2) of Section 32].

General fund. (2) The general fund shall be applied to meet the expenses of the Board, the cost of such measures as it may consider advisable to undertake for promoting the sale and increasing the consumption in India and elsewhere of coffee produced in India, or for promoting agricultural and technological research in the interest of the coffee industry in India.

[a] *Added by the Coffee Market Expansion (Second) Amendment Act, 1944 (16 [XVI] of 1944), S. 2.*

[22-11-1944].

Pool fund.

32. (1) To the pool fund shall be credited all sums realised by sales by the Board of coffee from the surplus pool.

(2) Subject to the provisions of sub-section (4) of section 13, the pool fund shall be applied only to—

(a) the making to registered owners of estates of payments proportionate to the value of the coffee delivered by them for inclusion in the surplus pool;

(b) the costs of storing, curing and marketing coffee deposited in and of administering the surplus pool;

(c) the purchase of coffee not delivered for inclusion in the surplus pool.

^a[Provided that where, after the requirements of the clauses of this sub-section have been met, there remains any excess in the pool fund, the Board may, with the previous sanction of the Central Government, transfer the whole or any part of such excess to the credit of the general fund].

[a] *Provido added by the Coffee Market Expansion (Second) Amendment Act, 1944* (16 [XVI] of 1944), S. 3. [22-11-1944].

33. The Board may, subject to any prescribed conditions, borrow on the security of

Power to borrow. the general fund or the pool fund for any purposes for which it is authorised to expend money from such fund, or on the security of the coffee delivered or treated as delivered for inclusion in the surplus pool for any purposes for which it is authorised to expend money from the pool fund.

Payments to registered owners. **34.** (1) The Board shall at such times as it thinks fit make to registered owners who have delivered coffee for inclusion in the surplus pool such payments out of the pool fund as it may think proper.

(2) The sum of all payments made under sub-section (2) to any one registered owner shall bear to the sum of the payments made to all registered owners the same proportion as the value of the coffee delivered by him out of the year's crop to the surplus pool bears to the value of all coffee delivered to the surplus pool out of that year's crop:

^a[Provided that in calculating the sum of all payments made under sub-section (1) and the value of the coffee delivered to the surplus pool out of the year's crop, respectively, any payment accepted by a registered owner as final payment in immediate settlement for coffee delivered by him for inclusion in the surplus pool and the value of any such coffee shall be excluded].

[a] *Added by the Coffee Market Expansion (Amendment) Act, 1943* (7 [VII] of 1943), S. 12 [26-3-1943].

Penalties and Procedure.

Failure to register. **35.** Any owner of a coffee estate who fails to apply for registration in accordance with section 14 shall be punishable with fine which may extend to one thousand rupees and to a further fine which may extend to five hundred rupees for each month after the first during which such failure continues.

Contraventions of Ss. 16, 17, 18 and 19. **36.** (1) Any registered owner who contravenes the provisions of sub-section (2) of section 16, or section 17 or section 18, any licensed curer ^a[or dealer] who contravenes the provisions of sub-section (2) of section 16, and any person who contravenes the provisions of section 19 shall be punishable with fine which may extend to one thousand rupees.

(2) When a registered owner is convicted under this section, the Board may thereafter deduct from any payment to be made under section 34 to such registered owner a sum equal to the value as estimated by the Board of any coffee unlawfully sold by him.

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1944* (2 [II] of 1944), S. 3. [27-2-1944]

Unlicensed curing establishment.

37. If any curing establishment operates as such without a licence, the owner shall be punishable with fine which may extend to five hundred rupees.

Contravention of section 23 (1).

^a[**37-A.** Any registered owner who fails to furnish the return required by sub-section (1) of section 23 as required by that sub-section shall be punishable with fine which may extend to one thousand rupees].

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1943* (7 [VII] of 1943), S. 18. [26-3-1943].

38. Any person who makes in any return to be furnished under section 23 or in any report to be made under section 29 any statement which is false and which he knows to be false or does not believe to be true shall be punishable with fine which may extend to one thousand rupees.

False returns.

a[38-A.] Any registered owner or licensed curer who fails to deliver any coffee to the Board as required by or under sub-sections (1) and (2) of section 25 shall be punishable with fine which may extend to one thousand rupees, and the Court by which such person is convicted may order the confiscation and delivery to the Board of any coffee in respect of which the offence was committed].

[a] *Inserted by the Coffee Market Expansion (Amendment) Act 1943 (7 [VII] of 1943), S. 14. [26-3-1943].*

a[38-B.] If the Board is satisfied that any coffee which is required under the provisions of section 25 to be delivered for inclusion in the surplus pool is being or is likely to be disposed of otherwise than by such delivery, the Board may order the seizure of such coffee, and may authorise an officer of the Board to effect seizure thereof for delivery for inclusion in the surplus pool, and such authorisation shall be sufficient warrant for such officer to take all steps necessary to secure possession of the coffee].

Powers to seize coffee withheld from inclusion in surplus pool.

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 14 [26-3-1943]*

39. Whoever obstructs any member or officer of the Board or any person authorised by the Board or by the Central Government in the discharge of any duty imposed on or entrusted to him under this Act, or who having control over or custody of any records fails to produce such records when required to do so or refuses information lawfully asked for by a member or officer of the Board or by a person authorised by the Board or by the Central Government to inspect such records or ask for such information shall be punishable with fine which may extend to one thousand rupees.

Obstruction.

40. (1) No Court other than the Court of a Magistrate of the first class shall take cognizance of any offence punishable under this Act.

(2) No Court shall take cognizance of an offence punishable under section 35 except on complaint made by an officer authorised in this behalf by the Provincial Government a[or of the offence specified in sub-section (2) of section 16 except on complaint made by an officer authorised in this behalf either by the Provincial Government or by the Board] or of an offence punishable under any other section except on complaint made with the previous sanction of the Central Government by an officer authorised in this behalf by the Board.

b[Provided that the Central Government may, by notification in the Official Gazette, direct that the previous sanction of the Central Government shall not be necessary for complaints in such cases or classes of cases as may be specified in the notification].

[a] *Inserted by the Coffee Market Expansion (Amendment) Act, 1944 (2 [II] of 1944), S. 4. [27-2-1944].*

[b] *Added, ibid, 1943 (7 [VII] of 1943), S. 15. [26-3-1943].*

General.

41. The Board shall have power to determine, after such inquiry as it thinks fit, the amount of coffee which has, up to the time when it first becomes subject to the provisions of sub-section (1) of section 14, been sold, or been sold off delivered in the year by any registered estate, and the amount so determined shall be conclusive for the purposes of section 12 and section 17.

Power of Board to determine amount of coffee sold by an estate.

42. (1) All acts of the Board shall be subject to the control of the Central Government which may cancel, suspend or modify as it thinks fit any action taken by the Board.

Control by the Central Government.

(2) The records of the Board shall be open to inspection at all reasonable times by any officer authorised in this behalf by the Central Government.

Appeals to the Central Government.

43. (1) Any person aggrieved by an order of the Board refusing a licence to or cancelling a licence of a curing establishment may, within sixty days of the making of the order, appeal to the Central Government.

(2) Any person making an appeal under this section shall pay a fee of five rupees which shall be credited to Central Revenues.

44. Any member of the Board, and any officer of the Board or other person authorised in this behalf by the Central Government or the Board, may enter any estate or any curing establishment a[or any place where coffee is stored or exposed for sale], and may require the production for his inspection of any records kept therein or ask for any information relating to the production, storage or sale of coffee [****]b.

[a] *Inserted* by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 16.

[26-3-1943]

[b] *Words omitted, ibid.*

Accounts of the Board. **45.** (1) The Board shall keep accounts in such manner as may be prescribed of all money received and expended by it.

(2) The accounts shall be kept separately for the general fund and the pool fund.

(3) The Board shall cause the accounts to be audited annually by auditors appointed by the Central Government, and the auditors shall have power to disallow any item of expenditure which has, in their opinion, been incurred otherwise than in accordance with this Act.

(4) The Central Government may on the application of the Board allow any item of expenditure disallowed by the auditors under sub-section (3).

Inspection of records of the Board and obtaining of copies. **46.** Any registered owner a[****] may, subject to the prescribed conditions, inspect the records maintained by the Board and may on payment of the prescribed fee obtain copies of any proceedings or orders of the Board.

[a] *Words omitted*, by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 17.

[26-3-1943]

Contracts. **47.** All contracts for the sale of coffee in so far as they are at variance with the provisions of this Act shall be void.

Provided that nothing contained in this section shall apply to contracts to which under section 47 of the Coffee Market Expansion Ordinance, 1940 (XIII of 1940), that Ordinance did not apply.

Bar of legal proceedings. **a[47-A.]** No suit, prosecution or other legal proceeding shall lie against the Board or any officer of the Board for or in respect of anything in good faith done or intended to be done under this Act].

[a] *Inserted* by the Coffee Market Expansion (Amendment) Act, 1943 (7 [VII] of 1943), S. 18.

[26-3-1943]

Power of the Central Government to make rules. **48.** (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power rules may be made providing for all or any of the following matters, namely :—

- (a) the term of office of members of the Board, the circumstances in which and the authority by which members may be removed, and the filling of casual vacancies in the Board ;
- (b) the conduct of business by the Board and the number of members which shall form a quorum at a meeting ;
- (c) the maintenance by the Board of records of business transacted by the Board, and the submission of copies thereof to the Central Government ;
- (d) the preparation by the Board of estimates of annual receipts and expenditure ;
- (e) the manner in which the internal sale quota of coffee estates shall be determined ;
- (f) the manner in which the Board shall exercise its powers of buying and selling coffee in the Indian market ;
- (g) the appointment by the Board of agents ;
- (h) the conditions to be fulfilled by a curing establishment before a licence to operate as such can be issued

- (i) the form of and the particulars to be contained in any returns or reports to be made to the Board under this Act ;
- (j) the form of, manner of application for, fees payable for, procedure in granting and conditions governing the licences and permits to be issued by the Board ;
- (k) any other matter except the matters referred to in section 15 which is to be or may be prescribed under this Act.

Repeal of Act XIV of 1935. a 49. The Indian Coffee Cess Act, 1935, is hereby repealed.

[a] *Substituted* by the Coffee Market Expansion (Amendment) Act, 1947 (4 [IV] of 1947), S. 4, [11-8-1947]

Repeals and savings. 50. (1) The Coffee Market Expansion Ordinance, 1940, the Coffee Market Expansion (Amendment) Ordinance, 1941, the Coffee Market Expansion (Second Amendment) Ordinance, 1941, and the Coffee Market Expansion (Third Amendment) Ordinance, 1941, are hereby repealed.

(2) Without prejudice to the provisions of section 24 of the General Clauses Act, 1897,—

- (a) any trial or proceeding under the Coffee Market Expansion Ordinance, 1940 pending at the time of the repeal of that Ordinance may be continued and completed as if such trial or proceeding were a trial or proceeding under this Act ;
- (b) all registrations made, all licences issued and all other things done under the said Ordinance shall be deemed to have been made, issued or done under this Act.

[THE INDIAN] COINAGE ACT, 1906.

(ACT III OF 1906)

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3. Power to establish and abolish Mints.	a[* * *]	16. Power to certain persons to cut diminished or defaced silver coins.
4. * * *	* * *	17. Procedure in regard to coin cut under section 16 (a).
5. * * *	* * *	18. Procedure in regard to coin cut under section 16 (b).
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10. c[* * * *	* * *	<i>Supplemental Provisions</i>
	<i>Legal tender.</i>	21. Power to make rules.
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[a] *Omitted* by the Indian coinage (Amendment) Act, 1947, (XXVIII of 1947), S. 2.

[aa] *Substituted*, for original headings and Ss 6 to 9 by Ordinance No. 4 [IV] of 1942, S. 2.

[b] *Substituted* for original heading and S. 6, *ibid*, S. 3.

[c] *Omitted* S. 10, 11 and 12 with heading above S. 10, *ibid*, S. 4.

[d] *Substituted* for original S. 13, *ibid*, S. 5.

[e] *Omitted* by Ordinance No. 4 (IV) of 1942, S. 4.

[f] *Omitted* by the Indian Coinage (Amendment) Act, 1947, (28 [XXVIII] of 1947), S. 6.

THE SCHEDULE.—[Repealed.]

[a] Omitted by the Indian Coinage (Amendment) Act, 1947, (28 [XXVIII] of 1947, S. 10.

STATEMENT OF OBJECTS AND REASONS

"The object of this Bill is to consolidate the Acts relating to the coinage. The law, as originally formulated in the Indian Coinage Act, 1870 (XXIII of 1870), has been materially modified by two Acts, namely, the Indian Coinage and Paper Currency Act, 1898 (VIII of 1898), which abolished obligatory free coinage, and the Indian Coinage and Paper Currency Act, 1899 (XXII of 1899), which made gold coins a

legal tender. The present Bill proposes to repeal both these Acts as well as the main Act of 1870, to reproduce their provisions, so far as they are still required, in a consolidated form, and to provide for the introduction of a nickel one-anna piece and of a bronze-coinage. . . ."

—Gazette of India, 1905, Part V, page 82.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Acts 4 of 1918; 22 of 1918; 21 of 1919; 36 of 1920; 10 of 1924; 4 of 1927; 2 of 1934; 6 of 1940; and 28 of 1947.

—Amended by Ordinances VI of 1940; XII of 1940;

XIV of 1940; and IV of 1942.

—Adapted by A. O.

—Repealed in part by Act 10 of 1914; and 28 of 1947.

COGNATE ACTS AND PROVISIONS.

1. Bronze Coin (Legal Tender) Act, XXII of 1918.
2. Coinage (Colonial Offences) Act, 1858 (16 & 17 Vict., c. 48)
3. Metal Tokens Act, I of 1889.

4. Native Coinage Act, IX of 1876.
5. Penal Code, 1860, Sections 230 to 254.
6. Reserve Bank of India Act, II of 1934.
7. Sea Customs Act, VIII of 1878, Section 18 (b).

[THE INDIAN] COINAGE ACT, 1906.

(ACT III OF 1906.)^a

[2nd March, 1906.]

An Act to consolidate and amend the law relating to Coinage and the Mint.

WHEREAS it is expedient to consolidate and amend the law relating to Coinage and the Mint: It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1905, Part V, p. 82; for Report of the Select Committee, see *ibid.*, 1906, Part V, p. 9; and for Proceedings in Council, see *ibid.*, 1905, Part VI P. 142; *ibid.*, 1906, Part VI, p. 28.

This Act has been declared to be in force in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and Sch.

Preliminary.

Short title and extent. 1. (1) This Act may be called THE INDIAN COINAGE ACT, 1906; and
(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas and the Pargana of Spiti.

Definitions.
context,—

2. In this Act, unless there is anything repugnant in the subject or context,—
 - (a) "deface", with its grammatical variations and cognate expressions, includes clipping, filing, stamping, or such other alteration of the surface or shape of a coin as is readily distinguishable from the effects of reasonable wear;
 - (b) "the Mint" includes the Mints now existing and any which may hereafter be established;
 - (c) "prescribed" includes prescribed by a rule made under this Act;
 - (d) "remedy" means variation from the standard weight and fineness; and
 - (e) "standard weight" means the weight prescribed for any coin.

Power to establish and abolish Mints. 3. The ^a[Central Government] may, by notification in the ^b[Official Gazette],—

- (a) establish a Mint at any place at which a Mint does not for the time being exist; and
- (b) abolish any Mint, whether now existing or hereafter established.

[a] Substituted by A. O. for "Governor-General in Council."

[b] Substituted by A. O. for "Gazette of India".

	a[*	*	*	*	*	*
4.	*	*	*	*	*	*	*
5.	*	*	*	*	*	*	*

[a] The Sections 4 and 5 with the heading above S. 4 have been omitted by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947), S. 2.

^a[Coinage.

Denominations, dimensions, designs and compositions of coins.

“6. Coins may be coined at the Mint for issue under the authority of the Central Government, of such denominations not higher than one rupee, of such dimensions and designs, and of such metals or of mixed metals of such composition as the Central Government may, by notification in the official Gazette, determine.”]

[a] Substituted for the original heading and S. 6 by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947), S. 8.

Standard weight and remedy.

^a[7. The standard weight of the coins of any denomination coined under the provisions of section 6, and the remedy allowed in the making of such coins shall be such as may be prescribed in this behalf by the Central Government.]

[a] Substituted for Original S. 7, heading preceding S. 8, S. 8 and S. 9 by the Indian Coinage (Amendment) Ordinance (No. 4 [IV] of 1942), S. 2 [24-1-1942].

	a[*	*	*	*	*	*
8.	*	*	*	*	*	*	*
9.	*	*	*	*	*	*	*

[a] See remark a under Section 7.

	a[*	*	*	*	*	*
10.	*	*	*	*	*	*	*
11.	*	*	*	*	*	*	*
12.	*	*	*	*	*	*	*

[a] Sections 10, 11 and 12 and the heading above S. 10 are omitted by the Indian Coinage (Amendment) Act, 1947, (28 [XXVIII] of 1947), S. 4.

Coin, when a legal tender.

^a[13. (1) The coins issued under the authority of section 6 shall be a legal tender in payment or on account,—

- (a) in the case of a rupee coin, for any sum ;
- (b) in the case of a half-rupee coin, for any sum not exceeding ten rupees;
- (c) in the case of any other coin, for any sum not exceeding one rupee ;

Provided that the coin has not been defaced and has not lost weight so as to be less than such weight as may be prescribed in its case.

(2) All silver coins issued under this Act after the 10th day of March 1940 shall continue as before to be a legal tender in payment or on account,—

- (a) in the case of a rupee coin, for any sum ;
- (b) in the case of a half-rupee coin, for any sum not exceeding ten rupees ;
- (c) in the case of a quarter-rupee, for any sum not exceeding one rupee ;

Provided that the coin has not been defaced and has not lost weight so as to be less than—

- (i) 176·4 grains Troy in the case of a rupee coin, or
- (ii) 88·2 grains Troy in the case of a half-rupee coin, or
- (iii) such weight as may be prescribed in the case of a quarter-rupee coin.

(3) All nickel, copper and bronze coins which may have been issued under this Act before the 24th day of January 1942 shall continue as before to be a legal tender in payment or on account for any sum not exceeding one rupee].

[a] Substituted for original S. 13 by the Indian Coinage (Amendment) Act, 1947, (28 [XXVIII] of 1947), S. 5.

a[14.	*	*	*	*	*	*
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[a] Section 13 was substituted for the original S. 14 by the Indian Coinage (Amendment) Ordinance (No. 4 [IV] of 1942), S. 4. [24-1-1942]

a[15. * * * * *]

[a] Omitted by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947) S. 6

Power to call in coin. ^a[15A. Notwithstanding anything contained in ^{aa}[* * section 13,] ^b[* *] ^{aa}[* *] the ^c[Central Government] may, by notification in the ^d[Official Gazette], call in, with effect from such date as may be specified in the notification, any coin, of whatever date or denomination, referred to in ^{ab}[that section] ^e[* *] and on and from the date so specified such coin shall cease to be a legal tender ^f[save to such extent as may be specified in the notification.]

e[* * * * *]

[a] Inserted by the Indian Coinage (Amendment) Act, 1924 (10 [X] of 1924), S. 3.

[b] The words "section 14" were omitted, *ibid.*, Ordinance, 1942 (4 [IV] of 1942), S. 5. [24-1-1942]

[c] Substituted by A. O. for "Governor-General in Council".

[d] Substituted, *ibid.*, for "Gazette of India".

[e] Some words and the proviso were omitted by Indian Coinage (Second Amendment) Ordinance, 1940 (12 [XII] of 1940), S. 2. [11-10-1940].

[f] Substituted, *ibid.*

[aa] The word and figure 'Section 13', have been substituted for the words and figures 'Section 12, Section 13 or Section 15' by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947), S. 7.

[ab] The words "that section" substituted for the words "any of these sections", *ibid.*, S. 7.

Diminished, Defaced and Counterfeit a[] Coins.*

Note :—Sections 16 to 20 deal with diminished, defaced and counterfeit coins. Of these, sections 16 to 19 deal with diminished or defaced coin, while section 20 is limited to counterfeit coin. As regards diminished or defaced silver coin, section 16 confers powers on certain persons, to be authorised in this behalf by the Central Government, to cut or break such coin. S. 17 prescribes the procedure to be followed in regard to coins cut or broken on the ground of their being of diminished weight. If diminished in weight beyond the limit of reasonable wear, as may be prescribed, but not beyond a further limit to be prescribed in this connection, they will be accepted at something less than face value according to graduated scale. If diminished beyond this last percentage, the pieces will be returned to the tenderer and will be worth to him only their value as silver bullion. Section 18 prescribes the procedure to be followed in regard to coins cut or broken on the ground that they have been defaced. In cases where the cutting officer has reason to believe that the defacement was fraudulent, he will return the pieces to the tenderer who will

bear the loss; and where the defacement is not fraudulent the coin, though it will be cut or broken, shall be received at full face value. An explanation has been added to this clause to show that defacement caused by sweating constitutes fraudulent defacement. Section 19 provides for the case where a coin is liable to be cut or broken both as being diminished in weight and as being defaced. In such cases the section provides that the person cutting or breaking the coin shall deal with it, if he has reason to believe that the coin has been fraudulently defaced, under the provisions of section 18, clause (a), relating to such coin, and otherwise under the provisions of section 17 as a coin which has been diminished in weight. As regards counterfeit coin, section 20 provides for such coin being wholly rejected by the person cutting or breaking them. Power is, however, also taken to require the tenderer to sell, in the case of silver coin, the pieces at bullion value to Government in cases where the officer considers this course to be for any reason desirable.—See Select Committee Report.]

Power to certain persons to cut diminished or defaced silver coins.

16. Where any silver coin which has been coined and issued under the authority of the ^b[Central Government] is tendered to any person ^cauthorised by the ^b[Central Government] ^d[* * *] to act under this section, and such person has reason to believe that the coin—

(a) has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, or

(b) has been defaced,
he shall, by himself or another, cut or break the coin.

[a] The word "Silver" was repealed by the Indian Coinage (Amendment) Act, 1919 (21 [XXI] of 1919), S. 6. (1).

[b] Substituted by A. O. for "Governor-General in Council".

[c] For persons so authorised, see General Rules and Orders.

[d] The words "or by the Local Government" were repealed by A. O.

Procedure in regard to coin cut under section 16 (a).

17. A person cutting or breaking coin under the provisions of clause (a) of section 16 shall observe the following procedure, namely :—

(a) if the coin has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, but not more than such further percentage as may be prescribed in this behalf, he shall either

return the pieces to the person tendering the coin, or, if such person so requests, shall receive and pay for the coin at such rates as may be prescribed in this behalf; and

- (b) if the coin has been diminished in weight so as to be more than such further percentage below standard weight so prescribed as aforesaid, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking.

Procedure in regard to coin cut under section 16 (b).

18. A person cutting or breaking coin under the provisions of clause (b) of section 16 shall observe the following procedure, namely :—

- (a) if such person has reason to believe that the coin has been fraudulently defaced, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking;
- (b) if such person has not reason to believe that the coin has been fraudulently defaced, he shall receive and pay for the coin at its nominal value.

Explanation.—For the purposes of this section a coin which there is reason to believe has been defaced by sweating shall be deemed to have been fraudulently defaced.

Procedure in regard to coin which is liable to be cut under both clause (a) and clause (b) of section 16.

19. If a coin is liable to be cut or broken under the provisions of both clause (a) and clause (b) of section 16, the person cutting or breaking the coin shall deal with it,—

- (a) if he has reason to believe that the coin has been fraudulently defaced, under clause (a) of section 18, and
- (b) in other cases, under section 17.

Power to certain persons to cut counterfeit or fraudulently defaced coin and procedure in regard to coin so cut.

20. Where any ^a[silver or other] coin purporting to be coined or issued under the authority of the ^b[Central Government] is tendered to any person ^cauthorised by the ^b[Central Government] ^d[* * *] to act under this section, and such person has reason to believe that the coin is counterfeit, ^e[or has been fraudulently defaced] he shall by himself or another cut or break the coin, and may at his discretion either return the pieces to the tenderer, who shall bear the loss caused by such cutting or breaking, or ^f[in the case of silver coin] receive and pay for the coin according to the value of the silver bullion contained in it.

[a] Omitted by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947), S. 8.

[b] Substituted by A. O. for "Governor-General in Council".

[c] For persons so authorised, see General Rules and Orders.

[d] The words "or by the Local Government" were repealed by A. O.

[e] Inserted by the Indian Coinage (Amendment) Act, 1947, (28 [XXVIII] of 1947), S. 8.

[f] Inserted by the Indian Coinage (Amendment) Act, 1919 (21 [XXI] of 1919), S. 6. (2).

[aa] Substituted for the words 'Silver or nickel', *ibid*, S. 8.

Supplemental Provisions.

Power to make rules.

21. (1) The ^a[Central Government] may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- ^b[(a) * * * * *]
- (b) provide for the guidance of persons authorised to cut or break coin under sections 16 and 20;
- (c) determine the percentage of diminution in weight below standard weight not being less ^c[than two per cent in the case of silver coins or five per cent. in the case of pure nickel coins,] which shall be the limit of reasonable wear;
- (d) prescribe the further percentage referred to in clause (a) of section 17, and the rates at which payments shall be made in the case of coins falling under the same clause ^d[* * * * *]

(3) Every such rule shall be published in the [Official Gazette], and on such publication shall have effect as if enacted in this Act.

[a] Substituted by A. O. for "Governor-General in Council".

[b] Omitted by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947), S. 9.

[c] Substituted for the words 'in any case than two per cent', *ibid.*, S. 9.

[d] The word "and" and clause (e) were repealed by the Currency Act, 1927 (4 [IV] of 1927), S. 2.

[e] Substituted by A. O. for "Gazette of India".

Bar of suits. 22. No suit or other proceeding shall lie against any person in respect of anything in good faith done, or intended to be done, under or in pursuance of the provisions of this Act.

Saving of making of other coins at Mints.

23. Nothing in this Act shall be deemed to prohibit or restrict the making at the Mint of coins intended for issue as money by the Government of any territories beyond the limits of British India.

a[24. * * * * *]

[a] Omitted by the Indian Coinage (Amendment) Act, 1947 (28 [XXVIII] of 1947), S. 10.

THE SCHEDULE.—[Enactments repealed.] Repealed by the Repealing and Amending Act, 1914. (10 [X] of 1914), S. 3 and Sch. II.

[THE] COLONIAL COURTS OF ADMIRALTY ACT, 1890.

(53 & 54 Vict., c. 27.)

An Act to amend the law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

[25th July, 1890.]

Short title.
1890.

1. This Act may be cited as the Colonial Courts of Admiralty Act,

Colonial Courts of Admiralty.

2. (1) Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction and such Court in reference to the jurisdiction conferred by this Act is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judicial authority the expression "Court of law" for the purposes of this section includes such Governor.

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

SECTION 2—Note 1.

The jurisdiction of the High Court in India in relation to necessities supplied to a ship rests on the provisions of this Act, which vests in it, *inter alia*, the powers described in Section 5 of the Admiralty Court Act, 1861 (24 & 25 Vict., c. 10). And under Section 5 of the latter statute the High Court in India, in the Admiralty side, has jurisdiction over any claim for necessities supplied to any ship elsewhere than in the part to which the ship Court belongs. (Vol 2) 1915 Cal 681 (683, 684) : 42 Cal 85.

Claim for necessities can be enforced in a Colonial Court of Admiralty by a suit *in rem*, and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to

be at the time when the suit is instituted. Before there can be an action *in rem* there must be a personal liability on the part of the owner. (Vol 10) 1928 Rang 163 (165) : 1 Rang 78.

In order to render a ship liable for maritime lien for injury caused, the ship itself must be the instrument which caused the damage. The old law of arresting any other ship instead has now become obsolete even in England. (Vol 24) 1987 Cal 122 (124).

To establish a maritime lien for damage against a ship, the damage must be the direct result of some unskilful or negligent conduct of those in charge of the ship which does the mischief, the ship herself being the 'instrument of mischief'. (1902) 29 Cal 402 (407).

(3) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty" were therein substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof, and the Colonial Court of Admiralty shall have jurisdiction accordingly :

Provided as follows :—

- (a) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales ; and
- (b) A Colonial Court of Admiralty shall have under the Naval Prize Act, 1864,^a and under the Slave Trade Act, 1873,^b and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice ; but, unless for the time being duly authorised, shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act, 1864^a, or otherwise in relation to prize ; and
- (c) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment ; and
- (d) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea or under any Act providing for the discipline of Her Majesty's Navy, than may be from time to time conferred on such Court by Order in Council.

(4) Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

[a] 27 & 28 Vict., c. 25.

[b] 36 & 37 Vict., c. 88.

Power of Colonial legislature as to Admiralty jurisdiction.

3. The legislature of a British possession may by any Colonial law—

(a) declare any Court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty^a, and provide for the exercise by such Court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction ; and

(b) confer upon any inferior or subordinate Court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit :

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty.

[a] See the Colonial Courts of Admiralty (India) Act, 1891 (16 [XVI] of 1891).

Reservation of Colonial law for Her Majesty's assent.

4. Every Colonial law which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any Court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

^a[This section shall not apply to Indian laws or Burma laws.]

[a] Inserted by A. O. (P).

Local Admiralty appeal.

5. Subject to rules of Court under this Act, judgments of a Court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgment of the Court in the exercise of its ordinary civil jurisdiction, and the Court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

Admiralty appeal to the Queen in Council.

6. (1) The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

- (a) from any judgment not having the effect of a definitive judgment unless the Court appealed from has given leave for such appeal, nor
- (b) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into Court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such Court to Her Majesty in Council, or as are for the time being possessed by the High Court in England or by the Court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4) All Orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions and in all places where Her Majesty has jurisdiction.

(5) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

Rules of Court.

7. (1) Rules of Court for regulating the procedure and practice (including fees and costs) in a Court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act, and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty to be matters of detail or of local concern may be revoked, varied, or added to without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full Court, or by any judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the Court can in any case be exercised by a single judge, any jurisdiction conferred by this Act may in the like case be exercised by a single judge.

Droits of Admiralty and of the Crown.

8. (1) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the crown in a British possession; and such droits and forfeitures, when condemned by a Court of a British possession in the exercise of the

jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for, and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court of Admiralty and of every other Court in a British possession exercising Admiralty jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be from time to time given by the Treasury.

(2) It shall be lawful for Her Majesty the Queen in Council by order to direct that, subject to any conditions, exceptions, reservations, and regulations contained in the Order, the said droits and forfeitures condemned by a Court in a British possession shall form part of the revenues of that possession either for ever or for such limited term or subject to such revocation as may be specified in the Order.

(3) If and so long as any of such droits or forfeitures by virtue of this or any other Act form part of the revenues of the said possession the same shall, subject to the provisions of any law for the time being applicable thereto, be notified, accounted for, and dealt with in manner directed by the Government of the possession and the Treasury shall not have any power in relation thereto.

Power to establish Vice-Admiralty Court. 9. (1) It shall be lawful for Her Majesty, by commission under the Great Seal, to empower the Admiralty to establish in a British possession any Vice-Admiralty Court or Courts.

(2) Upon the establishment of a Vice-Admiralty Court in a British possession, the Admiralty, by writing under their hands and the seal of the office of Admiralty, in such form as the Admiralty direct, may appoint a judge, registrar, marshal, and other officers of the Court, and may cancel any such appointment; and in addition to any other jurisdiction of such Court, may (subject to the limits imposed by this Act or the said commission from Her Majesty) vest in such Court the whole or any part of the jurisdiction by or by virtue of this Act conferred upon any Courts of that British possession, and may vary or revoke such vesting, and while such vesting is in force the power of such last-mentioned Courts to exercise the jurisdiction so vested shall be suspended.

Provided that—

(a) nothing in this section shall authorise a Vice-Admiralty Court so established in India ^a[or in Burma or in any other British possession] having a representative legislature, to exercise any jurisdiction, except for some purpose relating to prize, to Her Majesty's Navy, to the slave trade, to the matters dealt with by the Foreign Enlistment Act, 1870^b, or the Pacific Islanders Protection Acts, 1872^c and 1875^d, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law: and

(b) in the event of a vacancy in the office of judge, registrar, marshal, or other officer of any Vice-Admiralty Court in a British possession, the Governor of that possession may appoint a fit person to fill the vacancy until an appointment to the office is made by the Admiralty.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council from Courts in British possessions in the exercise of the jurisdiction conferred by this Act shall apply to appeals from Vice-Admiralty Courts but the rules and orders made in relation to appeals from Vice-Admiralty Courts may differ from the rules made in relation^f to appeals from the said Courts in British possessions.

(4) If Her Majesty at any time by commission under the Great Seal so directs, the Admiralty shall by writing under their hands and the Seal of the office of Admiralty abolish a Vice-Admiralty Court established in any British possession under this section, and upon such abolition the jurisdiction of any Colonial Court of Admiralty in that possession which was previously suspended shall be revived.

[a] Substituted by A. O. (P).

[b] 83 and 84 Vict., C. 90.

[c] 85 and 86 Vict., C. 19.

[d] 88 and 89 Vict., C. 51.

Power to appoint a Vice-Admiral. 10. Nothing in this Act shall affect any power of appointing a vice-admiral in and for any British possession or any place therein; and whenever there is not a formally appointed vice-admiral in a British possession or any place therein, the Governor of the possession shall be ex-officio vice-admiral thereof.

Exception of Channel Islands and other possessions.

11. (1) The provisions of this Act with respect to Colonial Courts of Admiralty shall not apply to the Channel Islands.

(2) It shall be lawful for the Queen in Council by order to declare, with respect to any British possession which has not a representative legislature, that the jurisdiction conferred by this Act on Colonial Courts of Admiralty shall not be vested in any court of such possession, or shall be vested only to the partial or limited extent specified in the Order.

12. It shall be lawful for Her Majesty the Queen in Council by Order to direct that this Act shall, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, apply to any Court established by Her Majesty for the exercise of jurisdiction in any place out of Her Majesty's dominions which is named in the Order as if that Court were a Colonial Court of Admiralty, and to provide for carrying into effect such application.

Application of Act to courts under Foreign Jurisdiction Acts.^a

[a] Now see Foreign Jurisdiction Act, 1890 (53 and 54 Vict., C. 37).

13. (1) It shall be lawful for Her Majesty the Queen in Council by Order to make rules as to the practice and procedure (including fees and costs) to be observed in and the returns to be made from Colonial Courts of Admiralty and Vice-Admiralty Courts in the exercise of their jurisdiction in matters relating to the slave trade, and in and from East African Courts as defined by the Slave Trade (East African Courts) Acts, 1873^a and 1879.^b

Rules for procedure in slave trade matters.

(2) Except when inconsistent with such Order in Council, the rules of Court for the time being in force in a Colonial Court of Admiralty or Vice-Admiralty Court shall, so far as applicable, extend to proceedings in such court in matters relating to the slave trade.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council, from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply, with the necessary modifications, to appeals from judgments of any East African Court made or purporting to be made in exercise of the jurisdiction under the Slave Trade (East African Courts) Acts, 1873^a and 1879^b.

[a] 36 and 37 Vict., C. 59.

[b] 42 and 43 Vict., C. 88.

14. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes authorised by this Act, and to revoke and vary such Orders, and every such Order while in operation shall have effect as if it were part of this Act.

Interpretation.

15. In the construction of this Act, unless the context otherwise requires,—

The expression "representative legislature" means, in relation to a British possession, a legislature comprising a legislative body of which at least one-half are elected by inhabitants of the British possession.

The expression "unlimited civil jurisdiction" means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered.

The expression "judgment" includes a decree, order, and sentence.

The expression "appeal" means any appeal, rehearing, or review; and the expression "local appeal" means an appeal to any court inferior to Her Majesty in Council.

The expression "Colonial law" means any Act, ordinance, or other law having the force of legislative enactment in a British possession and made by any authority, other than the Imperial Parliament of Her Majesty in Council, competent to make laws for such possession.

Commencement of Act.

16. (1) This Act shall, save as otherwise in this Act provided, come into force in every British possession on the first day of July, one thousand eight hundred and ninety-one.

Provided that—

- (a) This Act shall not come into force in any of the British possessions named in the First Schedule to this Act until Her Majesty so directs by Order in Council, and until the day named in that behalf in such Order ; and
- (b) If before any day above mentioned rules of court for the Colonial Court of Admiralty in any British possession have been approved by Her Majesty in Council, this Act may be proclaimed in that possession by the Governor thereof, and on such proclamation shall come into force on the day named in the proclamation.

(2) The day upon which this Act comes into force in any British possession shall, as regards that British possession, be deemed to be the commencement of this Act.

(3) If, on the commencement of this Act in any British possession, rules of court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863,^a and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Court or Courts of Admiralty of such possession, and in any Vice-Admiralty Court established under this Act in that possession, as rules of court under this Act, and may be revoked and varied accordingly; and all fees payable under such rules may be taken in such manner as the Colonial Court may direct, so however that the amount of each such fee shall so nearly as practicable be paid to the same officer or person who but for the passing of this Act would have been entitled to receive the same in respect of like business. So far as any such rules are inapplicable or do not extend, the rules of court for the exercise by a court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same court of the jurisdiction conferred by this Act.

(4) At any time after the passing of this Act any Colonial law may be passed, and any Vice-Admiralty Court may be established and jurisdiction vested in such Court but any such law, establishment, or vesting shall not come into effect until the commencement of this Act.

[a] 26 and 27 Vict., C. 24. This Act is now repealed ; see Sch. II.

Abolition of Vice-Admiralty Courts.

17. On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished : subject as follows :—

(1) All judgments of such Vice-Admiralty Court shall be executed and may be appealed from in like manner as if this Act had not been passed, and all appeals from any Vice-Admiralty Court pending at the commencement of this Act shall be heard and determined, and the judgment thereon executed as nearly as may be in like manner as if this Act had not been passed :

(2) All proceedings pending in the Vice-Admiralty Court in any British possession at the commencement of this Act shall, notwithstanding the repeal of any enactment by this Act, be continued in a Colonial Court of Admiralty of the possession in manner directed by rules of court, and, so far as no such rule extends, in a like manner as nearly as may be, as if they had been originally begun in such court :

(3) Where any person holding an office, whether that of judge, registrar or marshal, or any other office in any such Vice-Admiralty Court in a British possession, suffers any pecuniary loss in consequence of the abolition of such Court, the Government of the British possession, on complaint of such person, shall provide that such person shall receive reasonable compensation (by way of an increase of salary or a capital sum, or otherwise) in respect of his loss, subject nevertheless to the performance, if required by the said Government of the like duties as before such abolition.

(4) All books, papers, documents, office furniture, and other things at the commencement of this Act belonging, or appertaining to any Vice-Admiralty Court, shall be delivered over to the proper officer of the Colonial Court of Admiralty, or be otherwise dealt with in such manner as, subject to any directions from Her Majesty, the Governor may direct.

(5) Where, at the commencement of this Act in any British possession, any person holds a commission to act as advocate in any Vice-Admiralty Court abolished by this Act, either for

Her Majesty or for the Admiralty, such commission shall be of the same avail in every Court of the same British possession exercising jurisdiction under this Act, as if such Court were the Court mentioned or referred to in such commission.

Repeal. 18. The Acts specified in Second Schedule to this Act shall, to the extent mentioned in the third column of that schedule, be repealed as respects any British possession as from the commencement of this Act in that possession, and as respects any Courts out of Her Majesty's dominions as from the date of any Order applying this Act:

Provided that—

- (a) Any appeal against a judgment made before the commencement of this Act may be brought and any such appeal and any proceedings or appeals pending at the commencement of this Act may be carried on and completed and carried into effect as if such repeal had not been enacted; and
- (b) All enactments and rules at the passing of this Act in force touching the practice, procedure, fees, costs, and returns in matters relating to the slave trade, in Vice-Admiralty Courts and in East African Courts shall have effect as rules made in pursuance of this Act, and shall apply to Colonial Courts of Admiralty, and may be altered and revoked accordingly.

SCHEDULES

FIRST SCHEDULE

SECTION 16. BRITISH POSSESSIONS IN WHICH OPERATION OF ACT IS DELAYED.

New South Wales.

Victoria.

St. Helena.

British Honduras.

SECOND SCHEDULE

SECTION 18. ENACTMENTS REPEALED

SESSION AND CHAPTER	TITLE OF ACT.	EXTENT OF REPEAL.
56 Geo. 3, c. 82	An Act to render valid the judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of Judges of such courts.	The whole Act.
2 & 3 Will. 4, c. 51	An Act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction.	The whole Act.
3 & 4 Will. 4, c. 41	An Act for the better administration of justice in His Majesty's Privy Council.	Section 2.
6 & 7 Vict., c. 38	An Act to make further regulations for facilitating the hearing appeals and other matters by the Judicial Committee of the Privy Council.	In section 2, the words "or from any Admiralty or Vice-Admiralty Courts," and the words "or the Lords Commissioners of Appeals in prize causes or their surrogates." In section 3, the words "and the High Court of Admiralty of England," and the words "and from any Admiralty or Vice-Admiralty Courts."

SESSION AND CHAPTER	TITLE OF ACT.	EXTENT OF REPEAL.
7 & 8 Vict., c. 69	An Act for amending an Act passed in the fourth year of the reign of His late Majesty, entitled, "An Act for the better administration of justice in His Majesty's Privy Council," and to extend its jurisdiction and powers.	In section 5, from the first "the High Court of Admiralty" to the end of the section. In section 7, the words "and from Admiralty or Vice-Admiralty Courts." Sections 9 and 10, so far as relates to maritime causes. In section 12, the words "or maritime." In section 15, the words "and Admiralty and Vice-Admiralty."
26 Vict., c. 24	The Vice-Admiralty Courts Act, 1863.	In section 12, the words "and from the Admiralty and Vice-Admiralty Courts," and so much of the rest of the section as relates to maritime causes.
30 & 31 Vict., c. 45	The Vice-Admiralty Courts (Amendment) Act, 1867.	The whole Act.
36 & 37 Vict., c. 59	The Slave Trade (East African Courts) Act, 1873.	The whole Act.
36 & 37 Vict., c. 88	The Slave Trade Act, 1873.	Sections 4 and 5.
38 & 39 Vict., c. 51	The Pacific Islanders Protection Act, 1875.	Section 20 as far as relates to the taxation of any costs, charges, and expenses which can be taxed in pursuance of this Act. In section 23 the words "under the Vice-Admiralty Courts Act, 1863."
		So much of section 6 as authorises Her Majesty to confer Admiralty jurisdiction on any Court.

STATEMENT OF OBJECTS AND REASONS.

"The main object of this Bill is to declare certain Courts in India having unlimited civil jurisdiction to be Colonial Courts of Admiralty in pursuance of the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict., c. 27)....."

2. The Bill, like the English Act, is not intended to take away any jurisdiction of any High Court of Judicature in India. On the contrary, the Bill will, so far as the Admiralty and Vice-Admiralty jurisdictions of those Courts are affected, extend and improve them.

3. Besides the High Courts of Judicature at Calcutta, Madras and Bombay, it is proposed that there shall be three other Colonial Courts of Admiralty, namely :

- (a) the Court of the Recorder of Rangoon;
- (b) the Court of the Resident at Aden; and
- (c) the District Court of Karachi.

4. Under the English Act of 1890, a first appeal from the Court of the Recorder of Rangoon will lie to the Calcutta High Court; from the Court of the Resident at Aden direct to Her Majesty the Queen in Council; and from the District Court of Karachi to the Sadr Court in Sind. There is an ultimate appeal in all cases to Her Majesty the Queen in Council.

5. The Governor-General in Council has accepted the opinion of the Governor of Bombay in Council, and the unanimous opinion of the Hon'ble the Chief Justice and Judges of the Calcutta High Court, that the jurisdiction of Colonial Courts of Admiralty in India should not be limited territorially or otherwise."

—Gazette of India, 1891, Part V, Page 140,

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts II of 1923; 34 of 1926;

—Repealed in part by Act 10 of 1914.

—Adapted by A. O.

COGNATE ACTS AND PROVISIONS.

1. COLONIAL COURTS OF ADMIRALTY ACT, 1890 (53 & 54 VICT., c. 27).

[THE] COLONIAL COURTS OF ADMIRALTY (INDIA) ACT, 1891
(ACT XVI OF 1891)^a.

[14th May, 1891].

An Act to declare certain Courts in British India to be Colonial Courts of Admiralty.

Whereas it is provided by the Colonial Courts of Admiralty Act, 1890,^b that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty;

And whereas it is expedient, in pursuance of that provision, to declare certain Courts in British India to be Colonial Courts of Admiralty;

It is hereby enacted as follows:—

[a] For Proceedings in Council, *see* Gazette of India, 1891, Pt. VI, p. 116.

[b] 53 and 54 Vict., C. 27 *see* page 1581, *supra* of this volume.

Title and commencement. 1. (1) This Act may be called the Colonial Courts of Admiralty (India) Act, 1891; and

(2) It shall come into effect—

(a) if Her Majesty's pleasure thereon has been signified, by a notification in the ^b[Official Gazette], on or before the first day of July, 1891, then on that day, or

(b) if Her Majesty's pleasure thereon has not been so signified on or before that day, then on the day on which Her Majesty's pleasure shall be signified by such a notification as aforesaid.

[a] For notification publishing Her Majesty's Assent to this Act, *see* Gazette of India, 1891, Pt. I, p. 371.

[b] *Substituted* by A. O. for "Gazette of India."

Appointment of Colonial Courts of Admiralty. 2. The following Courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty, namely:—

(1) the High Court of Judicature at Fort William in Bengal,

(2) the High Court of Judicature at Madras.

(3) the High Court of Judicature at Bombay, ^a[and]

^b[* * * * *]

^c[^a(a) The Chief Court of Sind].

^d[* * * * *]

^e[* * * * *]

[a] *Inserted* by A. O.

[b] The words and figures "(4) the High Court of Judicature at Rangoon," were *repealed* by A. O.

[c] *Inserted* by the Sind Courts (Supplementary) Act, 1926 (84 [XXXIV] of 1926) S. 2 and Sch.

[15-4-1940]

[d] The words and figures "(5) the Court of the Resident at Aden" were *repealed* by A. O.

[e] The word "and" at the end of Cl. (5) and the whole of Cl. (6) were *omitted* by Act 84 of 1926, S. 2 and Sch.

[15-4-1940].

3. The expression "Court having Admiralty jurisdiction" and "Admiralty Court" and the expression "Admiralty or Vice-Admiralty cause," and other expressions referring to Admiralty or Vice-Admiralty Courts or causes, shall, wherever any such expression occurs in any ^a[Indian law], be deemed to include a Colonial Court of Admiralty and a Colonial Court of Admiralty cause, and to refer to a Colonial Court of Admiralty or a Colonial Court of Admiralty cause, respectively.

[a] *Substituted* by A. O. for "enactment of the Governor-General in Council, or of a Governor in Council or Lieutenant-Governor in Council."

Court-fees in suits in the Colonial Court of Admiralty at Karachi.

4. Court-fees in suits instituted in the Colonial Court of Admiralty at a[" * * *"] Karachi shall, unless the jurisdiction of the Court is to be exercised in any matter relating to the slave trade, be leviable in accordance with the provisions of Chapter III of the Court-fees Act, 1870.

[a] The words "Rangoon, Aden or" were repealed by A. O.

5. [Repeal] Repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914).

THE SCHEDULE.

ENACTMENTS REPEALED.

Repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914).

STATEMENT OF OBJECTS AND REASONS.

"Certain commercial documents of various kinds are by the practice of merchants accepted as evidence and taken as *prima facie* correct, but in a Court of law they cannot, in the absence of consent by the parties, be admitted in evidence without testimony as to their genuineness or the correctness of the statements made therein. Such documents are not admissible in evidence under S. 82 or any other provision of the Indian Evidence Act, 1872, without further proof. The result is that a party desirous of delaying the proceedings can often insist on the other side getting Commissions issued to take evidence as to facts which are for all practical purposes

sufficiently established by the documents in question. It is proposed to undertake legislation on the lines of the Bankers Books Evidence Act, 1891, so as to provide that commercial documents which are accepted as *prima facie* correct in commercial circles may be admitted in evidence without formal proof. A list of such documents has been prepared in consultation with Commercial Associations and Local Governments, and is included in the Schedule to the Bill, power being reserved to the Government of India to add to the list from time to time and to remove items from it."—*Gazette of India, 1937, Part V, page.*

[THE] COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939.

COGNATE ACTS AND PROVISIONS

See UNDER EVIDENCE ACT, 1872.

[THE] COMMERCIAL DOCUMENTS EVIDENCE ACT, 1939.

(ACT XXX OF 1939).^a

[26th September, 1939.]

An Act to amend the Law of Evidence with respect to certain commercial documents.

Whereas it is expedient to amend the law of Evidence with respect to certain commercial documents ;

It is hereby enacted as follows :—

[a] For the Report of Select Committee See Gazette of India 1939, Pt. V, p. 157.

This Act has been applied to—

British Baluchistan see Gazette of India, 1940, Pt. I, p. 790 ;

the Darjeeling district and the partially excluded areas of the Mymensingh district with effect from the 8th February, 1940, by Bengal Government Notification No. 361-J., dated 31st January, 1940.

Short title and extent.

1. (1) This Act may be called the Commercial Documents Evidence Act, 1939.

(2) It extends to the whole of British India.

Statements of relevant facts in scheduled documents to be themselves relevant facts.

2. Notwithstanding anything contained in the Indian Evidence Act, 1872, statements of facts in issue or of relevant facts made in any document included in the Schedule as to matters usually stated in such document shall be themselves relevant facts within the meaning of that Act,

Presumption as to genuineness of documents.

3. For the purposes of the Indian Evidence Act, 1872, and notwithstanding anything contained therein, a Court—

(a) shall presume, within the meaning of that Act, in relation to documents included in Part I of the Schedule, and

(b) may presume, within the meaning of that Act, in relation to documents included in Part II of the Schedule,—

that any document purporting to be a document included in Part I or Part II of the Schedule, as the case may be, and to have been duly made by or under the appropriate authority, was so made and that the statements contained therein are accurate.

4. In the Schedule the expression “recognised Chamber of Commerce” means a Chamber of Commerce recognised by the Government of its country as being competent to issue certificates of origin, and includes any other association similarly recognised.

Definition.

THE SCHEDULE.

(See Sections 2 and 3).

PART I.

Documents in relation to which the Court “SHALL presume”

1. Lloyd's Register of Shipping.
2. Lloyd's Daily Shipping Index.
3. Lloyd's Loading List.
4. Lloyd's Weekly Casualty Reports.
5. Certificate of delivery of goods to the Manchester Ship Canal Company.
6. Official log book, Supplementary Official log book and official wireless log kept by a British ship.
7. Certificate of Registry, Safety Certificate, Safety Radio-Telegraphy Certificate, Exemption Certificate, Certificate of Survey, Declaration of Survey, International Load Line Certificate, British India Load Line Certificate, Report of Survey of a ship provisionally detained as unsafe, Report of Survey to be served upon the master of a ship declared unsafe upon survey, Docking Certificate, Memorandum issued under Article 56 of the International Convention for the Safety of Life at Sea, 1929.
8. Certificates A and B, issued under the Indian Merchant Shipping Act, 1923.
9. The following documents relating to marine insurance, namely, insurance policy, receipt for premium, certificate of insurance and insurance cover note.
10. Certificate concerning the loss of country craft issued by the appropriate authority under Department of Commerce, Mercantile Marine Department Circular No. 2 of 1938.
11. Protest made before a Notary Public or other duly authorised official by a master of a ship relating to circumstances calculated to affect the liability of the ship-owner.
12. Licence or permit for radio-telegraph apparatus carried in ships or aircraft.
13. Certificate of registration of an aircraft granted by the Government of the country to which the aircraft belongs.
14. Certificate of airworthiness of an aircraft granted or validated by, or under the authority of, the Government of the country to which the aircraft belongs.

SECTION 3—Note 1.

“In considering the several documents included in the schedule, we came to the conclusion in several cases that although the document did not merit exclusion altogether the measure of its reliability is not such as to oblige the Court to make the presumption. We have, therefore, divided the schedule into two parts: in Part I we include documents in relation to which the Court shall make the presumption and in Part II documents in relation to which the presumption is left to the Court's discretion...”

—*Select Committee Report.*

SECTION 4—Note 1.

“We were faced by the difficulty that there appears to be little recognition by Governments of Chambers of Commerce and like associations as such: on the other hand there is a widely adopted convention whereby Governments recognise such associations as being competent to issue certificates of origin, and we propose the adoption of such recognition as the basis of the definition.”—*Select Committee Report.*

15. Licences and certificates of competency of aircraft personnel granted or validated by, or under the authority of, the Government of the country to which the personnel belongs.

16. Ground Engineer's Licence issued by a competent authority authorised in this behalf by Government.

17. Consular Certificate in respect of goods shipped or shut out, consular certificates of origin, and consular invoice.

18. Certificate of origin of goods issued (but not merely attested) by a recognised Chamber of Commerce, or by a British Consular officer of British or Indian Trade Commissioner or Agent.

19. Receipt for payment of customs duty issued by a Customs authority.

20. Schedule issued by a Port, Dock, Harbour, Wharfage or Warehouse authority, or by a Railway company, showing fees, dues, freights or other charges for the storage, transport or other services in connection with goods.

21. Tonnage schedule and schedule of fees, commission or other charges for services rendered, issued by a recognised Chamber of Commerce.

22. The publication known as the Indian Railway Conference Association Coaching and Goods Tariffs.

23. Copy, certified by the Registrar of Companies, of the memorandum or the articles of association of a company, filed under the Indian Companies Act, 1913.

24. Protest, noting and certifying the dishonour of a bill of exchange, made before a Notary Public or other duly authorised official.

PART II.

Documents in relation to which the Court "MAY presume."

1. Survey Report issued by a competent authority.

(i) in respect of cargo loaded ; or

(ii) certifying the quantity of coal loaded ; or

(iii) in respect of the security of hatches.

2. Official log book, Supplementary Official log book and official wireless log kept by a foreign ship.

3. Dock certificate, dock chalan, dock receipt or warrant, Port Warehouse certificate or warrant, issued by, or under the authority of, a Port, Dock, Harbour or Wharfage authority.

4. Certificate issued by a Port, Dock, Harbour, Wharfage or other authority having control of acceptance of goods for shipping, transport or delivery, relating to the date or time of shipment of goods, arrival of goods for acceptance, arrival of vessels or acceptance or delivery of goods, or to the allocation of berthing accommodation to vessels.

5. Export Application issued by a Port authority showing dues paid, weight and measurement and the shutting out of a consignment.

6. Certificate or receipt showing the weight or measurement of a consignment issued by the official measurer of the Conference Lines, or by a sworn or licensed measurer, or by a recognised Chamber of Commerce.

7. Reports and publications issued by a Port authority showing the movement of vessels, and certificates issued by such authority relating to such movements.

8. Certificate of safety for flight signed by a licensed Ground Engineer.

9. Aircraft Log Book, Journey Log Book and Log Book, maintained by the owner or operator in respect of aircraft.

10. Passenger List or Manifest of Goods carried in public transport aircraft.

SCH. ITEM 18—Note 1.

"On examination of some certificates of origin we found that while in some cases effective certificates were given by the Chamber of Commerce, in others the statement was merely to the effect that a declaration had been made in the presence of the represen-

tative of the Chamber either by the consignor or by an agent of his. Mere attestation we regard as of little value and we, therefore, propose to recognise in this Bill only effective declarations by the Chamber of Commerce concerned. . . ."—*Select Committee Report.*

11. Passenger ticket, issued by a steamship company or air transport company.
12. Air Consignment Note and Baggage Check, issued by an air transport company in respect of goods carried by air, and the counterfoil or duplicate thereof retained by the carrier.
13. Aircraft Load Sheet.
14. Storage warrant of a warehouse recognised by a Customs, Excise, Port, Dock, Harbour or Wharfage authority.
15. Acknowledgment receipt for goods granted by Port, Dock, Harbour, Wharfage or Warehouse authority or by a Railway or Steamship company.
16. Customs or Excise pass and Customs or Excise permit or certificate, issued by a Customs or Excise authority.
17. *Force majeure* certificate issued by a recognised Chamber of Commerce.
18. Receipt of a Railway or Steamship company granted to a consignor in acknowledgment of goods entrusted to the company for transport.
19. Receipt granted by the Posts and Telegraphs Department.
20. Certificate or survey award issued by a recognised Chamber of Commerce relating to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods.
21. Copy, certified by the Registrar of Companies, of the Balance Sheet, Profit and Loss Account, and audit report of a company, filed with the said Registrar under the Indian Companies Act, 1913, and the rules made thereunder.

[THE INDIAN] COMPANIES ACT, 1913.

(ACT VII OF 1913).

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STATEMENT OF OBJECTS AND REASONS (1912)

The object of this Bill is to revise and consolidate the Indian law on the subject of Joint-Stock Companies on the lines of recent English legislation. The law on this subject in India is contained in the Indian Companies Act, 1882, which was modelled closely on the English law in force in 1887. Since 1882 the Indian law has been added to by four amending Acts, namely, the Indian Companies Act (1882) Amendment Act, 1887; the Indian Companies (Memorandum of Association) Act, 1895; the Indian Companies (Branch Registers) Act, 1900, and the Indian Companies (Amendment) Act, 1910. The substantial additions, however, which have been made to the English law by the long series of Acts passed between 1879 and 1908 have not, with the exception of the matters dealt with in the four small amending Acts above-mentioned, been adopted in the Indian law. The more important of the later English Acts are the Companies Act, 1879; the Companies Act, 1890; the Companies (Winding up) Act, 1890, the Directors Liability Act, 1890; the Companies Act 1900; the Companies Act 1907; and the Companies (Consolidation) Act, 1908. The last named Act consolidated the English law into a convenient Code and this code has been taken as the model of the present Bill.

Among the new and important provisions introduced into Indian Company law by this Bill are those relating to:—(a) the preparation of a statutory report by a company limited by shares before the first general meeting; (b) the appointment and advertisement of directors; (c) the prospectus and statement in lieu of prospectus; (d) restrictions on proceeding to allotment; (e) restrictions on commencing business; (f) the appointment, remuneration and duties of auditors; (g) the registering of information regarding certain kinds of mortgages and charges; and (h) the registering of information regarding companies situated outside British India but operating therein.

The present Bill follows the English Act not merely in its general principles but in its detailed arrangement and expression, wherever possible, as it is considered a matter of the first importance to have the Indian law as uniform as possible with the English law, except where local circumstances demand a modification in substance.

It has been considered necessary to depart from the English law on the subject of the winding up of

companies by order of the Court, and in place of the provisions introduced into English law by the Companies (Winding up) Act, 1890, the procedure of the existing Indian law has been in the main retained. This procedure leaves the discretion in the matter of winding up in the hands of the Court, whereas in the English law important functions are exercised by the Board of Trade, by Official Receivers, and by Committees of Inspection. On the subject of the annual balance sheet the provisions of the existing Indian law have been retained where these appeared more complete than the provisions of the English law, and the prescribed form of balance sheet has also been retained.

In order to make inspection in the interests of shareholders obtainable without difficulty where a case for such inspection has been made out, the Registrar of Joint-Stock Companies has been empowered to demand from any company an explanation of anything that is not clear in its balance sheet or other returns submitted to him, and the company will be liable to a penalty if it fails to provide a full and true statement to the Registrar, when called upon. A Report from the Registrar will form a ground on which the Local Government [now Central Government] may order an inspection of the affairs of a company.

In regard to the qualifications of auditors, a matter on which the English law imposes no restriction, a provision has been inserted authorizing Local Governments [now Central Government] to issue certificates for the auditing of companies' accounts to approved persons in accordance with rules to be framed for the purpose and restricting the audit of companies' accounts to persons holding such certificates.

It has not been thought necessary to include the provision of the English Act (Sec. 40) whereby a company is empowered to return accumulated profits in reduction of paid-up share capital.

The other matters on which modifications have been made in the English law are of minor importance. The insertion of explanations based on case law has been generally avoided, but in one or two cases where decisions of the Courts have added to or explained the law, it has been thought desirable to expand or modify the wording of the English Act.

STATEMENT OF OBJECTS AND REASONS (1936) —

[THE INDIAN] COMPANIES (AMENDMENT) ACT, 1936.

For some considerable time Government has had under consideration the overhaul of the law relating to Companies.

2. Substantial material has accumulated in the form of communications and suggestions from Local Governments, public bodies and individuals, supplemented by publications in the press, indicating unanimity of opinion that the Indian Companies Act requires fairly extensive changes. The opinions received disclosed a demand for power to deal with mushroom and fraudulent companies, for changes in the provisions relating to the issue and contents of prospectuses, for increased disclosure to share-holders of the financial position of companies and for increased rights to share-holders in connection with the management of companies, for modification of the present law applicable to managing agents, for changes in the provisions applicable to winding up, for special provisions to govern Banking Companies and for numerous other improvements.

3. The Indian Companies Act, 1913, was based on the English Companies (Consolidation) Act of 1908 and followed generally the provisions of that Act. Its revision in order to overtake the subsequent developments in the law is overdue.

4. The English Act of 1908 was examined by a committee presided over by Lord Wrenbury in 1918 and again by a committee presided over by Mr. Greene, K. C., in 1926. The latter committee made extensive recommendations many of which were subsequently incorporated with or without modification in the Companies Consolidation Act, 1929. The guidance afforded by that Act is now available in the task of revising the company law of British India.

Act how affected by subsequent legislation.

Amended by Acts 10 of 1914; 11 of 1914; 11 of 1915; 42 of 1920; 47 of 1920; 33 of 1926; 19 of 1930; 1 of 1932; 2 of 1934; 22 of 1936; 2 of 1938; 34 of 1939; 10 of 1940; 22 of 1940; 36 of 1940; 26 of 1941; 17 of 1942; 21 of 1942; 50 of 1943; 1 of 1944; 4 of 1945; 6 of 1945; 13 of 1946.—Amended and repealed in part by Act 20 of 1937.—Adapted by A. O.

5. In September, 1934, the Government of India placed a lawyer with experience in the administration of Company Law on special duty to examine the material collected and to make proposals for the amendment of the Indian law. These proposals were further discussed by a small committee of business experts specially convened for the purpose. Out of these proposals and discussions there have crystallized the amendments now proposed.

6. The revision of the law in England took the form of a consolidating Act which completely replaced the Act of 1908. This course has not been followed here. The arrangement adopted in the new English Act has attracted unfavourable criticism to an extent which does not encourage its adoption, and there are manifest advantages in retaining the form of the existing Indian Act with the administration of which the Courts are now familiar, even though the additions to it by this Bill are extensive.

7. In the amendments proposed, the lines followed in the overhaul of the English law have in accordance with the policy followed in the past been adopted in the amendments now proposed where the problems dealt with are problems common to India and England. India has, however, problems peculiar to itself, for example, those connected with the managing agency system.

8. The special provisions relating to banking companies have been included, because there is no immediate prospect of legislation dealing solely with this object being undertaken. The recommendations of the Central Banking Enquiry Committee have been carefully considered in drafting these provisions. *Gazette of India, 1936, Part V, page 93.*

Cognate Acts and Provisions.

1. Companies (Foreign Interests) Act, XX of 1918.
2. Land Acquisition Act, I of 1894, S. 3 (e) and Part VII.
3. Official Secrets Act, XIX of 1923, S. 15.
4. Provincial Insolvency Act, V of 1920, S. 8.
5. Stamp Act, II of 1899, Sch. I, Art. 89.
6. Trusts Act, II of 1882, S. 88.

THE INDIAN COMPANIES ACT, 1913.

(ACT VII OF 1913)^a

[27th March, 1913.]

An Act to consolidate and amend the law relating to Trading Companies and other Associations.

Whereas it is expedient to consolidate and amend the law relating to Trading Companies and other Associations; It is hereby enacted as follows:—

[a] For Report of Select Committee, see *Gazette of India*, 1913, Pt. V, p. 45; and for Proceedings in Council, see *ibid.*, 1912, Pt. VI, p. 586, and *ibid.*, 1913, Pt. VI, pp. 6, 106 and 800.

The provisions of this Act do not apply to registered Co-operative Societies in Bengal, Bombay, Madras, Bihar and Orissa; see the Bengal Co-operative Societies Act, 1940 (Beng. 21 of 1940), the Bombay Co-operative Societies Act, 1925 (Bom. 7 [VII] of 1925), S. 68, the Madras Co-operative Societies Act, 1932 (Mad. 6 [VI] of 1932), S. 61, and the B. & O. Co-operative Societies Act, 1935 (B. & O. 6 [VI] of 1935, s. 8.

PART I. PRELIMINARY.

1. (1) This Act may be called the Indian Companies Act, 1913.
- (2) It shall come into force on the first day of April 1914; and
- (3) It extends to the whole of British India including British Baluchistan and the Santhal Parganas.

Short title, commencement and extent.

[1882—S. 1; (1929) 19 & 20 Geo. V, C. 23, S. 385.]

Definitions.

a[2. (1)] In this Act, unless there is anything repugnant in the subject or context,—

[a] The original S. 2 was re-numbered as sub-section (1) of that section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2. [15-1-1937].

- (1) “articles” means the articles of association of a company as originally framed or as altered by special resolution, including, so far as they apply to the company, the regulations contained (as the case may be) in a Table B in the Schedule annexed to Act No. XIX of 1857 or in a Table A in the First Schedule annexed to the Indian Companies Act, 1882, or in Table A in the First Schedule annexed to this Act:

[a] See Appendix I, *Infra*

[b] See Appendix II, *Infra*

PREAMBLE—Note 1.

[1] The Companies Act is an Act merely legislating for or regulating certain rights recognized under the common law in England. (Vol. 15) 1928 Mad. 571 (573) (D. B.).

[2] A Company registered under the Companies Act, 1913 is subject to all the provisions of that Act; and if it carries on life insurance business it is in addition subject to the further provisions contained in the Life Assurance Companies Act of 1912. (Vol. 21) 1934 Cal 63 (64): 35 Cr L Jour 492. [Note.—S. 287 saves the Indian Life Assurance Companies Act of 1912 and Provident Insurance Societies Act of 1912 from the application of this Act].

[3] *Interpretation*.—The object of a consolidating and Amending Act is to present the whole body of the statutory law completely, repealing the former enactments. The principle of interpreting a Codifying Act is stated by Lord Herschell in *Bank of England v. Vagliano*, (1891 A. C. 107, at pp. 144, 145): (A codifying statute should be interpreted as it stands and the former law should not be taken into consideration except upon some special ground, as an ambiguous provision.)* (1897) 2 Q.B. 334 (346); (1891) 1891 App. Cas. 107 (144).

[4] Where Act of Parliament receives a judicial construction putting a certain meaning on its words, and the same words are used by the Legislature in subsequent enactment, it can be presumed that the Legislature used these words with an intention to express the meaning which was put upon the same words before; unless this presumption is rebutted, the Act should be so construed even if the words were such that they might originally have been construed otherwise. (1864) 11 H. L. C. 443 (480); 35 L.J.M.C. 1: 19 W. R. (Eng.) 1069.

[5] There is no obligation on a Court of law so to construe a clause in an enactment as would lead to a clear absurdity which could not possibly be regarded as contemplated by the legislating authority or agency. On the other hand, that construction alone should be adopted which is in consonance with common sense, which does not lead to absurd results or enormous practical difficulties. (Vol. 15) 1928 Mad. 571 (577) (DB).

[6] If a new enactment creates new rights unknown previously to law and provides remedies for the infringement of such rights, it must follow that it was the clear intention of the legislature that such remedies should be enforced only in the manner and by following the procedure indicated. It is open to the legislature to take away any subsisting right of suit and provide a special remedy instead: but it must be done by express provision and such a general right is incapable of being taken away merely by implication. (Vol. 15) 1928 Mad. 571 (572, 573) (DB).

[7] When any section is copied into an Indian Companies Act from the English Statute it has got the same meaning as under English Statute. (Vol. 13) 1926 Lah 624 (626): 8 Lah. 549 (DB). (S. 285 of Indian Companies Act has been copied from English Statute and the above mentioned case refers to this section).

[8] Different Sections of the Act must be read so as to be consistent with each other. (Vol. 14) 1927 Pat. 132 (133): 6 Pat. 132 (DB). (Ss. 199 and 200).

[9] Precedent may be excluded by a change in the language of the new enactment. 1909 2 Ch. 484 (491).

[10] Where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (Vol. 30) 1943 Sind 89 (90); L. L. R. (1942) Kar 504 (DB). (S. 201, Companies Act excludes S. 89, Civil P.O.).

SECTION 2 (1) (2)—Note 1.

[1]. *Distinct Legal entity*.—Joint Stock Company is a distinct entity. It is not permissible to inquire whether the directors belong to the same family or whether it is as compendiously described, a one-man company. (Vol. 28) 1936 Bom. 62 (76): 60 Bom. 326 (DB). * (Vol. 14) 1927 Bom. 371 (374 375): 51 Bom. 372 (DB).

Also see under S. 23.

[2] *Domicile*.—The domicile of a corporation is the place considered by law to be the centre of its affairs which (1) in the case of a trading corporation is its principal place of business i.e., the place where the administrative business of the corporation is carried

- (2) "Company" means a company formed and registered under this Act or an existing company :
- (3) "the Court" means the Court having jurisdiction under this Act :
- (4) "debenture" includes debenture stock :
- (5) "director" includes any person occupying the position of a director by whatever name called :
- (6) "District Court" means the principal Civil Court of original jurisdiction in a district, but does not include a High Court in the exercise of its ordinary original civil jurisdiction :
- (7) "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 :

[a] Repealed by the Indian Companies Act, 1882 (6 [VI] of 1882), which was in turn repealed by this Act.

(8) "Insurance company" means a company that carries on the business of insurance either solely or in common with any other business or businesses :

(9) "manager" means a person who, subject to the control and direction of the directors has the management of the whole affairs of a company, and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not :

[a] Clause (9) was substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2, for original Cl. 9. [15-1-1937].

(9A) "managing agent" means a person, firm or company entitled to the management of the whole affairs of a company by virtue of an agreement with the company, and under the control and direction of the directors except to the extent, if any, otherwise provided for in the agreement and includes any person, firm or company occupying such position by whatever name called :

Explanation.—If a person occupying the position of a managing agent calls himself a manager he shall nevertheless be regarded as managing agent and not as manager for the purpose of this Act.]

[a] Clause (9A) was inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2, [15-1-1937].

Section 2 (1) (2)—Contd.

on, (2) in the case of any other corporation is the place where its functions are discharged. The registration of the company is not for all purposes, of itself decisive. The question in each case is, where is it that the real business of the company is carried on? According to the answer to that question, the companies' domicile must, in the main, be determined. The domicile of a trading corporation is the place where the centre of control is, where the directing power resides or, where the brain which controls the operations of the company is situated. (Vol. 26) 1939 Mad. 818 (824).

[3] The distinction between a company incorporated under an Act of Parliament and an association incorporated under Royal Charter is that the former can do such acts only as are authorised directly or indirectly by the statute creating it; the latter can do everything that an ordinary individual can do. Hence even though a corporation incorporated by a Royal Charter may have exceeded its powers in entering into a contract, though it may entail forfeiture, the transaction would nevertheless be valid. (Vol. 30) 1943 Mad. 111 (115).

SECTION 2 (1) (4)—Note 1.

[1] In determining what is or is not a debenture within the meaning of this clause the Court is not bound to hold that an instrument is or is not a debenture because it is so called by the company issuing it. The Court must look at the substance of the instrument itself and form the best opinion it can whether

the instrument is or is not a debenture. A document which either creates a debt or acknowledges it and is one of a series may be dealt with as a debenture. A creation of a charge over the assets of the company issuing the debenture though usual, is not an essential requisite of a debenture. There may be a mortgage debenture or a simple debenture which does not create any charge on any of the assets of the company. (Vol. 33) 1946 Bom. 18 (19) : 47 Cr. L. Jour 361 : I.L.R. (1945) Bom. 863.

SECTION 2 (1) (8)—Note 1.

[1] Compare the definition given in S. 2 (8), Insurance Act, 1938 which runs as follows: 'Insurance Company' means any insurer being company, a association or partnership which may be wound up under the Indian Companies Act, 1913, or to which the Indian Partnership Act 1932, applies."

SECTION 2 (1) (9)—Note 1.

[1] Unless a person is in charge of the entire business of the Company he cannot be deemed a Manager. A branch Manager is not a manager (Vol. 5) 1918 Lah 170 (171) : 19 Cr. L. Jour 215 : 1917 Pun Re. No. (Cr.) 47 (DB)

SECTION 2 (1) (11)—Note 1.

[1] One person, officer of two companies—His knowledge, as officer, of one company cannot be imputed to the other company in the absence of duty imposed on the officer to communicate it to the other company. (Vol. 28) 1941 Bom. 108 (116) : I. L. R. (1941) Bom. 278 (DB).

(10) "memorandum" means the memorandum of association of a company as originally framed or as altered in pursuance of the provisions of this Act :

(11) "officer" includes any director, ^a[managing agent,] manager or secretary but, save in sections 235, 236 and 237, does not include an auditor :

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2. [15-1-1937]*

(12) "prescribed" means, as respects the provisions of this Act relating to the winding up of companies, prescribed by rules made by the High Court, and, as respects the other provisions of this Act, prescribed by the ^a[Central Government] :

[a] *Substituted by A. O. for "Governor-General in Council".*

^a[(13) "private company" means a company which by its articles—

(a) restricts the right to transfer the shares, if any ; and

(b) limits the number of its members to fifty not including persons who are in the employment of the company ; and

(c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company :

Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member :]

[a] *Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2 for original clause (13). [15-1-1937]*

^a[(13A) "public company" means a company incorporated under this Act or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act, repealed thereby, which is not a private company.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2. [15-1-1937]*

(14) "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company ^a[but shall not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed.]

[a] *Added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2. [15-1-1937]*

(15) "the registrar" means a registrar or assistant registrar performing under this Act the duty of registration of companies : and

(16) "share" means share in the share capital of the company, and includes stock except when a distinction between stock and shares is expressed or implied :

^a[(17) "trading corporation" means a trading corporation within the meaning of Item 33 in List I in the Seventh Schedule to the Government of India Act, 1935.]

[a] *Inserted by A. O.*

^a[(2) Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether that other company is a company within the meaning of this Act or not, and

(a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company, or

Section 2 (1) (11) (contd.)

[2] Where A company guarantees the losses incurred by P on behalf of B company and C is the owner of A company and director of B company, C is bound to communicate to A Company his knowledge of losses incurred by B company. (Vol. 28) 1941 Bom. 108 (116) : I L R. (1941) Bom. 273 (D.B.)

[3] *Auditor* :—Auditor deliberately passing over manifest illegal payment is guilty of misfeasance. (Vol. 16) 1929 All 826 (831) (D. B.)

[4] *Broker* :—Share broker of a Company is not an officer for purposes of S. 235. (Vol. 25) 1938 Mad. 154 (157) : I L R. (1938) Mad. 192.

Section 2 (1) (13)—Note 1.

[1] A private Company, which issues an invitation to the public to subscribe for shares or debentures, ceases to be a private company and becomes a public company liable to fulfil the obligations imposed upon a public company by the Act and the rules. (Vol. 38) 1946 Bom. 18 (18) : 47 Cr. L. Jour. 361 : I L R. (1945) Bom. 863.

[2] As to the conversion of private company into a public company, see section 154.

Section 2 (1) (14)—Note 1.

[1] In (Vol. 12) 1925 Cal. 714 (714) : 52 Cal. 440 (D.B.) : 26 Cr. L. Jour. 1061 decided before the amend-

- (b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of this Act, and the expression "subsidiary company" in this Act means a company in the case of which the conditions of this sub-section are satisfied and includes a subsidiary company of such company :

Provided that where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account shall, for the purpose of determining under this section whether that other company is a subsidiary company, be taken of the shares so held.]

[1882—S. 3 ; (1908) 8 Ed. VII, C. 69—S. 285 ; (1929) 19 & 20 Geo. V. Ch. 23—S. 380.]

[a] New sub-section (2) was added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 2. [15-1-1937]

Provisions as to companies registered in Burma or Aden before separation from India.

a[2A. Notwithstanding anything in the last preceding section, a company which was immediately before the separation of Burma and Aden from India a company as defined by the said section, being a company the registered office whereof is in Burma or Aden,—

- (a) shall be deemed for the purposes of this Act to be a company registered and incorporated outside British India, and
- (b) shall not, unless the subject-matter or context so requires, be included in the expressions "company", "existing company", "public company", and "private company":

Provided that—

- (i) for the purposes of section 277 of this Act such a company shall, for a period of six months from the separation, be deemed to be a company incorporated and registered in British India ;
- (ii) the separation of Burma and Aden from India shall not render valid any mortgage or charge which, immediately before that date, was void against the liquidator or creditors of such a company.]

[a] Inserted by A. O.

[b] i.e., immediately before the 1st April, 1937.

Jurisdiction of the Courts. 3. (1) The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate :

Provided that the a[Central Government] may, by notification in the b[Official Gazette] and subject to such restrictions and conditions as it thinks fit, empower any District Court to

Section 2 (1) (14) (contd.)

ment of 1936, an advertisement in a newspaper offering shares for sale was held to be a prospectus as defined in the Act. After the amendment, the definition does not include any trade advertisement which shows on the face of it that a formal prospectus has been prepared and filed.

SECTION 2 (1) (16)—Note 1.

[1] Unless the word "share" is made by an Act, a *vox signata* in a sense exclusive of stock, stock would be included in its natural and ordinary meaning. (1875) L. R. 7 H. L. 717 (730).

SECTION 3—SYNOPSIS.

1. Applicability and scope.
2. 'High Court'
3. Section 3 (1), Proviso.
4. Section 3 (2).
5. Section 3 (3).

1. **Applicability and Scope.**—[1] The Court will not interfere with the internal management of Companies acting within their powers. (Vol. 26) 1939 Rang. 417 (417) * (Vol. 21) 1934 Bom. 427 (427) : 59 Bom. 218 (DB). (If the majority of the share-holders consider that a particular contract of employment should be terminated, the Court would not consider the matter at the instance of the minority of share-holders.) * (Vol. 21) 1934 Bom. 243 (245).

[2] Court does not interfere for forcing companies to conduct their business according to strictest rules. (Vol. 21) 1934 Bom. 243 (245, 247).

[3] Interpretation of the clause in the memorandum of association relating to the assets of the company, is not a matter of mere internal management: a single member can therefore maintain a suit against the company for a declaration as to the true interpretation of the clause in question and the company cannot be excused from being impleaded in such an action. (Vol. 22) 1935 Lah. 792 (798, 794) (D.B.)

exercise all or any of the jurisdiction by this Act conferred upon the Court, and in that case such District Court shall, as regards the jurisdiction so conferred, be the Court in respect of all companies having their registered offices in the district.

(2) For the purposes of jurisdiction to wind up companies, the expression "registered office" means the place which has longest been the registered office of the company during the six months immediately preceding the presentation of the petition for winding up.

(3) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.

[1882—S. 130;]

[a] Substituted by A.O. for "Local Government".

[b] Substituted by A. O. for "Local Official Gazette".

OBJECTS AND REASONS.

"We have inserted a new clause 3 prescribing the Court which is to exercise jurisdiction under the Act. Under the existing law certain powers of the Court can only be exercised by the High Court. As regards winding up proceedings, unless there is a special provision in the articles of the company, the Court having jurisdiction to wind up is the principal Court having original civil jurisdiction in the place in which the registered office of the company is situate. The company can, however, by its articles stipulate that the company if wound up shall be wound up in the Calcutta, Madras or Bombay High Courts or by the Chief Court of the Punjab. (Section 180 of the Indian Companies Act, 1882). It seems to be obviously desirable to define "the Court" if possible in such general terms as will necessitate no further reference to the matter in the body of the Bill. In the second place, we are not satisfied that the arrangements provided by the existing law are altogether suitable. We think there is *prima facie* some objection to an arrangement by which parties should be able by con-

tract to determine their tribunal in regard to proceedings by which the rights of third parties may be affected. In the third place, some of the opinions which have reached us lead to the conclusion that it may be undesirable that District Courts in all parts of India should be invested with jurisdiction under the Act, regard being had to the fact that its provisions are considerably more complicated than those of the existing Act. We have, therefore, provided that the Court having jurisdiction under the Bill shall be the High Court of the place in which the registered office of the company is situate, while we have at the same time provided that the Local Government [now Central Government] may empower District Courts to exercise all or any jurisdiction under the Act. We are fortified in this conclusion by the reflection that, making necessary allowances for differences of conditions, our amendment approximates the position as regards the exercise of jurisdiction to that provided by the English Law."

—S. C. R.

Section 3 (contd.)

[4] A company Judge has jurisdiction to pass orders to enforce statutory obligations of a company e.g., supplying copy of the register of the members of the Company to a shareholder. (Vol. 23) 1936 All. 568 (572) : 58 All. 988 (D.B.)

[5] Jurisdiction of the High Court referred to in S. 3 is the jurisdiction exercised by virtue of the specific provisions of the Act and not jurisdiction where merely a criminal offence under this Act is declared. S. 3 cannot be interpreted to mean that High Court is the only Court to try as Court of first instance offences due to breaches of provisions of Companies Act. (Vol. 23) 1936 All. 830 (831) : I.L.R. (1937) All. 220 : 38 Cr. L. Jour. 111 (F. B.) (Contra-vention of S. 85).

[6] The jurisdiction conferred on the High Court in Company matters is the jurisdiction to deal with matters provided by the Act and it is very doubtful whether an application to rectify the register of the Registrar, Joint Stock Company for which no provision is made in the Act can properly be brought before the Judge who is dealing with company matters. (Vol. 24) 1937 Cal. 81 (83, 84) : 68 Cal. 773.

[7] The existing jurisdiction of the district Courts under Companies Act, 1882 over cases which began before the commencement of the new Act of 1913 is preserved by S. 284 of the Act of 1913. (Vol. 1) 1914 Lah. 511 (512) : 1915 Pun. Re. No. 20.

[8] Company registered and having registered office in Bihar under jurisdiction of Patna High Court—Directors making payment after winding up petition—Official liquidator applied for enquiry into the conduct of the directors under S. 285—Some

directors were residing in England—One director living in British India but outside jurisdiction of Patna High Court—Patna High Court has no jurisdiction over directors residing in England but has it over directors in British India—Inquiry can be made in respect to such director residing in British India. (Vol. 24) 1937 Pat. 196 (198, 199) : 15 Pat. 630.

2. 'High Court'.—[1] 'High Court' includes all sides of the High Court, and equally applies to the High Courts having Original Side, as well as those having no Original Side. (Vol. 12) 1925 Cal. 606 (607, 608) (D.B.)

[2] Applications under the Companies Act relating to companies doing business in the mofussil should be made in the Original Side of the High Court. (Vol. 12) 1925 Cal. 626 (626) : 52 Cal. 586 (D.B.)

[3] Not the Allahabad High Court but the Chief Commissioner of Ajmere and Merwara is the High Court for the purposes of the Companies Act for places within its jurisdiction. (Vol. 13) 1926 All. 649 (650) : 48 All. 709.

[4] The High Court is not prohibited either by Company Law or Letters Patent or High Court Act from getting transferred to its own file proceeding in winding up on the file of District Court. Such a power is given by Civil Procedure Code. (1887) 9 All. 180 (182).

[5] Winding up of company—Official Liquidator directed to settle list of creditors—Advocate appearing before Official Liquidator for one of the creditors can apply under O. V, R. 20, Madras High Court Original Side Rules, for his bill of costs to be taxed. (Vol. 31) 1944 Mad. 867 (868) : I.L.R. (1945) Mad. 24.

PART II.

CONSTITUTION AND INCORPORATION

Prohibition of partnerships exceeding certain number.

4. (1) No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other ^a[Indian law] or of Royal Charter or Letters Patent.

(2) No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its objects the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of an Act of Parliament or some other ^a[Indian law] or of Royal Charter or Letters Patent.

Section 3 (contd.)

3. Section 3 (1), Proviso.—[1] The District Judge empowered under Proviso to S. 3 (1) has exclusive original jurisdiction to decide matters arising under the Act, with reference to Companies having registered offices within his district. But the revisional jurisdiction of the High Court under S. 115, Civil P.C., is not ousted. (Vol. 22) 1935 All 810 (815): 57 All 810 (D.B.).

[2] Office of company situate within jurisdiction of District Judge—District Judge has power to pass orders in liquidation proceedings—Contributories living outside British India are amenable to jurisdiction of District Judge. (Vol. 21) 1934 Lah. 362 (368): 15 Lah. 302.

4. Section 3 (2).—[1] Under the Companies Act, the High Court is the Court which has jurisdiction to wind up a company registered under it having its registered office anywhere in the Punjab. (Vol. 29) 1942 Lah. 74 (75): I. L. R. (1942) Lah. 800 (D.B.).

5. Section 3 (3).—[1] Sub-section (3) can have no application when objection to jurisdiction is taken at the very commencement and at the proper time. (Vol. 17) 1980 Mad. 74 (75): 53 Mad. 147* (D.B.). * (Vol. 14) 1927 Pat. 182 (183): 6 Pat. 182 (D. B.)

SECTION 4—SYNOPSIS

1. Applicability and scope.
2. Association.
3. Carrying on business.
4. Gain.
5. Illegal company, association or partnership.
6. Joint family trade or business—Sub-sec. (3).
7. Partnership.
8. Person.
9. Sub-section (5).*

1. Applicability and scope.—[1] A company of nine share-holders does not require registration. (Vol. 12) 1925 Mad. 298 (284).

[2] The members of a partnership or company or association hit by S. 4, can have beneficial interest in property. (Vol. 26) 1939 Cal. 187 (189): I.L.R. (1938) 2 Cal. 368 (D. B.).

[3] Section 4 governs company, association or partnership not only at its formation but also rules its continuance. (Vol. 26) 1939 Cal. 187 (189): I.L.R. (1938) 2 Cal. 368 (D.B.). (If number of original members, subsequently exceeds maximum allowable, the association becomes illegal if not registered.)

[4] Association illegal at inception due to want of registration—Subsequent reduction in number of members does not cure illegality—But subsequent

registration cures defect. (Vol. 17) 1980 Rang. 21 (27): 7 Rang. 540 (D.B.).

[5] Company formed in Native State not illegal according to the law of the State—Company or members forming it does not commit illegal act. (Vol. 17) 1980 Bom. 5 (6): 53 Bom. 652 (D. B.).

2. Association.—[1] To constitute an association, existence of legal relation between more than 20 persons giving rise to joint rights or obligations is necessary. But such relation is not necessary when object is to form a 'Company'. (Vol. 26) 1939 Rang. 273 (278, 274): 40 Cr. L. Jour. 799.

[2] Chit fund is not an association under S. 4. Manager can sue and be sued though it is not registered. (Vol. 6) 1919 Low Bur 102 (102)* (1906) 29 Mad. 477 (483)* (1897) 20 Mad. 68 (74) (A chit fund association having more than twenty subscribers for it, is no association for the purpose of gain. Its members can be sued for unpaid subscriptions.)

[But see (1906) 1 Mad. L. Tim. 106 (112) (A chit fund consisting of more than twenty persons having joint rights and obligations *inter se* is an association.)]

[3] Pool arrangement to stifle competition, even if it were an association, does not fall under S. 4. (1936) 60 Bom. 800 (827).

[4] Under S. 4, all members must be interested in the business either by themselves or by their agents. Person obtaining licence from Government to catch elephants joined by others who were to get profits—Defendant carrying on business without interference from others—Held he was not an agent, and that the case did not come under S. 4. So no registration was required and suit for account was held competent. (1909) 18 Cal. W. N. 638 (642, 643).

[5] Association of several firms consisting of more than twenty persons formed for acquiring gain is essentially within S. 4 and requires registration. (Vol. 1) 1914 Nag. 26 (31): 10 Nag. L. R. 98.

[6] Unregistered company started for carrying on business for gain—Money collected from subscribers numbering more than twenty—Subscribers become share-holders though share certificates have not been issued and case comes under sub-S. (2). (Vol. 26) 1939 Rang. 273 (274): 40 Cr. L. J. 799.

[7] Association of 100 members—Each member to pay subscription and the whole amount was to be given to one of the members by drawing lots until all the members had their turn—Association was to remain for 100 months—Held it was doubtful whether it required registration and whether a claim for refund of subscription would have been legally maintainable against secretary and treasurer. (Vol. 20) 1938 Lah. 121 (122).

(3) This section shall not apply to a joint family carrying on joint family trade or business and where two or more such joint families form a partnership, in computing the number of persons for the purposes of this section, minor members of such families shall be excluded.

(4) Every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business.

Section 4 (contd.)

3. Carrying on business.—[1] The test of business is continuity and repetition of acts; whether a repetition of acts amounts to business or not must depend upon the nature of the acts, and the act itself, if done singly, must be such as to be called business. But if the act when done singly does not amount to business, then merely because twenty persons or more than twenty persons are repeating the same act, it cannot be said that they are carrying on business. (1936) 60 Bom. 800 (S28).

[2] 'Carrying on business' implies continuous control of business. Proprietors of Wool factories entering into a pooling contract to work factories in a particular manner and sharing profits in a certain proportion—Contract for a period of five years—Two of the parties to work factory for 2½ years each and the other two at option to work or not—In case they worked profits should be shared—*Held* they did not constitute any association under S. 4 which requires continuous carrying on of business. (Vol. 21) 1934 Lah. 832 (884).

[3] The words 'any other business' show that what the Legislature contemplated is something which must be business in the same sense in which banking is, although implicitly, described as business. (1936) 60 Bom. 800 (824).

[4] The phrase "carry on business" is a very elastic one and is almost incapable of definition. The Court must in each case look to the circumstances. (94) 18 Bom. 294 (298); 21 Ind. App. 13 (P.C.). (Case under Cl. 12, Letters Patent (Bombay) 1865;—Expression 'carry on business' is intended to relate to business in which a man may contract debts and ought to be liable to be sued by persons having business transactions with him.)

4. Gain.—[1] Gain in S. 4 is not limited to pecuniary gain or commercial profits—Society with more than 20 persons with object to give aid to Chinese—Fund raised by contribution from members to be returned after three years—Money lent to needy Chinese for interest—Interest accrued to be sent on charity after three years—*Held* society was formed to carry on money-lending business and as it was not registered was illegal and therefore could not institute a suit for recovery of monies lent. (Vol. 19) 1932 Rang. 167 (168); 10 Rang. 490.

[2] Fact that gain is to be disposed of on a charitable object will not exclude operation of S. 4 where the association has over twenty members and its object is gain. (Vol. 17) 1930 All. 186 (187); 52 All. 325. (D.B.)

[3] The expression 'acquisition of gain' does not necessarily mean the acquisition of a commercial profit. It is sufficient that the association carries on a business for the purpose of obtaining payments, and it is not necessary that the business should result in a commercial profit at the end of the accounting period. (1926) Ch. 657 (663).

[4] Even though the business of an association has not for its object the acquisition of gain by the asso-

ciation, yet if it has for its object the acquisition of gain by the individual members and if the association consists of more than twenty members, it is hit by this section. (1882) 20 Ch.D. 137 (144, 145). (Meaning of the word 'gain' considered).

5. Illegal company, association or partnership.—[1] Provision of S. 4 is mandatory, any association contravening its provision is an illegal body and its existence cannot therefore be recognised by law. (Vol. 21) 1934 Lah. 832 (884) (D.B.).

[2] Where total number of persons constituting four unregistered firms, carrying on business, consisted of 22 persons such a partnership would be illegal. (Vol. 17) 1930 P. C. 300 (301) (P.C.)

[3] An association consisting of more than twenty members and not having been registered under S. 4 (2) can have no legal recognition as a legal unit and it cannot sue or be sued as a corporate body nor can it enter into a contract as such. But it cannot be said that a trade association is unlawful merely because it has not been registered in conformity with the provisions of this Act. (Vol. 18) 1931 All. 83 (84); 53 All. 816 (D.B.).

[4] Compulsory registrable association not registered. Members cannot sue *inter se* in respect of any matter connected with the association. (1911) All. L. Jour. 32 (35).

[5] Suit by third party against members of an illegal association can be maintained in certain circumstances; it would not be maintainable if he knew its illegal character and was himself *participant criminis*. (Vol. 21) 1934 Lah. 832 (884) (D.B.). * (Vol. 17) 1930 Bom. 5 (8); 53 Bom. 652 (D.B.).

[6] In the case of unregistered association of more than 20 persons if a member sues for dissolution a declaration can be granted that association is illegal but no relief for dissolution or accounts can be granted. (Vol. 13) 1926 All. 591 (593); 48 All. 735 (D.B.) (Sulaiman, J., dissenting). * (Vol. 13) 1926 Nag 241 (243).

[7] Partnership—Number of partners less than 20 at its inception—Number increasing beyond 20 without knowledge of one of the partners, A—Partnership converted into a joint stock company—A not given any share—Suit by A for declaration that there had been a dissolution of partnership and for recovery of share capital and profits—Suit without impleading all partner held not maintainable, as the liability was of the individual partners and of the partnership and not jointly of the various members constituting the partnership. (Vol. 25) 1938 Mad. 151 (153).

[8] A partition suit by one partner against the remaining partners of an illegal partnership is not maintainable. (Vol. 14) 1927 All. 487 (487); 49 All. 319 (D.B.).

[9] Suit for dissolution and for accounts—Preliminary decree passed by consent—Plaintiff applying to vacate it on the ground that firm was illegal under S. 4—*Held* a separate suit to set aside decree

(5) Any person who is a member of a company, association or partnership formed in contravention of this section shall be punishable with fine not exceeding one thousand rupees.]

[1882—S. 4; (1908) 8 Edw. VII, C. 69—S. 1; (1929) 19 & 20 Geo. V, C. 23—Ss. 357, 358].

[a] Substituted by A. O. for "Act of the Governor-General in Council".

[b] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 3. [15-1-1937].

Section 4 (contd.)

on the ground of fraud should be instituted. (Vol. 20) 1933 Sind 29 (31): 26 Sind L. R. 895.

[10] An unregistered association for carrying on rice business and consisting of more than 20 persons is illegal. A suit by the members of illegal association for a declaration of their respective shares and for payment is maintainable. (Vol. 17) 1930 Rang. 21 (27): 7 Rang. 540 (D.B.).

[11] Unregistered partnership—Suit against, for declaration that partnership was illegal and for recovery of share of capital contributed—Held the cause of action accrued from date payment and was not continuous. (Vol. 8) 1921 All. 73 (74) (D.B.).

[12] If an association, the number of the members of which exceeds twenty, is an illegal one by reason of non-registration a suit at the instance of the firm or its members is not maintainable (Vol. 26) 1939 Cal. 187 (189): L.L.R. (1938) 2 Cal. 868 (D.B.).

[13] In determining the purpose of the association the primary and original object of the association has to be looked into and no regard to be paid to circumstances developed later on. Hence if a legal association be formed, later on some of the members commit a breach of trust, the association does not become illegal. (Vol. 17) 1930 All. 186 (187): 52 All. 325 (D.B.).

[14] A company which is not registered under the Companies Act although it is a partnership of thirteen unregistered firms, composed in turn of individual members, the aggregate number of whom exceed twenty, is liable to assessment to income-tax on its profits, whatever penalties and disabilities it may incur on account of non-compliance with the provisions of the Companies Act. (Vol. 18) 1931 Lah. 876 (878).

6. Joint family trade or business—Sub-s. (3).—

[1] A trading association to be within S. 4 must be formed on the basis of contract between its members. A joint family business, however, in which interests are acquired not by an act of party but by the law of inheritance, is not an association of persons in this sense and does not come within the scope of S. 4. (Vol. 26) 1939 Cal. 187 (190): L.L.R. (1938) 2 Cal. 868 (D.B.).

[2] A Hindu undivided family is not a company and its rights, obligations, privileges and constitution are not the same as that of a company. (Vol. 24) 1937 Lah. 880 (885): L.L.R. (1937) Lah. 325 (DB).

[3] Where partnership arose not as a result of contract but by operation of law as in the case of a Hindu joint family firm the individual members are merely sub-partners and the joint family consisting of these is reckoned as one person for the purposes of S. 4. (Vol. 21) 1934 Nag. 45 (47): 30 Nag. L.R. 219.

[4] The word 'person' may comprise a number of individuals such as a joint Hindu family. (Vol. 17) 1930 Bom. 431 (435): 54 Bom. 696 (D.B.). * (Vol. 11) 1924 All. 414 (414): 46 All. 509 (D.B.).

7. Partnership.—[1] Pool arrangement amongst concerns for the purpose of stifling competition and distributing the whole profits pooled in a certain

proportion and each member allowed to carry on business in an unrestricted manner, is not a partnership as there is no common business. (1936) 60 Bom. 800 (327).

[2] Sub-partners are not members of a firm and their existence does not affect the number of members of a firm for the purposes of S. 4. (Vol. 23) 1936 Bom. 246 (248).

[3] Party who merely advances money but does nothing more than to be repaid by share of profits is merely a creditor though he may be styled as a partner, if his liability to pay the losses is clearly in respect of the losses occasioned by his neglect or default. (Vol. 9) 1922 Nag. 67 (69).

[4] Held on facts that the venture was not a single venture but was a partnership consisting of more than 20 persons within the meaning of S. 4 (2), and being unregistered, was illegal and could not maintain a suit. (Vol. 21) 1934 Bom. 861 (863) (D.B.).

[5] A single venture whereby a number of articles are purchased and sold may not be business. But when a number of bales are purchased, sales are to go on, profits are to be realised and are to be divided among partners it is not a single venture but amounts to a partnership. (Vol. 17) 1930 P. C. 300 (301) (P.C.).

[6] A becoming partner—Number of partners increasing beyond twenty without A's knowledge—Partnership subsequently converted into joint stock company, A being given no share—Suit by A for dissolution and for share of his profits in partnership—It was held that A was entitled to a share. (Vol. 25) 1938 Mad. 151 (152) ((1926) Ch. 657 relied on).

8. Person.—[1] Section 3 (39), General Clauses Act, 1897, says that 'person' shall include any company or association or body of individuals, whether incorporated or not. But the word 'person' in section 4, Companies Act, 1913, denotes individuals and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject and context of the section. (Vol. 27) 1930 P. C. 300 (301) (P.C.). * (Vol. 14) 1927 Mad 123 (124): 50 Mad 175 * (Vol. 1) 1914 Nag 26 (29): 10 Nag L. R. 98.

[2] Person lending his name to a partnership contract, is a 'person' constituting the total number of partners, though he may be representing a joint Hindu family or a firm consisting of himself and other members. (Vol. 18) 1926 All 337 (338): 48 All 895 (DB).

[See also Note 6.]

9. Sub-section (5).—[1] Members of an unregistered company of more than 20 persons formed before S. 4 (5) was enacted can be punished for continuing to be members of such a company. (Vol. 29) 1942 Mad 283 (284): 43 Cr. L. Jour 785. (The Magistrate can drop the proceedings if he finds that he ought not to have taken cognizance of the offence under S. 4 (5)).

[2] It is true that offences under S. 4 (5) and S. 283 are non-cognizable and cannot be investigated by the police under Ch. 14, Criminal P. C. But the mere fact that offences were wrongly investigated and sent up by police is not an obstacle to their being tried by a Magistrate. (Vol. 26) 1939 Rang 273 (274): 40 Cr. L. Jour 799.

Memorandum of Association.

*Mode of forming
incorporated Com-
pany.*

5. Any seven or more persons (or, where the company to be formed will be a private company, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability (that is to say), either—

- (i) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed a company limited by shares); or
- (ii) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed a company limited by guarantee); or
- (iii) a company not having any limit on the liability of its members (in this Act termed an unlimited company).

[1882—Ss. 6, 7; (1908) 8 Edw. VII, C. 69—S. 2; (1929) 19 & 20 Geo. V, C. 23—S. 1]

*Memorandum of
company limited by
shares.*

6. In the case of a company limited by shares—

- (1) the memorandum shall state—
 - (i) the name of the company, with “Limited” as the last word in its name;
 - (ii) the province in which the registered office of the company is to be situate;
 - (iii) the objects of the company, a [and, except in the case of trading corporations, the territories to which they extend];

[a] Inserted by A. O.

SECTION 5—Note 1.

[1] Court can go into the question whether a Company is genuine or not where the circumstances throw a doubt upon the genuineness. (Vol. 14) 1927 Bom 371 (385): 51 Bom 372 (DB).

[2] The mere fact of the principal business being abroad should not exclude any foreign merchants from incorporating themselves as a Joint Stock Company and carrying on business as such. (1871) 40 L. J. Ch. 655 (668).

[3] Gambling in differences in the stock exchange cannot be the legitimate business for an investment trust. (Vol. 31) 1944 Mad 586 (587): I. L. R. (1945) Mad 107 (DB). (Company in the nature of an investment trust though can buy and sell shares cannot legitimately amble in difference in Stock Exchange).

[4] In determining the object of the association, the primary and original object of the association has to be looked into and no regard should be paid to the circumstances that developed later. (Vol. 17) 1930 All 186 (187): 52 All 325 (DB). (If a perfectly legal association be formed and if later on, some of the members of the association should commit a breach of trust that fact should not render the original association an illegal one.)

[5] A company formed with the purpose of avoiding super-tax is not a genuine company. (Vol. 14) 1927 Bom 371 (382): 51 Bom 372. (DB).

[6] A's wife, daughter and four sons subscribed for one share each—A himself held the balance of the twenty thousand shares issued—All the requirements of the Companies Act were complied with and a company was duly incorporated—It was held by the House of Lords that the company was duly formed and registered and that the Court could not inquire whether or not such a one-man company was intended by the Legislature. (1897) App Cas 22 (30, 38).

[7] Proprietors of Zamindari forming a company do not act illegally where the means adopted for

management are beneficial. (12) 16 Cal W. N. 297 (298).

[8] The use of the words “otherwise” in the section shows that the statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other to be found in the Act which is preliminary to registration and essential. (13) 40 Cal 1 (19): 39 Ind App 237 (P.C.).

[9] There is no provision which limits the maximum number of shares that can be held by a member. It only sets the minimum at one share to become a shareholder. Nor is it necessary that the shareholders should be independent and beneficially interested persons. Hence the fact that one man because of his preponderating number of shares is in a position to outvote the others who are members of his own family will not make the company illegal where the memorandum has been signed by the requisite number. (1897) App Cas 22 (32, 34).

[10] An infant signing a memorandum is a ‘person’ within the meaning of the section though he can avoid subsequently the contract arising on his signature. Unless and until he repudiates the contract he is a ‘person’ and therefore an objection to registration on the ground that he is not “a person” is not sustainable. (1892) 3 Ch. 555 (561, 562) * (1876) 2 Ch. D. 610 (614).

[11] The word ‘person’ includes bodies politic. One limited Company can be a share-holder of another where it is authorised to do so under its memorandum and Articles of Association. (1867) L. R. 3 Ch. 105 (112, 114). * (1869) L. R. 4 Ch. App 252 (257).

SECTION 6—Note 1*Cognate sections*

Alteration of memorandum—10, 12 to 16.

Banking company—Statement of objects by—277 F, 277 G.

- (iv) that the liability of the members is limited;
- (v) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of fixed amount;
- (2) no subscriber of the memorandum shall take less than one share;
- (3) each subscriber shall write opposite to his name the number of shares he takes.

[1882—S. 8; (1908) 8 Edw. VII, C. 69—Ss. 3, 4 & 5; (1929) 19 & 20 Geo. V, C. 23—S. 2]

OBJECTS AND REASONS.

"In clause 6 [now section 6] we have substituted the word "province" for "part" thus drawing the definition in the General Clauses Act."—S. C. R., 1913.

Section 6 (contd.)

Company—

- Dispensing with use of word 'Limited'—26.
- Limited by share—Alteration or reduction of share capital—50, 55.
- Limited by share—Form of memorandum—Sch. III, Form A.
- Names of—11.
- Penalty for improper use of word 'Limited'—283.
- Publication of name—73, 74.
- Limited company—Directors' liability unlimited—70, 71, 157.
- Liquidation of company—Liability of members—156.
- Registered office of company—72.
- Transfer of from one province to another—12
- Statutory meeting—Holding of—77.
- Subscribers of memorandum become members of company—30

[1] When the Act says that the memorandum must 'state the objects' the meaning is that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined. The purpose is twofold. The first is that the intending incorporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that any one who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects. The objects of the company and the powers of the company to be exercised in effecting the objects are different things. Powers are not required to be and ought not to be specified in the memorandum. (1918) App. Cas 514 (522).

[2] Company's memorandum must state the Province in which the office of the proposed company must be situate, but once that province has been declared, there is no valid reason why the company should not fix its office anywhere it likes within the province and change it from time to time on giving notice. (Vol. 24) 1937 Cal 81 (88) : 63 Cal 773.

[3] If nothing is said in the memorandum, the articles of association may provide for the issue of authorised capital in the form of preference shares: if the articles do not provide, or do provide for equality *inter socios*, the power to issue preference shares may be obtained by alteration of the articles. If the memorandum prescribes the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that position by special resolution. (Vol. 20) 1933 P. C. 39 (42) (P. C.).

[4] Powers are not required to be and ought not to be specified in the memorandum of association. In the case of a trading company, the Act intends that the memorandum should define trade and not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade. (Vol. 18) 1931 P. C. 182 (185) (P. C.). * (18) 1918 App Cas 514 (522).

Construction of memorandum.—[5] The memorandum of association does not constitute a contract between the company and a third party named therein. (Vol. 21) 1934 Bom 427 (428) : 59 Bom 218 (D.B.).

[6] The memorandum of association like any other document, must be read fairly and its import derived from a reasonable interpretation of the language which it employs. A special rigid construction cannot be applied. (Vol. 18) 1931 P. C. 182 (184) (P. C.).

[7] In construing a memorandum of association in which there are general words, such words must be taken in connection with what are shown by the context to be the dominant or main object. It will not do under general words to turn a company formed with one object into a company for working out some other object however general the words are. (1905) 2 Ch 427 (434, 435).

[8] Except in matters as must by statute be provided for by the memorandum of a company it is not to be regarded as a document but must always be studied in connection with the articles of association wherever there is ambiguity or where it is silent. (Vol. 21) 1934 P. C. 39 (90) (P. C.).

[9] A company is entitled to exercise the powers conferred on it by the memorandum unless such right is clearly restricted by any article. (Vol. 20) 1933 P. C. 39 (42) (P. C.).

[10] Where the memorandum of association of a company stated that one of the objects of the company was to carry on the business of manufacturers of and dealers in salt, soda, iodine and other products and that it may do so in any part of the world. Held that the business included the sale of salt to purchasers abroad, though there was no express mention of exportation. (Vol. 18) 1931 P. C. 182 (185) (P. C.).

[11] The objects of a shipping company stated in its memorandum of association were to acquire and deal with...personal estate and effects; to invest money of the company in such manner as the directors think fit. The Directors bought gold and silver and deposited it in the Bank for safe custody. Held that the company's action was *ultra vires*. (Vol. 31) 1944 Bom 131 (134) : I L R (1944) Bom 247 (D.B.). (Per Stone, C.J., Kania, J., Contra: the action was not an investment.)

[12] Where one of the objects of the company stated in its memorandum of association was "to advance money at interest on the security of land, houses, machinery etc., situated in India, and to

Memorandum of company limited by guarantee.

7. In the case of a company limited by guarantee—

(1) the memorandum shall state—

- (i) the name of the company, with "Limited" as the last word in its name;
- (ii) the province in which the registered office of the company is to be situate;
- (iii) the objects of the company, a [and, except in the case of trading corporations, the territories to which they extend];
- (iv) that the liability of the members is limited;
- (v) that each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount:

(2) if the company has a share capital—

- (i) the memorandum shall also state the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount;
- (ii) no subscriber of the memorandum shall take less than one share;
- (iii) each subscriber shall write opposite to his name the number of shares he takes.

[1882—S. 9; (1908) 8 Edw. VII, C. 69—S. 3, 4, 5; (1929) 19 & 20 Geo. V, C. 23—S. 2]

[a] Inserted by A. O.

Memorandum of unlimited company.

8. In the case of an unlimited company—

(1) the memorandum shall state—

- (i) the name of the company;
- (ii) the province in which the registered office of the company is to be situate;
- (iii) the objects of the company, a [and, except in the case of trading corporations, the territories to which they extend]:

Section 6 (contd.)

invest money not immediately required upon such securities and bank deposits as may be from time to time determined". Held on construction that so far as the money not immediately required was concerned, the directors had complete discretion in the matter of approving the kind of security offered. (Vol. 22) 1935 Lah 792 (795) (D B).

[13] If the Memorandum authorises, a company can raise money by the issue of debentures and invest the same or any part of it. (Vol. 17) 1930 Cal 586 (597): 57 Cal 828.

[14] Whether any particular transaction is within the company's object depends on the construction of the memorandum of association. Powers specified as objects might be construed as merely ancillary to the company's main object. (1918) 1918 App Cas 514 (520, 528).

[15] A commercial corporation not only has powers that are expressly set out in its constitution but also impliedly justifiable. Therefore where a Colliery Company had express power to purchase or take on lease certain coal mines and mineral lands to work them and also to acquire real estates but there was no such power to sell, it was held that it had an implied power to sell the real estates it had acquired. (1907) 2 Ch. 259 (264, 269).

SECTION 7

Cognate sections.

Alteration of memorandum—10, 12 to 16
Contents of articles—17 (3) and (4).

Dispensing with use of word 'Limited'—26
Increase and reduction of share capital—66
Liquidation—Liability of members—156
Memorandum and articles of association—Form of—Sch. III, Forms B and C.
Name of company—11
Obligations of company where no prospectus is issued—98
Provision as to companies limited by guarantee—27

Publication of name—73, 74

Registered office—72

Registration of articles—17

Restrictions on commencement of business—188

Statutory meeting—Holding of—77

SECTION 8.

Cognate sections

Contents of articles of unlimited company—17 (3) and (4).

Liquidation of company—Liability of members—156

Memorandum and articles of association—Form of—Sch. III, Form D.

Notice to registrar of increase of capital or number of members—58.

Registration of unlimited company as limited—67, 68.

* Subscribers of memorandum become members of company—80.

(2) if the company has a share capital—

- (i) no subscriber of the memorandum shall take less than one share ;
- (ii) each subscriber shall write opposite to his name the number of shares he takes.

[1882—S. 10; (1908) 8 Edw. VII, C. 69—S. 3, 4, 5; (1929) 19 & 20 Geo. V, C. 23—S. 2]

[a] *Inserted by A. O.*

Printing and signature of memorandum. a [9. The memorandum shall—

- (a) be printed,
- (b) be divided into paragraphs numbered consecutively, and
- (c) be signed by each subscriber (who shall add his address and description) in the presence of at least one witness who shall attest the signature.]

[1882—S. 11; (1908) 8 Edw. VII, C. 69—S. 6; (1929) 19 & 20—Geo. V, C. 23—S. 3]

[a] *Substituted for the original S. 9 by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 1.* [15—1—1937]

Restriction on alteration of memorandum. 10. A company shall not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act:

a [Provided that any provision in the memorandum relating to the appointment of a manager or managing agent and other matters of a like nature incidental or subsidiary to the main objects of the company, shall not be deemed to be such condition.]

[1882—S. 12 ; (1908) 8 Edw. VII, C. 69—S. 7 ; (1929) 19 & 20 Geo. V, C. 23—S. 4]

[a] *Proviso added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 5.* [15—1—1937]

Name of company and change of name. 11. (1) A company shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires.

(2) If a company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a company in existence is previously

SECTION 10—Note 1.

Cognate sections.

Alteration of memorandum—12 to 15

Alteration of share capital—50

Name of company—11

Reduction of share capital—55

[1] To vary conditional rights and privileges given to various share-holders by strictly complying with articles of memorandum does not amount to alteration of conditions in memorandum, where one of the conditions in memorandum is that the rights and privileges are subject to variation. (Vol. 22) 1935 All 810 (818, 819) : 57 All 810.

[2] The provision in the memorandum of the company relating to the appointment of a managing agent is merely a detail of management for the purpose of carrying on the business of the company, and a company is entitled to regulate that detail in such manner as it likes without going to a Court for its sanction. (Vol. 31) 1944 Bom 76 (82). * (Vol. 21) 1934 Bom 427 (428) : 59 Bom 218.

[But see (Vol. 11) 1924 Mad 126 (127, 128) (DB). Clause in the Memorandum appointing certain person as agent and secretary of the company—*Held* that the clause was not one relating to the objects of the Company and as such could not be altered under s. 12 (1) (a) by a special resolution; nor was it one relating to the detail of management, but was a condition of an important condition within the

meaning of s. 10. (Note: Case decided before amendment and is of doubtful authority).]

[3] The insertion of the place-name of the registered office of a company in the memorandum of association does not make it an unalterable condition of the company's constitution and provided the alteration has been made in the manner provided by the Act such alteration is valid and binding on the company. (Vol. 24) 1937 Cal 81 (88) : 68 Cal 778.

[4] The word 'condition' is not limited by any such words as 'condition hereinbefore mentioned' or 'condition necessary to the constitution of the company'. Therefore, anything which is laid down as a rule in the memorandum of association must be taken to be one of the conditions on which the company is established. Hence any stipulation in the memorandum cannot be altered, save such as is expressly mentioned in this section. (1885) 80 Ch. D. 376 (381).

[5] As to construction of memorandum by reference to the articles, see Notes on S. 6.

SECTION 11—Note 1.

[1] Under the company law, a company by registering its name gains a monopoly of the use of that name. Even if the company is not registered the Court will restrain the registration under the Act of a projected new company which is intended to carry on the same business and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public. (Vol. 29) 1942 Bom 241 (244).

registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name.

a[3] Except with the previous consent in writing of the b[Central Government], no company shall be registered by a name which—

- (a) contains any of the following words, namely, "Crown", "Emperor", "Empire", "Empress", "Federal", "Imperial", "King", "Queen", "Royal", "State", "Reserve Bank", "Bank of Bengal", "Bank of Madras", "Bank of Bombay", or any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or any connection with His Majesty's Government or any department thereof; or
- (b) contains the word "Municipal" or "Chartered" or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter:

Provided that nothing in this sub-section shall apply to companies registered before the commencement of this Act.]

(4) Any company may, by special resolution and subject to the approval of the c[Central Government] signified in writing. d[* * * *] change its name.

(5) Where a company changes its name, the registrar shall enter the new name on the register in place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case. On the issue of such a certificate, the change of name shall be complete.

(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company; and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

[1882—S. 36 & 43; (1908) 8 Edw. VII, C. 69—S. 8; (1929) 19 & 20 Geo. V, C. 23—Ss. 17, 19].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 6 for the original sub-section. [15-1-1937].

[b] Substituted by A. O. for Governor-General in Council.

[c] Substituted by A. O. for "Local Government".

[d] The words "under the hand of one of the Secretaries to such Government" were repealed by A. O.

Alteration of memorandum. 12. (1) Subject to the provisions of this Act, a company may, by special resolution, alter the provisions of its memorandum so as to change the place of the registered office from one province to another, or with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently; or
- (b) to attain its main purpose by new or improved means; or
- (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

SECTION 12—Note 1.

[1] General meeting is not condition precedent to make a proposal to alter memorandum or articles. (Vol. 15) 1928 Bom 80 (83).

[2] Where a company registered under S. 26, Companies Act, desires to alter its memorandum of association, the proper course is to apply in the first instance to the Central Government for the approval of the proposed alterations and, then to the High Court for the confirmation of the alterations. But where the High Court wrongly confirms the alteration without its being first approved by the Central Government, the High Court can cancel its wrong order if no right has accrued to any person in consequence of the illegal order. (Vol. 24) 1937 All 432 (434): ILR (1937) All 902.

[3] Before the Court can sanction a scheme involving alteration of memorandum or articles of the

company, company should not take proceedings to alter them. (Vol. 15) 1928 Bom 80 (84).

[4] Preferential rights conferred upon a particular class of shares, cannot be modified except as provided by the Act. (Vol. 16) 1929 Bom 38 (40).

[5] Memorandum of association cannot be so altered as to include within its object the conduct of prize chits where the prize chits amount to a lottery. (Vol. 21) 1934 Mad 432 (434): 57 Mad 844.

[6] Insertion of name of place in the memorandum of association does not make it an unalterable condition of the company's constitution and provided the alteration has been made in the manner provided by the Act such alteration is valid and binding on the company. (Vol. 24) 1937 Cal 81 (88): 63 Cal 773.

[7] Sanction of the Court is not necessary for an alteration of a provision in memorandum relating to appointment of managing agent as this is merely a

- (e) to restrict or abandon any of the objects specified in the memorandum; ^a[or
- (f) to sell or dispose of the whole or any part of the undertaking of the company; or
- (g) to amalgamate with any other company or body of persons].

(2) The alteration shall not take effect until and except in so far as it is confirmed by the Court on petition.

(3) Before confirming the alteration, the Court must be satisfied—

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in a manner directed by the Court either his consent to the alteration has been obtained or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court:

Provided that the Court may, in the case of any person or class, for special reasons, dispense with the notice required by this section.

[1882—Ss. 4 & 5 (Act XII of 95); (1908) 8 Edw. VII, C. 69—S. 9 (1), (2), (3); (1929) 19 & 20 Geo. V, C. 23—S. 5 (1), (2), (3)].

[a] Added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 7. [15-1-1937].

OBJECTS AND REASONS

Amendment made in 1936—Sub-S. (1), Cls. (f) and (g):—In certain decisions it had been doubted whether in the absence of express provision in the memorandum, a company was competent to alter its objects so as to enable it to perform the acts now referred to in clauses (f) and (g). Sections 5 of the English Act, 1929, makes express provision for this purpose and has been adopted by these clauses.—See S.O.R. 1936.

13. The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit, and may make such order as to costs as it thinks proper.

Power of Court when confirming alteration.

[1882—S. 6; (1908) 8 Edw. VII, C. 69—S. 9 (4); (1929) 19 & 20 Geo. V, C. 23—S. 5 (4)].

Exercise of discretion by Court.

14. The Court shall, in exercising its discretion under sections 12 and 13, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members; and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement:

Provided that no part of the capital of the company may be expended in any such purchase.

[1882—S. 7; (1908) 8 Edw. VII, C. 69—S. 9 (5); (1929) 19 & 20 Geo. V, C. 23—S. 5 (5)]

Procedure on confirmation of the alteration.

15. (1) A certified copy of the order confirming the alteration, together with a printed copy of the memorandum as altered, shall, within three months from the date of the order, be filed by the company with the registrar, and he shall register the same, and shall certify the registration under his hand, and the certificate shall be conclusive evidence that all the requirements of this Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the memorandum so altered shall be the memorandum of the company.

(2) Where the alteration involves a transfer of the registered office from one province to another, a certified copy of the order confirming such change shall be filed by the

Section 12 (contd.)

a detail of management for the purposes of carrying on the business of the company. (Vol. 81) 1944 Bom 76 (82).

[8] Section 58 (4) of the Insurance Act, 1938 runs as follows: "An order of the Court confirming a scheme under this section whereby the memorandum of a company is altered with respect to its object shall as respects the alteration have effect as if it

were an order confirmed under section 12 of the Indian Companies Act, 1913, and the provisions of sections 15 and 16 of that Act shall apply accordingly."

SECTION 14—Note 1.

[1] Court has discretion in confirming a special resolution revoking the appointment of Agent and Secretary. (Vol. 11) 1924 Mad 126 (127) (D B).

company with the registrar in each of such provinces, and each of such registrars shall register the same, and shall certify under his hand the registration thereof, and the registrar for the province from which such office is transferred shall send to the registrar for the other province all documents relating to the company registered or filed in his office.

(3) The Court may by order at any time extend the time for the filing of documents with the registrar under this section for such period as the Court thinks proper.

[1882—S. 9; (1908) 8 Edw. VII, C. 69—S. 9 (6); (1929) 19 & 20 Geo. V, C. 23—S. 5 (6)]

Effect of failure to register within three months. 16. No such alteration shall have any operation until registration thereof has been duly effected in accordance with the provisions of section 15, and if such registration is not effected within three months next after the date of the order of the Court confirming the alteration, or within such further time as may be allowed by the Court in accordance with the provisions of section 15, such alteration and order and all proceedings connected therewith shall, at the expiration of such period of three months or such further time, as the case may be, become absolutely null and void.

Provided that the Court may, on sufficient cause shown, revive the order on application made within a further period of one month.

[1882—S. 9]

Articles of Association.

Registration of articles.

17. (1) There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

(2) Articles of association may adopt all or any of the regulations contained in Table A in the First Schedule, ^a[and shall in any event be deemed to contain regulations identical with or to the same effect as regulation 56, regulation 66, regulation 71, regulations 78, 79, 80, 81, and 82, regulation 95, regulation 97, regulation 105, regulation 107 and regulations 112, 113, 114, 115 and 116 contained in that Table:

Provided that ^b [Regulations 78, 79, 80, 81 and 82] shall not be deemed to be included in the articles of any private company except a private company which is the subsidiary company of a public company:

SECTION 17—SYNOPSIS.

1. Section 17 (1).

2. Section 17 (2).

Cognate Sections.

Articles—Meaning of—2 (1).

Memorandum of association—6 to 10.

Provision for share capital of company limited by guarantee—27 (2).

1. Section 17 (1).—[1] Articles of Association provide for varying sets of circumstances. (Vol. 27) 1940 Sind 87 (89).

[2] Provisions of forfeiture of shares in Articles of Association are enforceable. (1936) 63 Cal 531 (533).

[3] Provision in the articles as to how dividends are to be distributed while the company is a going concern does not *per se* govern or affect the distribution of surplus assets in a winding up. (Vol. 26) 1939 Cal 126 (127, 128): ILR (1938) 2 Cal 533.

[4] Where the articles of association provided that "all deeds, hundis, cheques, certificates and other instruments shall be signed by the managing director, the Secretary and the working director on behalf of the company", held that a mortgage deed executed by the Secretary and the working director alone was invalid and the mere fact that the managing director had been dismissed was not material. Held further that the mortgagee must be deemed to have notice of the Articles of Association and therefore could not take advantage of the principle laid down in *Royal British Bank v. Turquand* (119 E.R. 474) even though

he might have acted in good faith and the money might have been applied for the purposes of the company. (Vol. 21) 1934 Mad 579 (580, 581).

[5] The Articles of Association of a bank provided that the company is not bound to recognise the executor or administrator of the deceased unless he shall have obtained probate or letters of administration, or other legal representation from a duly constituted Court in British India. It was held that a succession certificate was "other legal representation" within the meaning of the Articles of Association. (Vol. 30) 1943 Mad 743 (746).

[6] Where an Article of Association of a bank declares that the office of a director shall *ipso facto* be vacated "if he resigns, or for any other reason becomes incapable of acting as a director", the article contemplates resignation or some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity but not the director's indebtedness to the bank which can be no ground for his removal. (Vol. 29) 1942 Mad 737 (737): ILR (1943) Mad 291.

[7] Articles of Association of insurance company—Construction—Article 148 providing that if at any meeting or adjourned meeting, vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected—Article 151 providing director's shall have power to elect any other person to be a director of the company either to fill up casual vacancy or as an addition to the Board, but the total number shall not at any time exceed the maximum number fixed—Directors 89

Provided further that regulation 107 shall be deemed to require that a statement of the reasons why of the whole amount of any item of expenditure which may in fairness be distributed over several years, only a portion thereof is charged against the income of the year, shall be shown in the profit and loss account, unless the company in general meeting shall determine otherwise.]

(3) In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital, shall state the amount of share capital with which the company proposes to be registered.

(4) In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles shall state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration.

[1882—S. 37 ; (1908) 8 Edw. VII, C. 69—Ss. 10, 44 ; (1929) 19 & 20 Geo. V, C. 23—Ss. 6, 7, 8 (1)]

[a] Added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 8. [15—1—1937]

[b] Substituted, for "regulation 78" *ibid*, 1938 (2 [II] of 1938), S. 2. [26—2—1938]

OBJECTS AND REASONS.

Amendment made in 1936.—"It is desired to make generally applicable certain provisions usually made by the articles of properly managed companies as to polls, absence of restrictions on form of proxies, retirement of directors by rotation, inspection of

accounts, details shown in profit and loss account and the giving of notice to members. This clause makes the adoption of the model regulations on this subject contained in Table A compulsory."—S. O. R. 1936.

Application of Table A.

18. In the case of a company limited by shares and registered after the commencement of this Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

[1882—S. 38; (1908) 8 Edw. VII, C. 69—S. 11; (1929) 19 & 20 Geo. V, C. 23—S. 8 (2)]

Form and signature of articles.

19. Articles shall—

- (a) be printed ;
- (b) be divided into paragraphs numbered consecutively ; and
- (c) be signed by each subscriber of the memorandum ^a[(who shall add his address and description)] of association in the presence of at least one witness who must attest the signature.

[1882—S. 39; (1908) 8 Edw. VII, C. 69—S. 12; (1929) 19 & 20 Geo. V, C. 23—S. 9]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 9. [15—1—1937]

Alteration of articles by special resolution.

20. (1) Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles ; and any alteration or addition so made shall be as valid if originally contained in the articles, and be subject in like manner to alteration by special resolution.

Section 17 (contd.)

appointed to hold office only until next following ordinary general meeting at which they shall retire but shall be eligible for re-election—Board of Directors co-opting six persons as Directors until general meeting—At general meeting only two Directors re-elected—Co-opted Directors held elected by virtue of a notional adjourned meeting and notional re-appointment under Article 148—Vacancy created by retirement of co-opted Director held same as any other and consequently Art. 148 applied. (Vol. 28) 1941 Cal 186 (140, 141, 142) : 1 L R (1940) Cal 560.

[See also the undermentioned case for construction of articles of association. (Vol. 26) 1939 Cal 126 (127, 128) : ILR (1938) 2 Cal 538.]

(Company—Winding up—On construction of Articles of Association, arrears of dividends on preferential shares held were not debts).

2. Section 17 (2).—[1] It was held in (Vol. 21) 1934 All 855 (861) that there was nothing in the Act to prevent the insertion in the articles of association of a clause limiting the liability of a director or officer of the company in relation to the public. But such an insertion will now be against the provisions of Sec. 86 C which was newly inserted by the Act of 1936.

SECTION 18—Note 1.

[1] In the absence of proof to the contrary, it must be taken that Table A of the Companies Act has been incorporated in the Articles of Association of a Company limited by shares. (Vol. 18) 1931 Pat 44 (45, 46) : 10 Pat 249 (DB).

SECTION 20—Note 1.

[1] Section 20 empowers a company to alter or add to its articles and when altered the new articles are as valid as if they had found place in the original articles. (46) 1946 Nag L Jour 128 (131).

(2) The power of altering articles under this section shall, in the case of any company formed and registered under Act No. XIX of 1857 and a Act No. VII of 1860 or either of them, extend to altering any provisions in Table B annexed to Act XIX of 1857, and shall also, in the case of an unlimited company formed and registered under the said Acts or either of them, extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding that those regulations are contained in the memorandum.

[1882—S. 76; (1908) 3 Edw. VII, C. 69—S. 13 (1), (2); (1929) 19 & 20 Geo. V, C. 23—Ss. 10, 319 (2)].

[a] Repealed by the Indian Companies Act, 1866 (10 [X] of 1866).

[b] See Appendix I to this Act, *infra*.

Section 20 (contd.)

[2] It is a cardinal rule of corporation law that *prima facie* a majority of its members is entitled to exercise the powers of the corporation and where no special provision is made, the whole are bound not only by the major part, but by the major part of those present at a regular corporate meeting whether the number present be a majority of the whole or not. Therefore, unless a construction of the articles of association of a company leads to the conclusion that there was an intention to supersede the ordinary rule, it must be held that, where no quorum has in fact been fixed, the acts of a major part of the directors for the time being are valid. (Vol. 29) 1942 Lah 68 (69, 70): I L R (1943) Lah 123 (DB).

[3] Right of a Company to alter the articles of association is statutory and cannot be limited or removed either by a contract or provision in the articles themselves. The only limitation on the power to alter is that it should be exercised fairly and according to law. (Vol. 32) 1945 Nag 187 (189): I L R (1945) Nag 599.

[4] Effect cannot be given to an article reserving power to the company to alter its articles by an ordinary resolution, as it would amount to getting round the provisions of S. 20, in an indirect manner. (Vol. 14) 1927 Bom 609 (611).

[5] Power given by the Act to alter articles should be exercised by the shareholders *bona fide* for the benefit of the company. It is not for the Court to say what is for the benefit but the shareholders alone can decide what is beneficial. It cannot be interfered with provided reasonable men would regard it so. (1927) 2 K B 9 (27).

[6] The ordinary rule is that anything which appears in the articles of association but is not provided for by the memorandum of association, may be altered by special resolution. The memorandum of association of a bank provided for the post of a hereditary secretary. His salary and emoluments were provided by the articles of association. Held that by a special resolution it was competent to the Directors to vary the articles and limit the powers and emoluments of the Secretary. (1910) 33 Mad 36 (39, 40).

[7] A member of a company will be ordinarily bound by any change in the articles of association but when there is a special contract between a member and the company, though that member is a shareholder, no change in the articles affects that contract. When there is such a special contract, the directors would not be acting *ultra vires* if they discharge the obligations under such contract from out of the general assets of the company. (Vol. 12) 1925 Cal 690 (696): 52 Cal 239.

[8] A became a member of a benefit fund association incorporated under this Act. A bound himself to abide by the rules as contained in its articles of association. The articles provided a scheme for the payment of the claim of the members. By the enactment of the Insurance Act (1938), the scheme became

abolished, and the association altered its articles of association so as to effect a change in the scheme of payment. A had notice of the meetings in which the amendment was made. Held that the change in the articles was binding on A, as the company had powers under S. 20 to alter the articles. (Vol. 32) 1945 Nag 187 (189): I L R (1945) Nag 599.

[9] An article providing for the qualification of directors cannot be altered by an ordinary resolution. It can alter the same only by a special resolution as required by S. 20. (Vol. 14) 1927 Bom 609 (611).

[10] Any alteration in the articles cannot bind a member from whom notice of the meeting at which the alteration was made was withheld. (Vol. 28) 1941 Mad 854 (855).

[11] Where a company amends the articles by a special resolution without mentioning in the notice under S. 81 that the question of amendment was to come up for decision in the meeting the amendment is invalid and *ultra vires*. (Vol. 27) 1940 Lah 248 (244).

[12] Rules framed by a Wheat Merchants' Association for regulating the conduct of business mutually—Rules amended by resolution to meet emergency created by sudden rains—Amendment of articles not to be made unless with five days' notice and passed by 2/3 majority in the general body—Resolution amending rules not conforming to articles—Held that the moving or passing of a resolution regulating the business of members upon the happening of a sudden and unexpected emergency did not amount to the amendment of the articles. (Vol. 17) 1930 All 661 (666, 667) (DB).

[13] Where one of the articles of association of a company provided in *absolute* terms that the number of directors shall be not more than four it was held that the article did not empower the company to alter the maximum number of directors except by a special resolution under this section. (1946) 50 Cal W N 810 (814).

[14] The Articles of Association of a company provided that 'unless otherwise determined by general meeting' the number of directors shall not be less than five or more than nine. The company by a general meeting without a special resolution resolved to increase the number to sixteen: Held, that the increase in the number of directors did not involve any alteration of the articles and that the resolution passed at the general meeting was valid. Held also, that such a provision implied that it was open to the shareholders to vary the number of directors therein referred to without in any way necessitating an alteration in the articles itself and that S. 20 did not apply. (Vol. 20) 1938 All 344 (346, 347): 55 All 899 * (Vol. 27) 1940 Sind 87 (90).

[15] As to the alteration of articles restricting foreign interests by a company governed by the Companies (Foreign Interests) Act, 1918, see S. 4 of that Act.

Effect of alteration in memorandum or articles.

a[20A. Notwithstanding anything in the memorandum or articles of a company, no member of the company shall be bound by an alteration made in the memorandum or articles after the date on which he became a member if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company :

Provided that this section shall not apply in any case where the member agrees in writing either before or after the alteration is made to be bound thereby].

[(1929) 19 & 20 Geo. V, C. 23—S. 22]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936, (22 [XXII] of 1936), S. 10. [15—1—1937]

General Provisions.

Effect of memorandum and articles.

21. (1) The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs, and legal representatives, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act.

(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him to the company.

[1882—S. 39; (1908) 8 Edw. VII, C. 69—S. 14; (1929) 19 & 20 Geo. V, C. 23—S. 20]

SECTION 20A—Note 1.

[1] Section 20A is limited to two things: (a) requiring a share-holder to take or subscribe for more shares than the number held by him at the rate of the alteration, and (b) increasing his liability to contribute to the share capital of, or otherwise to pay money to, the company. (46) 1946 Nag L Jour 128 (187).

SECTION 21—SYNOPSIS.

1. Section 21 (1)—Contractual nature of articles.

2. Section 21 (2)—“Debt due”.

1. Section 21 (1)—Contractual nature of articles.—[1] A member of a company and those claiming through him are bound by Company's Articles. As long as the Company and its directors are acting literally and ‘bona fides’ according to the provisions of the Articles, it or they cannot be said to be acting without sufficient cause. (Vol. 29) 1936 Rang 52 (53).

[2] Where members have under the articles a contractual right of inspection, that cannot be reduced by the power given to make rules, into a mere right to claim inspection subject to the Committee's approval. But a right of inspection does not carry with it a right to take copies, this right must be separately established. If he has got such a right the motive with which he wants to exercise it is irrelevant. (Vol 25) 1938 Cal 89 (90, 92).

[3] Articles of Association is no contract between a company and an outsider. It does not give to any individual member special rights beyond those of the members generally. Article only constitutes a contract between a Company and its members in respect of their ordinary rights as members. (Vol 15) 1928 Bom 252 (254) : 52 Bom 477.

[4] Even if the memorandum and articles of association of a company are held not to constitute a contract in themselves, an implied contract may be proved by the acts of the parties on the terms set out in the articles of association of the company. (Vol 29) 1942 Lah 47 (49) : I L R (1943) Lah 28.

[5] A shipping company incorporated under the Companies Act had clauses in its memorandum of

objects, viz., ‘to acquire and deal with the property—Personal estate and effects’ and ‘to invest money of the company in such manner as the directors think fit’. The company through its directors purchased gold and silver and kept the same with a bank for safe custody. In a suit by one of the share-holders for a declaration that the company's action was *ultra vires*, it was held that the company's action was not *ultra vires* as it came within one of the objects. (Vol 31) 1944 Bom 131 (134) : I L R (1944) Bom 247. (Meaning of the word ‘invest’ discussed)

[6] Articles of association of a banking company declaring director's office to be *ipso facto* vacated if he resigns or becomes incapable of acting as director—Held director's indebtedness to bank was not incapacity within the meaning of article. (Vol 29) 1942 Mad 787 (787) : I L R (1943) Mad 291.

2. Section 21 (2)—“Debt due”.—[1] Only money which is presently due can be described as a debt. Money does not become due merely because signatories to the Articles of Association or memorandum have undertaken to purchase shares and pay for them. The signatories of the Memorandum and Articles of Association of a Company undertook to purchase certain number of shares each. There was no term by which the signatories contracted to pay any sum on any particular date or any particular time or on demand. The failure of the signatories to pay the prescribed amount of their shares on or before the date fixed by the directors for payment does not entail a forfeiture as the amount was not presently due from the signatories. (Vol 26) 1939 All 739 (743).

[2] Unpaid share capital can be called up only in accordance with the articles of association and the provisions of Ch. V of the Act. Therefore where notice was not dispensed with by the articles of association mere passing of a resolution calling up shares will not constitute a valid call. (Vol 19) 1932 Cal 716 (718) : 59 Cal 1186.

[3] A suit by a company which is not under liquidation for recovery of arrears of allotment money and call money due on shares allotted to the defendant is cognizable by a Court of Small Causes. (Vol 20) 1938 Lah 657 (658).

Registration of memorandum and articles.

22. The memorandum and the articles (if any) shall be filed with the registrar for the province in which the registered office of the company is stated by the memorandum to be situate, and he shall retain and register them.

[1882—S. 40; (1908) 8 Edw. VII, C. 69—S. 15; (1929) 19 & 20 Geo. V, C. 23—S. 12]

Effect of registration.

23. (1) On the registration of the memorandum of a company, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited.

(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

[1882—S. 41; (1908) 8 Edw. VII, C. 69—26; (1929) 19 & 20 Geo. V, C. 23—S. 13]

Section 21 (contd.)

[4] Although the liability of a share-holder as regards the balance due on his shares is a debt accruing on the date of taking of the shares the liability is enforceable only after a valid call has been made. (Vol 19) 1932 Cal 716 (718) : 59 Cal 1186.

[5] A debtor of a company on becoming its share-holder becomes also bound by the provisions where it exists in the article by which any debt due by a share-holder to the company is made a first charge on the share. (Vol 6) 1919 Mad 1161 (1163) (DB).

[6] In the event of a company being wound up, the liability of a contributory creates a debt payable at the time specified in the calls made on him by the liquidator; see S. 159.

SECTION 22—Note 1.

Cognate sections.

Fees, payment of—249, 262, Sch. I Table B.
Place of registration—248.

Registrar when may refuse to register—5, 11.

[1] A person dealing with the Company must take the articles only as filed in the Registrar's office. If the directors propose to do something in excess of those powers, he cannot assume their power to be extended by a special resolution. For, such a resolution would require registration. (Vol 14) 1927 Cal 299 (302) (DB).

[2] Registrar has a discretion to refuse to register alteration of articles to same extent as he has with regard to articles. (Vol 20) 1933 Mad 129 (129).

[3] Where a scheme offends against S. 294-A, Penal Code, the Registrar can rightly refuse to register the articles as presented to him. (Vol 20) 1933 Mad 129 (130).

SECTION 23—SYNOPSIS.

1. Status and rights of a Company.

2. Suits by or against a Company.

Cognate sections

Conclusiveness of certificate of incorporation—24
Restrictions as to allotment—101.

Restrictions on commencement of business—108

1. **Status and rights of a Company.**—[1] Companies incorporated under the Companies Act are separate legal entities. (Vol 20) 1933 Pat 196 (197) : 12 Pat 216 * (Vol 2) 1915 P C 27 (29) : 42 Ind App 97 : 42 Cal 1029 (P O) *Obiter* * (Vol 14) 1927 Bom 371 (374, 375) : 51 Bom 372 (DB) (Company is a separate

entity from any individual although that individual may practically hold all the shares.) * (Vol 18) 1931 Bom 178 (180) (DB). (Distinction between Company and firm made out).

[2] A joint stock Company is a distinct entity, and although all the shares may be practically controlled by one person in law, it is not permissible or relevant to enquire whether the directors belonged to the same family or it is "one man company". (Vol 28) 1936 Bom 62 (76) : 60 Bom 326.

[3] There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected or that they or any one of them should take substantial interest in the undertaking, or that they should have a mind and will of their own, or that there should be anything like a balance of power in the constitution of the company. (1897) 2 All 22 (51).

[4] The distinction should be marked and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual share-holders and their actions, assets, rights and liabilities on the other. Where the Directors of a Company misuse their powers as directors to their own advantage, their actions as against the company will be of no effect and the Court will not enquire whether the company derived any benefit from such transaction. (Vol 24) 1937 P O 279 (285).

[5] A life insurance company registered under the Act, is subject to the provisions of this Act and the Life Insurance Act of 1912. (Vol 21) 1934 Cal 63 (64) : 35 Cr L Jour 492.

2. **Suits by or against a Company.**—[1] In order to redress a wrong done to the company, action, *prima facie* should be brought by the company itself. The will of the majority of the share-holders is the will of the Company for this purpose. (Vol 24) 1937 Cal 645 (646, 647) : I L R (1938) 1 Cal 90 (DB).

[2] Where the majority of shares of a company are controlled by those against whom the relief is sought, share-holders may sue on their own names but must show that acts complained of are of a fraudulent character or beyond the powers of the company. (Vol 24) 1937 Cal 645 (647) : I L R (1938) 1 Cal 90.

[3] Where the Chief Officer of a company, under powers given to him by the articles of association appoints a Secretary for management and for filing and defending suits for and on behalf of the company

Conclusiveness of certificate of incorporation.

24. (1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorised to be registered and duly registered under this Act.

(2) A declaration by an advocate, attorney or pleader entitled to appear before a High Court who is engaged in the formation of a company, or by a person named in the articles as a director, manager or secretary of the company, of compliance with all or any of the said requirements shall be filed with the registrar, and the registrar may accept such a declaration as sufficient evidence of compliance.

[1882—S. 40; (1908) 8 Edw. VII, C. 69—S. 17; (1929) 19 & 20 Geo. V, C. 23—S. 15]

Section 23 (contd.)

and such Secretary, in one of the suits describes himself as Secretary of the company, the suit is properly instituted. (Vol 24) 1937 Lah 751 (752).

[4] A suit for wages from a company lies against the company and not against its Secretary or Managing Director. (13) 1913 Pun L R No. 190 at page 655 (656).

[5] Where one of the parties to proceedings under S. 145, Cr. P. C., are ostensibly some managers of a certain limited company, costs against them should be realised either from managers or company itself. (Vol 24) 1937 Pat 559 (559) : 38 Cr L Jour 1099.

[6] Provisions of O. 29, R. 1, Civil P. C., are permissive and do not exclude the operation of O. 6, R. 14, Civil P. C. in a proper case, to a company. (Vol 18) 1931 Sind 178 (179) : 26 Sind L R 58 (DB) * (Vol 21) 1934 Cal 63 (63) : 35 Cr L Jour 492.

[7] A company is a legal entity. Where duty is imposed upon a company in such a way that a breach of duty amounts to a disobedience to the law then, the breach is an offence which can be visited upon the company, which cannot be convicted in the person of its agent. (Vol 20) 1933 Rang 70 (72) : 11 Rang 162 : 35 Cr L Jour 1040.

[8] Company is not bound by contract entered before its formation. (Vol 21) 1934 Bom 427 (428) : 59 Bom 218.

[9] An agreement entered into by the promoters of a company before incorporation of the company cannot be enforced by the company even though the company has, after its incorporation, adopted and ratified it. (Vol 33) 1946 Cal 23 (30) : 1 L R (1944) 2 Cal 101.

[10] In cases of "fraud upon the minority", if the wrong-doer has the balance of power, and therefore the company does not take action, there are two courses open : the minority may take the risk and boldly use the Company's name, or where the wrongful act is supported by the majority the minority share-holders can sue in their own name, or as a matter of convenience a share-holder can sue on behalf of himself and all the other share-holders. If however, the wrong-doers are also share-holders, these share-holders as a matter of course must be excluded from the category of plaintiffs; hence the phrase "except those who are defendants". In such cases the primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance. Where a decision of the directors is attacked on the ground that it is injurious to the Company, the directors should be parties. Where that act of directors so impeached has been confirmed and is still impeached on the

basis that the directors have got that confirmation by controlling the majority, still those directors should be parties. (Vol 28) 1941 Cal 174 (178, 180) : 1 L R (1941) 1 Cal 30.

[11] Where the action is brought by share-holders, the plaintiffs should distinctly allege the illegality of the act complained of and the impossibility of getting the company to impeach its validity. Mere irregularities committed by the directors cannot give a cause of action to share-holders and entitle them to challenge the validity of the resolutions passed, and the aggrieved share-holders must appeal to the company. This supremacy of the majority is subject to certain exception. These came into play (1) where the act complained of is *ultra vires* the Company ; (2) where the act complained of is a fraud on the minority ; (3) where there is an absolute necessity to waive the rule in order that there may not be a denial of justice. (Vol 21) 1934 Bom 248 (245).

[12] Neither under the Companies Act nor under the Co-operative Societies Act is there any statutory provision which entitles the creditor to treat members of a society with unlimited liability differently from the members of a society with limited liability. Creditors cannot proceed directly against individual members for the debts of society, until there is a winding up. (Vol 18) 1931 Pat 321 (328) : 11 Pat 174 (FB).

[13] The effect of incorporation is to make the body corporate a separate legal entity. A person must look to its assets for payment and can only call upon individual members to contribute in case the Act or charter so provides. (Vol 18) 1931 Pat 321 (321) : 11 Pat 174 (F B).

[14] The Court has jurisdiction to entertain suit by share-holders against the company in respect of the infringement of their rights as share-holders, e.g. the right of exercising their individual votes, when the interests of justice so required. (Vol 19) 1932 Mad 100 (108) (DB).

SECTION 24—Note 1.

[1] Certificate of incorporation is conclusive as to the fact of incorporation and that all the previous requisites of the Act in respect of registration have been complied with. The statutory condition that memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration. (1913) 40 Cal 1 (17) : 39 Ind App 287 : 6 Low Bur Rul 110 (PC).

[2] Under this section the memorandum of association and the prospectus must be deemed to have been properly signed, registered and presented to the registrar, and that no evidence can be admitted to the contrary. (1928) 26 All L Jour 347 (348).

[3] The memorandum and articles of association having been registered the certificate of the registrar

Copies of memorandum and articles to be given to members.

25. (1) Every company shall send to every member, a[at his request and within fourteen days thereof] on payment of one rupee or such less sum as the company may prescribe, a copy of the memorandum and of the articles (if any).

(2) If a company makes default in complying with the requirements of this section, it shall be liable for each offence to a fine not exceeding ten rupees.

[1882—S. 42; (1908) 8 Edw. VII, C. 69—S. 18; (1929) 19 & 20 Geo. V, C. 23—S. 23].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 11, for "at his request, and". [15-1-1937].

Alteration of memorandum or articles to be noted in every copy.

a[25A. (1) Where an alteration is made in the memorandum or articles of a company, every copy of the memorandum or articles issued after the date of the alteration shall be in accordance with the alteration.

(2) If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the memorandum or articles which are not in accordance with the alteration, it shall be liable to a fine not exceeding ten rupees for each copy so issued and every officer of the company who is knowingly and wilfully in default shall be liable to the like penalty.]

[1929—S. 19 & 20 Geo. V, C. 23—S. 24].

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 12. [15-1-1937].

OBJECTS AND REASONS

This section follows S. 24 of the English Act, 1929, in providing that the memorandum or articles of a company should show all changes made therein. As this section is made applicable to articles, S. 50, sub-Ss. (3) and (4) and S. 71, sub-Ss. (2) and

(3), containing similar provisions, have been repealed by the amending Act of 1936. The insertion of the words 'knowingly and wilfully' has been made to ensure that an unintentional default is not to be penalised.—See S.O.R. and S.C.R., 1936.

Association not for Profit.

Power to dispense with "Limited" in name of charitable and other companies.

26. (1) Where it is proved to the satisfaction of the a[Central Government] that an association capable of being formed as a limited company has been or is about to be formed for promoting commerce, art, science, b[religion], charity, or any other useful object, and applies or intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members the a[Central Government] may, by license under the hand of one of its Secretaries, direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly.

(2) A license by the a[Central Government] under this section may be granted on such conditions and subject to such regulations as the a[Central Government] thinks fit, and those conditions and regulations shall be binding on the association, and shall, if the a[Central Government] so directs, be inserted in the memorandum and articles, or in one of those documents.

(3) The association shall on registration enjoy all the privileges of limited companies, and be subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, c[and of sending lists of members to the registrar].

Section 24 (contd.)

is conclusive that the parties have become an incorporated body. (1876) 2 Ch D 610 (616).

[4] See also S. 262 and the following case : (1920) 1 Ch D 201 (213).

SECTION 25-A.

This section is newly inserted by the Amending Act of 1936 and follows S. 24 of the English Act, 1929, in providing that the memorandum should show all changes made therein. Prior to the insertion of this section, provisions similar to this section were included in Ss. 50 (3) and (4) and Ss. 71 (2) and (3) which have now been omitted by the Amending Act of 1936.—See S. O. R. and S. C. R., 1936.

The insertion of the words 'knowingly and wilfully' has been made to ensure that an unintentional default is not to be penalised—S. C. R. 1936.

SECTION 26—Note 1.

[1] An association incorporated under S. 26 not for earning profits and prohibited under the law from declaring dividends to which no relief under S. 48, Income-tax is available is not exempted from income-tax. (Vol 28) 1936 All 764 (767).

Where a company registered under S. 26 desires to alter its memorandum of association, the proper course for the company is to apply in the first instance to the local Government for the approval of the proposed alterations and, if the Local Govern-

(4) A licence under this section may at any time be revoked by the ^a[Central Government], and upon revocation the registrar shall enter the word "Limited" at the end of the name of the association upon the register, and the association shall cease to enjoy the exemptions and privileges granted by this section:

Provided that, before a licence is so revoked, the ^a[Central Government] shall give to the association notice in writing of its intention, and shall afford the association an opportunity of submitting a representation in opposition to the revocation.

[1882—S. 26; (1908) 8 Edw. VII, C. 69—S. 20; (1929) 19 & 20 Geo. V, 23—S. 18 (1), (4)].

[a] Substituted by A.O. for "Local Government".

[b] Inserted by the Indian Companies (Amendment) Act, 1926 (33 [XXXIII] of 1926), S. 2.

[c] Substituted for "and of filing lists of members and directors and managers with the registrar" by the Indian companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 18. [15-1-1937].

Companies limited by Guarantee

Provision as to companies limited by guarantee. 27. (1) In the case of a company limited by guarantee and not having a share capital, and registered after the commencement of this Act, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member shall be void

(2) For the purpose of the provisions of this Act relating to the memorandum of a company limited by guarantee and of this section, every provision in the memorandum or articles, or in any resolution, of any company limited by guarantee and registered after the ^a[commencement of this Act, purporting to divide the undertaking of the company into shares or interests, shall be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby.

[(1908) 8 Edw. VII, C. 69—S. 21; (1929) 19 & 20 Geo. V, C. 23—S. 21].

[a] i.e., 1st April, 1914.

PART III

SHARE CAPITAL, REGISTRATION OF UNLIMITED COMPANY AS LIMITED, AND UNLIMITED LIABILITY OF DIRECTORS

Distribution of Share Capital

Nature of shares. 28. (1) The shares or other interest of any member in a company shall be movable property, transferable in manner provided by the articles of the company.

(2) Each share in a company having a share capital shall be distinguished by its appropriate number.

[1882—S. 44; See Sch. I, Table A, Regs. 18 to 23. (1908) 8 Edw. VII, C. 69—S. 22; (1929) 19 & 20 Geo. V, C. 23—S. 62].

Section 26 (contd.)

ment approves them then the High Court can entertain the application of the Company for the confirmation of the articles. (Vol. 24) 1937 All 432 (484) : I L R (1937) All 202.

(High Court wrongly ordering confirmation of alteration without its approval by Local Government—High Court has jurisdiction to cancel its order).

SECTION 28—Note 1.

[1] Shares are *prima facie* transferable. A restriction which precludes a share-holder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. (Vol 15) 1928 P C 291 (293) (P.C.).

[2] Every share-holder in a company can as of right transfer his share to another and the transfer is complete on the day the deed is signed by both parties. The provision in the Articles of Association that no transfer would be valid and recognised unless registered in the books and that the company could refuse to register a transferee without assigning reasons is one for the protection of the company and

does not prevent the passing of title. (Vol II) 1924 Lah 173 (174) (DB).

[3] In the absence of anything in the Articles of Association forbidding the same, a sale by Court of shares held by a member has the effect of transferring the shares to the purchaser. The burden is on the opponents to prove the contrary by reference to some provision in the Memorandum or Articles of Association of the company. (Vol 15) 1928 Mad 571 (574) (DB).

[4] Transfer of shares otherwise than as provided by the Companies Act and the Articles of Association is invalid. A transferee without a proper conveyance has only an equitable right to compel the vendor to execute the proper conveyance upon which his title may be perfected. In the case of a sale of shares through Court, there is no further deed of transfer to be executed. Hence a purchaser of shares at a Court sale has priority over an assignee of shares in respect of which proper conveyance has not been made (Vol 10) 1923 Mad 241 (244, 245) : 45 Mad 587 (D B).

[5] The purchaser of shares at Court sale is in no way in a superior position to that of a transferee by

29. A certificate, under the common seal of the company, specifying any shares or stock held by any member, shall be *prima facie* evidence of the title of the member to the shares or stock therein specified.

Certificate of shares or stock.

[1882—S. 54; (1908) 8 Edw. VII, C. 69—S. 23; (1929) S. 19 & 20 Geo. V, C. 23—S. 68].

30. (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.

Definition of "member".

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.

[1882—S. 45; (1908) 8 Edw. VII, C. 69—S. 24; (1929) 19 & 20 Geo. V, C. 23—S. 25].

Section 28 (contd.)

a private sale, so far as the powers of the company in dealing with the transfer applications are concerned. (Vol 3) 1916 Bom 147 (150): 41 Bom 76 (DB).

[6] Under the English Law, a share is a 'Chose-in-action'. But in India, a share is not a chose-in-action. (Vol 30) 1943 Mad 74 (76): I L R (1943) Mad 115 (DB).

[7] The right of a share-holder to transfer his shares in a company is absolute subject to any restriction imposed by the articles of association. (Vol 30) 1943 Mad 743 (747).

[8] The term 'goods' as defined in the Sale of Goods Act, 1930, S. 2 (7) now includes stock and shares.

[9] A company cannot exercise wide powers of accepting a surrender. It can only accept a surrender of shares under condition and limitations under which shares can be forfeited. To hold that a company by a resolution of its directors accept surrender of shares would be to allow a company to reduce its capital at its pleasure. (Vol 15) 1928 Lah 240 (241).

SECTION 29—Note 1.

[1] As to the meaning of "stock" see Notes on S. 50.

[2] Certificates of shares are not document of title to goods within the meaning of S. 178 of the Contract Act. (See also Sale of Goods Act, 1930, S. 2 (4). (Vol 4) 1917 Cal 399 (401) (S B).

[3] Share certificates accompanied by transfer forms signed in blank by the registered holder are goods. (Vol 13) 1926 P C 38 (40): 50 Bom 360: 53 Ind App 92 (P C).

SECTION 30—SYNOPSIS.

1. Applicability and Scope.
2. Section 30 (1).
3. Section 30 (2).

Cognate Sections.

Allotment of shares—101, 102, 104.

Director, defect in appointment of —

Effect on allotment of shares—86.

1. Applicability and Scope.—[1] As a Registered share-holder has a vested interest in the property of the company and gets certain rights he must also be subjected to the burdens attached to it. (Vol 1) 1914 Bom 128 (129): 39 Bom 331 (DB) (Obligation to pay calls in the future).

[2] A minor may be a member of a company. (Vol 1) 1914 Bom 128 (129): 39 Bom 331 (DB).

[3] Share-holder who was a minor at the date of allotment of shares but after attaining majority received dividends and raised no objection to his name being included in the register of members is

estopped from denying as between himself and the company's representatives that he is a share-holder. (Vol 1) 1914 Bom 128 (129): 39 Bom 331 (DB).

[4] Shares transferred to person as qualification for directorship without payment—Such person holding out that he is share-holder and member of company—Liquidation of company—He is estopped from denying that he is share-holder or member of company. (Vol 28) 1936 Lah 480 (481): 17 Lah 576.

[5] Where a company by its resolution expels a member without any power under the articles of the company as the resolution of expulsion has no effect; the expelled member remains both as a share-holder, and a member. (Vol 28) 1941 Mad 354 (355).

[6] The membership in a mutual benefit fund is not terminated by the mere appropriation of the share capital of a member towards the amount due by him to the fund in the absence of any forfeiture. (Vol 23) 1936 Mad 97 (97) (DB).

2. Section 30 (1).—[1] The signatories to the Memorandum of Association become the first members of the Company from the date of incorporation. The fact that no shares are allotted to a signatory and that he has ceased to be treated as a member for a considerable time does not relieve him from liability and he is liable to be placed on the list of contributories. (Vol 21) 1934 Sind 39 (42, 43) (Affirmed in (Vol 25) 1938 Sind 187: 32 Sind L R 157.)

[2] Express allotment of shares to subscriber to the Memorandum of Association is necessary in order to give rise to liability to pay up value of the shares. (Vol 26) 1939 Mad 498 (498).

[3] Under S. 30, a person shall be deemed to have agreed to become a member of the company on his subscribing to the memorandum and on its registration can properly be entered as a member. He cannot plead that he subscribed to the memorandum subject to certain reservation. (1928) 26 All L Jour 347 (348).

[4] By merely subscribing to the memorandum a person becomes the member and on his death his heirs can be placed in the list of contributories in winding up. (See S. 160). (Vol 20) 1933 All 334 (337): 55 All 417 (DB).

[5] The first portion of Sub-S. (1) of S. 30 lays down a rule of substantive law; the second portion lays down a rule of procedure and it does not govern the earlier portion. The mere omission of the entry of the names of subscribers to the memorandum does not negative their membership. (Vol 13) 1926 All 550 (551): 48 All 580* (Vol 21) 1934 Sind 39 (43).

[6] Person signing Memorandum of Association and agreeing to purchase certain shares—Subsequently, but before registration of company, subscriber asking promoter to rescind his agreement on ground of misrepresentation of promoter—Subscriber held could not rescind on ground of misrepresenta-

Register of members. **31.** (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:—

- (i) the names and addresses, and the occupations, if any, of the members, and, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member;
- (ii) the date at which each person was entered in the register as a member;
- (iii) the date at which any person ceased to be a member.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

[1882—S. 47; (1908) 8 Edw. VII, C. 69—Ss. 25, 43; (1929) 19 & 20 Geo. V, C. 23—S. 95]

Index of members of company.

[31A. (1) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall within fourteen days after the date on which any alteration is made in the register of members make any necessary alteration in the index.

Section 30 (contd.)

tation of agent of company, as there was no company in existence at the date of subscribing. (Vol 24) 1987 Lah 527 (528): I L R (1987) Lah 294.

3. Section 30 (2).—[1] The question whether a particular person has agreed to become a member of a company is a question of fact. (1912) 36 Bom 557 (560).

[2] Where a person has been given shares or shares have been transferred to him, as qualification for a directorship without any payment, such a transfer makes the transferee a member of the company. (Vol 28) 1936 Lah 480 (481): 17 Lah 576.

[3] Agreement by a person to take shares makes him share-holder and his name must be entered in the register. (Vol 19) 1932 P C 212 (215) (PC).

[4] Only a person who is on the register is in the full sense of the word owner of the shares. (Vol 30) 1948 Mad 111 (114).

[5] A person is entitled to revoke his application for shares in company when, before the date of the allotment the prospectus of the company is changed in material particulars. (Vol 29) 1942 Mad 656 (656): I L R (1942) Mad 188.

[6] In the case of conditional applications the rule is that if the condition attached to the application is a condition precedent there is no contract until the condition is complied with, but if the condition attached is collateral or subsequent, the agreement is concluded by allotment and registration and the fact that the collateral condition has not been fulfilled will not affect the applicant's position as a share-holder. (1912) 36 Bom 557 (562) (Case decided under S. 28 of Act VI of 1882. * (1913) 35 All 538 (540) (Shares applied for subject to a condition precedent and partly paid for—Condition not fulfilled.—Resolution of company to refund part payment—Liquidation before payment could be made—Held applicant was not a member but only a creditor.)

[7] Objection on the ground of non-fulfilment of a condition cannot be raised subsequent to incorporation. (Vol 28) 1941 Cal 148 (148): I L R (1940) 2 Cal 175.

[8] Person induced to apply for shares of company owing to misrepresentation or fraud—Repudiation or avoidance of contract by share-holder must be

within reasonable time and before commencement of proceedings for winding up. (Vol 25) 1938 All 198 (194): I L R (1938) All 301.

[9] Allotment of shares by directors at their meeting—Five out of six directors present at meeting—Sanction of general meeting required under Articles of association—Allotment held could not be avoided. (Vol 38) 1946 Mad 35 (36, 37): I L R (1945) Mad 728.

[10] Where in the event of a company not making a profit the shares were not to be paid for at all, the share-holder is a 'bogus' share-holder. This is opposed to the whole object of the Companies Act. (1912) 36 Bom 557 (562).

SECTION 31—Note 1.

Cognate sections.

Branch register—41, 42.

Inspection of register—36.

Power of Court to rectify register—88, 89.

Power to close register—87.

Register to be evidence—40.

Share-warrant, registration of name of bearer of—45.

Subscribers of memorandum—Entry of, in register—30.

Trust not to be entered on register—82.

[1] For the purpose of taxation, the place where the register of the company is to be kept according to law determines the locality of the share for it is there that the shares can be effectually dealt with. (Vol 17) 1930 P C 10 (12) (PC). (Share-holder domiciled in New York—Company of which he was share-holder incorporated in Ontario—On death of share-holder share being personal estate held liable to succession duty in Ontario. * (Vol 26) 1939 Bom 447 (447): I L R (1939) Bom 611 (D B). (Wakf property consisting of immovable property and shares situate in Burma—Shares in companies registered in Rangoon—Mutawalli residing in Surat cannot be called upon to contribute to Wakf administration found under S. 61, Mussalman, Wakf (Bom. Amendment) Act, 1935.)

Section 31-A.

[1] The words 'knowingly and wilfully' have been inserted in Sub-S. (3) to ensure that an unintentional default is not to be penalised.

(2) The index, which may be in the form of a card index, shall in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

(3) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.]

[(1929) 19 & 20 Geo. V, C. 23—S. 96]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 14. [15—1—1937]

Annual list of members and summary.

32. (1) Every company having a share capital shall a[within eighteen months from its incorporation and thereafter] once at least in every year make a list of all persons who, on the day of the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of the first return) of the incorporation of the company.

(2) The list shall state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or (in the case of the first return) of the incorporation of the company by persons who are still members and persons who have ceased to be members respectively and the dates of registration of the transfers, and shall contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars:—

- (a) the amount of the share capital of the company, and the number of the shares into which it is divided;
- (b) the number of shares taken from the commencement of the company up to the date of the return;
- (c) the amount called up on each share;
- (d) the total amount of calls received;
- (e) the total amount of calls unpaid;
- (f) the total amount of the sums (if any) paid by way of commission in respect of any shares or debentures, or allowed by way of discount b[in respect of any shares or debentures], since the date of the last return c[or so much thereof as has not been written off at the date of the return];
- (g) the total number of shares forfeited;
- (h) the total amount of shares or stock for which share-warrants are outstanding at the date of the return;
- (i) the total amount of share-warrants issued and surrendered respectively since the date of the last return;

SECTION 32—Note 1.

Cognate sections

Commissions and discounts—105 to 106.

Debentures and floating charges—126 to 129.

Directors—38A to 37, Regs. 68 to 94.

Mortgages and charges—109 to 125.

Shares, call on—Regs. 12 to 17.

Shares, conversion of, into stock—50, 51.

Shares, forfeiture of—Regs. 24 to 30.

Share-warrants—43 to 48, Regs. 35 to 40.

[1] As to the definition of 'officer', see S. 2 (1) (11).

[2] An officer of a company cannot be convicted under this section unless it is found that he knowingly and wilfully authorised or permitted the default.

[3] Words 'knowingly' and 'wilfully' in Sub-S. (5) connote an intentional default. Where the default is merely inadvertent, accused should not be convicted.

(Vol 16) 1929 Lah 836 (837): 10 Lah 521: 31 Cr L Jour 341.

[4] The words 'knowingly' and 'wilfully' are used in S. 32. with reference only to the officers of the company and not to the company itself. The Company is always liable where the return is not sent in; but the officers of the company are liable only if they knowingly or wilfully authorise or permit the default. (Vol 29) 1942 Mad 75 (76): 43 Cr L Jour 188 * (Vol 21) 1934 Cal 63 (64): 35 Cr L Jour 492.

[5] Where in a charge under S. 32 (5) the lower Court found that certain entries did not agree with the figures in papers filed previously and there was no evidence that the previous returns were correct it was held that the whole charge failed in the absence of evidence of the correctness of the previous returns. (Vol 19) 1932 Mad 497 (498, 499): 33 Cr L Jour (589) * (Vol 29) 1942 Cal 225 (225): 43 Cr L Jour 466. (No finding that conduct of accused amounted to knowingly or wilfully authorising or permitting default —Conviction set aside).

- (k) the number of shares or amount of stock comprised in each sharewarrant;
- (l) the names and addresses of the persons who at the date of the return are the directors of the company and of the persons (if any) who at the said date are the managers or managing agents of the company, and the changes in the personnel of the directors, managers and managing agents since the last return together with the dates on which they took place; and
- (m) the total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act.

(3) The above list and summary shall be contained in a separate part of the register of members, and shall be completed within [twenty-one days] after the date of the first or only ordinary general meeting in the year, and the company shall forthwith file with the registrar a copy signed by a director or by the manager or the secretary of the company, together with a certificate from such director, manager or secretary that the list and summary state the facts as they stood on the day aforesaid.

f[(4) A private company shall send with the annual return required by sub-S. (1), a certificate signed by a director or other officer of the company that the company has not, since the date of the last return or, in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and where the annual return discloses the fact that the number of members of the company exceeds fifty, also a certificate so signed that the excess consists wholly of persons who under sub-clause (b) of clause 13 of sub-S. (1) of S. 2 are not to be included in reckoning the number of fifty.]

g[(5) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.]

[1882—S. 48, 49, & 50; (1908) 8 Edw. VII, C. 69—S. 26; (1929) 19 & 20 Geo. V, C. 23—Ss. 108, 110].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936). S. 15. [15-1-1937].

[b] *Substituted, ibid.*, for "in respect of any debentures."

[c] *Added, ibid.*

Section 32 (contd.)

[6] Forfeiture recognised in S. 32 (2) (g) and Sch. III Form E is not limited to forfeiture for non-payment of calls only. Regulations 24 to 30 in Table A do not control the section or the form. The Act sanctions forfeiture generally, that is to say, forfeiture as a means to get rid of a member who is in default either in payment of calls or in observing or performing other rules and regulations of the company. (1945) 49 Cal W N 502 (509).

[7] Purely arithmetical mistakes in additions in the returns filed—Accused held cannot be convicted. (Vol 19) 1932 Mad 497 (499): 33 Cr L J 589.

[8] If an officer of the company knows of the fact of non-compliance with the requirements of the section and takes no steps to have them complied with, it can be held that he *permitted* the defaults to continue. In order that a conviction under this section of an officer may be sustained, the only thing the prosecution has to prove is that the particular officer knowingly and wilfully authorised or permitted the defaults. The offence is complete if the officer knew of the defaults and permitted them; it is not necessary further to prove that he authorised those defaults. (Vol 23) 1936 Cal 237 (238): 37 Cr L J 552.

[9] A person charged under this section is not entitled to plead by way of defence the impossibility of complying with it by reason of no general meeting having been held, at any rate when he himself is also a party to the default in holding the meeting. (1911) 1 K B 588 (592).

[See also (Vol 29) 1942 Cal 225 (225): 43 Cr L J 492.]

[10] Where a director is convicted under S. 76, his further conviction under S. 32 may be dropped. (Vol 29) 1942 Cal 225 (225): 43 Cr L J 466.

[11] The offence contemplated by S. 32 (5) is a continuing offence. The obligation to forward to the Registrar the summary and list specified in this section does not come to an end on the date on which by default on the part of every officer of the company, the penalty begins to accrue. Hence any person who acts as an officer of the company during the continuance of the offence becomes liable whether he was legally appointed or not. (Vol 8) 1916 Lah 397 (399, 400): 17 Cr L J 242.

[12] The fact that the managing director and chief secretary have resigned their position before the prosecution for non-compliance with the provisions of this section was started, without resigning thereby their post as director does not free them from their liability. (Vol 1) 1914 Lah 125 (126) (DB): 15 Cr L J 900 (901): (Case under Companies Act, 1882, Ss. 48, 50).

[13] Under the Punjab Government Notification No. 3, dated 28rd February 1910, Registrar of the Joint Stock Companies can authorise any person to institute complaints of offences. (Vol 8) 1916 Lah 397 (398): 17 Cr L J 242. (Case decided under Companies Act, 1882).

[14] When the conviction is not of the managing director but of a company, company acting through a properly authorised agent is the proper appellant and not the managing director. (Vol 21) 1934 Cal 63 (63): 35 Cr L J 492.

[cc] This seems to be a discrepancy. Even in the book published by the Government this clause is lettered (k) instead of (j).

[d] *Substituted, ibid.* for "the Managers of the company".

[e] *Substituted, ibid.* for "seven days".

[f] *Inserted, ibid.*

[g] Sub-S. (4) was renumbered as Sub-S. (5), *ibid.*

OBJECTS AND REASONS

"We have altered the date up to which the list and summary required by clause 32 (now S. 32) is to be prepared. We are of the opinion that the day of the general meeting is the most suitable date from every point of view. We have amended clause (32) (2) (i) so as to provide for the inclusion in the particulars required thereby of the names of the managers of the company. We think this important in view of the peculiar position which managing agents occupy in this country. We have amended sub-clause (3) of the same clause so as to require a certificate only of the

fact that the list and summary are as they stood in the day of the general meeting."—S.C.K., 1933.

Amendment made in 1936.—Sub-S. (1) of S. 32 as it stood prior to the amendment did not clearly show when the first list of members was to be prepared if a company was incorporated towards the end of a year. Confusion was also caused by the use of the words first or ordinary general meeting. The amendment made in 1936 is designed to remove this uncertainty and confusion.—See S.O.R., 1936, Cl. 12.

Trusts not to be entered on register.

33. No notice of any trust, expressed, implied or constructive shall be entered on the register, or be receivable by the registrar.

[1882—S. 53; (1908) 8 Edw. VII, C. 69—S. 27; (1929) 19 & 20 Geo. V, C. 23—S. 101]

Transfer of shares.

[34. (1)] An application for the registration of the transfer of shares in a company may be made either by the transferor or the transferee, provided that where such application is made by the transferor no registration shall in the case of partly paid shares be effected unless the company gives notice of the application to the transferee and subject to the provisions of sub-S. 34(7) the company shall, unless objection is made by the transferee within two weeks from the date of receipt of the notice, enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for registration was made by the transferee.

(2) For the purposes of sub-S. (1) notice to the transferee shall be deemed to have been duly given if despatched by prepaid post to the transferee at the address given in the instrument of transfer and shall be deemed to have been delivered in the ordinary course of post.

SECTION 33—Note 1.

[1] Though a company is not bound to recognise a trust in respect of its shares, it would not prevent the Court from recognising it and considering the rights between the parties. (Vol. 18) 1931 Bom 269 (271, 272) (DB).

[2] A share in a joint stock company is capable of equitable assignment and can be a subject of a trust. S. 33 which forbids notice of a trust to be entered on the register implies that there can be a trust of shares. (1948) 45 Bom L R 46 (50).

[3] Where the articles of association of a company provide that the company should have a paramount lien upon every share for all debts due from the holder thereof the company cannot, in respect of moneys which became due from the shareholders to the company after notice of the deposit of the shares by them with the mortgagees' claim priority over the advances made by the mortgagees after such notice. (1931) 33 Bom L R 184 (195, 201, 202).

[4] Both husband and wife cannot be made liable for call money due where the wife is only a benamidar for the husband. The company can compel the wife alone to pay. (Vol. 30) 1948 Cal 440 (441) (DB).

SECTION 34—SYNOPSIS.

1. Amendment—Effect of.
2. Necessary formalities.
3. Priority.
4. Refusal to transfer.
5. Transfer and transmission.

Cognate sections

Transfer, avoidance of, after commencement of winding up.—227.

Transfer by a legal representative—35.

1. Amendment—Effect of.—See the objects and reasons given under the text of this section above.

2. Necessary formalities.—[1] Where a shareholder purports to transfer his share, the transfer must include the right to get on the register of the shareholders and to become a shareholder in his stead. The transfer must be operative to divest him of this right and vest it in the transferee. If he effects a sale which in law is void (being in favour of person under legal incapacity to purchase) the transferor does not cease to be the legal owner and he remains on the register, subject to the liabilities attaching to his membership. (Vol. 80) 1948 Mad 111 (114).

[2] Until the transferee's name is entered in the register, the dividends on the shares are also payable to the transferor for he is deemed to be the holder of the shares until the entry is made. (Vol. 23) 1936 Bom 24 (27); 60 Bom 297.

[3] When the shares are sold and vendee's name is registered in the company's record, the vendor is not entitled to a decree against company for proportionate dividend in spite of private agreement between the vendor and vendee. (Vol. 32) 1945 All 47 (48); I L R (1945) All 15.

[4] Deed of transfer of share must be executed by both transferor and transferee. (Vol. 10) 1928 Mad 241 (242); 45 Mad 537 (DB).

(3) It shall not be lawful for the company to register a transfer of shares in or debentures of the company unless the proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with the scrip:

Provided that, where it is proved to the satisfaction of the directors of the company that an instrument of transfer signed by the transferor and transferee has been lost, the company may, if the directors think fit, on an application in writing made by the transferee and bearing the stamp required by an instrument of transfer, register the transfer on such terms as to indemnity as the directors may think fit.

(4) If a company refuses to register the transfer of any shares or debentures, the company shall, within two months from the date on which the instrument of transfer was lodged with the company, send to the transferee and the transferor notice of the refusal.

(5) If default is made in complying with sub-S. (4) of this section, the company and every director, manager, secretary or other officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

Section 34 (contd.)

[5] The contract is complete on the day when the deed of transfer of shares is signed by both the parties and the deed is handed over to the transferee. The transferee then steps into the shoes of transferor and becomes the owner of the shares in his place with all the advantages and disadvantages attached to the status, even though the shares are not transferred to the transferee's name. (Vol. 11) 1924 Lah 173 (174, 175) (DB).

[6] The transferee in cases of transfers of shares in blank has the right to fill in the necessary particulars including his own name as transferee and the date of the transfer after the death of the original transferor. The instrument then is complete and transferee is entitled to have his name registered as the holder of the shares in the company's registers. (Vol. 29) 1942 Cal 461 (464); 1 I L R (1942) 1 Cal 122.

[7] Before a share-holder can get himself removed and another person can come in his stead, both must conform to regulations of the company. (Vol 30) 1943 Mad 111 (114).

[8] An article of company conferring power on directors to transfer shares without an instrument of transfer is *ultra vires*. (Vol 28) 1941 Mad 354 (355).

[9] Transfer of shares by a director without requisite formalities will not be recognised and transferor will still remain a contributory. (Vol 2) 1915 Lah 320 (321).

[10] Companies Act does not contemplate the registration of the name of a firm as holder of its shares, but only individuals or other legal entities. An application is therefore not maintainable when transfer is made in firm name of partnership concern and not in the name of any person. (Vol 31) 1944 Oudh 818 (321).

[11] A gift of certain shares was intended by the transferor to take effect by way of transfer. He did not intend any trust and died before the transfer deed was completed; nor was the deed presented for registration before the company during his life time. It was held that there was no equity in perfecting the imperfect gift and that the intended transfer could not also be held to operate as a declaration of trust. (Vol 8) 1921 Cal 148 (149); 48 Cal 986.

[12] For registration as a share-holder a person must present to the company the share script accompanied by a duly stamped and signed transfer-deed. (Vol 32) 1945 Bom 149 (151); 1 I L R (1945) Bom 334 (DB).

[13] Where a transferee complies with all the necessary formalities there is no duty on his part to see that the company has carried out its part in registering the transfer in strict accordance with the articles of association. Where according to articles of association two directors were to decide the registration of transfer of shares it was held simply because one only did it, it was not invalid. (1911) 6 Low Bur Rul 152 (157).

3. **Priority.**—[1] On confirmation of Court sale and issue of order under O. 21, R. 79, Civil P.C. no further steps are required to be taken by the Code for completing the sale of shares. All that remains for the company is to signify or to withhold its assent to the transfer. The auction-purchaser has therefore priority over the private transferee from the share-holder who has not got the assignment in the manner required by law and is thus merely a holder of an equitable contract. (Vol 10) 1923 Mad 241 (245): 45 Mad 587 (DB).

[2] As between two persons claiming title to shares in a company which are registered in the name of third person, priority of title prevails unless the later claimant can show that as between himself and the company he had acquired the full status of a share-holder before the company received the notice of the first claimant's claim. (1912) 36 Bom 334 (337).

4. **Refusal to transfer.**—[1] A transfer of a share cannot take effect without the sanction of company. (Vol 14) 1927 Lah 797 (797) (DB).

[2] It is in the discretion of the company to recognise or not a transfer whether it is private or by Court auction. (Vol 10) 1923 Mad 241 (242): 45 Mad 587 (DB).

[3] Directors refusing to consent to the registration of transfer of shares are not bound to state their reasons for the refusal. If they do not state their reasons, they must, in the absence of evidence to the contrary, be assumed to have acted *bona fide* and honestly in the interest of the company. To vitiate the exercise of their powers it must be shown by evidence that they were acting arbitrarily and capriciously or from some improper motive. (1931) 33 Bom L R 184 (197) * (1892) 16 Bom 80 (90, 91). (But the refusal must be on the personal objection to the transferee and not because the transferee declines to pledge himself to hold a particular view as held by the directors.) * (Vol 28) 1941 All 360 (362, 363); 1 I L R (1941) All 671. (Willingness of the majority of the share-holders to recognise the transfer is absolutely immaterial.) * (1900) 22 All 410 (412) * (Vol 22) 1935 Mad 784 (784).

(6) Nothing in sub-S. (3) shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

(7) Nothing in this section shall prejudice any power of the company under its articles to refuse to register the transfer of any shares.]

[1882—S. 29; See Sch I, Table A. Regs. 18 to 20 (1908) 8 Edw. VII, C. 69—S. 28; (1929) 19 & 20 Geo. V, C. 23—Ss. 63, 65, 66].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 16 for the original section. [15-1-1937].

[b] Substituted, *ibid*, 1938 (2 [II] of 1938), S. 3.

[26-2-1938].

OBJECTS AND REASONS

Amendments made in 1936.—The Act as it stood prior to its amendment in 1936 did not lay down the procedure for the transfer of shares; this was generally provided for in the articles of the company. Undue restrictions upon transfers and undue delay in registering transfers were not uncommon. The section now substituted by the amending Act in 1936, while leaving a discretion with the directors to refuse transfer requires for a transfer application either by the transferor or transferee, notice by the transferee in the case of an application by the transferor, the

use of the proper instrument of transfer required by the company in the case of an application by the transferee. It also prescribes the time limit within which an objection by a transferee may be made or a refusal to register a transfer must be communicated. —See S.O.R., 1936, Cl. 13.

“The new sub-S. (6) of S. 34 makes it clear that there is no intention in anything contained in the section to affect the right of a company to refuse to register a transfer of shares, where that right exists by virtue of the articles.”—S.O.R., 1936.

Section 34 (*contd.*)

[4] The right of a share-holder to transfer his shares in a company is absolute as it is inherent in the ownership of the shares; but it can be restricted by contract, which has to be found in the articles of association of the company. Even in a case where power to refuse registration of transfer of shares is conferred on the directors of a company in absolute terms, the refusal must not be arbitrary. Provided they act in a *bona fide* manner, the directors are not bound to give any reasons. But if they give any reasons, the Court can examine them, but it will not overrule the decision of the directors merely on the ground that it would have reached a different conclusion. If the directors refuse registration on any wrong principle their act can be rectified. When consent for the transfer of shares is withheld by the directors for reasons which cannot stand scrutiny and no objection is raised of a personal kind against him on whom the shares have devolved by operation of law, to recognise a power in the directors to refuse the transfer is to countenance an abuse of powers vested in them for the due and efficient management of the company. (Vol 30) 1943 Mad 743 (747, 748) * (1900) 22 All 410 (427, 429) (In re *Bell Bros*, 7 L T 689 Foll.)

[5] Reasons for refusing to register transfers should not be arbitrary, capricious or wanton. Where the objection taken by the company for refusal to register the transfer is an arbitrary one in that the company thereby endeavours to try and avoid the consequence of what they considered their own prior mistake and to obtain a position which by their own deliberate act they have waived such objection cannot be upheld. (1912) 6 Low Bur Rul 152 (158).

[6] Directors should refuse registration of transfer of shares when the company is insolvent though winding up is not commenced. (Vol 2) 1915 Lah 320 (321).

[7] Articles gave powers to company to refuse to recognise transfer made when share-holder was indebted to the company on any account whatsoever and gave lien on all shares other than fully paid-up shares—A holder created equitable mortgage over his fully paid-up shares—It was held that power to refuse to register transfer of shares was confined to shares that were not fully paid up. (Vol 21) 1984 Mad 476 (480) : 57 Mad 965 (DB).

[8] Slight delay in according sanction to a transfer of shares would not justify a payment of dividends to a person not yet entered as a member on the books of the company and such a delay would not make the company liable to an action for damages. (Vol. 28) 1936 Lah 207 (208).

[9] An irregularity in a meeting of directors convened for confirmation of a transfer of a share for want of notice does not invalidate a transfer duly made. It is enough that at the date of the winding up there was upon the register a transferee who was legally liable to the company in respect of the shares. (Vol. 23) 1936 Bom 24 (28) : 60 Bom 297.

[10] As to the rights of a purchaser of shares in a company where the transfer of shares has been refused by the company, see (1943) 45 Bom L R 46 (48, 49).

[11] Arbitrary refusal by company to transfer shares in plaintiff's name—Damages when and how far can be claimed stated. (Vol 80) 1948 Mad 743 (748, 749).

5. Transfer and transmission.—[1] Transfer and transmission of shares in a company are quite distinct from each other. The former is based upon the act of parties; the latter is the result of the operation of law. In the case of a transmission of shares they continue to be subject to the original liabilities and if there was any lien on the shares of any sums due, the lien would subsist notwithstanding the devolution of the shares. (Vol 30) 1943 Mad 743 (747).

[2] Articles 19 to 27 of the Articles of Association of a company were under the heading ‘Shares (transfer)’ and articles 28 to 30 were under the heading ‘Shares (transmission)’. Art. 20 provided that the shares in the company shall be transferred by endorsement on the certificate in such form as shall from time to time be approved by the managers of the company. The plaintiff required the defendant company to register in his name certain shares purchased by him at a sale held by Court in execution of a decree and subsequently confirmed. On the company's refusal to register his name the plaintiff brought the suit. It was held that the expression ‘transfer’ was not appropriate to indicate a sale *in invitum* by the Court as that expression was more appropriate to indicate what was effected or brought about by the will of the person in whom the property was vested and that the expression ‘transmission’ was more appropriate than the word ‘transfer’ for indicating

Transfer by legal representative. **35.** A transfer of the share or other interest of a deceased member of a company made by his legal representative shall, although the legal representative is not himself a member, be as valid as if he had been a member at the time of the execution of the instrument of transfer.

[1882—S. 46; See Sch. I, Table A, Regs. 21 & 22; (1908) 8 Edw. VII, C. 62—S. 29; (1929) 19 & 20 Geo. V, C. 23—S. 64]

Inspection of register of members. **36.** (1) The register of members, commencing from the date of the registration of the company ^a[and the index of members] shall be kept at the registered office of the company, and, except when closed under the provisions of this Act, shall during business hours (subject to such reasonable restrictions, as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member gratis, and to the inspection of any other person on payment of one rupee, or such less sum as the company may prescribe for each inspection. ^a[Any such member or other person may make extracts therefrom.]

(2) Any member or other person may require a copy of the register, or of any part thereof, or of the list and summary required by this Act, or any part thereof, on payment of six annas for every hundred words or fractional part thereof required to be copied ^a[and the company shall cause any copy so required by any person to be sent to that person within a period of ten days, exclusive of non-working days and days on which the transfer books of the company are closed, commencing on the day next after the day on which the requirement is received by the company].

^b(3) If any inspection required under this section is refused or if any copy required under this section is not sent within the proper period the company and every officer of the company who is in default shall be liable in respect of each offence to a fine not exceeding twenty rupees and to a further fine not exceeding twenty rupees for every day during which the refusal or default continues and the Court may by an order compel an immediate inspection of the register and index or direct that copies required shall be sent to the persons requiring them.]

[1882—S. 55; (1908) 8 Edw. VII, C. 69—S. 30; (1929) 19 & 20 Geo. V, C. 23—S. 98]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 17.

[15-1-1937]

[b] Substituted, *ibid.*, for the original sub-section.

OBJECTS AND REASONS.

Amendments made in 1936.—“We have extended (3) of section 36 a provision enabling the Court to the time allowed for compliance with a request for a enforce compliance with such a request where there copy of the register, and have added in sub-section is undue delay.”—S. O. R., 1936.

Power to close register. **37.** A company may, on giving ^a[seven days' previous] notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole ^b[forty-five] days in each year ^a[but not exceeding thirty days at a time].

[1882—S. 56; (1908) 8 Edw. VII, C. 69—S. 31; (1929) 19 & 20 Geo. V, C. 23—S. 99]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 18.

[15-1-1937]

[b] Substituted, *ibid.*, for “thirty”.

Section 34 (contd.)

assignments effected by some agency other than the transferor; the case, therefore, fell under the heading ‘Shares (transmission)’. (Vol 15) 1928 Mad 571 (574) (DB).

SECTION 35—Note 1.

[1] As to the liability of a legal representative as a contributory in case of death of member, see S. 160.

[2] As to the meaning of ‘legal representative’ see Civil P. C. S. 2 (11); see also Succession Act, 1925, Sa. 211 and 811.

SECTION 36—Note 1.

[1] The provision in sub-S. (8) as regards immediate inspection being ordered by the Court is pre-

sumably inserted in the Act with a view to provide for those contingencies in which the Court for sufficient reasons is satisfied that the purpose of the inspection will be frustrated unless immediate inspection is ordered. (Vol. 28) 1936 All 568 (572) : 58 All 988.

[2] By sub-S. (9) as substituted by the amending Act of 1936, it is now provided that the Court may by an order “direct that copies required shall be sent to the persons requiring them.” In a case decided prior to the above amendment it was held that the Court had jurisdiction to order a company to deliver a copy of the register of the members of the company to a share-holder of the company even though there was no express provision in the Act empowering it to do so. (Vol 28) 1936 All 568 (572) : 58 All 988.

Power of Court to
rectify register.

38. (1) If—

- (a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company; or
- (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application, or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

SECTION 38—SYNOPSIS.

1. Application for rectification—Sub-S. (1).
2. Application—Parties to.
3. Power of Court—Sub-section (2).
4. Question relating to title—Sub-section (3).
5. "Direct an issue to be tried"—Proviso.
6. Appeal.

1. Application for rectification—Sub-S. (1).—

[1] The articles of association imposed certain restrictions and conditions regarding the change of name in the register. The company insisted on those conditions and restrictions being fulfilled. It was held that the company was not acting 'without sufficient cause' within the meaning of S. 38 (1) (a). (Vol 28) 1936 Rang 52 (58).

[2] Where the contributory has failed to show that his name was entered in the register fraudulently or without sufficient cause, rectification of share register by deleting a number of shares standing against his name cannot be ordered. (Vol 28) 1936 Bom 24 (29) : 60 Bom 297.

[3] The striking out or expunging a member's name from the register is an 'omission' within the meaning of S. 38 (1) (a). (Vol. 28) 1941 Mad 354 (356).

[4] The expression 'omission' may be inapt to cover cases of refusal to register. (Vol 15) 1928 Mad 571 (573) (DB).

[5] Shareholder who transfers his shares is entitled to have his transferee's name registered on an application for the same on proving default or delay on company's part to do the same. (Vol 2) 1915 Bom 1 (10) : 40 Bom 134 (DB).

[6] A mortgage of the uncalled share capital of the company is a person vitally interested in the proceedings for removal of name of a shareholder from the register. (Vol 7) 1920 Cal 789 (790) : 47 Cal 901 (DB).

[7] If names of persons are improperly added in the register, the remedy of the company is to apply under S. 38 for rectification and not to take upon itself to alter the register. (Vol 38) 1946 Mad 35 (35) : 1 L R (1945) Mad 728.

[8] A, the head of a *mutt* was allotted shares in his name—B, his successor in office applied to have the shares in the name of the *mutt*—A still alive—Directors demanding a transfer from A or an indemnity from the *mutt* before making the change—Transfer or indemnity not furnished—Shares forfeited—Suit for rectification by B—B adduced no evidence to show that A had used the funds of the *mutt* in paying the calls—Held that B should have applied for rectification under the Companies Act and such application would have failed as B could not have shown that the directors had acted capriciously or unreasonably in refusing to make the change. (1908) 26 Mad 79 (84, 85).

[9] Transfer of shares in the firm name of a partnership concern and not in the name of any individual—Application for registration under this section is not maintainable. (Vol 81) 1944 Oudh 818 (321).

[10] Where a person purchases shares on condition that he would be appointed Chairman of the local board of the bank and he is allotted shares and appointed Chairman, but subsequently there is a breach of the condition by his dismissal, his remedy is by an action for damages and not for getting his name removed from the register of the share-holders. (Vol 28) 1936 Lah 700 (701) : 17 Lah 798 (DB). (Share-holder having right to have his name expunged from register—No action taken for seven years—Right is barred).

2. Application—Parties to.—[1]—An order to put the transferee's name on the register of the company cannot be made in an action to which the transferor is not a party. (Vol 15) 1928 P C 291 (291) (PC).

[But see (1900) 22 All 410 (419) (DB)].

[2] Directors of a company are not necessary or proper parties to an application made under S. 38. (Vol 38) 1946 Lah 193 (196).

3. Power of Court—Sub-section (2).—[1] Court has ultimate jurisdiction to decide whether a transferee has a right under the Articles of Association to get his name registered or not and for that purpose to determine whether he is a proper person. (1912) 14 Bom L R 919 (921).

[2] Where the company discloses the grounds on which the registration of a transfer is refused, the Court can and should consider such grounds. (1912) 6 Low Bur Rul 152 (157, 158).

[3] Company judge acting under S. 38 has no jurisdiction to appoint Receiver to take over management of Company—O. 40, R 1 (i), Civil P. C. does not apply. (Vol 38) 1946 Lah 193 (198).

[4] Although persons are not entitled to an order *ex debito justitiae*, the jurisdiction under S. 38 is unlimited with a discretion in the Court in the circumstances of each case. (Vol 7) 1920 Cal 789 (790) : 47 Cal 901 *(Vol 15) 1928 Mad 571 (573) (DB).

[5] The exercise of jurisdiction given by S. 38 is discretionary, having regard to the person who is the applicant and to all the facts and circumstances of the case. (Vol 28) 1936 Bom 24 (26) : 60 Bom 297 *(Vol 7) 1920 Low Bur 50 (50).

[6] Section does not confer upon the Court jurisdiction to make a roving enquiry as to whether what has happened is desirable or even reasonable. (Vol 28) 1936 Rang 52 (53).

[7] A person who claims to have been misled by fraud or false representation into taking shares in a company should raise the objection without delay.

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and generally may decide any question necessary or expedient to be decided for rectification of the register:

Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code.

[1882—S. 58; (1908) 8 Edw. VII, C. 69—S. 32 (1), (2), (3); (1929) 19 & 20 Geo. V, C. 23—S. 100 (1), (2), (3)]

Notice to registrar of rectification of register.

39. In the case of a company required by this Act to file a list of its members with the registrar, the Court, when making an order for rectification of the register, shall, by its order, direct notice of the rectification to

Section 38 (contd.)

(Vol 2) 1915 Lah 100 (100) (Having regard to delay of two years and complexity of question involved the High Court refused to exercise its jurisdiction to rectify register under this section).

[8] Mere delay is not by itself a ground for refusing to order rectification. (Vol 26) 1939 Pat 603 (604).

[9] Application designed to save the expense of taking out letters of administration and the transfer of the shares to minor applicants—Application should be rejected. (Vol 7) 1920 Low Bur 50 (50).

[10] In the exercise of its discretion the Court will not order a Company under S. 34 to register a transfer, where the alleged transferor is not before the Court and there is real doubt as to the validity or *bona fides* of the transaction. (1892) 8 Cal 317 (325, 326).

[11] The making of an order under the section is discretionary and it may be refused where there is a conflict of evidence without prejudice to the applicant's right to bring an action for rectification. (1981) 38 Bom L R 184 (208).

[12] A, indebted to a company, deposited certain number of fully paid-up shares with a bank with intent to create an equitable mortgage. The bank entered on the blank transfer-deed names of two of its officials who were registered by the company as the owners of the shares. Subsequently B purchased a number of these shares; but when asked to register the transfer to B the company refused on the ground that a lien which they claimed to possess under one of the Articles of Association upon A's share had not been discharged. On an application for rectification of the register, it was held that the transfer to the officials of the bank was valid and that the company having registered the transfer in the names of the bank officials were now estopped from denying that they were the proprietors of these shares. The rectification of the register in favour of B was ordered. (1912) 6 Low Bur Rul 152 (158).

[13] Quorum of three required at directors' meeting—Five directors at a meeting allotting shares to three of them—S. 91-B Companies Act, disentitling such three from voting—Quorum not formed and allotment is invalid—Rectification ordered. (Vol 8) 1921 Bom 372 (373, 374).

[14] Board of Directors having powers to decline the registration of any transfer of shares unless the transferee is approved by them—Shares transferred—Directors requiring transferees to give undertaking as to their future course of action as regards a

particular question of policy undertaking not given—*Held*, directors could not refuse to register the transfer as they had no personal objection to the transferees. (1892) 16 Bom 80 (90).

4. Question relating to title—Sub-section (3).—

[1] The Court under sub-S. (8) can consider a dispute between a member who applies to have his name removed from the register and the mortgagees of the uncalled share capital of the company. (Vol 7) 1920 Cal 789 (790); 47 Cal 901 (DB).

5. "Direct an issue to be tried"—Proviso.—

[1] The proviso to S. 38 applies to the section generally and not only to the last sub-section. (Vol 8) 1916 Bom 147 (149); 41 Bom 76 (DB).

[2] Under the proviso to the section the Court can direct an issue to be tried. (Vol 15) 1928 Mad 571 (573) (DB).

[3] The jurisdiction of Civil Courts to decide questions falling within the purview of S. 38 is not excluded. (Vol 15) 1928 Lah 234 (235).

[4] The transferee of a share can bring a suit for the registration of his name in respect of the shares purchased and his remedy is not limited to the making of an application under S. 38. (Vol 15) 1928 Mad 571 (581) (DB).

[5] Where complexity of questions are involved, the applicant may pursue his remedy by a regular suit in which all the matters can be properly enquired into. (Vol 2) 1915 Lah 100 (100) (DB).

[6] Where there was a defect in the constitution of the Board of Directors which refused to register the transfer of shares and the defect was not cured by the Articles of Association, *held* that the Court was not bound to dismiss the application for rectification on the ground that there had not been any refusal to register by a properly constituted Board, but might treat the defence set up as a refusal and deal with the application on the merits. (1900) 22 All 410 (421).

6. Appeal.—[1] An appeal lies from an order passed under this section though no issue had been directed upon a question of title. (1899) 26 Cal 944 (945).

[2] The conditions for an appeal are that the lower Court should have directed the trial of an issue involving a question of law and should have come to a decision on such issue. (Vol 8) 1916 Bom 147 (148); 41 Bom 76 (DB).

[3] Under S. 38, the District Judge is not obliged to decide a question of title but if he does decide or direct an issue to be tried, appeal will lie in the manner provided by S. 100, Civil P. C. (Vol 9) 1922 All 258 (260); 44 All 151 (DB).

be filed with the registrar^a [within a fortnight from the date of the completion of the order].

[1882—S. 59; (1908) 8 Edw. VII, C. 69—S. 32 (4); (1929) 19 & 20 Geo. V, C. 23—S. 100 (4)]

[a] Added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 19. [15-1-1937]

Register to be evidence.

40. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

[1882—S. 60; (1908) 8 Edw. VII, C. 69—S. 33; (1929) 19 & 20 Geo. V, C. 23—S. 102]

Power for company to keep branch register in the United Kingdom.

41. (1) A company having a share capital may, if so authorised by its articles, cause to be kept in the United Kingdom a branch register of members (in this Act called a British register).

(2) The company shall, within one month from the date of the opening of any British register, file with the registrar notice of the situation of the office where such register is kept and, in the event of any change in the situation of such office or of its discontinuance, shall within one month from the date of such change or discontinuance, as the case may be, file notice of such change or discontinuance.

(3) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[(1908) 8 Edw. VII, C. 69—S. 34 (1), (2); (1929) 19 & 20 Geo. V, C. 23—S. 103]

OBJECTS AND REASONS.

"We have amended clause 41 (now section 41) so as to require that notice of the facts required to be given by that clause should be given within one month, and we have added a penalty for failure to observe its provisions."—S.O.R., 1918.

Regulations as to British register.

42. (1) A British register shall be deemed to be part of the company's register of members (in this section called the principal register).

(2) It shall be kept in the same manner in which the principal register is by this Act required to be kept, except that the advertisement before closing the register shall be inserted in some newspaper circulating in the locality wherein the British register is kept.

(3) The company shall transmit to its registered office in India a copy of every entry in its British register as soon as may be after the entry is made; and shall cause to be kept at such office, duly entered up from time to time, a duplicate of its British register, and the duplicate shall, for all the purposes of this Act, be deemed to be part of the principal register.

(4) Subject to the provisions of this section with respect to the duplicate register, the shares registered in a British register shall be distinguished from the shares registered in the principal register, and no transaction with respect to any shares registered in a British register shall, during the continuance of that registration, be registered in any other register.

(5) The company may discontinue to keep any British register, and thereupon all entries in that register shall be transferred to the principal register.

(6) Subject to the provisions of this Act, any company may, by its articles, make such regulations as it may think fit respecting the keeping of a British register.

[(1908) 8 Edw. VII, C. 69—S. 35; (1929) 19 & 20 Geo. V, C. 23—S. 104]

SECTION 40—Note 1.

[1] All entries in documents of a company are presumed to be true. The onus lies heavily upon those who assert that the entries are incorrect and had been made fraudulently or without sufficient cause. (Vol 22) 1935 Lah 157 (158) (DB).

[2] Where the name of a person is entered in the register of members, the onus is on him to prove that he is not a member. (Vol 20) 1933 Lah 1016 (1016) * (Vol 20) 1933 Lah 108 (108).

[3] Where the names of persons are found on the register as share-holders, it should be taken for granted that they are qualified to vote for the reduction of capital of the Company. (Vol 28) 1936 Cal 927 (881): 68 Cal 708 (DB). (Burden to prove that they are not so entitled to vote, is on those alleging it.)

[4] The Register of members is *prima facie* evidence of membership and the burden of proving allegations as to conditions and failure to send notice

of allotment is on the person alleging. (Vol 18) 1926 Lah 414 (414).

[5] The register of share-holders in a company is not absolutely conclusive. But it is necessary not only from the point of view of the law but as a matter of policy to see that it is as conclusive as it can be made consistently with a proper interpretation of the Companies Act. Contesting share-holder is as much estopped from going against the register and disowning liability, as the company would be estopped from questioning his title when once he was put upon the register. When he has been treated as share-holder and has acted as such he cannot go back and deny his position. (Vol 28) 1936 Bom 24 (29): 60 Bom 297.

[6] The mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment in fact was made. Notice of allotment is essential. (Vol 20) 1933 Mad 520 (520, 521): 57 Mad 849.

Application of sections 41 & 42 to Burma. a[42 A. (1) The provisions of sections 41 and 42 shall apply in relation to Burma as they apply in relation to the United Kingdom.

(2) In the application of the said provisions to Burma, references to a British register shall be construed as references to a Burma register.]

[a] Inserted by A.O.

Issue of share-warrants to bearer.

43. a[(1)] A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares, or to stock, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the shares or stock included in the warrant, in this Act termed a share-warrant.

b[(2) Nothing in this section shall apply to a private company.]

[1882—S. 30; (1908) 8 Edw. VII, C. 69—S. 37 (1); (1929) 19 & 20 Geo. V, C. 23—S. 70 (1)]

[a] The original S. 43 was re-numbered as sub-section (1) of that section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 20. [15-1-1937].

[b] Added, *ibid*.

OBJECTS AND REASONS.

Amendment made in 1936.—"The issue of bearer share-warrants is not compatible with the provision contained in new section 2 (1) (13) (a). Section 43 should not, therefore, apply to private companies."—S. O. R., 1936.

44. A share-warrant shall entitle the bearer thereof to the shares or stock therein specified, and the shares or stock may be transferred by delivery of the warrant.

[1882—S. 31; (1908) 8 Edw. VII, C. 69—S. 37 (2); (1929) 19 & 20 Geo. V, C. 23—S. 70 (3)].

45. The bearer of a share-warrant shall, subject to the articles of the company, be entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members; and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register the name of a bearer of a share-warrant in respect of the shares or stock therein specified without the warrant being surrendered and cancelled.

[1882—S. 32; (1908) 8 Edw. VII, C. 69—S. 37 (3); (1929) 19 & 20 Geo. V, C. 23—S. 97 (2), (3)].

46. The bearer of a share-warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either to the full extent or for any purposes defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, in cases where such a qualification is required by the articles.

[1882—S. 33; (1908) 8 Edw. VII, C. 69—S. 37 (4); (1929) 19 & 20 Geo. V, C. 23—Ss. 97 (5), 141 (2)].

47. (1) On the issue of a share-warrant, the company shall strike out of its register of members the name of the member then entered therein as holding the shares or stock specified in the warrant as if he had ceased to be a member, and shall enter in the register the following particulars, namely:—

- (i) the fact of the issue of the warrant;
- (ii) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and
- (iii) the date of the issue of the warrant.

(2) If a company makes default in complying with the requirements of this section it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully continues or permits the default shall be liable to the like penalty.

[1882—S. 34; (1908) 8 Edw. VII, C. 69—S. 37 (5); (1929) 19 & 20 Geo. V, C. 93—S. 97 (1)].

48. Until the warrant is surrendered, the above particulars shall be deemed to be the particulars required by this Act to be entered in the register of members; and, on the surrender, the date of the surrender shall be entered as if it were the date at which a person ceased to be a member.

[1908] 8 Edw. VII, C. 69—S. 37 (6); (1929) 19 & 20 Geo. V, C. 23—S. 97 (4)].

SECTION 48—Note 1.

[1] A share-holder whose shares are forfeited ceases to be a member but not one surrendering shares. (Vol 15) 1928 Lah 240 (241).

49. A company, if so authorised by its articles, may do any one or more of the following things, namely:—

Power of company to arrange for different amounts being paid on shares.

(1) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares:

(2) accept from any member who assents thereto the whole or a part of the amount remaining unpaid on any shares held by him although no part of that amount has been called up;

(3) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

[1882—S. 27; See Sch. I, Table A, Regs. 16, 17, 98; (1908) 8 Edw. VII, C. 69—S. 39; (1929) 19 & 20 Geo. V. C. 23—S. 48.]

Power of company limited by shares to alter its share capital.

50. (1) A company limited by shares, if so authorised by its articles, may alter the conditions of its memorandum as follows (that is to say), it may—

(a) increase its share capital by the issue of new shares of such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(c) convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

(2) The powers conferred by this section a[* * *] must be exercised b[by the company in general meeting].

c[(3)] A cancellation of shares in pursuance of this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

c[(4)] The company shall file with the registrar notice of the exercise of any power referred to in clause (d) or clause (e) of sub-section (1) within fifteen days from the exercise thereof.]

[1882—Ss. 12, 23, 24, 25; See Sch. I, Table A, Regs. 41-44 A. (1908) 8 Edw. VII, C. 69—S. 41; (1929) 19 & 20 Geo. V, C. 23—S. 50]

[a] The words "with respect to sub-division of shares" were repealed by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936). S. 21. [15-1-1937]

[b] Substituted by S. 21, *ibid.*, for "by special resolution"

[c] Original sub-sections (3) and (4) were omitted, sub-section (5) was re-numbered (3) and sub-section (4) was added, by S. 21, *ibid.*

SECTION 49—Note 1.

[1] There is by virtue of the ordinary law of partnership an implied condition of equality between shareholders in a company; *prima facie* it is entirely improper for the directors to make a call on some members of a class of shareholders who stand in the same relation to the company as the other members of the class without making a similar call on all the other members of that class. Even assuming that the company has power under its articles of association to make calls on certain members without making similar calls on other members of the class such power should be exercised on special grounds and should not be used against some of the members because they had been dilatory in paying previous calls and caused the company trouble and expense. (1915) 2 Ch 283 (289) ((1894) App Cas 399 (417) relied on).

SECTION 50—Note 1.

Cognate Sections.

Capital, further issue of—105 C.

Share capital, increase of—51.

Share capital, reduction of—55

Stock conversion of shares into—51 52, Regs. 31 to 34.

[1] Suit for declaration that defendants are not shareholders on ground of invalidity of resolution authorising allotment is not competent. Even if such a suit is competent the absence of prayer for consequential relief brings the suit within the mischiefs of S. 42, Specific Relief Act and makes the suit bad. (Vol 19) 1982 Cal 714 (714, 715) (DB).

[2] For the difference between 'shares' and 'Stock' see the following case. (1875) L R 7 H L 717 (723, 724).

OBJECTS AND REASONS.

Amendment made in 1936.—The section as it stood prior to its amendment in 1936 allowed alteration of capital to be effected by the directors and required only an alteration involving sub-division of shares to be made in general meeting. One consequence was that the registrar's office had no record of alterations of capital made by directors. The section as amended in 1936 brings the law into accord with section 50 of

the English Company Act, 1929.—*See S. O. R., 1936, cl. 18.*

"We have brought the provision of the law into conformity with the English Act which does not require a special resolution but only the authority of the company in general meeting for a change in the memorandum."—*S. C. R., 1936.*

Notice to registrar of consolidation of share capital, conversion of shares into stock, etc.

51. (1) Where a company having a share capital has consolidated and divided its share capital into shares of larger amount than its existing shares or converted any of its shares into stock, or re-converted stock into shares, it shall within fifteen days of the consolidation and division, conversion or reconversion, file notice with the registrar of the same, specifying the share consolidated and divided, or converted, or the stock re-converted.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

[1882—S. 51; (1908) 8 Edw. VII, C. 69—S. 42; (1929) 19 & 20 Geo. V, C. 23—S. 51]

52 Where a company having a share capital has converted any of its shares into stock, and filed notice of the conversion with the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the share capital as is converted into stock; and the register of members of the company, and the list of members to be filed with the registrar, shall show the amount of stock held by each member instead of the amount of shares and the particulars relating to shares hereinbefore required by this Act.

[1882—S. 52; (1908) 8 Edw. VII, C. 69—S. 43; (1929) 19 & 20 Geo. V, C. 23—S. 95 (1)].

Notice of increase of share capital or of members.

53. (1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond the registered capital, and where a company not having a share capital has increased the number of its members beyond the registered number, it shall file with the registrar, in the case of an increase of share capital, within fifteen days after the passing a [* * * *] of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place, notice of the increase of capital or members, and the registrar shall record the increase.

b[(2) The notice to be given as aforesaid shall include particulars of the classes of shares affected and the conditions (if any) subject to which the new shares are to be issued.]

b[(3)] If a company makes a default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

[1882—S. 57; (1908) 8 Edw. VII, C. 69—S. 44; (1929) 19 & 20 Geo. V, C. 23—S. 52 (1), (3)].

[a] The words "or in the case of a special resolution the confirmation" were repealed by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 22. [15-1-1937]

[b] Sub-section (2) was inserted and the original sub-section (2) re-numbered (3), by S. 22, *ibid.*

OBJECTS AND REASONS

"We have returned to the drafting of the English Act in regard to special resolutions and have made the necessary alterations in Cl. 53 (now S. 53) and other places where the Bill has departed from the English Act in this respect. In doing so, we have been guided by the fact that, although the English drafting may

be open to question, its language is very familiar to the legal profession and to the general public, and, in these circumstances, it seems to us undesirable to depart from it merely for the sake of a questionable improvement in form."—*S.C.R., 1913.*

54. [Re-organisation of share capital]—*Omitted by the Indian Companies (Amendment) Act, 1942 (17 [XVII] of 1942), S. 2* [30-3-1942].

SECTION 54—Note 1.

The omitted section 54 ran as follows:—

"54 (1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify

the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its share into shares of different classes:

Reduction of Share Capital.

Restrictions on purchase by company or its own shares.

54A. (1) No company limited by shares shall have power to buy its own shares or the shares of a public company of which it is a subsidiary company unless the consequent reduction of capital is effected and sanctioned in the manner provided by Ss. 55 to 66.

(2) No company limited by shares other than a private company, not being a subsidiary company of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company:

Provided that nothing in this section shall be taken to prohibit, where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business.

(3) If a company acts in contravention of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees.

(4) Nothing in this section shall affect the right of a company to redeem any shares issued under S. 105B].

[1882—S. 249; (1929) 19 & 20 Geo. V, C. 23—S. 45.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 [(XXII) of 1936], S. 24.

[15-1-1937].

OBJECTS AND REASONS

Amendment made in 1936.—Before the insertion of this section in 1936, the utilisation of the funds of a company in the purchase of its own shares had the result of reducing its capital and was prohibited by sub-section (1) of S. 55. The prohibition was circumvented in some cases by advancing money out of the

company's funds to nominees who acquired the shares S. 54A, newly inserted in 1936, follows S. 45 of the English Act in forbidding this subterfuge. Sub-S. (1) of existing S. 55 is transferred to the new section now introduced."—See S. O. R., 1936.

Section 54 (contd.)

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and every resolution so passed shall bind all shareholders of the class.

[2] Where an order is made under this section, a certified copy thereof shall be filed with the registrar within twenty-one days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed."

The following is an extract taken from the Statement of Objects and Reasons made for the passing of the Indian Companies (Amendment) Act, 1942, by which this section was omitted: "Section 54 of the Indian Companies Act, 1913, provides that if the conditions contained in the memorandum of a company are to be modified so as to re-organise its share capital, whether by consolidation of shares of different classes or by division of its shares into shares of different classes, no preference or special privilege attached to any class of shares shall be interfered with except by resolution passed by a majority of share-holders of that class holding three-fourths of the share capital of that class. The well-nigh prohibitive majority required by the section has made it extremely difficult, in practice to put through any scheme for consolidation or sub-division of share capital in the case of companies in which the rights and privileges attached to the different classes of shares are set out in the memorandum. With the passing of the Indian Companies (Amendment) Act 1936, an anomaly has resulted—that while under the new section 153 A added by that Act, it is now possible for a company to carry out a scheme for the

transfer of the whole of its assets and undertaking and for dissolution by proceedings under section 153, which require a far less stringent majority than is required by section 54, the relatively less important matter of consolidation or sub-division of the capital of a company can only be effected through the machinery of the latter section. . . .

It is now sought to remedy what was left undone by the Indian Companies (Amendment) Act, 1936, by deletion of section 54 and amendment of section 153. . . ."

SECTION 54A—Note 1.

[1] Provision in the articles for option to the company to buy its own shares is *ultra vires*. (1912) 14 Bom L R 521 (527) (Case decided under original Sub-S. (1) of S. 55 which now corresponds with S. 54A).

[2] Although a company duly created in one state is recognised as a corporation by other states, the transactions of that company are governed not by the law of the state creating it, but by the law of the place where those transactions occur, and by the constitution of the company; the capacity of a company to acquire rights and incur obligations is limited by the object to attain which it is created, and these limits must be regarded whenever and wherever the extent of the corporate powers has to be judicially decided. Thus the legal incapacity of a limited liability company to purchase its own shares is not dependent upon the fact of the purchase being made either within the territorial limits of the place where the company was incorporated or outside its territorial limits but it is beyond the scope of its constitution. (Vol. 30) 1948 Mad 111 (113, 114).

[3] It was held in this case that the exercise of the power of forfeiture of shares did not bring about any illegal reduction of capital in contravention of S. 55 specially in view of the fact that under one of the articles of association of the company all the

55. a[(1)] Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may—

- Reduction of share capital.*
- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up; or
 - (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
 - (c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

a[(2)] A special resolution under this section is in this Act called a resolution for reducing share capital.

[1882—S. 13; (1908) 8 Edw. VII, C. 69—S. 46; (1929) 19 & 20 Geo. V, C. 23—S. 55.]

[a] Original sub-section (1) of S. 55 was omitted and sub-sections (2) and (3) were re-numbered as (1) and (2) respectively, by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986) S. 25. [15-1-1987]

Application to Court for confirming order. **56.** Where a company has passed a [* *] a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

[1882—S. 15; (1908) 8 Edw. VII, C. 69—S. 47; (1929) 19 & 20 Geo. V, C. 23—S. 56 (1)]

[a] The words "and confirmed" were repealed by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986), S. 26. [15-1-1987]

Section 54A (contd.)

shares of the company were fully paid up and that the exercise of this power of forfeiture in the circumstances of this case did not amount to a buying of its own shares so as to offend against 54A. (1945) 49 Cal W N 502 (516).

SECTION 55—Note 1.

Cognate Sections

Articles, alteration of—20.

Memorandum, restriction on the alteration of—10.

Reduction, order confirming—60.

Share, meaning of—2 (16).

[1] Reduction of capital should not be permitted unless effected under statutory authority or by forfeiture as laid down in the articles. Any reduction of capital contrary to this principle is *ultra vires*. (Vol 17) 1980 Bom 267 (271): 54 Bom 178.

[2] Where by its articles, a limited company enabled its subscribers of shares of Rs. 100 to sever all connections with the company on payment of Rs. 84, held that this being reduction of capital without assent of the Court was opposed to S. 55 and such an article was *ultra vires* (Vol 16) 1929 Mad 778 (778): 52 Mad 915 (DB).

[3] A limited company not in liquidation cannot make payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment can only be made by way of division of profits. (Vol 17) 1980 P C 902 (906) (PO).

[4] It is not always essential for the court, when a petition for reduction of capital is made, to satisfy itself that there has been a reduction of capital. The only question which the Court has to consider is whether the company had duly passed its special resolution. (Vol 28) 1986 Cal 827 (830): 63 Cal 708.

[5] But where a reduction of capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed

on some evidence. Where in opposing the petition, a person accepts the statement of the company that there had been a loss of capital as stated by the Managing Director, the Court should act upon the assumption that there is evidence of loss of capital. (Vol. 28) 1986 Cal 827 (830): 63 Cal 708.

[6] For valid surrender, see Sch. 1 Table A Reg. 24.

SECTION 56—Note 1.

[1] Under S. 56, validity of resolution cannot be questioned. The Court is only concerned with confirming the proposed reduction. Questions to be considered are: Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of public who may become shareholders? and, is the reduction fair and equitable as between the different classes of share-holders? Court should not interfere with internal management of a company. (Vol. 26) 1989 Rang 417 (418).

[2] For reduction of the share capital the following principles are applicable. (1) That a company has the power to reduce its capital if the power is conferred by the articles of association. (2) Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. (3) The Company is to determine the extent. The mode and incidence of the reduction. (4) The company may reduce the share capital of all its shareholders *pro rata* or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. (5) That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. (6) That in doing so the Court should keep in view the consideration that the decision has been arrived at by business men who are fully cognizant of their necessities and are the best custodians of their interests and should therefore be slow to interfere. (Vol 25) 1988 Pesh 41 (45).

[3] See also notes on Ss. 55 and 60.

Addition to name of company of "and reduced".

57. On and from the ^a [passing] by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any share-holder of any paid-up share capital, then on and from ^b [the making of the order confirming the reduction], the company shall add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, and those words shall, until that date, be deemed to be part of the name of the company:

Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any share-holder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced".

[1882—Ss. 14, 15; (1908) 8 Edw. VII, C. 69—S. 48; (1928) 19 & 20 Geo. V, C. 23—S. 57 (2) (a), (3)]

[a] *Substituted* for "confirmation" by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 27. [15-1-1937]

[b] *Substituted, ibid.*, for "the presentation of the petition for confirming the reduction".

Objections by creditors and settlement of list of objecting creditors.

58. (1) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital, or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction.

(2) The Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

[1882—S. 16; (1908) 8 Edw. VII, C. 69—S. 49 (1), (2); (1929) 19 & 20 Geo. V, C. 23—S. 56 (2) (a), (b)]

Power to dispense with consent of creditor on security being given for his debt.

59. Where a creditor entered on the list of creditors whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say),—

(i) if the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim;

(ii) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.

[1882—S. 17; (1908) 8 Edw. VII, C. 69—S. 49 (3); (1929) 19 & 20 Geo. V, C. 23—S. 56 (2) (a)]

60. The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has been determined or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

Order confirming reduction.

[(1908) 8 Edw. VII, C. 69—S. 50; (1929) 19 & 20 Geo. V, C. 23—S. 57 (1)].

SECTION 60—Note 1.

Cognate Sections

Company, addition to the name of, words "and reduced."—57.

Creditor, power to dispense with consent of—59.

Creditors, objections by—58.

[1] Where the reduction is shared equally by all the share-holders who are all of one class and is

designed to work justly and equitably not involving diminution of any liability in respect of the unpaid capital or payment to any share-holder of any paid-up capital and there is evidence regarding the loss of capital and non-representation of available assets, there is nothing to prevent the Court from confirming such reduction. (Vol 26) 1939 Rang 417 (418).

[2] See also notes on Ss. 55 and 56.

61. (1) The registrar on production to him of an order of the Court confirming the reduction of the share capital of a company, and on the filing with him of a certified copy of the order and of a minute (approved by the Court) showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount (if any) at the date of the registration deemed to be paid up on each share, shall register the order and minute.

(2) On the registration, and not before, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

[1882—S. 18; (1908) 8 Edw. VIII, C. 69—S. 51; (1929) 19 & 20 Geo. V, C. 23—S. 58 (1), (4)].

Minute to form part of memorandum, **62.** (1) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of the company, and shall be valid and alterable as if it had been originally contained therein, and shall be embodied in every copy of the memorandum issued after its registration.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

[1882—Ss. 19, 21, 25; (1908) 8 Edw. VII, C. 69—S. 52; (1929) 19 & 20 Geo. V, C. 23—S. 58 (5)].

Liability of members in respect of reduced shares. **63.** (1) A member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount paid, or (as the case may be) the reduced amount, if any, which is to be deemed to have been paid, on the share and the amount of the share as fixed by the minute:

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim not entered on the list of creditors, and, after the reduction, the company is unable, within the meaning of the provisions of this Act with respect to winding up by the Court, to pay the amount of his debt or claim, then—

(i) every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt, or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before that registration; and

(ii) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

[1882—Ss. 19, 20; (1908) 8 Edw. VII, C. 69—S. 55; (1929) 19 & 20 Geo. V, C. 23—S. 59.]

Penalty on concealment of name of creditor. **64.** If any officer of the company wilfully conceals the name of any creditor entitled to object to the reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor, or if any officer of the company abets any such concealment or misrepresentation as aforesaid, every such officer shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

[1882—S. 22; (1908) 8 Edw. VII, C. 69—S. 54; (1929) 19 & 20 Geo. V, C. 23—S. 60].

Publication of reasons for reduction.

65. In any case of reduction of share capital, the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

[(1908) 8 Edw. VII, C. 69—S. 55; (1929) 19 & 20 Geo. V, C. 23—S. 57 (a), (b)].

Increase and reduction of share capital in case of a company limited by guarantee having a share capital.

66. A company limited by guarantee and registered after the commencement of this Act may, if it has a share capital and is so authorised by its articles, increase or reduce its share capital in the same manner and subject to the same conditions in and subject to which a company limited by shares may increase or reduce its share capital under the provisions of this Act.

[(1908) 8 Edw. VII, C. 69—S. 46; (1929) 19 & 20 Geo. V, C. 23—S. 55.]

a[Variation of Shareholders' Rights.]

Rights of holders of special classes of shares.

a[**66A.** (1) If in the case of a company, the share capital of which is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than ten per cent of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the variation cancelled, and where any such application is made the variation shall not have effect unless and until it is confirmed by the Court.

(2) An application under this section must be made within fourteen days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(3) On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the Court on any such application shall be final.

(5) The company shall within fifteen days after the service on the company of any order made on any such application forward a copy of the order to the registrar and, if default is made in complying with this provision, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(6) The expression "variation" in this section includes "abrogation" and the expression "varied" shall be construed accordingly.]

[(1929) 19 & 20 Geo. V, C. 23—S. 61.]

[**a**] This heading and S. 66-A were inserted by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986), S. 28. [15-1-1987.]

Registration of Unlimited Company as Limited.

Registration of unlimited company as limited.

67. (1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts, liabilities, obligations or contracts incurred or entered into by, to, with or on behalf of, the company before the registration, and those debts, liabilities, obligations and contracts may be enforced in manner provided by Part VIII of this Act in the case of a company registered in pursuance of that Part.

(2) On registration in pursuance of this section, the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any

documents with copies of which he was furnished on the occasion of the original registration of the company; but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act.

[(1908) 8 Edw. VII, C. 69—S. 57; (1929) 19 & 20 Geo. V, C. 23—S. 16.]

Power of unlimited company to provide for reserve share capital on re-registration.

68. An unlimited company having a share capital may, by its resolution for registration as a limited company in pursuance of this Act, do either or both of the following things, namely:—

- (a) increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the amount by which its capital is so increased shall be capable of being called up except in the event and for the purposes of the company being wound up;
- (b) provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up.

[(1908) 8 Edw. VII, C. 69—S. 58; (1929) 19 & 20 Geo. V, C. 23—S. 53.]

Reserve Liability of Limited Company.

Reserve liability of limited company.

69. A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except in the event and for the purposes aforesaid.

[(1908) 8 Edw. VII, C. 69—S. 59; (1929) 19 & 20 Geo. V, C. 23—S. 49]

Unlimited Liability of Directors.

Limited company may have directors with unlimited liability.

70. (1) In a limited company the liability of the directors or of any director may, if so provided by the memorandum, be unlimited.

(2) In a limited, company in which the liability of any director is unlimited, the directors of the company (if any) and the member who proposes a person for election or appointment to the office of director shall add to that proposal a statement that the liability of the person holding that office will be unlimited and the promoters and officers of the company, or one of them, shall, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

(3) If any director or proposer makes default in adding such a statement, or if any promoter or officer of the company makes default in giving such a notice, he shall be liable to a fine not exceeding one thousand rupees and shall also be liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed shall not be affected by the default.

[1882—S. 7; (1908) 8 Edw. VII, C. 69—S. 60; (1929) 19 & 20 Geo. V, C. 23—S. 146.]

Special resolution of limited company making liability of directors unlimited.

71. (1) A limited company, if so authorised by its articles, may, by special resolution, alter its memorandum so as to render unlimited the liability of its directors or of any director.

(2) Upon the [passing] of any such special resolution, the provisions thereof shall be as valid as if they had been originally contained in the memorandum. [* * *]

[1882—S. 76 (3); (1908) 8 Edw. VII, C. 69—S. 61; (1929) 19 & 20 Geo. V, C. 23—S. 147]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 29, for "confirmation". [15-1-1937]

[b] Certain words in sub-section (2) and sub-section (3) of S. 71 were repealed by S. 29, *ibid.*

SECTION 70—Note 1.

[1] In the winding up of a limited company any director whether past or present, whose liability is, in pursuance of this Act, unlimited, shall, in

addition to his liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company; see section 157,

OBJECTS AND REASONS

After the word 'memorandum' sub-section (2) contained the words : "A copy thereof shall be embodied in or annexed to every copy of the memorandum issued after the confirmation of the resolution ; "and sub-section (3) provided a penalty for the default.

The words and the sub-section are omitted by the amending Act of 1936, as they are no longer necessary in view of section 25 A newly inserted.—See S. O. R. 1936.

PART IV.

MANAGEMENT AND ADMINISTRATION

Office and Name

Registered office of company. a[72. (1) A company shall as from the day on which it begins to carry on business, or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which all communications and notices may be addressed.

(2) Notice of the situation of the registered office and of any change therein shall be given within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be, to the registrar who shall record the same.

(3) The inclusion in the annual return of a company of the statement as to the address of its registered office shall not be taken to satisfy the obligation imposed by this section.

(4) If a company carries on business without complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which it so carries on business.]

[1882—Ss. 63, 64 ; (1908) 8 Edw. VII, C. 69—S. 62 ; (1929) 19 & 20 Geo. V, C. 23—S. 92]

[a] Substituted for the original section, by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 30. [15-1-1937]

Publication of name by a limited company. 73. Every limited company—

- (a) shall paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible and in English characters, and also, if the registered office be situate in a place beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ;
- (b) shall have its name engraven in legible characters on its seal ;
- (c) shall have its name mentioned in legible English characters in all bill-heads and letter paper and in all notices, advertisements and other official publications of the company, and in all bills of exchange, hundis, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels ; invoices, receipts and letters of credit of the company.

[1882—S. 65 ; (1908) 8 Edw. VII, C. 69—S. 63 (1) ; (1929) 19 & 20 Geo. V, S. 23—S. 93 (1)]

SECTION 72—Note 1.

[1] This section is merely permissive and not imperative. It only provides one of several methods whereby a communication of notice may be served on a company. (Vol 28) 1941 Rang 389 (340) (SB).

[2] Where there is a change in the registered office of a company, in order that the change might be effective it is necessary that the registrar should be notified of the change. A mere resolution to change is insufficient. (Vol 18) 1931 Cal 692 (694) : 58 Cal 716. (Part of business of company shifting but registered office still existing at its usual place—Notice must be addressed to usual registered office).

SECTION 73—Note 1.

[1] Section 73 being a penal provision has to be construed strictly. Its object is to make the company

itself continually to bring to the notice of those who deal or might deal with it the fact that it is limited. The requirements of this section would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building in which it is situate. The words 'outside the office' in clause (a) cannot be construed to mean outside the premises in which the office is situate. (Vol 28) 1941 Bom 97 (98) : ILR (1941) Bom 186 : 42 Cr L Jour 452 (DB).

[2] Where a promissory note is signed by secretary on paper bearing rubber stamp of company the note must be deemed to be signed on behalf of the company. (Vol 10) 1928 Bom 29 (29) (DB) (Case under S. 72 of Act VI of 1882).

OBJECTS AND REASONS

"We have amended clause 78 (now section 78) so as to make it clear that the name of the company need not be translated into the English language, and that it will suffice if it is in English characters. We do not think it necessary to require that the name of the company should be recorded on its seal in more than one language, and we have amended clause 78 (b) accordingly. We have amended clause 78 (c) by the addition of the words 'bill-heads and letter paper'". —S. C. R., 1913.

Penalties for non-publication of name. **74.** (1) If a limited company does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a fine not exceeding fifty rupees for not so painting or affixing its name, and for every day during which its name is not so kept painted or affixed, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

(2) If any officer of a limited company, or any person on its behalf, uses or authorises the use of any seal purporting to be a seal of the company where-on its name is not so engraven as aforesaid, or issues or authorises the issue of any bill-head, letter paper, notice, advertisement or other official publication of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, hundi, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding five hundred rupees, and shall further be personally liable to the holder of any such bill of exchange, hundi, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

[1882—S. 66 ; (1908) Edw. VII, C. 69—S. 63 (2), (3) ; (1929) 19 & 20 Geo. V, C. 23—S. 93 (2), (4)]

Publication of authorised as well as subscribed and paid-up capital. **75.** (1) Where any notice, advertisement or other official publication of a company contains a statement of the amount of the authorised capital of the company, such notice, advertisement or other official publication shall also contain a statement in an equally prominent position and in equally conspicuous characters of the amount of the capital which has been subscribed and the amount paid up.

(2) Any company which makes default in complying with the requirements of this section and every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding one thousand rupees.

OBJECTS AND REASONS.

"We have inserted a new clause 75 (now section 75) requiring a company which publishes a statement of its authorised capital to mention in an equally conspicuous manner its subscribed and paid-up capital, and have annexed a penalty for failure to comply with its provisions. It is analogous to the provision in the existing law relating to Life Assurance. We regard this as an important safeguard to prevent the deception of the more ignorant class of investors." —S. C. R., 1913

Meetings and Proceedings.

Annual general meeting. **76.** (1) A general meeting of every company shall be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting.

SECTION 74—Note 1.

[1] Section 78 is a penal provision and should be construed strictly. The burden, therefore, is very strongly on the prosecution to show that there really has been an infringement of the law. (Vol 28) 1941 Bom 97 (98) : ILR (1941) Bom 186 : 42 Or L Jour 452 (DB).

SECTION 76—Note 1.

[1] Section 76 demands that a distinct and separate meeting should be held every year. Same meeting cannot be continued and held once in each year. (Vol 25) 1938 Mad 640 (641) : 39 Or L Jour 907. (Contention, that as general meeting called on 30-12-1934 was adjourned to and held on 31-3-1935 it follows that general meeting held on 23-1-1936 was within fifteen months of 31-3-1935 overruled).

[2] Extraordinary meeting held on requisition by shareholders is not a general meeting within S. 76. (Vol 10) 1928 Bom 194 (195) : 24 Or L Jour 349. (DB).

[3] Section does not differentiate between a general meeting and an extraordinary general meeting of a company. Where an extraordinary general meeting of a company was held within fifteen months of the last general meeting, it was held that no offence had been committed under S. 76 (1). (Vol 7) 1920 All 357 (358) : 21 Or L Jour 94.

[4] The expression 'manager' includes every person or body of persons who conducts or conduct the affairs of the company and to whom its management, subject to the control of the Directors, is entrusted. (Vol 3) 1916 Lah 199 (201) : 17 Or L Jour 306.

(2) If default is made in holding a meeting in accordance with the provisions of this section, the company and every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees.

(3) If default is made as aforesaid, the Court may, on the application of any member of the company, call or direct the calling of a general meeting of the company.]

[1882—S. 74; See Sch. I, Table A, Regs. 45 to 67; (1908) 8 Edw. VII, C. 69—S. 64; (1929) 19 & 20 Geo. V, C. 23—S. 112]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 31 for the original section. [15-1-1937]

Statutory meeting of company. a[77. (1) Every company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month nor more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting.

(2) The directors shall, at least twenty-one days before the day on which the meeting is held, forward a report (in this Act referred to as the statutory report) certified as required by this section to every member of the company.

(3) The statutory report shall be certified by not less than two directors of the company or by the chairman of the directors if authorised in this behalf by the directors and shall state—

- (a) the total number of shares allotted, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted;
- (b) the total amount of cash received by the company in respect of all the shares allotted, distinguished as aforesaid;
- (c) an abstract of the receipts of the company and of the payments made thereout up to a date within seven days of the date of the report, exhibiting under

Section 76 (contd.)

[5] A firm is as capable of managing a company as an individual. (Vol 3) 1916 Lah 199 (201): 17 Or L Jour 306. (If it does so, it cannot escape liability for its misfeasance or nonfeasance merely by calling itself Managing Agent instead of Manager. Case under Act of 1882, S. 74, now S. 134).

[6] An ordinary director of a company who was not knowingly and wilfully a party to the default under S. 76 (2) cannot be convicted. (1942) 43 Or L Jour 295 (295) (Mad) * ('41) 42 Cr L Jour 854 (854) (Mad).

[7] Before conviction of an officer under S. 134 (4) Companies Act for default in submitting the balance-sheet in a case where no general meeting was held, it must be shown with reference to the provisions of S. 76 of the Act, that the officer was party to default in holding the general meeting. (Vol 5) 1918 Cal 190 (191): 18 Cr L Jour 325. (DB).

[8] Where the officers took legal advice and acted accordingly it was held that they could not be said to have been 'knowingly parties to the default.' (Vol 25) 1938 Mad 640 (641): 39 Or L Jour 907.

[9] Where there is conviction of a director under S. 76, conviction under S. 32 may be dropped. (Vol 29) 1942 Cal 225 (225): 43 Cr L Jour 466.

[10] *Sub-section (3)*—The terms of the section are mandatory. It can be invoked by any member when there is a failure to summon the general meeting but it does not enable the Court to make an order which will excuse persons responsible for failure to call a general meeting from the consequences of their omission. (Vol 21) 1934 Cal 624 (625): 61 Cal 408.

[11] *General Body*—Per Lord Hardwicke—“Wherever a certain number are incorporated, a major part of them may do any corporate act. So if all are summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part.” (1744) 26 E R 581 (581) * 2 Atk 212.

[See also (1888) 21 Q B D 160 (165) (Observations of Wills, J.)]

[12] General body can sanction payment of gratuity to ex-servant even if by-laws did not provide for its payment—Mere fact that Board of Management is delegated with power to frame by-laws does not take away power of General body to sanction a gratuity. (Vol 27) 1940 Mad 928 (928, 929).

[13] Whether the Registrar has powers to condone delay in the holding of general meeting. (Vol 28) 1941 Mad 504 (504): 42 Cr L Jour 688. (In this case the conviction was set aside as there was no contention regarding whether he had or had not power to condone).

[See also (Vol 21) 1934 Cal 624 (625): 61 Cal 408 (Where Buckland, J. seems to be of opinion that the registrar has no such power).

SECTION 77—Note 1.

[1] *Sub-section (9)*—A company may be wound up by the Court if default is made in filing the statutory report or in holding the statutory meeting; see section 162.

[2] Where a petition for winding up a company is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the

distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning the balance remaining in hand, and an account or estimate of the preliminary expenses of the company showing separately any commission or discount paid on the issue or sale of shares;

- (d) the names, addresses and descriptions of the directors, auditors, managing agents and managers, if any, and secretary of the company and the changes, if any, which have occurred since the date of the incorporation;
- (e) the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification;
- (f) the extent to which underwriting contracts, if any, have been carried out;
- (g) the arrears, if any, due on calls from directors, managing agents and managers; and
- (h) the particulars of any commission or brokerage paid or to be paid in connection with the issue or sale of shares to any director, managing agent or manager or a partner of the managing agent if the managing agent is a firm or if the managing agent is a private company, a director thereof.

(4) The statutory report shall, so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares and to the receipts and payments of the company, be certified as correct by the auditors of the company.

(5) The directors shall cause a copy of the statutory report certified as required by this section to be delivered to the registration forthwith after the sending thereof to the members of the company.

(6) The directors shall cause a list showing the names, descriptions and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

(7) The members of the company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the articles may be passed.

(8) The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting shall have the same powers as an original meeting.

(9) If a petition is presented to the Court in manner provided by Part V for winding up the company on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just.

(10) In the event of any default in complying with the provisions of this section every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding five hundred rupees.

(11) This section shall not apply to a private company.

[1882—S. 75; See Sch. I, Table A, Reg. 45; (1908) 8 Edw. VII, C. 69—S. 65; (1929) 19 & 20 Geo. V, C. 23—Ss. 113, 171 (2)]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 32 for the Original section. [15-1-1937]

Section 77 (contd.)

Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default.—See section 170 (2).

[3] Sub-section (10)—The prosecution has only to prove that the officer knowingly and wilfully authorised or permitted the defaults, in order to sustain a

conviction under this section. (Vol 28) 1936 Cal 287 (288): 37 Cr L Jour 552.

[4] Offence committed and punishable under Companies Act (1882) while it was in force cannot be punished after its repeal. (Vol 4) 1917 Lah 280 (280): 15 Cr L Jour 596.

Calling of extra-ordinary general meeting on requisition.

78. (1) Notwithstanding anything in the articles, the directors of a company which has a share capital shall, on the requisition of the holders of not less than one-tenth of the issued share capital of the company upon which all calls or other sums then due have been paid, forthwith proceed to call an extraordinary general meeting of the company.

(2) The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form, each signed by one or more requisitionists.

(3) If the directors do not proceed within twenty-one days from the date of the requisition being so deposited to cause a meeting to be called, the requisitionists, or a majority of them in value, may themselves call the meeting, but in either case any meeting so called shall be held within three months from the date of the deposit of the requisition.

^a[(4)] Any meeting called under this section by the requisitionists shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by directors.

^a[(5)] Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting shall be repaid to the requisitionists by the company, and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default.]

[See Sch. I, Table A, Reg. 48. (1908) 8 Edw. VII, C. 69—S. 66; (1929) 19 & 20 Geo. V, C. 23—S. 114]

[a] Sub-section (4) was omitted, original sub-section (5) was renumbered as (4) and sub-section (5) was added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 88. [15-1-1937]

^a[79. (1) The following provisions shall have effect with respect to meetings of a company other than a private company not being a subsidiary of a public company and the procedure thereat, notwithstanding any provision made in the articles of the company in this behalf:—

Provisions as to meetings and votes.

- (a) a meeting of a company other than a meeting for the passing of a special resolution may be called by not less than fourteen days' notice in writing; but with the consent of all the members entitled to receive notice of some particular meeting that meeting may be convened by such shorter notice and in such manner as those members may think fit;

SECTION 78—Note 1.

[1] A share-holder is entitled to be given adequate information as to the business to be transacted at the meeting. But this does not mean that in order to make the meeting a valid one, the notice of the meeting should recite all facts necessary to meet every technical objection which may be raised to its validity. (Vol. 27) 1940 Sind 87 (88).

[2] *Meeting on requisition.*—No presumption that requisition was received on the date it bears (Vol. 27) 1940 Sind 87 (88).

SECTION 79—SYNOPSIS

1. Notice
2. Proxies.
3. Procedure at Meetings.

1. **Notice.**—[1] Meeting not held in accordance with Articles of Association or by direction of Court to a liquidator in winding up proceedings is not a meeting of the company. The mere fact that certain share-holders met together at a private house and passed resolutions appointing directors and so on, does not make that a meeting of the Company. (Vol. 12) 1925 Cal 817 (818); 52 Cal 518 (DB).

[2] Share-holder having knowledge about business to be transacted at meeting cannot complain of insufficiency of notice. (Vol. 15) 1928 P C 180 (185); 55 Ind App 274; 52 Bom 571 (PC) * (Vol. 12) 1925 Bom 49 (54) (DB). (Share-holder by his conduct

showing that he knew the real nature of the business to be transacted at the meeting).

[3] The omission to mention any secret arrangement would constitute a serious defect in the notice. But where no such arrangement is proved the Court will not upset any proceedings taken on a notice for some defect due to an honest mistake. (Vol. 12) 1925 Bom 49 (55) (DB).

[4] As to the publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies, see Insurance Act, 1938, S. 100.

2. **Proxies.**—[1] A second proxy after expiry of time does not revoke the first lodged in time. (Vol. 15) 1928 Bom 80 (89).

[2] Members voting on amendment but the substantive proposition was voted on by their proxies—*Held* the proxies votes were valid. (Vol. 15) 1928 Bom 80 (86).

[3] One proxy form was settled by Court—A member signing the proxy added some words which were too vague to have any meaning. *Held* that the votes were good. (Vol. 15) 1928 Bom 80 (87).

[4] Voting made by proxy in the presence of the member entitled to vote is valid. (Vol. 15) 1928 Bom 80 (86).

[5] Undated proxies are valid. (Vol. 15) 1928 Bom 80 (88).

- (b) notice of the meeting of a company with a statement of the business to be transacted at the meeting shall be served on every member in the manner in which notices are required to be served by Table A and for the purpose of this clause the expression 'Table A' means that table as for the time being in force; but the accidental omission to give notice to, or the non-receipt of notice by, any member shall not invalidate the proceedings at any meeting;
 - (c) five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll: Provided that in the case of a private company if not more than seven members are personally present, one member, and if more than seven members are personally present, two members shall be entitled to demand a poll;
 - (d) an instrument appointing a proxy, if in the form set out in regulation 67 of Table A, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles; and
 - (e) any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class.
- (2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf:—
- (a) two or more members holding not less than one-tenth of the total share capital paid up or, if the company has not a share capital, not less than five per cent, in number of the members of the company may call a meeting;
 - (b) in the case of a private company two members and in the case of any other company five members personally present shall be a quorum;
 - (c) any member elected by the members present at a meeting may be chairman thereof;

Section 79 (contd.)

[6] Any substantial failure to comply with the Court's discretion would invalidate the proxy. (Vol 15) 1928 Bom 80 (89).

[7] Proxies given by debtors to the company are bad. (Vol 15) 1928 Bom 80 (88).

[8] Proxies given by company in favour of its director are bad. (Vol 15) 1928 Bom 80 (87).

[9] Votes recorded on unstamped proxies must be excluded. (Vol 15) 1928 Bom 80 (89).

3. Procedure at Meetings.—[1] As to provisions relating to Quorum of members, see Reg. 51; Chairman at the general meeting see Regs. 53, 54; Adjournment of meeting, see Reg 55; Method of taking votes, see Regs. 60 to 63.

[2] While any of the business for which the meeting is convened remains unfinished, the chairman of the meeting, unless so empowered by the articles, has no power to stop or adjourn the meeting at his own will. (1894) 3 Ch. 159 (162) (If he does so, the meeting can conduct the business in hand and appoint another chairman for that purpose).

[8] Amendment moved should not be in substance a direct negation of the subject matter of the proposition. Nor can it go beyond the notice conveying the meeting or in the case of an ordinary meeting, beyond the scope of the ordinary business which by the articles may be transacted without special notice. Thus where in an ordinary meeting convened for the purpose of receiving and adopting the accounts an amendment to remove the directors will be irregular; but an amendment refusing to adopt it and appointing a committee of inspection to examine and make a report is valid. (Vol 32) 1945 Bom 475 (476, 477): ILR (1945) Bom 687

[4] Any proper amendment should not be ruled out without being put for consideration and if the chairman rules out, the resolution is liable to be set aside. But an amendment which contains a counter proposal involving either adjournment or rejection of the proposal or where the amendment goes beyond the scope of the subject matter of resolution should be ruled out. Hence where the subject for consideration whether a proposal for amalgamation with another company is to be accepted or not, an amendment which in effect wanted a modification of the scheme and required the other company to do something after amalgamation, the amendment is illegal. But the shareholders can adjourn consideration of proposal in order to negotiate with the other company. (Vol 12) 1925 Bom 49 (57, 58) (DB).

[5] When the chairman wrongly rules the amendment out of order and the original unamended proposition is moved and lost, the proper course is to treat the proceeding subsequent to the putting of proposition as a nullity and to call another general meeting and start afresh with the consideration of the proposition. (Vol 32) 1945 Bom 475 (476, 477): ILR (1945) Bom 687.

[6] Amendment to resolution lost on show of hands—Poll demanded and taken—But before declaration of result of poll, demand for poll and other amendments withdrawn and new amendment allowed—Original resolution is not invalidated. (Vol 12) 1925 Bom 49 (69) (DB).

[7] Amendment may be rejected if it is contrary to the terms of the order of the Court, under which the meeting takes place. (Vol 12) 1925 Bom 105 (106) (DB).

[8] Point of order assailing competency of the meeting to consider the resolution which is long

- (d) in the case of a company originally having a share capital, every member shall have one vote in respect of each share or each hundred rupees of stock held by him, and in any other case every member shall have one vote;
- (e) on a poll votes may be given either personally or by proxy;
- f) the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing, or if the appointor is a corporation, either under seal or under the hand of an officer or an attorney duly authorised; and
- (g) a proxy must be a member of the company.

(3) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.]

[1882—S. 78. See Sch. I, Table A, Regs. 49 to 67 and 112 to 116. (1908) 8 Edw. VII, C. 69—S. 67; (1929) 19 & 20 Geo. V, C. 23—S. 115]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 34 for the original section. [15-1-1937]

OBJECTS AND REASONS.

Amendment made in 1936.—This section is "based on section 115 of the English Act, but whereas that section allows of its provisions being overridden by the provisions made in the articles of the company, the section here makes certain provisions such as those governing the notice to be given for special resolution, the manner of service of notices, the number of members entitled to demand a poll and the form of proxy instruments incapable of variation."—S. O. R., 1936.

"We have provided specifically that agenda must accompany notice of a general meeting, and have amplified the provisions relating to demand for a poll. We have added a provision to deal with a practice said to be not uncommon of denying to share-holders duly brought on the register the full exercise of their rights as share-holders until after a specified period. We have increased the quorum for a general meeting of a public company, where other provision is not made in the article, to five." —S. C. R., 1936.

Representation of companies at meetings of other companies of which they are members.

80. A company which is a member of another company may, by resolution of the directors, authorise any of its officials or any other person to act as its representative at any meeting of that other company, and the person so authorised shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

[See Sch. I, Table A, Reg. 64. (1908) 8 Edw. VII, C. 69—S. 68; (1929) 19 & 20 Geo. V, C. 23—S. 116]

81. (1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

Extraordinary and special resolutions.

Section 79 (contd.)

enough to form a speech against the resolution is properly ruled out as a point of order. (Vol 12) 1925 Bom 49 (56) (DB).

[9] A share-holder is entitled to be heard in reasonable terms for a reasonable time. Whether the denial of this right vitiates the resolution itself, depends on the circumstances of each case. If it is practically certain that his speech would not have made any difference in the situation, the resolution will stand. (Vol 12) 1925 Bom 49 (58, 59) (DB).

[10] A speaker who is shouted down to his seat can be held to have been prevented from speaking if from circumstances it appears that he would have been prevented if he continued. (Vol 12) 1925 Bom 49 (58, 59) (DB).

[11] Objection to validity of votes must be handed to the chairman before the commencement of the poll with particulars of the votes objected to. (Vol 12) 1925 Bom 49 (60) (DB).

SECTION 81—SYNOPSIS.

1. Amendments to resolutions.—See S. 79 N. 3.
2. Notice.
3. Proxy.—See S. 79.
4. Declaration of Chairman—Sub-S. (3).
5. Taking of poll—Sub-S. (5).

1. Amendments to resolutions.—See S. 79. N. 3.

2. Notice.—[1] The omission to name the Meeting as extraordinary in the notice does not vitiate the proceedings, when the agenda indicated and the members had knowledge of the purpose of the meeting and did not object. (Vol 25) 1938 Pesh 41 (44).

a[(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice specifying the intention to propose the resolution as a special resolution has been duly given :

Provided that, if all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.]

(3) At any meeting at which an extraordinary resolution b[or a special resolution is submitted to be passed] a declaration of the chairman on a show of hands that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(4) At any meeting at which an extraordinary resolution b[or a special resolution is submitted to be passed] a poll may be demanded of [* *].

(5) In a case where, if a poll is demanded, it may in accordance with the articles be taken in such manner as the chairman may direct ; it may, if the chairman so directs, be taken at the meeting at which it is demanded.

(6) When a poll is demanded in accordance with this section, in computing the majority on the poll, reference shall be had to the number of votes to which each member is entitled by the articles of the company, d[or under this Act.]

(7) For the purposes of this section notice of a meeting shall be deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the articles, a[or under this Act.]

[1882—Ss. 77, 78 ; (1908) 8 Edw. VII, C. 69—S. 69 ; (1929) 19 & 20 Geo. V, C. 23—S. 117]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 95 for the original sub-section. [15-1-1937]

[b] *Substituted, ibid.*, for the words "is submitted to be passed or a special resolution is submitted to be passed or confirmed."

[c] Certain words were *repealed, ibid.*

[d] *Added, ibid.*

OBJECTS AND REASONS.

Amendment made in 1936.—Section 81 is amended in 1936 on the lines of S. 117 of the English Act, that is to say, it abolishes the necessity for the confirmation of a special resolution by a second general meeting, but requires 21 days' notice to be given of the meeting at which the special resolution is passed.—S.O.R., 1936.

82. (1) A copy of every special and extraordinary resolution shall, within fifteen days from a[the passing thereof] be printed or typewritten b[and duly certified under the signature of an officer of the company] and filed with the registrar who shall record the same.

Registration and copies of special and extraordinary resolutions.

Section 81 (contd.)

[2]—A special resolution seeking to amend the articles without proper notice under S. 81 is *ultra vires* and invalid. (Vol 27) 1940 Lah 243 (244).

[3] If the directors issue a circular in which they refer to certain alterations and say that only alterations are with regard to cl. (x) of the articles of associations, whereas there are equally important alterations in cl. (y), it cannot be said that shareholders have sufficient notice of the alterations in cl. (y). (Vol 18) 1931 Bom 354 (365) (DB).

3. Proxy—See S. 79.

4. Declaration of Chairman—Sub-S. (3) —

[1] A declaration of the chairman in a show of hands that the resolution is carried is conclusive evidence and the minutes of the meeting are not admissible in evidence to show that the declaration of the chairman is unwarranted. (Vol 16) 1929 Bom 38 (44).

[2] The conclusiveness of the declaration of the chairman contemplated by Sub-section (3) attaches to the declaration where the chairman does not find by the declaration the figures for or against the resolution. But where the chairman by his declaration finds the figures and erroneously in point of law holds that the resolution has been duly passed, the resolution cannot be said to have been passed according to law. (Vol 24) 1937 Cal 645 (648, 649) : I L R (1938) 1 Cal 90 (DB).

5. Taking of poll—Sub-S. (5).—[1] When a poll is demanded at a general meeting, the original meeting in law continues until the chairman has carried out the direction given to him by the shareholders to take a poll. It is a notional meeting not dependent for its existence and continuity upon the shareholders being actually in session and business being transacted. The actual process of holding the poll is not a meeting at all. It differs in several of its features from any meeting of shareholders. It is only the result of the poll which forms part of the meeting at which the poll was demanded by being deemed to be a resolution passed at it. (Vol 19) 1932 Mad 100 (102) (DB).

SECTION 82—Note 1.

[1] The Registrar has power to exercise a discretion to refuse to register with regard to the alterations.

(2) Where articles have been registered, a copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the date of the resolution.

(3) Where articles have not been registered, a copy of every special resolution shall be forwarded in print to any member at his request, on payment of one rupee or such less sum as the company may direct.

(4) If a company makes default in so filing with the registrar a copy of a special or extraordinary resolution, it shall be liable to a fine not exceeding twenty rupees for every day during which the default continues.

(5) If a company makes default in embodying in or annexing to a copy of its articles or in forwarding in print to a member when required by this section a copy of a special resolution, it shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(6) Every officer of a company, who knowingly and wilfully authorises or permits any default by the company in complying with the requirements of this section shall be liable to the like penalty as is imposed by this section on the company for that default.

[1882—Ss. 79, 80 ; (1908) 8 Edw. VII, C. 69—S. 70 ; (1929) 19 & 20 Geo. V, C. 23—S. 118.]

[a] Substituted for "the confirmation of the special resolution or from the passing of the extraordinary resolution, as the case may be," by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 86. [15-1-1937]

[b] Inserted, *ibid.*

Minutes of proceedings of general meetings and of its directors.

83. (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose.

(2) Any such minute, if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or meeting of directors in respect of the proceedings whereof minutes have been so made shall be deemed to have been duly called and held, and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

a[(4) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936, shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that no less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge.

(5) Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (4) at a charge not exceeding six annas for every hundred words.

(6) If any inspection required under sub-section (4) of this section is refused or if any copy required under sub-section (5) of this section is not furnished within the time specified in sub-section (5) the company and every officer of the company who is knowingly and wilfully in default shall be liable in respect of each offence to a fine not exceeding twenty-five rupees and to a further fine not exceeding twenty-five rupees for every day during which the default continues.

Section 82 (contd.)

tion of articles to same extent as he has with regard to articles. (Vol. 20) 1938 Mad 129 (129). (Alteration to carry on lottery—Registrar has power to refuse registration).

[2] There is nothing in the Companies Act which prohibits the Registrar from filing amendment of the articles of association of a company, converting a public company into a private one; and by reason of S. 82 he is bound to file them. (Vol 30) 1943 Pat 278 (280); 22 Pat 204.

SECTION 83—Note 1.

[1] The minutes of a meeting are *prima facie* evidence of what happened at the meeting. (Vol 12) 1925 Bom 49 (60) (DB) * (Vol 12) 1925 Bom 105 (109) (DB).

[2] Minutes of proceedings are presumed to be true. The onus lies heavily upon those who assert to show that they are incorrect. (Vol 22) 1935 Lah 157 (158) (DB).

[3] As to the right of inspection of proceeding books of an association and right to take copies see (Vol 25) 1938 Cal 89 (90). (A decision prior to the amendment in 1936).

(7) In the case of any such refusal or default, the Court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them.]

[1882—S. 92; (1908) 8 Edw. VII, C. 69—S. 71; (1929) 19 & 20 Geo. V, C. 23—S. 120]

[a] Sub-Ss. (4) to (7) were added by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986), S. 87. [15-1-1987].

[b] The Act came into force on the 15th January, 1987.

[c] Substituted by the Repealing and Amending Act, 1989 (84 [XXXIV] of 1989), S. 2, Sch. I. [30-9-1989.]

a [Directors.]

83A. b [(1) Every company shall have at least three directors.]

Directors obligatory.

(2) This section shall not apply to a private company c [except a private company being a subsidiary company of a public company.]

[See Sch. I, Table A, Regs. 68 to 94; (1929) 19 & 20 Geo. V, C. 23—S. 139.]

[a] This heading and S. 88A were inserted by the Indian Companies (Amendment) Act, 1914 (11 [XI] of 1914), S. 2.

[b] Substituted by the Indian Companies (Amendment)ⁱ Act, 1986 (22 [XXII] of 1986), S. 88, for the original sub-section. [15-1-1987]

[c] Added, *ibid*.

OBJECTS AND REASONS

Amendment made in 1986.—"The change made gives effect to our decision that private companies which are subsidiary of public companies should not enjoy the exemption accorded to private companies

by certain provisions of the Act, e.g., S. 88A, and Ss. 86D, 87C, 87D, 91B (8), 91D, and Sub-Ss. 144 (1) and 144 (5)."—S.C.R., 1986.

Appointment of directors.

a[83B. b[(1)] In default of and subject to any regulations in the articles of a^a company other than a private company—

- (i) the subscribers of the memorandum shall be deemed to be the directors of the company until the first directors shall have been appointed;
- (ii) the directors of the company shall be appointed by the members in general meeting; and
- (iii) any casual vacancy occurring among the directors may be filled up by the directors, but the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last appointed a director.]

SECTION 83B—Note 1.

[1] A casual vacancy means in general any vacancy occurring by death, resignation or bankruptcy and not by efflux of time. (Vol 19) 1932 Mad 100 (103) (DB).

[2] The election of a person as director by directors, entitles him to hold office till the next general meeting, while if he is elected by the shareholders, he is entitled to hold office for three years. (Vol 20) 1933 All 844 (846) : 55 All 899 (DB).

[3] Directors elected at a general meeting but not in conformity with articles of association—Such election and proceedings are void if adopted—Directors thus elected are *de jure* directors till validly replaced in accordance with articles of association of company. (1988) 67 Cal L Jour 148 (151).

[4] Held on construction of the articles of association of a company that the power of company in general meeting to appoint additional directors was not excluded and that no special resolution was necessary. (Vol 27) 1940 Sind 87 (90).

[5] Member failing to be elected as director at general meeting can be co-opted for the limited period for which power to co-opt exists. (Vol 20) 1933 All 844 (846) : 55 All 899 (DB).

[6] An article of a Company provided that if no election takes place at a meeting where such an election was intended, that the meeting shall stand adjourned to the same day the following week and if no election takes place the vacating directors shall be

deemed to have been re-elected. By another article the directors had powers to co-opt to fill up vacancies or as addition and persons so co-opted were to hold office till the next general meeting. The directors co-opted six persons and in the following general meeting these co-opted directors were not elected specifically nor were the vacancies filled up. Held : that they should be deemed to have been elected according to the terms of the first article. (Vol 28) 1941 Cal 186 (187) : I L R (1940) 1 Cal 560.

[7] Company meeting called for election of certain directors to be elected by shareholders—Chairman ordering poll to be taken on certain future day—Chairman was absent on that day poll was not taken—Co-option of directors by remaining office-holding directors—This action was held *ultra vires* the company's articles—Some shareholders held could sue to set aside this procedure and for order for holding new election. (Vol 19) 1932 Mad 100 (106) (DB).

[8] A suit challenging the position of a particular board of directors and to remove them from the directorate is wrongly constituted. But a suit to declare plaintiff a director and for the protection of his rights is competent. (Vol 28) 1941 Cal 186 (189) : I L R (1940) 1 Cal 560.

[9] In suit for declaration and injunction by excluded director, Court should grant temporary injunction restraining defendants from interfering with rights of plaintiff. (Vol 20) 1933 All 844 (846) : 55 All 899 (DB).

b [(2)] Notwithstanding anything contained in the articles of a company other than a private company not less than two-thirds of the whole number of directors shall be persons whose period of office is liable to determination at any time by retirement of directors in rotation.

Provided that nothing herein contained shall apply to a company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, where by virtue of the articles of the company the number of directors whose period of office is liable to determination at any time by retirement of directors in rotation falls below the two-thirds proportion mentioned in this section.]

[See Sch. I, Table A, Regs. 78, 79.]

[a] Section 88B was inserted by the Indian Companies (Amendment) Act, 1914 (11 [XI] of 1914), S. 2.

[b] The original Section 88B was renumbered as Sub-section (1) of that section and Sub-section (2) was added by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 39; [15-1-1937].

[c] The Act came into force on the 15th January, 1937.

OBJECTS AND REASONS.

Amendment made in 1936.—"This provision is to be read in conjunction with S. 17 (2) which by making the provisions of Art. 78 or Table A applicable to all companies secures that all first directors of a company must retire at the first ordinary meeting of the company."—S.O.R., 1936.

Restrictions on appointment or advertisement of director.
84. (1) A person shall not be capable of being appointed director of a company by the articles, and shall not be named as a director or proposed director of a company in any prospectus issued by or on behalf of the company or in relation to any intended company or in any statement in lieu of prospectus filed by or on behalf of a company, unless, before the registration of the articles or the publication of the prospectus, or the filing of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

(i) signed and filed with the registrar a consent in writing to act as such director; and

(ii) save in the case of ^a[companies] not having a share capital, either signed the memorandum for a number of shares not less than his qualification (if any) ^b[or taken from the company and paid or agreed to pay for his qualification shares] or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares (if any) ^b[or made and filed with the registrar an affidavit to the effect that a number of shares, not less than his qualification (if any), are registered in his name];

(2) On the application for registration of the memorandum and articles ^b[if any,] of a company the applicant shall file with the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant shall be liable to a fine not exceeding five hundred rupees.

(3) This section shall not apply to a private company ^b[or a company which was a private company before becoming a public company] nor to a prospectus issued by or on behalf of a company after the expiration of one year from the date at which the company is entitled to commence business.

[(1908) 8 Edw. VII, C. 69—S. 72; (1929) 19 & 20 Geo. V, C. 23—S. 140].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 40, for the words "a company limited by guarantee and"; [15-1-1937].

[b] Inserted. *ibid.*

85. (1) Without prejudice to the restrictions imposed by S. 84, it shall be the duty of every director who is by the articles required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles.

a[* * * * *]

SECTION 84—Note 1.

Cognate sections.

Director, qualification of—85, Reg. 70.

Prospectus, requirements as to directors in 98 (1) (O), 98.

SECTION 85—Note 1.

[1] It is not obligatory on a director to hold shares and though in the articles provision is generally made that a director should hold certain number of shares the articles may be amended so as to

a[(2)] If, after the expiration of the said period or shorter time, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding fifty rupees for every day between the expiration of the said period or shorter time and the last day on which it is proved that he acted as a director.

[See Sch. I, Table A, Regs. 70, 77 (a); (1908) 8 Edw. VII, C. 69—S. 73; (1929) 19 & 20 Geo. V, C. 23—S. 141]

[a] The original sub-section (2) of S. 85 was *repealed* and sub-section (3) was *re-numbered* (2) by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 41. [15-1-1937].

86. The acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification :
Validity of acts of directors. Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been shown to be invalid.

[See Sch. I, Table A, Reg. 94; (1908) 8 Edw. VII, C. 69—S. 74; (1929) 19 & 20 Geo. V, C. 23—S. 143].

Ineligibility of bankrupt to act as director. a[86A. (1) If any person being an undischarged insolvent acts as director or managing agent or manager of any company, he shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand rupees or to both.

(2) In this section the expression "company" includes a company incorporated outside British India which has an established place of business within British India.]

[(1929) 19 & 20 Geo. V, C. 23—S. 142 (1)]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 42. [15-1-1937]

Section 85 (contd.)

enable persons to be directors without any share qualifications. (Vol 20) 1933 Lah 51 (52) (DB).

[2] The High Court has no jurisdiction to try an accused merely on an application under S. 85. It has jurisdiction only if the case is committed to it under S. 194 (1), Criminal P. O. or if the proceedings are started on an application of the advocate-general under S. 194 (2) or are transferred to it under S. 526 Criminal P. O. (Vol 23) 1936 All 830 (831, 832) : I L R (1937) All 220 : 38 Cr L Jour 111 (FB).

[3] Contravention of S. 85 is an "Offence". (Vol 23) 1936 All 830 (830) : I L R (1937) All 220 : 38 Cr L Jour 111 (FB).

[4] Where a director is liable in respect of negligence, default, breach of duty or breach of trust the Court may relieve him from his liability on such terms as the Court may think fit. See S. 281.

(See also S. 86 (O)).

[5] It was held in (Vol 1) 1914 Lah 222 (223) (DB) that mere ceasing to hold the necessary qualification shares involved vacation of his office by a director under Sub-section (2) of this section. Now see S. 86 (1) (A).

SECTION 86—Note 1.

[1] Acts done *bona fide* by a Manager or Director are valid in spite of a defect in his appointment, not only between company and outsiders but also between company and its members. (1911) 1911 Pun L R No. 179 page 650 (658) : 1911 Pun Re No. 46 (DB).

[2] To render valid an act of the directors which is beyond their authority there must be acquiescence of the share-holders. This acquiescence cannot be presumed unless knowledge of the invalidity of the transaction is brought home to every share-holder. There can be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. (Vol 25) 1938 P O 284 (289) : I L R (1939) Kar (P O) 16 : I L R (1939) Lah 1 (P O).

[3] The Director invalidly appointed cannot in absence of a provision in Articles of Association bind

share-holders unless the defect is unknown at the time. (Vol 14) 1927 Lah 797 (797) (DB).

[4] Allotment of shares by an irregularly appointed but a *de facto* directors—Articles of association upholding acts done by a *de facto* director done in a *bona fide* manner—Articles held covered allotment of shares by the directors and validated them. (Vol 1) 1914 All 471 (473) : 36 All 412 (DB). (S. 86 was not referred to).

[5] As between company and third persons having no notice to the contrary directors *de facto* are directors *de jure*. (1911) 18 Bom L R 162 (181).

[6] Even though none of the directors of the company had paid the allotment money on the shares held by them, all acts (e.g. allotment of shares in a meeting called for the purpose) done by them as such directors are valid. (Vol 22) 1935 Lah 464 (464),

[7] Where a person in good faith thinking himself to be a director so acts and signs a plaint on behalf of his company he becomes a *de facto* director and his act is validated by S. 86. Where in the course of the proceedings in Court a mere doubt is raised as to the validity of the position of such a director, such a raising of doubt is not enough to "show" that his appointment was invalid. The appointment cannot be considered to be "Shown" to be invalid until the Court has come to a definite decision on the subject. (Vol 18) 1931 Rang 139 (142) : 9 Rang 56 (DB).

[8] Defendant raising question of competency of director to sign and verify plaint.—He is entitled to cross-examine the director as to expose all facts bearing on that question.—It is only when all those facts are before the Court that it can properly come to a finding as to whether S. 86 covers the case. (Vol. 18) 1931 Rang 54 (65) (DB).

[9] When a company is shown to have accepted a certain person for many years as its director and had never on any occasion repudiated any of his acts as such, it is not open to one who has no concern with the company to challenge the appointment of such director or to contest his authority to act on behalf of the company. (Vol 2) 1915 Lah 473 (473) (DB).

a[86B. If in the case of any company provision is made by the articles or by any agreement entered into between any person and the company for empowering a director or manager of the company to assign his office as such to another person, any assignment of office made in pursuance of the said provision shall, notwithstanding anything to the contrary contained in the said provision, be of no effect unless and until it is approved by a special resolution of the company :

Assignment of office by directors. Provided that the exercise by a director of a power to appoint an alternate or substitute director to act for him during an absence of not less than three months from the district in which meetings of the directors are ordinarily held, if done with the approval of the board of directors, shall not be deemed to be an assignment of office within the meaning of this section :

Provided always that any such alternate or substitute director shall *ipso facto* vacate office if and when the appointor returns to the district in which meetings of the directors are ordinarily held.

Explanation.—For the purposes of the provisos to this section, the presidency-towns of Calcutta and Madras shall be deemed to be part of the 24-Parganas and Chingleput Districts, respectively, and the presidency-town of Bombay shall be deemed to be part of the Bombay Suburban and the Thana districts.]

[(1929) 19 & 20 Geo. V, C. 23—S. 151.]

[a] Inserted by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986), S. 42. [15-1-1987]

a[86C. Save as provided in this section, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any director, manager or officer of the company or any person (whether an officer of the company or not) employed by the company as auditor from or indemnifying him against any liability which by virtue any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void :

Avoidance of provisions relieving liability of directors.

Provided that

- (a) in relation to any such provision which is in force at the date of the commencement of the Indian Companies (Amendment) Act, 1986, this section shall have effect only on the expiration of a period of six months from that date, and
- (b) nothing in this section, shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force, and
- (c) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under Section 281 of this Act in which relief is granted to him by the Court.]

[(1929) 19 & 20 Geo. V, C. 23—S. 152]

[a] Inserted by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986), S. 42. [15-1-1987].

[b] The Act came into force on the 15th January, 1987.

SECTION 86 C—Note 1.

[1] Persons cannot be held liable in respect of the default made in preparing balance-sheet or placing it before general meeting of the company, which took place long before they ever became directors or indeed before they were even share-holders. (Vol 24) 1987 Mad 841 (842) : 88 Ori L Jour 695.

[2] Chairman receiving money on behalf of Company and expending it on matters connected with the Company cannot be made personally liable for it. (Vol 25) 1988 Lah 841 (844) (DB).

[8] Where loan is tainted with dishonesty and directors are responsible for the loan, they are liable for the debt. (Vol 28) 1986 Lah 271 (278) (DB).

[4] When the Articles of Association comprise the indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, in order to be guilty of negligence, a director should not only be guilty of negligence, but also must know that he is committing a breach of duty or is recklessly careless in the matter. Where apart from the insolvency of an official, there is no ground to suspect his honesty a director is justified in trusting him. (Vol 25) 1988 Mad 124 (127) : 1 L J (1988) Mad 292.

[See also (1925) 1 Ch 407 (434). (In this case Romer, J. has enumerated certain principles relating to the duties of directors).]

^a[86D. (1) No company shall make any loan or guarantee any loan made to a director of the company or to a firm of which such director is a partner ^b[or to a private company of which such director is a member or director.]

Loans to directors.

(2) In the event of any contravention of sub-section (1) any director of the company who is a party to such contravention shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or in discharging the guarantee shall be liable jointly and severally for the amount unpaid.

(3) This section shall not apply to a private company (except a private company which is the subsidiary company of a public company) or to a banking company.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 42. [15-1-1937].*

[b] *Substituted, ibid., 1938 (2 [II] of 1938), S. 4. [26-2-1938].*

^a[86E. No director or firm of which such director is a partner or private company of which such director is a director shall without the consent of the company in general meeting hold any office of profit under the company except that of a managing director or manager or a legal or technical adviser or a banker:

Director not to hold office of profit.

Provided that nothing herein contained shall apply to a director elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936, in respect of any office of profit under the company held by him at the commencement of the said Act.

Explanation.—For the purposes of this section the office of managing agent shall not be deemed to be an office of profit under the company.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 42. [15-1-1937]*

[b] *The Act came into force on the 15th January, 1937.*

^a[86F. Except with the consent of the directors, a director of the company, or the firm of which he is a partner or any partner of such firm, or the private company of which he is a member or director, shall not enter into any contracts of the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract or agreement for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.]

Sanction of directors necessary for certain contracts.

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 42. [15-1-1937].*

[b] *The Act came into force on the 15th January, 1937.*

^a[86G. (1) The company may by extraordinary resolution remove any director, whose period of office is liable to determination at any time by retirement of directors in rotation, before the expiration of his period of office and may by ordinary resolution appoint another person in his stead. The person

Removal of directors.

SECTION 86 D—Note 1.

[1] 'K' was muni of 'H', a director of a bank,—K's application for loan from bank was supported by statement as to his business and property known by 'H' to be untrue and that the loan was in reality taken for the benefit of H's firm and the receipt of the money was entered in firms book.—The bank sued K for money but he had been adjudicated a bankrupt during the pendency of the suit held; that H had acted dishonestly in sanctioning K's application for loan and was liable for a fraud committed by him. (Vol 28) 1936 Lah 268 (271): 17 Lah 262.

[2] In contravention of S. 86 D the directors sanctioned loan to one of the directors for a period of one year. Before the year had terminated, one of the directors moved his fellow directors to cancel the resolution. They refused and resolved that as the year for which the loan was made had not then elapsed, they would not then interfere. Thereupon the director who moved for cancellation filed a complaint with the Registrar of Joint Stock Companies under S. 86 D. The Registrar refused to intervene; Held that there was undoubtedly a contravention of the provisions of S. 86 in sanctioning a loan to a director and when the attention of the directors on the second occasion was drawn to this,

they should have taken steps at once to see that the illegal loan was terminated. The Registrar of Joint Stock Companies should also have taken action in the matter and atleast have told the directors that they should see that such an illegality was not committed again. (Vol 29) 1942 Mad 452 (452): 43 Crl L Jour 770.

[3] Loans to directors of a bank are contemplated under this section as part of its business. (Vol 29) 1942 Mad 787 (787): I L R (1948) Mad 291.

[4] The office of a director shall be vacated if he or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the Company in contravention of this section. See section 86. 1 (g).

SECTION 86 E—Note 1.

[1] The office of a director contravening the provisions of this section shall be vacated; see section 86 I (e).

SECTION 86 F—Note 1.

[1] The office of a director shall be vacated if he acts in contravention of section 86 F; see section 86 I (h).

SECTION 86 G—Note 1.

[1] Where the articles of association provided that a director shall be removed by an extra-ordinary

so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. A director so removed shall not be reappointed a director by the board of directors.

(2) This section shall not apply to directors elected or appointed before the commencement of the Indian Companies (Amendment) Act, 1936.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936, (22 [XXII] of 1936), S. 42.*

[15-1-1937].

[b] The Act came into force on the 15th January, 1937,

Restrictions on powers of directors. a[86H. The directors of a public company or of a subsidiary company of a public company shall not, except with the consent of the company concerned in general meeting,—

(a) sell or dispose of the undertaking of the company ;

(b) remit any debt due by a director.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 42 [15-1-1937].*

Vacation of Office of Director.

a[86I. The office of a director shall be vacated if—

(a) he fails to obtain within the time specified in sub-section (1) of section b[85], or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment, or

(b) he is found to be of unsound mind by a Court of competent jurisdiction, or

(c) he is adjudged an insolvent, or

(d) he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made, or

(e) he or any firm of which he is a partner or any private company of which he is a director without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker, or

(f) he absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months whichever is the longer without leave of absence from the board of directors, or

(g) he or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of section 86D, or

(h) he acts in contravention of section 86F.

(2) Nothing contained in this section shall be deemed to preclude a company from providing by its articles that the office of director shall be vacated on grounds additional to those specified in this section.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 42.*

[15-1-1937]

[b] *Substituted, ibid, 1938 (2 [II] of 1938), S. 3 for " 84 "*

[26-2-1938].

Register of directors, managers and managing agents.

a[87. (1) Every company shall keep at its registered office a register of its directors, managers and managing agents containing with respect to each of them the following particulars, that is to say :—

Section 86G (contd.)

resolution, a director cannot be removed under a rule passed under powers conveyed by another article, which is procedural only and gives no power to directors to frame fresh articles of association. Such a rule is therefore *ultra vires* and cannot be relied upon in support of the removal of the director. (Vol. 29) 1942 Mad 787 (737) : I L R (1943) Mad 291.

entitled to invest money in constructing a building. (Vol. 21) 1934 Mad 411 (416) (DB).

[8] Where the articles provided that the directors could invest money not immediately required upon such securities and bank deposits as may be from time to time determined—*Held*, that the directors had complete discretion in the matter of approving the kind of security offered. (Vol. 22) 1935 Lah 792 (798) (DB).

SECTION 86 H—Note 1.

[1] The assets of a company cannot be disposed of by the resolution of the directors only ; they can only be disposed of after a resolution of the share-holders passed at a special meeting called for the purpose of winding up the company and disposing of its assets. (Vol. 25) 1938 Rang 447 (447) (DB).

[2] Where articles authorise directors to invest money in purchase of house property they are not

SECTION 87—Note 1.

[1] The word 'who' in S 87 (4) refers only to an officer of the company and not to the company ; and the words 'knowingly and wilfully' only relate to a person—and not to a company. So in a prosecution for omission to inform change it is not necessary to prove that any body connected with the Company had knowledge of the change. (Vol. 30) 1943 Mad 214 (215) : 44 Orl L Jour 880.

- (a) in the case of an individual, his present name in full, any former name or surname in full, his usual residential address, his nationality and, if that nationality is not the nationality of origin, his nationality of origin and his business occupation, if any, and if he holds any other directorship or directorships the particulars of such directorship or directorships ;
- (b) in the case of a corporation, its corporate name and registered or principal office ; and the full name, address and nationality of each of its directors ; and
- (c) in the case of a firm, the full name, address and nationality of each partner, and the date on which each became a partner.

(2) The company shall within the periods respectively mentioned in this sub-section send to the registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register.

The period within which the said return is to be sent shall be a period of fourteen days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be fourteen days from the happening thereof.

(3) The register to be kept under this section shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one rupee or such less sum as the company may impose for each inspection.

(4) If any inspection required under this section is refused or if default is made in complying with sub-section (1) or sub-section (2) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of fifty rupees.

(5) In the case of any such refusal, the Court on application made by the person to whom inspection has been refused and upon notice to the company may by order direct an immediate inspection of the register].

[1882—Ss. 70, 71 ; (1929) 19 & 20 Geo. V, C. 23—S. 144].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 48 for the original section. [15-1-1937].

a[Managing Agents].

Duration of appointment of managing agent.

a[87A. (1) No managing agent shall, after the commencement of the Indian Companies (Amendment) Act, 1936, be appointed to hold office for a term of more than twenty years at a time.

(2) Notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company a managing agent of a company appointed before the commencement of the Indian Companies (Amendment) Act, 1936, shall not continue to hold office after the expiry of twenty years from the commencement of the said Act unless then re-appointed thereto or unless he has been re-appointed thereto before the expiry of the said twenty years.

Section 87 (contd.)

[2] Where a statutory duty is cast upon a company to do something, it must take steps to see that it is aware of all changes that it has to notify to the Registrar, and if it fails to do so, then the company becomes liable for the default. The act makes the company liable for every default without proof of negligence and therefore no distinction can be made between acts which are available from records and which are not. (Vol. 30) 1943 Mad 214 (215) : 44 Cr L Jour 380.

[3] Notwithstanding the provisions of S. 87, the appointment of director shall remain part of the indoor management and it would hardly conduce to facility of business if outsiders were compelled to search the register and find for themselves whether a person who was permitted to act as a director of the company for some length of time was also its direc-

tor *de jure*. (Vol. 18) 1926 Bom 28 (31) * (Vol 28) 1936 Bom 62 (86) : 60 Bom 326 (DB).

[4] Unless a person is in charge of the entire business of a company, he cannot be deemed to be the manager thereof. A person in charge of the business of a branch of a bank thereof does not come within the purview of the term 'Manager' as used in this section. (Vol. 5) 1918 Lah 170 (171) : 1917 Pun Re No. 47, Cr : 19 Cr L Jour 215. (DB).

SECTION 87 A—Note 1.

[1] With respect to agency agreement, sections 87 B to 87 I of the amending Act of 1936 are not retrospective. Only S. 87 A is retrospective by reason of which managing agencies existing when the Act came into force, can only survive for 20 years from that date. (Vol. 31) 1944 Bom 205 (208) (DB).

[2] Money cannot be recovered back as money had and received if the circumstances are such that there

(3) A managing agent whose office is terminated by virtue of the provisions of sub-section (2) shall upon such termination be entitled to a charge upon the assets of the company by way of indemnity for all liabilities or obligations properly incurred by the managing agent on behalf of the company subject to existing charges and encumbrances, if any.

(4) The termination of the office of a managing agent by virtue of the provisions of sub-section (2) shall not take effect until all moneys payable to the managing agent for loans made to or remuneration due up to the date of such termination from the company are paid.

(5) Nothing in this section shall apply to a private company which is not the subsidiary company of a public company.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937].

[b] The Act came into force on the 15th January, 1937.

OBJECTS AND REASONS

Sub-section (2) is drafted so as to avoid a possible implication with a managing agent whose appointment would otherwise expire earlier might be entitled under the sub-section to continue in office for 20 years after the commencement of the Amending Act of 1936, and at the same time to show that re-appointment is possible. Sub-sections (3) and (4) are drafted to refer specifically to loans made to the company and to remuneration due from the com-

pany to the managing agent at the time of the termination of the managing agency and to secure to the managing agent a lien on the assets of the company to provide for any claims made on him for liabilities undertaken by him on behalf of the company. The termination of the managing agency contract under this section does not affect any right the managing agent may have to be compensated for the premature termination of his functions.—See S C R 1936.

Conditions applicable to managing agents.

a [87B. Notwithstanding anything to the contrary contained in the articles of the company or in any agreement with the company—

- (a) a company may, by resolution passed at a general meeting of which notice has been given to the managing agent in the same manner as to members of the company, remove a managing agent if he is convicted of an offence in relation to the affairs of the company punishable under the Indian Penal Code, and being under the provisions of the Code of Criminal Procedure, 1898, non-bailable; and for the purposes of this clause, where the managing agent is a firm or company an offence committed by a member of such firm or a director of or an officer holding a general power-of-attorney from such company shall be deemed to be an offence committed by such firm or company:

Section 87A (contd.)

is nothing unconscionable or improper in the defendant having retained the money, even though he could not have maintained an action, for recovering the same from the plaintiff. Thus where articles of association provided for the appointment of a certain firm as managing agents and directors to execute agreement forthwith but none was executed and the firm purporting to act as such agents withdrew money for their remuneration and initial expenses and subsequently resigned agency it was held that the company could not recover the money as money had and received. (Vol. 22) 1936 Mad 799 (803) (DB).

[3] Agreement to employ firm of four partners as managing agents in 1907.—One partner died in 1910.—Other two partners assigning their shares to stranger in 1920—Stranger again assigning in 1922 to P.—Last surviving partner assigning his interest to D in 1939.—Company serving notice on firm that agreement of 1907 terminated.—No new agreement entered into.—Only intimation of changes noted.—P suing for damages for breach of agreement of 1907.—Suit, not tenable without setting up novation or estoppel as P was not party to agreement of 1907. (Vol. 31) 1944 Bom 205 (209, 210) (DB).

[4] Where the managing agents of a company admitted to be in possession of money belonging to the company, but claimed a lien over it, it was held that the Court had power under section 185 to ask

them to deposit the amount in Court until the adjudication of their claim as lien-holders. (Vol. 20) 1938 Lah 437 (439): 14 Lah 68.

[5] As to appointment of a managing agent by a banking company, see sections 277 H and 270 I of this Act; as to the limitation on employment of managing agents by an insurer company, see section 32 (2), Insurance Act, 1938.

SECTION 87 B—Note 1.

[1] As a general rule, a party to a contract cannot assign his liability thereunder without the other party's consent; under S. 87-B (c) too the office of the managing agent cannot be transferred without the consent of the company. S. 87-B (c) applies to the case of a transfer of the office of the managing agent to himself and certain others. (Vol. 31) 1944 Bom 76 (82).

[2] S. 87-B (d) restrains the voluntary alienation to the detriment of a company by the managing agent of his remuneration. But it does not bar a compulsory sale at the instance of a creditor. (Vol. 28) 1941 Cal 240 (241).

[3] In considering the question of misconduct necessary to justify the termination of the employment of the managing agents, the same principle applies which applies to the case of a master and servant. In each case the question must be whether the misconduct proved or reasonably apprehended,

Provided that a managing agent shall not be liable to be removed under the provisions hereof if the offending member, director or officer as aforesaid is expelled or dismissed by the managing agent within thirty days from the date of his conviction or if his conviction is set aside on appeal;

- (b) the office of a managing agent shall be vacated if he is adjudged insolvent;
- (c) a transfer of his office by a managing agent shall be void unless approved by the company in general meeting:

Provided that in the case of a managing agent's firm a change in the partners thereof shall not be deemed to operate as a transfer of the office of managing agent, so long as one of the original partners shall continue to be a partner of the managing agent's firm. For the purpose of this proviso 'original partners' shall mean, in the case of managing agents appointed before the commencement of the Indian Companies (Amendment) Act, 1936, partners who were partners at the date of the commencement of the said Act, and in the case of managing agents appointed after the commencement of the said Act, partners who were partners at the date of the appointment;

- (d) a charge or assignment of his remuneration or any part thereof effected by a managing agent shall be void as against the company;
- (e) if a company is wound up either by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined without prejudice, however, to the right of the managing agent to recover any moneys recoverable by the managing agent from the company: Provided that where the Court finds that the winding up is due to the negligence or default of the managing agent himself the managing agent shall not be entitled to receive any compensation for the premature termination of his contract of management; and
- (f) the appointment of a managing agent, the removal of a managing agent and any variation of a managing agent's contract of management made after the commencement of the Indian Companies (Amendment) Act, 1936, shall not be valid unless approved by the company by a resolution at a general meeting of the company notwithstanding anything to the contrary in section 86E:

Provided that nothing herein contained shall apply to the appointment of a company's first managing agent made prior to the issue of the prospectus or statement in lieu of prospectus where the terms of the appointment of such managing agent are there set forth.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937]*

[b] The Act came into force on the 15th January, 1937.

Section 87B (contd.)

has such a direct bearing on the employer's business or on the discharge of the employee of that part of the employer's business in which he is employed, as to seriously affect or to threaten to seriously affect the employer's business or the employee's efficient discharge of his duty to his employer. The nature of the particular business, and the nature of the duties of the employee, will require to be considered in each case in order to arrive at a just conclusion on the question; but the principle remains the same (Vol 81) 1944 P O 17 (18): I L R (1944) Kar 57 (Where the quarrels between the partners of the firm of managing agents were such as to be detrimental to the interests of the company, the termination of the employment of managing agents would be justified).

[4] The purpose of section 87-B seems to be to prevent the appointment of a managing agent of a company or the dismissal of a managing agent by a company without the share-holders in general meet-

ing giving their assent. But when the articles of association bind the members of the company and the company itself to follow a certain procedure in dismissing its managing agents and that procedure does not contravene the provision of section 87 B but goes beyond the provisions of that section in the way of providing protection for the members of the company there is nothing in section 87 B (f) which authorises the abrogation of a contract contained in the articles of association prescribing that the services of the managing agents shall be dispensed with in a particular manner; (1946) 50 Cal W N 810 (328). (For the removal of managing agents Art. 182 of articles of association of a company required an extraordinary resolution passed at an extraordinary general meeting of which not less than six months' notice was to be given and at which persons holding not less than three-fourths of the issued ordinary capital were to be present—By an ordinary resolution passed by a bare majority the managing agents were removed—*Held* the resolution was invalid.)

OBJECTS AND REASONS.

Clause (a) provides that it shall be for conviction of a non-bailable offence committed in relation to the company that a managing agent may be removed; it also deals with those cases in which the managing agent is a firm or a company. Clause (c) provides that an ordinary resolution, instead of an extraordinary resolution, should be sufficient for the approval of a transfer of office by a managing agent. It is provided in clause (e) that if the negligence or misconduct of the managing agent itself conduces to the

winding up, the managing agent shall be debarred from recovering compensation for the consequent termination of his contract. It is clear that clause (f) does not apply to appointments, etc., made before the amending Act of 1936 comes into force; it also saves from its operation those preliminary appointments announced in a prospectus, which it would be impracticable to hold in abeyance until the first general meeting.—See S. C. R., 1936.

Remuneration of managing agent. ^a[87C. (1) Where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936, the remuneration of the managing agent shall be a sum based on a fixed percentage of the net annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management.

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company.

(3) For the purposes of this section 'net profits' means the profits of the company calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, depreciation, bounties or subsidies received from ^c [any Government] or from a public body, profits by way of premium on shares sold, profits on sale proceeds of forfeited shares, or profits from the sale of the whole or part of the undertaking of the company but without any deduction in respect of income-tax or super-tax, or any other tax or duty on income or revenue or for expenditure by way of interest on debentures or otherwise on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other special fund.

(4) This section shall not apply to a private company except a private company which is the subsidiary company of a public company or to any company whose principal business is the business of insurance.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937]*

[b] The Act came into force on the 15th January, 1937.

[c] *Substituted by A. O. for "Government".*

Loans to managing agents. ^a [87D. (1) No company shall make to a managing agent of the company or to any partner of the firm, if the managing agent is a firm, ^b [or to any member or director of the private company], if the managing agent is a private company, any loan out of moneys of the company or guarantee any loan made to a managing agent.

(2) Nothing contained in this section shall apply to any credit held by a managing agent in a current account maintained subject to limits previously approved by the board of directors by the company with the managing agent for the purposes of the company's business.

(3) In the event of any contravention of sub-section (1) any director of the company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to five hundred rupees, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid.

SECTION 87C—Note 1.

[1] Held, on interpretation of company's articles that the term 'net profits' used therein was not the same as used in S. 87-C of companies Act. (Vol. 28) 1941 Rang 145 (147): 1941 Rang. L. R. 181 (SB).

[2] As to the limitation on the remuneration payable to a managing agent by an insurer company, see section 82 (8), Insurance Act, 1938.

SECTION 87D—Note 1.

[1] Where a managing agent of a company, though not authorised to borrow, borrows money which is not necessary and neither *bona fide* nor for benefit of company, the company is not liable for the amount borrowed. (Vol. 27) 1940 Oudh 202 (205): 15 Luck 515 (DB).

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company.

(5) Except with the consent of three-fourths of the directors present and entitled to vote on the resolution, a managing agent of the company, or the firm of which he is a partner, or any partner of such firm, or, if the managing agent is a private company, a member or director thereof, shall not enter into any contract for the sale, purchase or supply of goods and materials with the company, provided that nothing herein contained shall affect any such contract for such sale, purchase or supply entered into before the commencement of the Indian Companies (Amendment) Act, 1936.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937]

[b] Substituted, *ibid* 1938 (2 [II] of 1938), S. 6. [26-2-1938]

[c] The Act came into force on the 15th January, 1937.

Loans to or by companies under the same management.
a[87E. (1) No company incorporated under this Act after the commencement of the Indian Companies (Amendment) Act, 1936, which is under the management of a managing agent shall make any loan to or guarantee any loan made to any company under management by the same managing agent, and no company shall after the expiry of six months from the commencement of the said Act except by way of renewal of an existing loan or guarantee given make any loan to or guarantee any loan made to any such company :

Provided that nothing herein contained shall apply to loans made or guarantees given by a company to or on behalf of a company under its own management or loans made by or to a company to or by a subsidiary company thereof or to guarantees given by a company on behalf of a subsidiary company thereof.

(2) In the event of any contravention of the provisions of this section, any director or officer of the company making the loan or giving the guarantee who is knowingly and wilfully in default shall be liable to a fine not exceeding one thousand rupees and shall be jointly and severally liable for any loss incurred by the company in respect of such loan or guarantee.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937].

[b] The Act came into force on the 15th January 1937.

Purchase by company of shares of company under same managing agent.
a[87F. A company other than an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not purchase shares or debentures of any company under management by the same managing agent, unless the purchase has been previously approved by a unanimous decision of the board of directors of the purchasing company.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937].

Restriction on managing agent's powers of management.
a[87G. A managing agent shall not exercise in respect of any company of which he is a managing agent a power to issue debentures or, except with the authority of the directors, and within the limits fixed by them, a power to invest the funds of the company, and any delegation of any such power by a company to a managing agent shall be void.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-3-1937].

Managing agent not to engage in business competing with the business of managed company.
a[87H. A managing agent shall not on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company under his management or by a subsidiary company of such company.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937]

Limit on number of directors appointed by managing agent.
a[87I. Notwithstanding anything contained in the articles of a company other than a private company the directors, if any, appointed by the managing agent shall not exceed in number one-third of the whole number of directors.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 44. [15-1-1937].

Contracts.

88. (1) Contracts on behalf of a company may be made as follows
Form of contracts. (that is to say):—

- (i) any contract which, if made between private persons, would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied, and may in the same manner be varied or discharged;
- (ii) any contract which, if made between private persons, would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged.

(2) All contracts made according to this section shall be effectual in law and shall bind the company and its successors and all other parties thereto, their heirs, or legal representatives, as the case may be.

[1882—S. 67; (1908) 8 Edw. VII, C. 69—S. 76; (1929) 19 & 20 Geo. V, C. 23—S. 29].

SECTION 88—Note 1.

[1] A company cannot be bound by a contract entered into on its behalf before the company was formed, and it is not competent to bring a company into existence bound to enter into a contract with the third party, the terms of which have been arranged before the company is formed. It is for the company to consider after its formation whether it will enter into the contract or not. (Vol 21) 1984 Bom 427 (428) : 59 Bom 218 (DB). * (Vol 10) 1928 Lah 100 (101).

[2] An agreement, to which the company was not a party which was entered into on its behalf by the promoters of the company before its incorporation cannot be enforced by the company even if after its incorporation it has adopted and rectified the agreement. (Vol. 38) 1946 Cal 28 (80) : I L R (1944) 2 Cal 101.

[3] A provision in the articles of association prohibiting the directors from delegating their power to borrow does not prevent them from empowering one of the directors to execute a mortgage deed in respect of a loan which has already been incurred, and to settle the details of the mortgage transaction. (Vol 19) 1932 All 141 (148) : 58 All 1009 (DB).

[4] Where the directors lend to the company in excess of the borrowing powers conferred upon them by the articles of association and all these moneys are in fact utilised by the company, the company is liable to pay that amount. If in fact the monies have not been utilised by the company, the company is not liable for them. (Vol 29) 1942 Bom 231 (236, 237).

[5] Where borrowing is *ultra vires* the directors and not *ultra vires* the company, the money could be recovered in action for money had and received. (Vol 23) 1936 Bom 62 (66) : 60 Bom 326 (DB).

[6] Where a mortgage deed is executed by an agent authorised by the directors, the transaction is not vitiated by the fact that there was a defect in the passing of the resolution authorising the agent to execute the document. The creditor is entitled to assume that all acts of internal management have been regularly performed. (Vol 19) 1932 All 141 (145) : 58 All 1009 (DB).

[7] Where the articles of association contained a clause empowering managing agent to conduct and manage the business and affairs of the case and to enter into all contracts and do all other things usual

and necessary or desirable in the management of the affairs of the company but there was also another clause which expressly prohibited the directors from delegating their power to borrow, it was held that the two clauses should be read together and the first clause could not be interpreted to give unrestricted power to borrow on behalf of the company and the second clause did not restrict the agent from raising temporary loan in emergency for management of the company. (Vol 19) 1932 All 141 (145) : 58 All 1009 (DB).

[8] Where a person knowing at least something about the constitution of a bank and knowing that its Managing Director has died, takes a transfer of the bank's property from its accountant within a few days after the death of the Managing Director, he is not entitled to assume that the transfer was authorised and regular. (Vol 29) 1942 Oudh 417 (421, 422) : 18 Luck 110 (DB).

[9] R and K were the managing directors of a company but from the inception of the company the management of its business was left entirely to R who was also the agent of the joint family firm of which R was the head. Thus R controlled the business of the firm as well as that of the company. Under the authority given to him to borrow money from the joint family firm R borrowed large sums of money from that firm and misappropriated them. It was not until all the sums had actually been misappropriated by R that the directors of the company including K became aware of R's fraudulent conduct. In the claim by the firm against the company to recover the amount borrowed by R from it, it was held that if R had borrowed money from another firm under the authority conferred upon him by the company the lender would not have been put on inquiry as to the application of the money and the company would in such circumstances have been liable notwithstanding that R had misappropriated the money borrowed. R's knowledge of the fraud which he was committing was not the knowledge of the firm or the company. Therefore the company must be held to be liable. (Vol. 31) 1944 Mad 582 (535) : I L R (1945) Mad 96 (DB).

[10] Chairman has implied authority to create lien on property of corporation in respect of loan sanctioned by board of directors though articles are silent about it. (Vol. 26) 1939 Sind 100 (106).

[11] Where a loan contracted by a managing agent was shown as a debt in the report of the direc-

Bills of exchange and promissory notes.

89. A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority, express or implied.

[1882—S. 72; (1908) 8 Edw. VII, C. 69—S. 77; (1929) 19 & 20 Geo. V, C. 23—S. 30]

Execution of deeds.

90. A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place ^a [either in or outside British India]; and every deed signed by such attorney, on behalf of the company, and under his seal, where sealing is required, shall bind the company, and have the same effect as if it were under its common seal.

[1882—S. 81; (1908) 8 Edw. VII, C. 69—S. 78; (1929) 19 & 20 Geo. V, C. 23—S. 31]

[a] Substituted by the Indian Companies (Amendment) Act, 1986 (22 [XXII] of 1986), S. 45 for "not situate in British India". [16-1-1987]

Power for company to have official seal for use abroad.

91. (1) A company whose objects require or comprise the transaction of business beyond the limits of British India may, if authorised by its articles, have for use in any territory, district or place not situate in British India, an official seal which shall be a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district or place where it is to be used.

(2) A company having such an official seal may, by writing under its common seal, authorise any person appointed for the purpose in any territory, district or place not situate in British India to affix the same to any deed or other document to which the company is party in that territory, district or place.

(3) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period (if any) mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

(4) The person affixing any such official seal shall, by writing under his hand, on the deed or other document to which the seal is affixed, certify the date and place of affixing the same.

(5) A deed or other document to which an official seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

[(1908) 8 Edw. VII, C. 69—S. 79; (1929) 19 & 20 Geo. V, C. 23—S. 32]

Section 88 (contd.)

tors to the share-holders submitting the audited account, which was signed by the directors at a properly convened meeting. Held that assuming that the managing agent had acted *ultra vires* in contracting the loan there was a ratification by the directors which made the loan binding on the company. (Vol 19) 1982 All 141 (143) : 58 All 1009 (DB).

[12] Under S. 88 a mortgage-deed could be validly executed on behalf of a company, by any person acting on behalf of the company. It need not necessarily be under the common seal. If a document under seal is not necessary, then a mere defect in the manner of affixing the seal will not render the document invalid. (Vol 19) 1982 All 141 (142) : 58 All 1009 (DB).

[13] For restriction on borrowing powers of a company see under S. 108 (5).

[14] As to power for company to have official seal for use abroad, see Section 91, as to seal, See S. I, Table A, Reg. 76.

SECTION 89—Note 1.

[1] The question as to liability of a company on a particular endorsement is in every case one of construction of that endorsement; where responsibility of

company is not made quite clear company is not liable. Where the endorsement was "M. and Sons, Managing agents of L A company; held that it would not necessarily be clear to anyone that the responsibility of L. A. Company was involved and therefore S. A. Company was not liable. (Vol 12) 1925 Cal 1062 (1063, 1064) : 52 Cal 802. (DB).

[2] When a person is not specifically authorized either as a managing agent or otherwise to execute or make a promissory note in his own name so as to bind the Company, the company will not be liable. (Vol 17) (1980) All 778 (778) : 52 All 888 (DB).

[3] The ignorance of the Manager of the bank of the terms of the Articles of Association does not affect his power to make a transfer of negotiable instruments. He is the agent of Bank for performing all ordinary banking transactions, and a transfer of such an instrument is a very ordinary transaction. (Vol 11) 1984 Lah 462 (463) (DB).

[4] When a promissory note was signed by the secretary of a company on paper bearing rubber stamp of the company, it was held that note was signed on behalf of company. (Vol 10) 1928 Bom 29 (29) (DB).

[5] Where a manager of family which is managing agent of company executes a promissory note in

Disclosure of interest by director.

a[91A. (1) Every director who is directly or indirectly concerned or interested in any contract or arrangement entered into by or on behalf of the company shall disclose the nature of his interest at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest or the making of the contract or arrangement :

Provided that a general notice that a director is a b[director or a member of any specified company or is a member of any specified firm], and is to be regarded as interested in any subsequent transaction with such firm or company, shall as regards any such transaction be sufficient disclosure within the meaning of this sub-section and after such general notice, it shall not be necessary to give any special notice relating to any particular transaction with such firm or company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

c[(3) A register shall be kept by the company in which shall be entered particulars of all contracts or arrangements to which sub-section (1) applies and which shall be open to inspection by any member of the company at the registered office of the company during business hours.

Section 89 (contd.)

his own name in favour of the promisee and borrows money with the object of lending it to a company, the company cannot be held liable to the promisee even if he knew with what object the money was being borrowed; before the company can be held liable it must be found that the loan was actually a loan to the company. The mere fact that the company benefited by the loan is not by itself sufficient to bind the company. (Vol 33) 1946 All 372 (376) : I L R (1946) All 361.

SECTION 91A—Note 1.

[1] Directors of the company are agents of the company and trustees for the share-holders and as a general rule, cannot enter into a contract with the company for personal benefit. (Vol 2) 1915 Mad 1179 (1180) : 98 Mad 991.

[2] Articles of Company not objecting to director being interested in contract with the Company but requiring such interest to be disclosed and further imposing a restriction that he shall not vote on questions affecting the contract—Articles not amended subsequent to 1914. *Held* that though S. 91-A and 91-B introduced in 1914 imposed penalty for breach, they did not render article *ultra vires*. (Vol 16) 1929 Mad 353 (356) (DB).

[3] A breach of S. 91-A, 91-B or 91-C does not *ipso facto* render a contract void or voidable. But non-disclosure or voting by a director, where but for the vote the contract would not have been sanctioned will render the interested director liable to account for secret profits. (Vol 16) 1929 Mad 353 (357, 358) (DB).

[4] Although director ought to disclose his interest in the other party to contract where such interest is likely to conflict with his duty to the Company, formal disclosure is not necessary if all directors know of such interest. (Vol 16) 1929 Mad 353 (358) (DB).

[5] Per Srinivas Ayyangar J.—Where the Articles of Association did not object to a director being interested in a contract provided such interest is duly disclosed by him and the company sued one director alleging his interest in the contract but did not allege its non-disclosure by him in the plaint. *Held*—that under the Articles, the director will have to show that he complied with the proviso in the

articles by disclosing his interest. (Vol 16) 1929 Mad 353 (368) (DB).

[6] A letter written by the director disclosing his interest in the firm where the purchase was made by him and endorsed as noted by the Chairman of the board, his signature is not disclosure at the director's meeting. The mere endorsement by the Chairman does not prove such a disclosure. (Vol 25) 1938 Cal 440 (442) : 39 Cr. L. Jour 687 (DB).

[7] In India the interest of a director in a contract need not necessarily be a pecuniary interest, but even mere relationship as that of husband and wife or father and son, is interest if the circumstances are such that it may reasonably be regarded as affecting the director's mind. (Per Srinivasa Ayyangar J-Obiter) (Vol 16) 1929 Mad 353 (368) (DB).

[8] Per Srinivasa Ayyangar, Wallace J. Contra : Where a director of a Company executed a lease on its behalf, and his son had obtained a power-of-attorney from the lessee and was made a major partner with six annas share in the lease and there was difference between the rate of working charges to be given to the Company as stated in the lease and that on the basis of which the lessees were to calculate their profits, it was held that though the director was separate from his son, he must be considered to have pecuniary interest in the lease. (Vol 16) 1929 Mad 353 (368, 370) (DB).

[9] Sub-partnership with other party to contract is interest in contract. (Vol 16) 1929 Mad 353 (368) (DB).

[10] Contracts referred to in S. 91-A also include contracts not made at a meeting of directors and even petty purchases from another firm in which purchasing director has an interest. (Vol 25) 1938 Cal 440 (441) : 39 Cr L Jour 687 (DB).

[11] Where the secretaries of a company having power to enter into a mortgage on behalf of a Company took director's sanction without disclosing their interest, they cannot afterwards plead that they themselves could have sanctioned the mortgage. (Vol 16) 1929 Mad 353 (356) (DB).

[12] Allegation of non-disclosure of interest in the contract not taken up in the plaint itself cannot be raised subsequently after issues are framed and evidence closed. (Vol 16) 1929 Mad 353 (369) (DB).

(4) Every officer of the company who knowingly and wilfully acts in contravention of the provisions of sub-section (3) shall be liable to a fine not exceeding five hundred rupees.]

[(1929) 19 & 20 Geo. V, C. 23—S. 149]

[a] Inserted by the Indian Companies (Amendment) Act, 1914 (11 [XI] of 1914), S. 3.

[b] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), s. 46, for "member of any specified firm or company". [15-1-1937]

[c] Sub-sections (3) and (4) were inserted *ibid*.

OBJECTS AND REASONS

Amendment made in 1936.—"We consider that some provision should be made to ensure that shareholders may obtain information about contracts in which directors of the company are interested. We

have provided [in sub-section (3)] that a register shall be maintained to supply this information."—S. C. R., 1936.

Prohibition of voting by interested director.

a [91B. (1) No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested b[nor shall his presence count. for the purpose of forming a quorum at the time of any such vote]; and if he does so vote, his vote shall not be counted:

Provided that the directors or any of them may vote on any contract of indemnity against any loss which they or any one or more of them may suffer by reason of becoming or being sureties or surety for the company.

(2) Every director who contravenes the provisions of sub-section (1) shall be liable to a fine not exceeding one thousand rupees.]

c[(3) This section shall not apply to a private company.]

b[Provided that where a private company is a subsidiary company of a public company, this section shall apply to all contracts or arrangements made on behalf of the subsidiary company with any person other than the holding company.]

[a] Inserted by the Indian Companies (Amendment) Act, 1914 (11 [XI] of 1914), S. 3.

[b] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 47. [15-1-1937]

[c] Inserted by the Indian Companies (Amendment) Act, 1920 (42 [XLII] of 1920), S. 2.

SECTION 91B—Note 1.

[1] Where a director of a company has an interest as share-holder in another Company or is in a fiduciary position towards and owes a duty to another Company, which is proposing to enter into a transaction with the Company of which he is the director, he comes within the rule laid down in S. 91-B, and the transaction is voidable at the instance of the Company with whom it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others. S. 91-B would not however, deprive of the benefit of his contract with the company a third party who had no notice of the defect in the director's authority. Such a person would be entitled to assume that the internal management of the Company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him. (Vol 25) 1938 PC 159 (162, 163): I L R (1938) Bom 421: 32 Sind L R 517 (PC).

[2] S Company which had been financing P Company through MT Company for 7 years, decided to have the property of P Company as security for debt owed really by MT Company and obtained an equitable mortgage over P's property. MT Company which was putting up P's property as security held almost all the shares in P company and the directors of P Company had for years been directors of MT Company and these facts were known to directors of S Company in course of their business. Winding up proceedings having been started in respect of P Company, S Company claimed to be a secured

creditor of P by virtue of the equitable mortgage in its favour.

Held that the official liquidator was entitled to avoid the equitable mortgage on which S Company based its claim; as S Company was not entitled to assume that S. 91-B had been complied with. (Vol 25) 1938 PC 159 (162, 163, 164): I L R (1938) Bom 421: 32 Sind L R 517 (PC).

[3] Persons dealing with a Company are fixed with notice of limitation of powers imposed by statute or contained in the memorandum or articles of association. But once the power to act is shown as authorised they need not enquire whether it was properly exercised. The questions whether a director was personally interested in a contract or whether he was qualified to vote are all of purely internal management and with which a third party need not concern himself. (Vol 23) 1936 Bom 62 (80): 60 Bom 326 (DB).

[4] A Company owed money to C its director and managing agent. One of the articles provided that the directors may receive from a member all or any part of the Capital due upon shares held over and above the sum called and interest was payable. The quorum for the board of directors was three. C's brother S also was a director and a share-holder and had lent money to C for being utilised for the Company. At a meeting where three directors including C and S were present a resolution was passed setting off a part of money due to C against what he owed towards the shares. It was held that though it was open to a Company to agree to set off money due by it towards future calls, the arrangement arrived at was invalid. (Vol 29) 1942 Mad 95 (96, 97): I L R (1942) Mad 280 (DB) * (Vol 8) 1921 Bom 372 (373).

Disclosure to members in case of contract appointing a manager.

a[91C. (1) Where a company enters into a contract for the appointment of a manager b[or managing agent] of the company in which contract any director of the company is directly or indirectly concerned or interested, or varies any such existing contract, the company shall, b[within twenty-one days from the date of entering into the contract or the varying of the contract,] send an abstract of the terms of such contract or variation, as the case may be, together with a memorandum clearly indicating the nature of the interest of the director in such contract, or in such, variation, to every member; and the contract shall be open to the inspection of any member at the registered office of the company.

(2) If a company makes default in complying with the requirements of sub-section (1), it shall be liable to a fine not exceeding one thousand rupees; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.]

[a] Inserted by the Indian Companies (Amendment) Act, 1914 (11 [XI] of 1914) S. 3.

[b] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 48. [15-1-1937]

Contracts by agents of company in which company is undisclosed principal.

a[91D. (1) Every manager or other agent of a company other than a private company b[not being the subsidiary company of a public company] who enters into a contract for or on behalf of the company in which contract the company is an undisclosed principal shall, at the time of entering into the contract, make a memorandum in writing of the terms of the contract, and specify therein the person with whom it has been made.

(2) Every such manager or other agent shall forthwith deliver the memorandum aforesaid to the company b[and send copies to the directors], and such memorandum shall be filed in the office of the company and laid before the directors at the next directors' meeting.

(3) If any such manager or other agent makes default in complying with the requirements of this section—

(a) the contract shall, at the option of the company, be void as against the company; and

(b) such manager or other agent shall be liable to a fine not exceeding two hundred rupees.]

[a] Inserted by the Indian Companies (Amendment) Act, 1914 (11 [XI] of 1914), S. 3.

[b] Inserted, *ibid.*, 1936 (22 [XXII] of 1936), S. 49.

[15-1-1937]

Prospectus.

Filing of prospectus.

92. (1) Every prospectus issued by or on behalf of a company or in relation to any intended company shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the

prospectus.

(2) A copy of every such prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall

SECTION 92—Note 1.

[1] For the definition of 'prospectus' in every part of S. 92, the Court must go back to S. 2 (1) (14). To hold that a prospectus is a prospectus only if it conforms to the terms of S. 93, would mean that in regard to S. 92, the penalty for failure to file the prospectus could be avoided by allowing it to lack any of the requisites laid down in S. 93. Moreover under S. 93 (5) a company is not absolved from the liability under S. 100. (Vol 21) 1934 Mad 641 (642).

[2] It was held in (Vol 12) 1925 Cal 714: 26 Or L Jour 1061 (LB) that advertisement in a newspaper offering to the public some shares of the company for sale is a 'prospectus' as defined in section 2 (1) (14) and a copy of an advertisement of this nature must be filed with the registrar before issuing it. In the light of the amendment made to section 2 (1) (14) in

1936 this decision cannot be taken to be good law now.

[3] Where a prospectus issued to the public in Bengal did not contain certain particulars required by S. 93 and was not a verbatim translation of the English prospectus filed with the Registrar, which in fact fulfilled all the requirements of law, held S. 92 was contravened. (Vol 23) 1936 Cal 33 (35): 37 Or L Jour 379 (DB).

[4] Even when proceedings under sub-section (5) are initiated by a private person where the case is one of great importance in view of the scope of the Act and in the interests of the community the High Court can interfere when there is contravention of law. (Vol 28) 1936 Cal 33 (38): 37 Or L Jour 379 (DB).

be filed for registration with the registrar on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration.

(3) The registrar shall not register any prospectus unless it is dated, and the copy thereof signed, in manner required by this section.

(4) Every prospectus shall state on the face of it that a copy has been filed for registration as required by this section.

(5) If a prospectus is issued without a copy thereof being so filed, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding fifty rupees for every day from the date of the issue of the prospectus until a copy thereof is so filed.

[(1908) 8 Edw. VII, C. 69—S. 80; (1929) 19 & 20 Geo. V, C. 23—S. 34].

Specific requirements as to particulars of prospectus.

93. (1) Every prospectus issued by or on behalf a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state—

- (a) the contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively; and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company ^a[and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption]; and
- (b) the number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and
- (c) the names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers ^a[and managing agents or proposed managing agents] (if any) ^a[and any provision in the articles or in any contract as to the appointment of managers or managing agents and the remuneration payable to them]; and
- (d) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount (if any) paid on the shares so allotted; and
- (e) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued; and
- ^a[(ee) where any issue of shares or debentures is underwritten, the names of the underwriters, and the opinion of the directors that the resources of the underwriters are sufficient to discharge the underwriting obligations; and]
- (f) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscrip-

SECTION 93—Note 1.

[1] Ordinarily a prospectus is not relevant in any matter touching the contract between shareholder and the company. It is not the contract but only matter which induces the contract. It may be relevant in an action for rescission based on misrepresentation or fraud, or in an action for deceit, but not in an action of contract. The contract proper is to be

found in the application for allotment and in the articles of association. Where, however, the application for allotment of shares stipulated that the shares are subject to certain terms of the prospectus as these form part of the contract, it will be relevant to examine those terms of the prospectus. ('46) 1946 Nag L Jour 128 (182).

tion by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares or debentures to the vendor, and where there is more than one separate vendor or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors; and

- ^a[(f)] where any property referred to in clause (j) has within the two years preceding the issue of the prospectus been transferred by sale, the amount paid by the purchaser at each such transfer so far as the information is available and, where any such property is a business, the profits accruing from such business during each of the three years immediately preceding the issue of the prospectus or during each year of the existence of the business if less than three years so far as the information is available. A balance sheet of the business concerned made up to a date not more than ninety days before the date of the issue of the prospectus shall be appended to the prospectus; and]
- (g) the amount (if any) paid or payable as purchase-money in each, shares or debentures, for any such property as aforesaid, specifying the amount (if any) payable for good will; and
- (h) the amount (if any) paid within the two preceding years or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, ^b[or as discount in respect of shares issued, showing separately the amount, if any, so paid to the managing agents]: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and
- (i) the amount or estimated amount of preliminary expenses; and
- ^c(k) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- (l) the dates of, and parties to, every material contract ^a[including contracts relating to the acquisition of property to which clause (f) applies], and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract ^a[except a contract appointing or fixing the remuneration of a managing director or managing agent)] entered into more than two years before the date of issue of the prospectus; and
- (m) the names and addresses of the auditors (if any) of the company; and
- (n) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and
- o) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, [and the rights in respect of capital and dividends attached to], the several classes of shares respectively; [and]
- ^a[(p)] where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of those restrictions;] ^d[and]
- ^d[(q)] where any part of the sums required for the matters set out in sub-section (2) of section 101 is to be provided out of sources other than share capital, particulars of the amount to be so provided and the sources thereof.]

^a[(1A) Where the prospectus is issued by a company which has been carrying on business prior to the issue thereof, the prospectus shall set out the following reports in addition to the matters referred to in sub-section (1), namely:—

- (i) a report by the auditors of the company with respect to the profits of the company including its subsidiary companies, if any, so far as the information is available in each of the three financial years immediately preceding the issue of the prospectus and with respect to the rates of the dividends, if any, paid by the company on each class of shares in the company for each of the said three years giving particulars of each such class of shares on which such dividends have been paid and the source from which the dividends have been paid and particulars of the cases in which no dividends have been paid on any class of shares for any of those years, and if no accounts have been made up for any part of a period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact;
- (ii) if the proceeds or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, a report made by an accountant or accountants holding the certificate referred to in section 144 who shall be named in the prospectus upon the profits of the business in respect of each of the three financial years immediately preceding the issue of the prospectus:

Provided that if, in the case of a company which has been carrying on business for less than three years, the accounts of the company have been made up only in respect of two years or any shorter period, this sub-section shall have effect as if references to two years or such shorter period were substituted for references to three years.]

^a [(1B) The statement referred to in clause (f) of sub-section (1) and the report referred to in sub-section (1A) with respect to the profits of a company or business shall show clearly the trading results and all charges and expenses incidental thereto excluding income or profits having no relation to the trading for the period covered and excluding also items of profit or income of a non-recurring nature but including amounts appropriated from profits to such purposes as payment of taxation or reserves.]

e[* * * * *

(2) Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum, or the signatories thereto, and the number of shares subscribed for by them.

(3) This section shall not apply to a circular or notice inviting existing members or debenture-holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons.

(4) The requirements of this section as to the memorandum and the qualification, remuneration and interest of directors, the names, descriptions and addresses of directors or proposed directors, and of managers or proposed managers, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business:

[Provided that the said requirements, except the requirement as to the amount or estimated amount of preliminary expenses, shall apply to a prospectus filed in pursuance of section 154.]

(5) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act apart from this section.

[1882—S. 88 ; (1908) 8 Edw. VII, C. 69—S. 81 ; (1929) 19 & 20 Geo. V, C. 23—S. 35]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 50.

[15-1-1987]

[b] *Substituted*, for "or the rate of any such Commission", see *ibid*.

[c] Even in the book published by the Government this clause is lettered (K) instead of (J).

[d] *Inserted* by the Repealing and Amending Act, 1937 (20 [XX] of 1937), S. 2 and Sch I.

[e] *Sub-sec (1C) was repealed, ibid* S. 8 and Sch II. It had been originally *inserted* by Act 22 of 1936, S. 50.

Meaning of "vendor" in section 93.

94. For the purposes of section 93 every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase or for any option of purchase, of any property to be acquired by the company, in any case where—

- (a) the purchase-money is not fully paid at the date of issue of the prospectus ; or
- (b) the purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ; or
- (c) the contract depends for its validity or fulfilment on the result of that issue.

[(1908) 8 Edw. VII C. 69—S. 81 (2) ; (1929) 19 and 20 Geo. V C. 23—Sch. IV. Part III. Para 2].

Application of section 93 to the case of property taken on lease.

95. Where any of the property to be acquired by the company is to be taken on lease, section 93 shall apply as if the expression "vendor" included the lessor, and the expression "purchase-money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

[(1908) 8 Edw. VII C. 69—S. 81 (3) ; (1929) 19 and 20 Geo. V C. 23—Sch. IV. Part III. Para 3].

Invalidity of certain conditions as to waiver or notice.

96. ^a [(1)] Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirements of section 93, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void.

^a[(2)] It shall not be lawful to issue any form of application for the shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of section 93 :

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

- (a) in connection with *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures ; or
- (b) in relation to shares or debentures which were not offered to the public.

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five hundred rupees].

[(1908) 8 Edw. VII C. 69—S. 81 (4) ; (1929) 19 and 20 Geo. V C. 23—S. 35 (2) (3)].

[a] The original s. 96 was *re-numbered* as sub-section (1) of that section and sub-section (2) was *added*, by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), s. 51. [15-1-1937.]

97. ^a[(1)] If a prospectus is issued which does not comply with the provisions of section 93, every person who is knowingly responsible for the issue of such prospectus shall be liable to a fine not exceeding fifty rupees for every day from the day of the issue of the prospectus until a copy complying with the requirements of section 93 is filed.]

^a[(2)] In the event of non-compliance with b [or contravention of] any of the requirements of section 93, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance b [or contravention] if he proves that—

- (a) as regards any matter not disclosed, he was not cognisant thereof ; or
- (b) the non-compliance b [or contravention] arose from an honest mistake of fact on his part; b [or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the Court were immaterial, or was otherwise such as ought in the opinion of the Court having regard to all the circumstances of the case reasonably to be excused.]

Provided that, in the event of non-compliance with b or [contravention of] the requirements contained in clause (a) of sub-section (1) of section 93, no such director or other person shall any liability in respect of the non-compliance b [or contravention] unless it be proved that he had incur knowledge of the matters not disclosed.

[(1908) 8 Edw. VII C. 69—S. 81 (6) ; (1929) 19 and 20 Geo. V C. 23—S. 35 (4)].

[a] The original s. 97 was *re-numbered* as sub-section (2) of that section and sub-section (1) was *inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), s. 52. [15-1-1937.]

[b] *Inserted, ibid.*

98. (1) A company which does not issue a prospectus on or with reference to its formation shall not allot any of its shares or debentures unless before the first allotment of either shares or debentures there has been filed with the registrar a statement in lieu of prospectus signed by every person who is named therein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars ^a [set out in the form marked I in the Second Schedule].

(2) This section shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act or, in so far as it relates to the allotment of shares to a company limited by guarantee and not having a share capital.

[See S. 102. (1908) 8 Edw. VII. C. 69—S. 82; (1929) 19 and 20 Geo. V, C. 23—S. 40].

[a] Substituted for "set out in the Second Sch.", by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 53. [15-1-1937].

^a[**98A. (1)** Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures but without prejudice to the liability, if any, of the persons by whom the offer is made in respect of mis-statements contained in the document or otherwise in respect thereof.

(2) For the purposes of this Act it shall, unless the contrary is proved, be evidence that an allotment of or an agreement to allot shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

(a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot; or

(b) that at the date when the offer was made the whole of the consideration to be received by the company in respect of the shares or debentures had not been so received;

(3) Section 97 shall apply to the person or persons making the offer as though they were persons named in a prospectus as directors of a company, and the provisions of section 93 shall have effect as if it required a prospectus to state, in addition to the matters required by that section to be stated in a prospectus—

(a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and

(b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

(4) Where a person making an offer to which this section relates is a company or a firm it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by all directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing.]

[(1929) 19 and 20 Geo V, C.—23 S. 38].

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 54. [15-1-1937].

Restriction on alteration of terms mentioned in prospectus or statement in lieu of prospectus.

99. A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting.

[See S. 77 (3) (e). (1908) 8 Edw. VII, C. 69—S. 83; (1929) 19 and 20 Geo. V, C 23—S. 36].

100. (1) Where a prospectus invites persons to subscribe for shares in or debentures of a company, every person who is a director of the company at the time of the issue of the prospectus, and every person who has authorised the naming of himself and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time, and every promoter of the company, and every person who has authorised the issue of the prospectus, shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for all loss or damage they may have sustained by reason of any misleading or untrue statement therein, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

- (a) with respect to every misleading or untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe and did up to the time of the allotment of the shares or debentures, as the case may be, believe that the statement fairly represented the facts or was true ;
- (b) with respect to every misleading or untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation : Provided that the director, person named as director, promoter or person who authorised the issue of the prospectus shall be liable to pay compensation as aforesaid if it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it; and
- (c) with respect to every misleading or untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document;

or unless it is proved—

- (i) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
- (ii) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; or
- (iii) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any misleading or untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal, and of the reason therefor.

(2) Where a company existing at the commencement of this Act has issued shares or debentures, and for the purpose of obtaining further capital by subscriptions for shares or debentures issues a prospectus, a director shall not be liable in respect of any statement therein unless he has authorised the issue of the prospectus, or has adopted or ratified it.

(3) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus and has not authorised

SECTION 100—Note 1.

[1] By virtue of sub-section (5) of Section 93 a person who has incurred penalty under S. 100. is expressly debarred from saving himself from that penalty by anything occurring in S. 93 ; otherwise he can take advantage of his own wrong. (Vol 21) 1934 Mad 641 (642).

[2] Two of the directors mentioned in a prospectus retired before allotment of shares and the fact of retirement was not communicated to the allottee of shares.

Held that the allottee of the shares would be entitled to rescind the contract of allotment of shares and claim a refund of the moneys paid by him. (Vol 17) 1930 Mad 825 (826).

[3] A director of a company is not liable for fraud (such as issuing pamphlet, circulars and prospectus) committed by his co-directors or by any other agent of the company unless the knowledge of it is brought home either personally or tacitly to him. (1878) 10 Ch D 502 (513, 514).

or consented to the issue thereof, the directors of the company except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, shall be liable to indemnify the person named as aforesaid against all damages costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any suit or legal proceedings brought against him in respect thereof.

(4) Every person who, by reason of his being a director or named as a director, or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(5) For the purposes of this section—

(a) the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or the portion thereof containing the misleading or untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company ;

(b) the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him.

[(1908) 8 Edw. VII C. 69—S. 84, (1929) 19 and 20 Geo V. C. 23—S. 37].

Objects and Reasons.

"After full discussion we considered it distinctly advisable that the word 'misleading' should be retained in clause 101 of the Bill (now section 100 of the Act), and we have made slight verbal alterations to provide for this addition throughout the clause."—S. C. R., 1913.

ALLOTMENT.

101. ^a[(1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which in the opinion of the directors must be raised by the issue of share capital in order to provide the sums or, if any part thereof is to be defrayed in any other manner, the balance of the sum required to be provided in respect of the matters specified in sub-section (2) has been subscribed, and the sum of at least five per cent thereof has been paid to or received in cash by the company.

(2) The matters for which provision for the raising of a minimum amount of share capital must be made by the directors are the following, namely :—

(a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;

(b) any preliminary expenses payable by the company and any commission so payable to any person in consideration of his agreeing to subscribe for or of his procuring or agreeing to procure subscriptions for any shares in the company ;

(c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters, and

(d) working capital.

SECTION 101—Note 1.

[1] A company can allot to an applicant only unappropriated shares. Shares which are already appropriated to a person can be transferred only by that person and cannot be the subject-matter of allotment by the company. (Vol 24) 1937 Lah 812 (813, 814) (DB).

[2] It is not correct to say that there can be no concluded contract to allot shares until after allotment intact and communication of the allotment to the proposed share-holder. A valid executory contract for allotment of shares is constituted by offer and communicated acceptance before allotment is made. Where there is only an application for shares to a company and nothing further is done by the company except the

allotment there is no conclusive contract until the allotment is communicated to the applicant. (Vol 17) 1930 PC 134 (136) (PC).

[3] An allotment of shares must be made within a reasonable time and a person is not bound to accept an allotment made after the lapse of a reasonable time. (Vol 21) 1934 Bom 97 (99) (DB)* (Vol 23) 1936 Lah 16 (17) (Where allotment was made after long delay just the day before the company went into liquidation and no notice of allotment was sent, and it was not shown that the applicant's name was put on the register of members, it was held that the allotment was invalid.)

[4] Before a person is informed of the allotment of shares to him, he has a right to revoke his offer to purchase the shares and ask for the return of the money

(2A) The amount referred to in sub-section (1) as the amount stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as the minimum subscription.

(2B) All moneys received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934, until returned in accordance with the provisions of sub-section (4) or until the certificate to commence business is obtained under section 103.

(2C) In the event of any contravention of the provisions of sub-section (2B) every promoter, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five hundred rupees.]

(3) The amount payable on application on each share shall not be less than five per cent of the nominal amount of the share.

(4) If the conditions aforesaid have not been complied with on the expiration of one hundred and ^b[eighty] days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred and ^c[ninety] days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of seven per cent. per annum from the expiration of the one hundred and ^d [ninetieth] day : Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.

(5) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void.

(6) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription.

(7) In the case of the first allotment of share capital payable in cash of a company which does not issue any invitation to the public to subscribe for its shares, no allotment shall be made unless the minimum subscription (that is to say)—

(a) the amount (if any) fixed by the memorandum or articles and named in the statement in lieu of prospectus as the minimum subscription upon which the directors may proceed to allotment ; or

(b) if no amount is so fixed and named, the whole amount of the share capital other than that issued or agreed to be issued as fully or partly paid up otherwise than in cash ;

has been subscribed and an amount not less than five per cent of the nominal amount of each share payable in cash has been paid to and received by the company.

Section 101 (contd.)

paid for that purpose inasmuch as in order to obtain a binding allotment there must be an application, an allotment and a communication of his allotment. (Vol 20) 1933 Rang 388 (388).

[See also (Vol 6) 1919 Lah 351 (353) (DB). (It is open to a party to revoke his application for the allotment of any shares provided the revocation is anterior to the date of any valid allotment or ratification by the Board of Directors)].

[5] An application for shares was made by the applicant conditional on an undertaking by the Bank that he would be appointed a permanent director of the local branch. The Bank had, however, allotted him shares regardless of this condition. The applicant accepted the position as share-holder by accepting dividends, filing suit to enforce it and by pledging the shares :

Held that he could not contend that the allotment was void on ground of non-fulfilment of condition precedent as he had by his own conduct waived the condition. (Vol 22) 1935 Lah 691 (692) (DB) * (Vol 23) 1936 Lah 700 (701) : 17 Lah 793 (DB).

[6] Articles of association not specially providing for allotment by Directors—Provision for management by Treasurer and Secretaries under supervision of Directors—Directors entitled to confer powers on the Secretaries from time to time—Application from putting forward secretaries as the persons to whom application should be made—Allotment on such cases by secretaries is valid. (Vol 2) 1915 Mad 325 (326) (DB).

[7] Secretary of a company has no general authority to make representations to induce persons to take shares in a company. A person who is induced to take shares in a company by a fraudulent misrepresentation of the secretary not authorised by or known to the officers of the company entitled to make representations is not entitled to maintain an action against the company for rescission of a contract, or, for damages for such misrepresentation. (Vol 24) 1937 Lah 544 (549).

[8] Allotment of shares made without the application and without receiving the allotment money is not valid. (Vol 21) 1934 All 855 (862) (DB).

(8) Sub-section (7) shall not apply to a private company or to a company which has allotted any shares or debentures before the commencement of this Act.

[(1908) 8 Edw. VII C. 69—S. 85 (1)—(6); (1929) 19 and 20 Geo V. C. 23—S. 39].

[a] Sub-section (1) to (2C) were substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), s. 55, for original sub-sections (1) and (2). [15-1-1937.]

[b] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) s. 55, for "twenty" [15-1-1937.]

[c] Substituted *ibid.*, for "thirty".

[d] Substituted *ibid.*, for "thirtieth."

[e] *I.e.*, the 1st April, 1914, see s. 1 (2) *supra*.

102. (1) An allotment made by a company to an applicant in contravention of the provisions of irregular allotment. sions of ^a[section 98 or section 101] shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later ^b[or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment and not later], and shall be so voidable notwithstanding that the company is in course of being wound up.

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of ^a[section 98 or section 101] with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby : Provided that proceedings to recover any such loss, damages or costs shall not be commenced after the expiration of two years from the date of the allotment.

[(1908) 8 Edw. VII C. 69—S. 86; (1929) 19 and 20 Geo V. C. 23—S. 41.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 7. [26-2-1938.]

[b] Inserted, *ibid.*, 1936 (22 [XXII] of 1936), S. 56. [15-1-1937.]

Restrictions on commencement of business. **103.** (1) A company shall not commence any business or exercise any borrowing powers unless—

(a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription ; and

(b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription or, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, on the shares payable in cash ; and

Section 101 (*contd.*)

[9] A subscriber to Memorandum of Association has to pay for his shares in cash, in spite of his agreement with the promisee that he should receive them for his legal services. (Vol 31) 1944 Mad 322 (324) : ILR (1944) Mad 796 (DB).

[10] Sub-s. (3) is applicable to all allotment of shares whether at the time of the floating of the company or any subsequent period. (Vol 23) 1936 Lah 790 (791) (DB).

[11] Provisions of Sub-s. (3) are mandatory—Consequently application for shares when not accompanied by five per cent of the nominal amount of such shares is not a valid offer and therefore does not entitle the company to demand the share money. (Vol 26) 1939 Nag 225 (225) : ILR (1941) Nag 567.

[12] S. 101 does not forbid the directors from allotting shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do

this would be an infringement of the Act. (Vol 27) 1940 Cal 164 (166) : ILR (1939) 2 Cal 512.

[13] Suit by a share-holder that allotment of shares to certain persons is illegal and that they cannot act as share-holders does not lie under section 42, Specific Relief Act. (Vol 19) 1932 Cal 714 (714) (DB).

SECTION 102—Note 1.

[1] An allotment of share made without an application and allotment money is illegal. Directors who make such allotment in wilful contravention of S. 101 are guilty of misfeasance and must compensate to the company. (Vol 21) 1934 All 855 (862) (DB).

SECTION 103—Note 1.

[1] Where the managing agents of the company borrow money, which is not within their power, on behalf of the company which could not then commence any business inasmuch as it had not got a certificate under section 103, the borrowing cannot be said to be a *bona fide* transaction and even if the money is utilised for the company the company cannot be saddled with the liabilities therein. (Vol 27) 1940 Oudh 202 (205) : 15 Luck 515 (DB).

- (c) there has been filed with the registrar a duly verified declaration by the secretary or one of the directors in the prescribed form, that the aforesaid conditions have been complied with; and
- (d) in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, there has been filed with the registrar a statement in lieu of prospectus.

(2) The registrar shall, on the filing of a duly verified declaration, in accordance with the provisions of this section certify that the company is entitled to commence business, and that certificate shall be conclusive evidence that the company is so entitled :

Provided that, in the case of a company which does not issue a prospectus inviting the public to subscribe for its shares, the registrar shall not give such a certificate unless a statement in lieu of prospectus has been filed with him.

(3) Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding.

(4) Nothing in this section shall prevent the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

(5) If any company commences business or exercises borrowing powers in contravention of this section, every person who is responsible for the contravention shall, without prejudice to any other liability, be liable to a fine not exceeding five hundred rupees for every day during which the contravention continues.

(6) Nothing in this section shall apply to a private company, or to a company registered before the commencement of this Act which does not issue a prospectus inviting the public to subscribe for its shares or, in so far as its provisions relate to shares, to a company limited by guarantee and not having a share capital.

[(1908) 8 Edw. VII, C. 69—S. 87 : (1929) 19 and 20 Geo. V. C. 23—S. 94]

Return as to allotments.

104. (1) Whenever a company having a share capital makes any allotment of its shares, the company shall, within one month thereafter—

- (a) file with the registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share; and

SECTION 104—Note 1.

[1] Where a debenture deed provided that registered holder thereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share Rs. 100 of company forming part of or ranking *pari passu* with shares of original capital, and upon surrender of this debenture under this condition holder will not be entitled to proportionate interest thereon and ordinary share so allotted in exchange shall rank for dividend from and after half-year in which registration is made. *Held* that share allotted in those circumstances was allotted as fully paid up otherwise than in cash. (Vol 5) 1918 Mad 680 (680) : 41 Mad 807 (DB).

[2] Ratification by Board of Directors of previous contract with vendors of business is not contract in writing constituting the title of the allottee within the meaning of S. 104 (b). (Vol 13) 1926 Mad 880 (880) : 27 Or L Jour 700.

[3] Arrangement that a registered company's purchased shares are not to be paid for in cash but are to be issued as fully paid up shares as part of an advance which the company has undertaken to make is illegal if not made in writing and filed with the registrar. (Vol 1) 1914 Lah 483 (486) (DB).

[4] There is nothing in S. 104 Companies Act which requires that a stamp duty payable on a conveyance should be levied on agreement for allotment of shares by a company in future. (Vol 19) 1932 All 291 (293) (FB).

[5] Agreement to allot fully paid shares in consideration of the allotment of shares of another company was held not a conveyance and was properly stamped as an agreement with a twelve-annas stamp. (Vol 24) 1937 Mad 259 (261) : ILR (1937) Mad 559 (FB).

[6] Where contract of which particulars are given under S. 104 is only an agreement to transfer property in the future, the particulars thereof cannot be treated as a conveyance. (Vol 21) 1934 Lah 530 (532) : 15 Lah 501 (SB).

[7] Allotment of shares in consideration of written agreement as regards transfer of business—Return of allotment in Form VI accompanied by agreement forming the consideration for allotment—*Held* the agreement was not a conveyance and the fact that it was a written one was immaterial and so it was not liable to stamp duty, as a conveyance. (Vol 24) 1937 Lah 533 (534) : 15 Lah 500 (SB).

[8] The Directors and Managers of a company must furnish the return of allotments of shares required by S. 104 of the Companies Act. Ignorance of

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash, produce for the inspection and examination of the registrar a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and file with the registrar copies verified in the prescribed manner of all such contracts and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(2) Where such a contract as above mentioned is not reduced to writing, the company shall, within one month after the allotment, file with the registrar the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and these particulars shall be deemed to be an instrument within the meaning of the Indian Stamp Act, 1899, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under section 31 of that Act.

^a[(2A) If the registrar is satisfied that in the circumstances of any particular case the period of one month specified in sub-sections (1) and (2) for compliance with the requirements of this section is inadequate, he may extend that period as he thinks fit, and, if he does so, the provisions of sub-sections (1) and (2) shall have effect in that particular case as if for the said period of one month the extended period allowed by the registrar were substituted.]

(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues :

Provided that, in case of default in filing with the registrar ^b[within the time specified in sub-section (1) and (2)] any document required to be filed by this section, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to file the document was accidental or due to inadvertence or that on other grounds it is just and equitable to grant relief, may make an order extending the time for the filing of the document for such a period as the Court may think proper.

^c[(4) Nothing in this section shall apply to the issue and allotment by a company of shares which under the provisions of its articles were forfeited for non-payment of calls.]

[(1908) 8 Edw. VII, C. 69—S. 88; (1929) 19 and 20 Geo. V, C. 23—S. 42]

[a] Sub-sec. (2-A) was inserted by the Indian Companies (Amendment) Act, 1941 (26 [XXVI] of 1941). S. 2.

[b] Substituted, *ibid.*, for "within one month after the allotment."

[26-11-1941.]

[c] Inserted, *ibid.*, 1936 (22 [XXII] of 1936), S. 57.

[15-1-1937.]

Objects and Reasons.

Sub-section (1) (b).—"It was very strongly represented to us that the requirement in sub-clause, (1) (b) of this clause, by which the contracts, therein referred to, have to be filed with the Registrar, was a cause of great practical inconvenience. We had some hesitation in departing from the English practice, but considered that in these circumstances we should be justified in allowing certified copies to be filed..."—S.C.R. 1913.

Sub-section (2-A).—Cases have occurred in which particulars relating to the allocation in the United Kingdom of shares of companies with share capital have not

been received in India within one month from the date of allotment to enable them to be filed with the Registrar of Joint Stock Companies by the time required under sub-section (1) of this section. Such cases were likely to occur frequently during the period of war. In such circumstances it is unreasonable that companies should always apply to the High Courts for relief as provided in sub-section (3). Hence power is conferred on the Registrar to extend in exceptional cases the period within which the required return of share allotment can be filed.—See S. O. R., 1941, *Gazette of India*. 1941. Part V, page 199.

Section 104 (contd.)

law is no excuse. (Vol 6) 1919 Lab 361 (362, 363) : 20 Cr L Jour 725 : 1919 Pun Re Cr. No. 26 (DB).

[9] Allotment of shares as fully paid up in consideration of assets transferred to the Company—Failure to file agreement does not render the allottee of shares as a contributory—Only consequence of such a failure is the penalty provided by sub section (3) of this section. (Vol 13) 1926 All 524 (526) : 48 All 503 (DB).

[10] Registrar should file the documents referred in S. 104 even though they might have been presented after the expiry of time fixed for their presentation and the officer of the company presenting the documents should be informed that unless within certain time the applicant obtains an order from the Court extending the time for filing up, to the time when he actually did file, he will be liable to be prosecuted. (Vol 17) 1930 Cal 146 (146) : 56 Cal 976.

COMMISSIONS AND DISCOUNTS.

105. (1) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or

Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc.

conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles and the commission paid or agreed to be paid does not exceed the amount or rate so authorised and if the amount or rate per cent of the commission paid or agreed to be paid is—

(a) in the case of shares offered to the public for subscription, disclosed in the prospectus; or

(b) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar and, where a circular or notice, not being a prospectus inviting subscription for the shares is issued, also disclosed in that circular or notice.

(2) Save as aforesaid^a [and save as provided in section 105A], no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise

(3) Nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section.

[(1908) 8 Edw VII, C. 69—S. 89; (1929) 19 and 20 Geo. V. C. 23—S. 43]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 58 [15-1-1937]

SECTION 105—Note 1.

Cognate Sections.

Commission on debentures, particulars in case of—111.

Commission paid in respect of shares or debentures to be shown in annual list—32 (2) (f).

Commission, statement in balance sheet as to—106.

[1] If an arrangement for the issue of shares is such that in the course of its due working out there is as much a possibility that in the result the shares will have been issued at a discount, then the issue of shares as fully paid cannot be justified. (Vol 17) 1930 P C 151 (154): 51 Ind App 152: 54 Bom 437 (PC).

[2] An agreement by a company with its sole contractor for supply of materials to grant him certain shares on payment of the allotment money, the balance to be recovered in cash or from value of goods supplied is not an illegal agreement and does not contravene

S. 105. (Vol 19) 1932 PC 240 (243): 54 All 827: 80 Ind App (PC).

[3] An agreement to underwrite the shares of a limited company for a commission is *ultra vires* the company. Such an agreement stands on the same footing as an agreement by the company to pay a commission to a person in consideration of his subscribing *in praesenti* for a definite number of shares. (Vol 19) 1932 PC 212 (215) (PC).

[See also (Vol 15) 1928 PC 143 (146) (PC), (Case from Ontario).]

[4] An underwriting agreement is an agreement to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public. (Vol 19) 1932 PC 212 (214) (PC).

[5] Payment by a company of brokerage to brokers for placing its shares with other persons is legitimate. (Vol 19) 1932 PC 212 (214) (PC).

Objects and Reasons.

"The main point which [was] pressed upon our notice was that we ought to make it quite clear that Section 106 (now section 105) refers to all classes of commission paid for under-writing shares whether paid from capital or from profits. We have examined the question to the best of our ability, and have come to the conclusion that there is nothing in the clause as it stands which prevents the payment of commission out of profits without the disclosure required by that section. We are not altogether satisfied that it is necessary to

insert such a prohibition in the law. The matter was the subject of exhaustive investigation when the amendment of the Company Law was undertaken in England, and we naturally feel considerable hesitation in departing from the result that was then arrived at. Any alteration of the law is not unlikely to lead to litigation in the Courts here, and we are disinclined to disturb the course of English judicial decisions in connection with so intricate a matter."—S. C. R., 1913.

Power to issue shares
at a discount.

^a[105A. (1) Subject to the provisions of this section, it shall be law-
ful for a company to issue at a discount shares in the company of a class

already issued :

Provided that—

- (a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company and must be sanctioned by the Court ;
- (b) the resolution must specify the maximum rate of discount (not exceeding ten per cent in any case) at which shares are to be issued ;
- (c) not less than one year must at the date of issue have elapsed since the date on which the company was entitled to commence business ;
- (d) the shares to be issued at a discount must be issued within six months after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Every prospectus relating to the issue of the shares and every balance-sheet issued by the company subsequently to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question.

(3) If default is made in complying with sub-section (2), the company and every officer of the company who is in default shall be liable to a fine not exceeding fifty rupees.)

[(1929) 19 and 20 Geo. V, C. 23—S. 47].

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 59 [15-1-1937].*

Issue of redeemable
preference shares.

^a[105B. (1) Subject to the provisions of this section, a company
limited by shares may, if so authorised by its articles, issue preference
shares which are, or at the option of the company are to be, liable to be redeemed :

Provided that—

- (a) no such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or out of sale proceeds of any property of the company ;
- (b) no such shares shall be redeemed unless they are fully paid ;

SECTION 105 A—Note 1.

[1] Before the introduction of this section in 1936, the issue of shares at a discount was held to be illegal as contravening the provisions of this Act. (Vol 17) 1930 PC 151 (154) : 57 Ind App 152 : 54 Bom 437 (PC) (Subject to the provisions of this section the issue of such shares is, now, legal.

SECTION 105 B—Note 1.

[1] Where in the Articles of Association it was provided that the surplus assets were to be applied in the first place in repaying to the holder of preference shares, the amount paid up thereon and the residue belonged to the holder of the ordinary shares. *Held* that the arrears of preferential dividends could not be

'debts' and therefore to be paid out of the assets of the company before "surplus assets" were ascertained. (Vol 26, 1939 Cal 126 (128) : ILR (1938) 2 Cal 533.

[2] Where the dividends on the second preference shares are declared by the company 'subject to income-tax' it cannot be said that there is no declaration of dividend except after deduction of tax at the standard rate. The words 'subject to tax' mean no more than subject to tax properly deductible, and therefore in a case where no tax is properly deductible, the words have no effect on the amount of dividend declared. (Vol 27) 1940 Bom 97 (101) : ILR (1940) Bom 165 (FB).

[3] Section 54 A does not affect the right of a company to redeem any shares issued under this section; see section 54 A (4).

(c) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of profits which would otherwise have been available for dividend be transferred to a reserve fund, to be called "the capital redemption reserve fund", a sum equal to the amount applied in redeeming the shares, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were paid-up share capital of the company ;

(d) where any such shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption must have been provided for out of the profits of the company before the shares are redeemed.

(2) There shall be included in every balance-sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be, liable to be redeemed or, where no definite date is fixed for redemption, the period of notice to be given for redemption.

If a company fails to comply with the provisions of this sub-section, the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand rupees.

(3) Subject to the provisions of this section, the redemption of preference shares thereunder may be effected on such terms and in such manner as may be provided by the articles of the company.

(4) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it shall have power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purpose of calculating the fees payable under section 243 be deemed to be increased by the issue of shares in pursuance of this sub-section :

Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to stamp duty, be deemed to have been issued in pursuance of this sub-section unless the old shares are redeemed within one month after the issue of the new shares.

(5) Where new shares have been issued in pursuance of the last foregoing sub-section, the capital redemption reserve fund may, notwithstanding anything in this section, be applied by the company, up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.]

[(1929) 19 and 20 Geo V. C. 23—S. 46.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 59. [15-1-1937.]*

^a**105C.** Where the directors decide to increase the capital of the company by the issue of further shares such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.]

[a] *Inserted by the Indian Companies (Amendment) Act 1936 (22 [XXII] of 1936), S. 59. [15-1-1937.]*

Statement in balance-sheet as to commissions and discounts.

106. Where a company has paid any sums by way of commission in respect of any shares or debentures or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed or so much thereof as has not been written off, shall be stated in every balance-sheet of the company until the whole amount thereof has been written off.

[(1908) 8 Edw. VII. C. 69—S. 90; (1929) 19 and 20 Geo. V, C. 23—S. 44 (1)]

PAYMENT OF INTEREST OUT OF CAPITAL.

107. Where any shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions in this section mentioned, and may charge the same to capital as part of the cost of construction of the work or building, or the provision of plant :

Power of company to pay interest out of capital in certain cases.

Provided that—

- (1) no such payment shall be made unless the same is authorised by the articles or by special resolution ;
- (2) no such payment, whether authorised by the articles or by special resolution, shall be made without the previous sanction of the ^a[Central Government], which sanction shall be conclusive evidence for the purposes of this section that the shares of the company, in respect of which such sanction is given, have been issued for a purpose specified in this section ;
- (3) before sanctioning any such payment, the ^b[Central Government] may, at the expense of the company, appoint a person to inquire and report to ^cthe ^a[Central Government] as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry ;
- (4) the payment shall be made only for such period as may be determined by ^a[Central Government] ; and such period shall in no case extend beyond the close of the half-year next after the half-year during which the works or buildings have been actually completed or the plant provided ;
- (5) the rate of interest shall in no case exceed four per cent per annum or such lower rate as the ^c[Central Government], may, by notification in the ^d[Official Gazette], prescribe
- (6) the payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid ;
- (7) the accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate ;
- (5) nothing in this section shall affect any company to which the Indian Railway Companies Act, 1895, or the Indian Tramways Act, 1902, applies.

[1908] 8 Edw. VII, C. 69—S. 92; (1929) 19 and 20 Geo. V. C. 23—S. 54 (1)]

[a] *Substituted* by A. O. for "Local Government."

[b] *Substituted* by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2, Sch. I, for "such" [28-9-1939].

[c] *Substituted* by A. O. for "Governor-General in Council."

[d] *Substituted* by A. O. for "Gazette of India."

Objects and Reasons.

"It has been represented to us that clause 108 (now section 107) might place a company in a very difficult position as it may be necessary after the lapse of a considerable period of time to show that the shares of the company were issued for one of the purposes speci-

fied in the clause, and that this might be an almost impossible matter. We have, therefore, made the sanction of the Local Government (now Central Government) conclusive evidence on this point for the purposes of this clause'; [See Proviso (2)]—S.C.R., 1913

CERTIFICATE OF SHARES, ETC.

108. (1) Every company shall, within three months after the allotment of any of its shares, Limitation of time for debentures or debenture stock, and within three months after the registration of the transfer of any such shares, debentures or debenture stock complete and have ready for delivery the certificates of all shares, the debentures, and the certificates of all debenture stock allotted or transferred, unless the conditions of issue of the shares, debentures or debenture stock otherwise provide.

(2) If default is made in complying with the requirements of this section, the company, and every officer of the company who is knowingly a party to the default, shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[(1908) 8 Edw. VII, C. 69—S. 92; (1929) 19 and 20 Geo. V. C. 23—S. 67 (1) (2)].

INFORMATION AS TO MORTGAGES, CHARGES, ETC.

Certain mortgages and charges to be void if not registered.

109. ^a[(1) Every mortgage or charge created after the commencement of this Act by a company and being either—

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge on any immoveable property wherever situate, or any interest therein; or
- (d) a mortgage or charge on any book debts of the company; or
- ^b[(e) a mortgage or a charge, not being a pledge on any moveable property of the company except stock-in-trade; or]

^c[(f)] a floating charge on the undertaking or property of the company; shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, or a copy thereof verified in the prescribed manner are filed with the registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section, the money secured thereby shall immediately become payable.
Provided that—

- (i) in the case of a mortgage or charge created out of British India, comprising solely property situate outside British India, twenty-one days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the date of the creation of the mortgage or charge as the time within which the particulars and instrument or copy are to be filed with the registrar; and

SECTION 108—Note 1.

[1] The share certificate requires to be stamped under Art. 19, Stamp Act, 1899.

SECTION 109—Synopsis.

1. Rectification of Register of mortgages and charges.—See under S. 120.
2. Section 109 (1) (General).
3. Section 109 (1) (c).
4. Section 109 (1) (d).
5. Section 109 (1) (e).
6. Section 109 (1) (f).
7. Section 109 (1) Proviso (iv).
8. Section 109 (2).

Cognate Sections.

Mortgages and charges.—

- Certificate of registration—114, 115.
- Copy of instrument creating, to be kept at registered office—117.
- Inspection of copies of instruments creating—124.
- Rectification of register of—120.
- Registration of—112.
- Registration of charges created by foreign companies—277 D.
- Registration of—Only, as respects mortgages regards—116.

1. Rectification of Register of mortgages and charges.—[1] See under S. 120.

- (ii) where the mortgage or charge is created in British India but comprises property outside British India, the instrument creating or purporting to create the mortgage or charge or a copy thereof verified in the prescribed manner may be filed for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid or effectual according to the law of the country in which the property is situate; and
- (iii) where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a mortgage or charge on those book debts; and
- (iv) the holding of debentures entitling the holder to a charge on immovable property shall not be deemed to be an interest in immovable property.

b[(2) Where any mortgage or charge on any property of a company required to be registered under this section has been so registered, any person acquiring, such property or any part thereof, or any share or interest therein, shall be deemed to have notice of the said mortgage or charge as from the date of such registration.

d[In this section "British India" does not include Burma or Aden, whatever the date of the mortgage or charge in question.]

[(1908) 8 Edw. VII. C. 69—S. 93(1); (1929) 19 and 20 Geo V, C. 23—S. 79(1)—(4), (6) (7)].

[a] The original Sec. 109 was re-numbered as sub-sec. (1) of that section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 60. [15-1-1937].

[b] Inserted, *ibid.*

[c] The original clause (e) was re-lettered (f), *ibid.*

[d] Inserted by A. O.

Section 109 (contd.)

2. Section 109 (1) (General).—[1] Section 109 applies to a mortgage or charge created by the Company by contract and not to a charge arising by operation of law. (Vol 14) 1927 Oudh 55 (59) : 2 Luck 299 (DB).

[2] A mortgage unregistered according to the section does not create a valid charge on the company's properties as against a creditor or liquidator. (Vol 17) 1930 PC 66 (75) : 57 Ind App 76 : 5 Luck 128 (PC) * (Vol 26) 1939 Sind 100 (106).

[3] A mortgage unregistered according to the section is valid as an admission of debt. (Vol 17) 1930 PC 66 (75) : 57 Ind App 76 : 5 Luck 128 (PC).

[4] Mortgage not registered cannot be repudiated by the Company itself while it is a going concern. (Vol 14) 1927 Rang 288 (288) : 5 Rang 535. (DB) (In re *Monolithic Building Company, v. Tacom The Company* (1916) 1 Ch 643. Dist).

[5] Where a Company which was empowered to borrow money not exceeding the unpaid subscribed capital issued debentures binding themselves and their successors and their real and personal estate for payment of sums advanced and also by a proviso that the debenture holders should be paid *pari passu*. Held that the debentures were a charge on the movable and immovable properties of the company at the time of winding up but did not include the uncalled moneys. (1880) 15 Ch D 465 (472).

[6] Between a prior unregistered mortgage and a subsequent registered mortgage, the subsequent mortgage prevails even where the subsequent mortgagee has an express notice of the prior mortgage at the time of the execution of instrument. (1915) 1 Ch 643 (662, 663).

3. Section 109 (1) (c).—[1] Particulars of a mortgage by deposit of title deeds must be filed with

Registrar whether it is accompanied by a memorandum of deposit or not. (Vol 14) 1927 Bom 167 (169) (DB).

[2] In certain circumstances machinery might be 'immovable property' under the section if it is affixed to the soil. (Vol 25) 1938 All 574 (577) : ILR (1938) All 896.

[3] As to the effect of non-registration either under this Act or under Section 17, Registration Act, of an instrument executed by a company purporting to create a mortgage in favour of the plaintiff, see (Vol 17) 1930 PC 76 (78) (PC).

4. Section 109 (1) (d).—[1] Assignment of book-debt for securing existing debt constitutes a mortgage and if unregistered is inoperative against liquidator or creditors. (Vol 22) 1935 Cal 218 (222) : 62 Cal 1 (DB).

5. Section 109 (1) (e).—[1] Where a bank endorses to its creditors as security, promotes drawn in its favour by its debtors and delivers them to the creditor entitling him to realise the securities as and how he pleased, the transaction though it may amount to a mortgage also amounts to a pledge and does not, therefore, require registration. (Vol 30) 1943 Mad 73 (74) (DB).

6. Section 109 (1) (f).—[1] A floating security is not specific mortgage of the assets, with liberty to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act by the mortgagee is done which causes it to crystallise into a fixed security. (Vol 14) 1927 Cal 682 (685) : 54 Cal 513 (DB) (Charge created on all property by borrower company—All property to be in possession and control of lender company—Borrower company not to alienate or, if alienated, undertaking to replace the same by another property of equal value—Lender company placed in

Objects and Reasons.

"Clause 110 (now section 109) and the following clauses were the subject of our careful consideration. We gave our best attention to the question whether the condition of India required any substantial modification of English law. Our attention was also drawn by the representatives of the Bengal Chamber of Commerce to the case of *Ladenburg & Co. v Goodwin, Ferreira & Co.* (1912) 3 K. B. D. 275. They represented to us that this recent judicial pronouncement might seriously impede the course of business in this country. We gave all possible weight to the opinions which were advanced in support of these contentions, but, on the whole, we came to the conclusion that the substantial protection afforded to creditors by these clauses was too important a matter to allow the arguments against them to prevail. We were, moreover, of the opinion

that the importance of the decision in question had perhaps been exaggerated, and it was not likely to be so far-reaching in its effects as had been suggested. We have, therefore, retained with slight verbal amendments the clauses in question as they appeared in the Bill submitted for our consideration"—S.C.R., 1913.

Amendments made in 1936.—Prior to the amendment made in 1936 under the provisions as then existed, a charge or mortgage created over movable property of the company other than book-debts or the uncalled share capital was not required to be registered. The first amendment made in 1936 requires such charges or mortgages to be registered with certain qualifications. The second amendment is designed to affect transferees with notice as from the date of registration.—See S.O.R., 1936.

a[109A. (1) Where after the commencement of the Indian Companies (Amendment) Act, 1936, a company registered in British India acquires any property which on properties acquired is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar for registration

Section 109 (contd.)

possession—No floating charge is created) * (Vol 26) 1939 Sind 100 (103, 106) (Where the assets of a Corporation are of a fluctuating nature, changing from time to time in the ordinary course of business, and while taking loan creating charge on their assets no restraint of any kind whatever is placed on the conduct of the business of the Corporation, and the charge does not crystallise into a fixed security, the charge so created is a floating charge) * (Vol 13) 1926 Bom 427 (430) : 50 Bom 547 (DB).

[2] The principal tests as to whether a charge is a floating charge or not are : (1) Is it a charge upon all or a certain class of assets, present or future ? (2) Would the assets charged in the ordinary course of business be changed from time to time ? (3) Has the company power until such step is taken by the charges to carry on the business of the company in the ordinary way ? (Vol 29) 1942 All 119 (120) : ILR (1942) All 242 (FB) ((Vol 25) 1938 All 574 : ILR (1938) All 896 Affirmed.)

[3] An agreement between the parties that the amount paid to the company will be a second charge on the machinery and other goods of the company, creates a floating charge, i.e., a charge which would fasten on to the property that might exist when the time arrived for the charge to be enforced and would be void under this section for want of registration. (Vol 29) 1942 All 119 (120) : ILR (1942) All 242 (FB) * ((Vol 25) 1938 All 574 : ILR (1938) All 896 affirmed)

[4] A floating charge is a present charge though it does not finally attach upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of business. (Vol 18) 1931 Cal 223 (231) : 58 Cal 136 (DB) (Reversed on another point in (Vol 18) 1931 PC 245 : 58 Ind App 323 : 59 Cal 377 (PC) * (Vol 21) 1934 All 161 (162) (It is the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes.)

[5] Where all present and future movables were pledged by director of a company but himself remained in possession as agent of the pledgee, held that the parties did not create a pledge of existing properties but that only a floating charge was created and it not being registered, was void against the liquidator. (Vol 13) 1926 Bom 28 (30) (DB).

[6] Debenture account with bank on security of block and machinery—Company winding up—Liquidator leasing out property and realising rent—Order of liquidation and crystallising of security—Bank's security held did not extend to rents realised from lease. (Vol 23) 1936 Oudh 338 (339) : 12 Luck 233 (DB).

[7] As to whether debentures creating a floating charge require registration under S. 17, Registration Act, 1908, see (Vol 18) 1931 PC 245 (247) : 58 Ind App 323 : 59 Cal 377 (PC).

[8] Nothing contained in the Transfer of Property Act affects any law for the time being in force relating to transfer of property to or by companies ; see Transfer of Property Act, 1932, section 5.

[9] For effect of a floating charge, see under S. 233.

7. Section 109 (1) Prov'so (iv).—[1] Provisio (iv) to S. 109 merely means that mortgage or charge granted by a Company is not to be deemed to be an interest in immovable property merely by reason that it comprises or takes effect over debentures held by the company and that such debentures constitute a charge on immovable property of the company. (Vol 18) 1931 Cal 223 (232) : 58 Cal 136 (DB).

8. Section 109 (2).—[1] Company—Debentures—Issue of debentures relating to immovable properties—Registration followed by proper certificate or registration—Subsequent alteration by Registrar of his own accord does not affect validity of debentures between parties to it. (Vol 17) 1930 Cal 536 : 57 Cal 323.

[2] As to whether the validity of the registration under this section is affected by an omission of certain particulars from the register, see (1924) 1 KB 431 (443, 444).

in manner required by this Act within twenty-one days after the date on which the acquisition is completed :

Provided that, if the property is situate and the charge was created outside British India, twenty-one days after the date on which the copy of the instrument could in due course of post, and if despatched with due diligence, have been received in British India shall be substituted for twenty-one days after the completion of the acquisition as the time within which the particulars and the copy of the instrument are to be delivered to the registrar.

(2) If default is made in complying with this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine of five hundred rupees.]

[(1929) 19 and 20 Geo. V, C. 23—S. 81.]

[a] Inserted by the Indian Companies (Amendment) Act. 1936 [22 (XXII) of 1936], S. 6. [15-1-1937.]

[b] The Act came into force on the 15th January 1937.

110. Where a series of debentures containing, or giving by reference to any other instrument, Particulars in case any charge to the benefit of which the debenture-holders of that series are series of debentures entitled *pari passu* is created by a company, it shall be sufficient for the entitling holders *pari passu*. purposes of section 109, if there are filed with the registrar within twenty-one days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars :—

- (a) the total amount secured by the whole series ; and
 - (b) the dates of the resolutions authorising the issue of the series and the date of the covering deed (if any) by which the security is created or defined ; and
 - (c) a general description of the property charged ; and
 - (d) the names of the trustees (if any) for the debenture-holders ;
- together with the deed or a copy thereof verified in the prescribed manner containing the charge, or if there is no such deed, one of the debentures of the series, and the registrar shall, on payment of the prescribed fee, enter those particulars in the register :

Provided that, where more than one issue is made of debentures in the series, there shall be filed with the registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued.

[(1908) 8 Edw. VII, C. 69—S. 93 (3) ; (1929) 19 and 20 Geo V, C. 23—S. 79 (8).]

111. Where any commission, allowance or discount has been paid or made either directly or Particulars in case indirectly by the company to any person in consideration of his subscrib. commission, etc., on ing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be filed for registration under sections 109 and 110 shall include particulars as to the amount or rate per cent of the commission, discount or allowance so paid or made, but an omission to do this shall not affect the validity of the debentures issued :

Provided that the deposit of any debentures as security for any debt of the company shall not for the purposes of this provision be treated as the issue of the debentures at a discount.

[(1908) 8 Edw. VII, C. 69—S. 93 (4) ; (1929) 19 and 20 Geo. V, C. 23—S. 79 (9).]

112. (1) The registrar shall keep, with respect to each company, a register in the prescribed Register of mortgages form of all mortgages and charges created by the company after the com. and charges. mencement of this Act and requiring registration under section 109, and shall, on payment of the prescribed fee, enter in the register, with respect to every such mortgage, or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

(2) After making the entry required by sub-section (1), the registrar shall return the instrument (if any) or the verified copy thereof, as the case may be, filed in accordance with the provisions of section 109 or section 110 to the person filing the same.

(3) The register kept in pursuance of this section shall be open to inspection by any person on payment of the prescribed fee, not exceeding one rupee for each inspection.

[(1908) 8 Edw. VII, C. 69—S. 93 (2), (3), (5) ; (1929) 19 and 20 Geo. V, C. 23—S. 82 (1), (3).]

113. The registrar shall keep a chronological index, in the prescribed form and with the Index to register of prescribed particulars, of the mortgages or charges registered with him under this Act.

[(1908) 8 Edw. VII, C. 69—S. 93; (1929) 19 and 20 Geo. V, C. 23—S. 82 (4)]

Certificate of registration.

114. The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of section 109, stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of sections 109 to 112 as to registration have been complied with.

[(1908) 8 Edw. VII, C. 69—(S) 93 (5); (1929) 19 and 20 Geo. V, C. 23—S. 82 (2)].

Endorsement of certificate of registration on debenture or certificate of debenture stock.

115. The company shall cause a copy of every certificate of registration, given under section 114, to be endorsed on every debenture or certificate of debenture stock which is issued by the company, and the payment of which is secured by the mortgage or charge so registered:

Provided that nothing in this section shall be construed as requiring a company to cause a certificate of registration of any mortgage or charge so given to be endorsed on any debenture or certificate of debenture stock which has been issued by the company before the mortgage or charge was created.

[(1908) 8 Edw. VII, C. 69—S. 93 (6); (1929) 19 and 20 Geo. V, C. 23—S. 83 (1)]

Duty of company and right of interested party as regards registration.

116. (1) It shall be the duty of the company to file with the registrar for registration the prescribed particulars of every mortgage or charge created by the company and of the issues of debentures of a series, requiring registration under section 109, but registration of any such mortgage or charge may be effected on the application of any person interested therein.

(2) Where the registration is effected on the application of some person other than the company, that person shall be entitled to recover from the company the amount of any fees properly paid by him to the registrar on the registration.

^a(3) Whenever the terms or conditions or extent or operation of any mortgage or charge registered under this section are modified, it shall be the duty of the company to send to the registrar the particulars of such modification, and the provisions of this section as to registration of mortgage or a charge shall apply to such modification of the mortgage or charge as aforesaid.]

[(1908) 8 Edw. VII, C. 69—S. 93 (7); (1929) 19 and 20 Geo. V, C. 23—S. 80 (1) (2)].

[a] *Inserted by the Indian Companies (Amendment) Act, 1936, (22 [XXII] of 1936), S. 62. [15-1-1937.]*

Copy of instrument creating mortgage or charge to be kept at registered office.

117. Every company shall cause a copy of every instrument creating any mortgage or charge requiring registration under section 109 to be kept at the registered office of the company: Provided that, in the case of a series of uniform debentures, a copy of one such debenture shall be sufficient.

[(1908) 8 Edw. VII, C. 69—S. 93 (9); (1929) 19 and 20 Geo. V, C. 23—S. 87].

Registration of appointment of receiver.

118. (1) If any person obtains an order for the appointment of a receiver of the property of a company, or appoints such a receiver under any powers contained in any instrument, he shall, within fifteen days from the date of the order or of the appointment under the powers contained in the instrument, file notice of the fact with the registrar, and the registrar shall, on payment of the prescribed fee, enter the fact in the register of mortgages and charges.

SECTION 114—Note 1.

[1] If after the issue of debentures relating to immovable property by a company, the debenture-holder gets them registered under the Companies Act and obtains a proper certificate for the same, nothing done subsequently by way of alteration by the registrar of his own accord affects the validity of the documents as between the company and the debenture-holder. (Vol 17) 1930 Cal 536 (537): 57 Cal 328.

[2] Although a certificate given by the registrar of Joint Stock Companies under S. 114 of the Act is conclusive evidence of the compliance of the formalities

prescribed by S. 109, the registration having been made long after 21 days after the date of the mortgage and order of the Civil Court extending the period having been vacated, there is no valid registration within the prescribed time. (Vol 24) 1937 Oudh 62 (64).

SECTION 118—Note 1.

[1] Receiver of a company cannot be appointed by Court except in debenture-holder's action when the business and assets are charged with payment of the claims of debenture-holder. (Vol 12) 1925 Cal 817 (819): 52 Cal 513 (DB).

(2) If any person makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[(1908) 8 Edw. VII. C. 69—S. 94 (1), (2); (1929) 19 and 20 Geo. V. C. 23—S. 86 (1), (3)]

119. (1) Every receiver of the property of a company who has been appointed under the powers contained in any instrument, and who has taken possession, shall, once in every half-year while he remains in possession, and also on ceasing to act as receiver, file with the registrar an abstract in the prescribed form of his receipts and payments during the period to which the abstract relates, and shall, also, on ceasing to act as receiver, file with the registrar notice to that effect, and the registrar shall enter the notice in the register of mortgages and charges.

^a[(2) Where a receiver of the property of a company has been appointed, every invoice, order for goods, or business letter issued by or on behalf of the company, or the receiver of the company, being a document on or in which the name of the company appears, shall contain a statement that a receiver has been appointed.]

(3) If default is made in complying with the requirements of this section, the company and every director, manager, managing agent, secretary or other officer of the company and every receiver who knowingly and wilfully authorises or permits the default, shall be liable to a fine not exceeding two hundred rupees.]

[(1908) 8 Edw. VII. C. 69—S. 95; (1929) 19 and 20 Geo V. C. 23—Ss. 308, 310].

[a] Sub-sections (2) and (3) were *substituted* for the original sub-section (2) by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 63. [15-1-1937].

120. ^a[1] The Court, on being satisfied that the omission to register a mortgage or charge of mortgages. Rectification of register within the time required by section 109, or that the omission or misstatement of any particular with respect to any such mortgage or charge, b[or the omission to give intimation to the registrar of the payment or satisfaction of a debt for which a charge or mortgage was created] was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested and on such terms and conditions as seem to the Court just and expedient, order that the time for registration be extended, or, as the case may be, that the omission or misstatement be rectified, and may make such order as to the costs of the application as it thinks fit.

^b[(2) Where the Court extends the time for the registration of a mortgage or charge, the order shall not prejudice any rights acquired in respect of the property concerned prior to the time when the mortgage or charge is actually registered.]

[(1908) 8 Edw. VII. C. 69—S. 96; (1929) 19 and 20 Geo. V. C. 23—S. 85].

[a] The original S. 120 was *re-numbered* as sub-section (1) of that section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 64. [15-1-1937]

[b] *Inserted, ibid.*

SECTION 120—Note 1.

[1] Where a company's property was mortgaged to two persons and the plaintiff's mortgage which was a subsequent one recited that it created a *second* charge but was registered earlier and the defendant's prior mortgage was registered later but within the time extended under S. 120 with an order that it should be without prejudice to the rights of any mortgagee accrued in the meantime, the order cannot be held as intended to convert the plaintiff's second charge upon the property into a first charge thereon.

(Vol 17) 1930 PC 66 (75) : 57 Ind App 76 : 5 Luck 128 (PC) ((Vol 14) 1927 Oudh 300 (DB) affirmed.)

[2] Mortgage by company not registered within time—Company going into liquidation—Time for registration cannot be extended. (Vol 24) 1937 Oudh 62 (65).

[3] The Judge is competent to review his order passed under S. 120. He has also inherent power to vacate his previous order if he considers it necessary for the ends of justice to do so. (Vol 24) 1937 Oudh 62 (63).

^a 121. (1) It shall be the duty of the company to give intimation to the registrar of the pay-
 Registration or satisfac- ment or satisfaction of any charge or mortgage created by the company
 tion of mortgages and and requiring registration under section 109 within twenty-one days from
 charges. the date of the payment or satisfaction thereof.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the mort-
 gagee calling upon him to show cause, within a time (not exceeding fourteen days) to be fixed by
 such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.

(3) The registrar shall, if no cause is shown, order that a memorandum of satisfaction be
 entered on the register and shall if required furnish the company with a copy thereof.

(4) Where cause is shown, the registrar shall record a note to that effect in the register, and
 shall inform the company that he has done so.]

[(1908) 8 Edw. VII, C. 69—S. 97 ; (1929) 19 and 20 Geo. V. C 23—S. 84.]

[a] Substituted for the original section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of
 1936), S. 65. [15-1-1937.]

Objects and Reasons.

"We consider it inappropriate that the registrar should have authority to determine whether the cause shown
 is satisfactory or not, or to decide any matter in dispute under the section. We have, therefore, provided that he
 should merely note the fact of dispute and inform the parties that he has done so."—S.C.R., 1936.

Penalties.

122. (1) If any company makes default in filing with the registrar for
 registration the particulars—

(a) of any mortgage or charge created by the company ; or

^a[(b) of the payment or satisfaction of a debt in respect of which a mortgage or charge has
 been registered under section 109 or section 109A ; or]

^a[(c) of the issues of debentures of a series,

requiring registration with the registrar under the foregoing provisions of this Act, then, unless the
 registration has been effected on the application of some other person, the company, and every
 officer of the company or other person who is knowingly a party to the default, shall on conviction
 be liable to a fine not exceeding five hundred rupees for every day during which the default
 continues.

(2) Subject as aforesaid, if any company makes default in complying with any of the
 requirements of this Act as to the registration with the registrar of any mortgage or charge created
 by the company, the company, and every officer of the company, who knowingly and wilfully
 authorises or permits the default shall, without prejudice to any other liability, be liable on con-
 viction to a fine not exceeding one thousand rupees.

(3) If any person knowingly and wilfully authorises or permits the delivery of any deben-
 ture or certificates of debenture stock requiring registration with the registrar under the foregoing
 provisions of this Act without a copy of the certificate of registration being endorsed upon it, he
 shall, without prejudice to any other liability, be liable on conviction to a fine not exceeding one
 thousand rupees.

[(1908) 8 Edw. VII, C. 69—S. 99 (1), (3) ; (1929) 19 and 20 Geo. V, C. 23—Ss. 80 (3), 83 (2).]

[a] (Clause (b) was inserted and the original clause (b) re-lettered (c) by the Indian Companies (Amendment)
 Act, 1936 (22 [XXII] of 1936), S. 66. [15-1-1937.]

123. (1) Every ^a[" company shall keep a register of mortgages and enter therein all mort-
 Company's register of gages and charges specifically affecting property of the company b[and
 mortgages. all floating charges on the undertaking or on any property of the com-
 pany], giving in each case a short description of the property mortgaged or charged, the amount of
 the mortgage or charge and (except in the case of securities to bearer) the names of the mortgagees
 or persons entitled thereto.

SECTION 123—Note 1.

[1] Under the Explanation to S. 68 of Act of
 1882, which has been omitted in the correspond-
 ing section 123 of the present Act, an officer of
 the company in whose favour a charge specifically

affecting the property of the company, had been created,
 could not avail himself of it, unless it was registered
 under S. 68, though he had ceased to be an officer at
 the time when the charge was sought to be enforced.
 (Vol 7) 1920 PC 56 (60) : 43 Mad 550 : 47 Ind App 38
 (PC) * (Vol 4) 1917 Mad 646 (647) (DB).

(2) If any director, manager or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding five hundred rupees.

[1892—S. 68; (1908) 8 Edw. VII C. 69—S. 100; (1929) 19 and 20 Geo. V, C. 23—S. 88.]

[a] The word "limited" was *repealed* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 67. [15-1-1937.]

[b] *Inserted ibid.*

Objects and Reasons.

Amendment made in 1936.—It had been doubted whether the provisions of section 123 apply to floating charges in view of the fact that such charges do not affect property until the charges are crystallized. The amendment made in 1936 makes the intention of the section clear.—S.O.R., 1936.

124. (1) The copies kept at the registered office of the company in pursuance of section 117 of instruments creating any mortgage or charge requiring registration under this Act with the registrar, and the register of mortgages kept in pursuance of section 123, shall be open at all reasonable times to the inspection of any creditor or member of the company without fee, and the register of mortgages shall also be open to the inspection of any other person on payment of such fee, not exceeding one rupee for each inspection, as the company may prescribe.

(2) If inspection of the said copies or register is refused, the company shall be liable to a fine not exceeding fifty rupees and a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and in addition to the above penalty, the Court may by order compel an immediate inspection of the copies or register.

[1882—S. 68; (1908) 8 Edw. VII, C. 69—S. 101; (1929) 19 and 20 Geo. V, C. 23—S. 89.]

125. (1) Every register of holders of debentures of a company shall, except when closed in accordance with the articles during such period or periods (not exceeding on the whole thirty days in any year) as may be specified in the articles, be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that at least two hours in each day are appointed for inspection, and every such holder may require a copy of the register or any part thereof on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(2) A copy of any trust-deed for securing any issue of debentures shall be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust-deed of the sum of one rupee or such less sum as may be prescribed by the company, or, where the trust-deed has not been printed, on payment of six annas for every one hundred words or fractional part thereof required to be copied.

(3) If inspection is refused, or a copy is refused or not forwarded, the company shall be liable to a fine not exceeding fifty rupees, and to a further fine not exceeding twenty rupees for every day during which the refusal continues, and every officer of the company who knowingly authorises or permits the refusal shall incur the like penalty, and the Court may by order compel an immediate inspection of the register.

[(1908) 8 Edw. VII, C. 69—S. 102; (1929) 19 and 20 Geo. V, C. 23—S. 73].

DEBENTURES AND FLOATING CHARGES

126. A condition contained in any debentures or in any deed for securing any debentures, whether issued or executed before or after the passing of this Act, shall not be invalid by reason only that thereby the debentures are made irredeemable or redeemable only on the happening of a contingency, however, remote, or on the expiration of a period however long.

Perpetual debentures. [(1908) 8 Edw. VII, C. 69—S. 103; (1929) 19 and 20 Geo. V, C. 23—S. 74].

SECTION 126—Note 1.

[1] Action by holders of debentures issued by company under security of fixed and floating charge over its assets—Right of labourers in company to priority—Receiver appointed by Court acting under its order obtaining loan from creditor to pay company's em-

ployees who had gone on strike as their salaries had not been paid for three months and agreeing to hypothecate property of the company—Creditor held entitled to a charge in priority to debenture-holders. (Vol 32) 1945 PC 121 (123): ILR (1945) All 597: 72 Ind App 133: ILR (1945) Kar (PC) 245 (PC).

127. (1) Where either before or after the commencement of this Act a company has redeemed

any debentures previously issued, the company, unless the articles or the conditions of issue expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued or his assigns), shall have power, and shall be deemed always to have had power, to keep the debentures alive for the purposes of re-issue, and where a company has purported to exercise such a power the company shall have power, and shall be deemed always to have had power, to re-issue the debentures either by re-issuing the same debentures or by issuing other debentures in their place, and upon such re-issue the person entitled to the debentures shall have, and shall be deemed always to have had, the same rights and priorities as if the debentures had not previously been issued.

(2) Where with the object of keeping debentures alive for the purpose of re-issue they have, either before or after the commencement of this Act, been transferred to a nominee of the company, a transfer from that nominee shall be deemed to be a re-issue for the purposes of this section.

(3) Where a company has, either before or after the commencement of this Act, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

(4) The re-issue of a debenture or the issue of another debenture in its place under the power by this section given to, or deemed to have been possessed by, a company, whether the re-issue or issue was made before or after the commencement of this Act, shall be treated as the issue of a new debenture for the purposes of stamp duty, but it shall not be so treated for the purposes of any provision limiting the amount or number of debentures to be issued:

Provided that any person lending money on the security of a debenture re-issued under this section which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not duly stamped, but in any such case the company shall be liable to pay the proper stamp duty and penalty.

(5) Nothing in this section shall prejudice—

(a) the operation of any decree or order of a Court of competent jurisdiction pronounced or made before the twenty-fifth day of February, 1910, as between the parties to the proceedings in which the decree or order was made, and any appeal from any such decree or order shall be decided as if this Act had not been passed; or

(b) any power to issue debentures in the place of any debentures paid off or otherwise satisfied or extinguished, reserved to a company by its debentures or the securities for the same.

[(1908) 8 Edw. VII, C. 69—S. 104; (1929) 19 and 20 Geo. V, C. 23—S. 75 (1), (2), (4), (5).]

Specific performance of contract to subscribe for debentures.

128. A contract with a company to take up and pay for any debentures of the company may be enforced by a decree for specific performance.

[(1908) 8 Edw. VII, C. 69—S. 105; (1929) 19 and 20 Geo. V, C. 23—S. 76].

Section 126 (*contd.*)

[2] To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The power is usually conferred by the instrument constituting the debenture security upon the majority of the class of holders. It often enables them

to modify by resolution properly passed, the security itself. The power must be exercised for benefiting the class as a whole and not individual members only. Subject to this the power may be unrestricted. (Vol 14) 1927 PC 62 (62, 63).

129. (1) Where either a receiver is appointed on behalf of the holders of any debentures of a

Payments of certain debts out of assets subject to floating charge in priority to claims under the charge.

company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(3) Any payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

[(1908) 8 Edw. VII, C. 69—S. 107; (1929) 19 and 20 Geo. V, C. 23—S. 78].

STATEMENTS, BOOKS AND ACCOUNTS.

Books to be kept by company and penalty for not keeping proper books

130. (1) Every company shall cause to be kept proper books of account with respect to—

- (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place ;
- (b) all sales and purchases of goods by the company,
- (c) the assets and liabilities of the company.

(2) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall be open to inspection by the directors during business hours.

b(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2), if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2)]

b(4) In the case of a company managed by a managing agent the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees.]

[See Sch I Table A, Regs. 108 to 110 (1929) 19 and 20 Geo. V, C. 23—S. 122.]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 68, for the original [15-1-1937.]

[b] Sub-sec. (3) was re-numbered as sub-sec. (4) and new sub-sec. (3) was inserted, *ibid*, 1938, (2 [II] of 1938 S. 8. [26-2-1938.]

Objects and Reasons.

"We consider it sufficient that inspection should be possible at any time during office hours, and have amended sub-section (2) accordingly. Having regard to Indian practice the directors of a company should, we think, be made liable to a penalty under this section

only in those cases where the company is not run by a managing agent. We have accordingly provided that the managing agent, where there is one, shall be responsible for securing compliance with his section."—S.O.R., 1936.

SECTION 129—Note 1.

[1] Where a debenture deed charged all assets of company as floating charge and provided that the company shall carry on business and deal with assets till default is made for six calendar months in paying the principal and the company carried on business in spite of the default and created charges even after default, held that the company's right continued till the debenture-holder showed his desire to stop it as by

applying for Receiver and that the charges were not void. (Vol 3) 1916 Mad 7 (8) (DB) & (Vol 4) 1917 Mad 646 (647) (DB).

SECTION 130—Note 1.

[1] Per Lokur, J.—The words "assets and liabilities" have the same sense in Ss. 130 and 132. (Vol 31) 1944 Bom 107 (114) : ILR (1944) Bom 302 : 45 Cr L Jour 612 (FB).

131. a⁽¹⁾ The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a balance-sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months or in the case of a company carrying on business or having interests outside British India by more than twelve months :

Provided that the registrar may - for any special reason extend the period by a period not exceeding three months].

(2) The balance-sheet [and the profit and loss account or income and expenditure account] shall be audited by the auditor of the company as hereinafter provided, and the auditor's report shall be attached thereto, or there shall be inserted at the foot thereof a reference to the report, and the report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(3) Every company other than a private company shall send a copy of c [such balance-sheet and profit and loss account or income and expenditure account so audited together with a copy of the auditor's report] to the registered address of every member of the company at least d [fourteen days] before the meeting at which it is to be laid before the members of the company, and shall deposit a copy at the registered office of the company for the inspection of the members of the company during a period of at least d [fourteen days] before that meeting.

e(4) [* * * *]

[1882—S. 74 ; (1929) 19 and 20 Geo. V, C. 23—Ss. 123, 130 (1a)].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), s. 69, for the original sub-section. [15-1-1937].

[b] Inserted *ibid*.

[c] Substituted *ibid*, for "such balance-sheet so audited."

[d] Substituted *ibid*, for "seven days."

[e] Sub-section (4) was repealed *ibid*.

SECTION 131—Note 1.

[1] A company is under statutory duty to issue proper balance-sheet and the existence of disputes regarding amount due to company is no excuse. (Vol 20) 1933 Lah 301 (302).

[2] A balance-sheet must not be a mere inventory. It is supposed to be a pictorial representation of the trading position of the company easily appreciated not by ignorant people but by persons who are reasonably able to understand commercial expression and commercial conditions. (Vol 23) 1936 Cal 680 (683) : ILR (1937) 1 Cal 328 : 38 Cr L Jour 151 (DB).

[3] Registrar condoning delay in holding general meeting should also be deemed to have condoned delay in filing the balance-sheet before it. (Vol 28) 1941 Mad 504 (504) : 42 Cr L Jour 683.

[4] Persons who were never directors nor officers, nor even shareholders, when default occurred, are not liable in respect of offence under S. 131. (Vol 24) 1937 Mad 341 (342) : 38 Cr L Jour 695 * (Vol 1) 1914 Lah 222 (223) : 15 Cr L Jour 380 (DB). (A director of the company who resigns office before the expiry of the period allowed by law for filing a balance-sheet cannot be fixed with liability under S. 74 of the Companies Act of 1882 (now S 131) for failure to file a balance sheet with the Registrar of Joint Stock Companies).

[5] Under Regulations framed by the Punjab Government under S. 220(b) of Act 1882 (now S. 248 (2)) only Registrar is authorised for instituting and conducting all prosecutions specially which are in connection with breach of rules relating to submission of balance-sheets and other periodical returns. So com-

plaint under S. 74 of Act, 1882 (now S. 131) for wilful default in filing balance-sheet not brought by Registrar but by clerk of his office and countersigned by Public Prosecutor, is bad in law and proceedings of Magistrate based on such complaints are *ultra vires* and liable to be set aside on revision by High Court at any time during pendency of case. (1910) 11 Cr L Jour 577 (579) (Lah).

[6] A magistrate has jurisdiction to entertain a complaint against a director of a company for a failure to comply with the provisions of S. 74 of the Act of 1882 and (now S. 131) for misappropriation of money or falsification of accounts. But ordinarily a magistrate should be chary of proceeding on a complaint of this kind except after reference to the Registrar of the Joint Stock Companies or on the complaint of responsible persons. (1911) 12 Cr L Jour 596 (596, 597) (All).

[7] The same persons cannot be charged in respect of the same years with offences punishable both under Ss. 131 and 134. (Vol 24) 1937 Mad 341 (341) : 38 Cr. L Jour 695.

[8] When a company fails to get accounts balanced and prepare a balance-sheet and to make a list of its members, it should be convicted under Sec. 131 rather than under S. 134 (4). That the accounts had been called for by various criminal Courts is no defence. (Vol 21) 1934 Cal 63 (64) : 35 Cr L Jour 492.

[9] Auditor signing auditor's report below false balance-sheet makes false statement and is liable under S. 282. (Vol 19) 1932 Sind 4 (7) : 25 Sind LR 297.

[10] As to the publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies, see Insurance Act, 1938, S. 100.

131A. (1) The directors shall make out and attach to every balance-sheet a report with respect to the state of the company's affairs; the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance-sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance-sheet.

[2] The report referred to in sub-section (1) may be signed by the chairman of the directors on behalf on the directors if authorised in that behalf by the directors.

[3] The provisions of sub-section b [(4)] of section 130 shall apply to any person being a director who is knowingly and wilfully guilty of a default in complying with this section.]

[(1929) 19 and 20 Geo. V, C. 23—S. 123 (2)].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 70. [15-1-1937].

[b] *Substituted* for "(3)" by the Repealing and Amending Act, 1945 (6 [VI] of 1945) S. 3 and Sch. II.

132. (1) The balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company ^a[in accordance with the requirements indicated by the items contained in the Form marked F in the third schedule] giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

(2) The balance-sheet shall be in the form marked F in the Third Schedule or as near there to as circumstances admit.

b(3) The profit and loss account shall include particulars showing the total of the amount paid whether as fees, percentages or otherwise to the managing agent, if any, and the directors respectively as remuneration for their services and, where a special resolution passed by the members of the company so requires, to the manager, and the total of the amount written off for depreciation. If any director of the company is by virtue of the nomination, whether direct or indirect, of the company, a director of any other company, any remuneration or other emoluments received by him for his own use, whether as a director of, or otherwise in connection with the management of, that other company, shall be shown in a note at the foot of the account or in a statement attached thereto].

[See Sch. I, Table A. Regs, 106 to 110 (1908) 8 Edw. VII, C. 69—S. 26 (3); (1929) 19 and 20 Geo. V. C. 23—S. 124].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1943 (30 [XXX] of 1943), S. 2. [27-11-1943].

[b] *Inserted, ibid*, 1936 (22 [XXII] of 1936), S. 71.

[15-1-1937.]

SECTION 132—Note 1.

[1] Directors stand in fiduciary capacity with respect to capital under their control. The investing public should have confidence in the persons managing the concerns. Hence they cannot be allowed to publish false balance-sheets to conceal their own improper conduct. (Vol 23) 1936 Cal 680 (684, 686); 38 Cr. L Jour 151 : ILR (1937) 1 Cal 328 (DB).

[2] When balance-sheet does not disclose true state of affairs of a company, opinion of Auditor that it is properly drawn is of no value. (Vol 23) 1936 Cal 680 (685) : 38 Cr L Jour 151 : ILR (1937) 1 Cal 328 (DB).

[3] A loan and a deposit are quite different terms for one is an asset and the other a liability. Consolidating the two and presenting them as one item is a case of non-disclosure amounting to suppression of truth. (Vol 23) 1936 Cal 680 (684) : 38 Cr. L Jour 151 (DB) : ILR (1937) 1 Cal 328.

[4] The words 'assets and liabilities' must be taken in the same sense in both S. 130 and 132. (Vol 31) 1944 Bom 107 (114) : 45 Cr. L Jour 612 : ILR (1944) Bom 302 (FB).

[5] Balance-sheet should not be a mere inventory. It should be a pictorial representation of trading-position understandable to people in commercial line. (Vol 23) 1936 Cal 680 (683, 684) : 38 Cr. L Jour 151 : ILR (1937) 1 Cal 328 (DB).

[6] A debt, though there is little prospect of recovery, should be included under the head book debts. But the company can write off such debts and then they cease to be book-debts. (Vol 14) 1927 Bom 414 (417, 418) : 28 Cr. L Jour 568 (DB) (Fawcett, J. It is doubtful whether a secret reserve fund can be allowed. Even if it can be allowed, it should be revealed in the balance-sheet).

[7] All genuine book-debts whether they are considered good, doubtful or bad debts must be shown in entry against the item and the clear provisions of the form cannot be allowed to be whittled down by general considerations as to the object of a. balance-sheet. If any part of a secret reserve is availed of to meet bad and doubtful book-debts it must be revealed in the balance-sheet. (Vol 14) 1927 Bom 414 (417, 418) : 28 Cr L Jour 568 (DB).

Objects and Reasons.

Amendment made in 1943—Sub-section (1)—See the Objects and Reasons given under section 151.

Amendment made in 1936—Sub-section (3)—“We are of opinion that it is unnecessary that the profit and

loss account should disclose the remuneration of a manager who is not a managing agent, but we think that the shareholders should have power by passing a special resolution to require this information to be included in the profit and loss account.”—S.C.R., 1936.

^a[132A. (1) Where a company, in this Act referred to as the holding company, holds shares,

Balance-sheet to include particulars as to subsidiary companies.

either directly or through a nominee, in a subsidiary company or in two or more subsidiary companies there shall be annexed to the balance-sheet of the holding company the last audited balance sheet, profit and loss account and auditors' report of the subsidiary company or companies, and a statement signed by the persons by whom, in pursuance of section 193, the balance-sheet of the holding company is signed stating how the profits and losses of the subsidiary company, or, where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have been dealt with in or for the purposes of the accounts of the holding company, and in particular how and to what extent—

(a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company or of both, and

(b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the company as disclosed in its accounts :

Provided that it shall not be necessary to specify in any such statement the actual amount of the profits or losses of any subsidiary company or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner :

Provided further that for the purposes of this section an investment company, that is to say, a company whose principal business is the acquisition and holding of shares, stocks, debentures or other securities, shall not be deemed to be a holding company by reason only that part of its assets consists in 51 per cent. or more of the shares of another company.

(2) If, in the case of a subsidiary company, the auditors' report on the balance-sheet of the company does not state without qualification that the auditors have obtained all the information and explanations they have required and that the balance-sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement, which is to be annexed as aforesaid to the balance-sheet of the holding company, shall contain particulars of the manner in which the report is qualified.

(3) For the purposes of this section the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance-sheet shall so report in writing and their report shall be annexed to the balance-sheet in lieu of the statement.

(5) The holding company may by a resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 190 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours.

(6) The rights conferred by section 198 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company.

[(1929) 19 and 20 Geo. V. C. 28—S. 126].

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936). S. 72. [15-1-1937]

Objects and Reasons.

"We consider that the balance-sheet and profit and loss account of subsidiary companies and the auditor's report should be circulated along with the accounts of the holding company. We also consider that members of the holding company should be empowered to inspect the accounts of subsidiary companies, and should have rights in respect of them to demand investigation. We have made provision to this effect in this clause

(i. e. section). We also consider that when the holding company is a public company subsidiary companies, even if private companies, should not enjoy exemption from the provisions of sections 83A, 86D, 87C, 87D, 91B, 91D, 144 (1) and 144 (5) (iii). We have provided accordingly by amendments dealing with these provisions."—S. C. R., 1936.

Authentication of balance-sheet.

133. (1) Save as provided by section (2) the balance-sheet ^a[and profit and loss account or income and expenditure account] shall—

- (i) in the case of a banking company, be signed by the manager ^a[or managing agent] (if any) and, where there are more than three directors of the company, by at least three of those directors and, where there are not more than three directors, by all the directors ;
- (ii) in the case of any other company, be signed by two directors or, when there are less than two directors, by the sole director and by the manager ^a[or managing agent] (if any) of the company.

(2) When the total number of directors of the company for the time being in British India is less than the number of directors whose signatures are required by sub-section (1), then the balance-sheet ^a[and profit and loss account or income and expenditure account] shall be signed by all the directors for the time being in British India, or, if there is only one director for the time being in British India, by such director, but in such a case there shall be subjoined to the balance-sheet ^a[and profit and loss account or income and expenditure account] a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1).

^b[(3) If any default is made in laying before the company or in issuing a balance-sheet and profit and loss account or income and expenditure account as required by section 131 or if any balance-sheet and profit and loss account or income and expenditure account is issued, circulated or published which does not comply with the requirements laid down by and under section 131, section 132, section 132A and this section, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.]

[(1908) 8 Edw. VII. C. 69—S. 113 (3), (4), (5), (6) ; (1929) 19 and 20 Geo. V, C. 23—S. 129].

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) §. 73. [15-1-1937].*

[b] *Substituted ibid., for the original sub-section.*

134. (1) ^a[After the balance-sheet and profit and loss account ^b[or the income and expenditure account as the case may be] have been laid before the company at to be forwarded to the the general meeting ^c[three copies thereof] signed by the manager or secretary of the company shall be filed with the registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32.

(2) If the general meeting before which a balance-sheet is laid does not adopt the balance-sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance-sheet and to the ^d[copies] thereof required to be filed with the registrar.

SECTION 133—Note 1.

[1] S. 133 (3) makes punishable the default in fulfilling the requirements of Ss. 131, 132 and 132 A only. There is no reference to R. 107 and therefore non-fulfilment of the requirement of R. 107 of Sch 1 Table A cannot constitute an offence under S. 133 (3) (Vol 31) 1944 Bom 107 (116) : ILR (1944) Bom 302 : 45 Cr L Jour 612 (FB).

[2] The fact that one of the members of a firm acting as Managing Agents of a company was punished in his individual capacity as a Director of the company is no ground for not punishing him in his capacity as a member of the managing firm. (Vol 3) 1916 Lah 199 (201) : 1916 Pun Re No. 18 Cr : 17 Cr L Jour 306.

SECTION 134—Note 1.

[1] Where the prize bonds issued to the Public by a private limited company were, in fact debentures, it was held that the company ceased to be a private one and became a public company and therefore, a conviction for failure to file copies of balance sheet with the Registrar under S 134 was proper. (Vol 33) 1946 Bom 18 (20) : ILR (1945) Bom 863 : 47 Cr L Jour 861.

[2] The offence under S. 134 (4) is complete if the officer of the company knew of the defaults and permitted them, and it is not necessary to prove that he wilfully authorised those defaults. (Vol 23) 1936 Cal 237 (235) : 37 Cr L Jour 552.

(3) This section shall not apply to a private company.

(4) If a company makes default in complying with the requirements of this section, the company and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section.

[(1908) 8 Edw. VII, C. 69—S. 26 (3), (4), (5); (1929) 19 and 20 Geo. V, C. 23—S. 110.]

[a] *Substituted* for "After the balance-sheet has" by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 74. [15-1-1937.]

[b] *Inserted, ibid.*, 1938 (2 [II] of 1938), S. 9. [26-2-1938.]

[c] *Substituted, ibid.*, for "a copy of the balance sheet."

[d] *Substituted, ibid.*, for "copy."

135. Save as otherwise provided in this Act, any member of a company shall be entitled to

Right of member of company to copies of the balance-sheet and the auditor's report. be furnished with copies of the balance-sheet ^a[and the profit and loss account or the income and expenditure account] and the auditor's report at a charge not exceeding six annas for every hundred words or fractional part thereof.

[(1908) 8 Edw. VII, C. 69—S. 113 (3); (1929) 19 and 20 Geo. V, C. 23—S. 130 (1).]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 75. [15-1-1937.]

STATEMENT TO BE PUBLISHED BY BANKING AND CERTAIN OTHER COMPANIES

136. (1) Every company being a limited banking company or an insurance company or a

Certain companies to deposit, provident or benefit society shall, before it commences business, publish statement in and also on the first Monday in February and the first Monday in August schedule. in every year during which it carries on business, make a statement in the form marked G in the Third Schedule, or as near thereto as circumstances will admit.

Section 134 (contd.)

[3] In answer to a charge under S. 134 (4) it is not open to a director of a joint stock company to plead that as no general meeting was called in the year and no balance-sheet was laid before the company at any such general meeting, it was impossible for him or his company to comply with the requirements of S. 134 (Vol 4) 1917 Cal 1 (1) : 45 Cal 486 : 18 Cr L Jour 787 (DB).

[4] Before conviction of an officer under Sub-section (4) for default in submitting the balance-sheet in a case where no general meeting was held, it must be shown with reference to the provisions of S. 76 that the officer was party to default in holding the general meeting (Vol 5) 1918 Cal 190 (191) : 18 Cr L Jour 325 (DB).

[5] The same persons cannot be charged in respect of the same years with offences punishable under Ss. 131 and 134, Companies Act because S. 134 clearly contemplates the sending of a copy of the balance-sheet only after it has been placed before the company at a general meeting under S. 131. Where in a case there is no such placing of the balance-sheet before the company at a general meeting, the offence under S. 134 cannot be committed. (Vol 24) 1937 Mad 341 (341) : 38 Cr L Jour 695.

[6] A charge under S. 134 (4) of non-filing of the balance-sheet is refuted if the balance-sheet was not due to be filed before the Registrar. It is immaterial whether the balance-sheet was prepared or not. (Vol 19) 1932 Mad 497 (498) : 33 Cr L Jour 589.

[7] An order directing the Directors individually to pay the fine imposed on the company is illegal. (Vol 11) 1924 Lah 489 (490) : 26 Cr L Jour 799.

[8] The Presidency Magistrates in Calcutta possess jurisdiction to try charges under S. 134 even where the

company is situate outside Calcutta, as the office of the Registrar with whom the balance-sheet should be filed is in Calcutta. (Vol 4) 1917 Cal 1 (1) : 45 Cal 486 : 18 Cr L Jour 787 (DB).

[9] Where the conviction is not of the managing director but of the company an appeal is not properly instituted unless the appeal is by company through some authorised agent. (Vol 21) 1934 Cal 63 (63) : 35 Cr L Jour 492.

[10] The Chairman of Directors could not escape liability on the ground that he depended on the Managing Agents to do all that was necessary. He was bound to take all reasonable measures he could do to prevent default. (Vol 3) 1916 Lah 199 (200) : 17 Cr L Jour 306 : 1916 Pun Re Cr No. 18.

[11] As to the exemption from filing a balance-sheet with the registrar as required by sub-section (1) of this section where an insurer is a company incorporated under this Act, see section 17, Insurance Act, 1938; and as to supply by Mutual Insurance company to the members of documents furnished to the registrar under this section, see section 101 of that Act.

SECTION 136—Note 1.

[1] That the statements were not published in time on account of the view of the officers of the company held in good faith that a change in the financial year of the company would justify their action, is no defence (Vol 11) 1924 Bom 308 (309) : 48 Bom 305 : 25 Cr L Jour 1194 (DB).

[2] Where the intention of the magistrate seems to have been to proceed against the Banking Company but there was nothing in his order or in the summons to show that a particular person was summoned as representing the company or that any proceedings were being taken against the company as such, the procedure

(2) A copy of the statement a[together with a copy of the last audited balance-sheet laid before the members of the company] shall be displayed and, until the display of the next following statement, kept displayed in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

(3) Every member and every creditor of the company shall be entitled to a copy of the statement on payment of a sum not exceeding eight annas.

(4) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty.

(5) This section shall not apply to a life assurance company or provident insurance society to which the provisions of the b[Indian Life Assurance Companies Act, 1912, or of the bProvident Insurance Societies Act, 1912, as the case may be, as to the annual statements to be made by such company or society, apply with or without modifications, if the company or society complies with those provisions.

[(1908) 8 Edw. VII, C. 69—S. 108; (1929) 19 and 20 Geo. V, C. 23—S. 131.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 76. [15-1-1937.]

[b] These two Acts have been *repeated* by the Insurance Act, 1938 (4 [IV] of 1938), S. 106; *cf.* also S. 102-B of that Act.

INVESTIGATION BY THE REGISTRAR.

137. (1) Where the registrar, on perusal of any document which a company is required to submit to him under the provisions of this Act, is of opinion that any information or explanation is necessary in order that such document may afford full particulars of the matter to which it purports to relate, he may, by a written order, call on the company submitting the document to furnish in writing such information or explanation within such time as he may specify in his order.

(2) On the receipt of an order under sub-section (1), it shall be the duty of all persons who are or have been officers of the company to furnish such information or explanation to the best of their power.

(3) If any such person refuses or neglects to furnish any such information or explanation, he shall be liable to a fine not exceeding fifty rupees in respect of each offence a[, and the Court may on the application of the registrar and upon notice to the company make an order on the company for production of such documents as in its opinion may reasonably be required by the registrar for his investigation and allow the registrar inspection thereof on such terms and conditions as it thinks fit.]

(4) On receipt of such information or explanation the registrar may annex the same to the original document submitted to him; and any additional document so annexed by the registrar shall be subject to the like provisions as to inspection and the taking of copies as the original document is subject.

Section 136 (*contd.*)

in issuing a summons to such a person is incorrect. Sub-S. (4) of the S. 136 provides for a penalty against the company and there is nothing to prevent the issue of summons against the company itself. (Vol 31) 1944 Pat 210 (211): 46 Cr L Jour 168.

SECTION 137—Note 1.

[1] S. 137 (3) has no relation to a prosecution for an offence under S. 282. Registrar's complaint is necessary only where there is a failure to provide information required by him, for the Court to order production of documents. (Vol 29) 1942 Sind 9 (10): 43 Cr L Jour 304.

[2] No report by the registrar under sub-section (5) of this section—The Central Government may appoint

inspectors to investigate the affairs of any company and to report thereon; see section 138 (iv).

[3] The subject-matter of s. 137 is an investigation rather than a prosecution. Sub-s. (6) is confined to cases in which there are allegations of fraud and many prosecutions under the Act would be entirely outside it. The intention of the section is to facilitate the investigation of the affairs of a company and it has no reference to actual proceedings in Court. (Vol 27) 1940 Cal 232 (234): ILR (1940) 1 Cal 575: 41 Cr L Jour 625 (DB).

[4] Private prosecutions are not barred by S. 137 (6). It is impossible to read into Sub-S. (6) of S. 137 any prohibition of private prosecution. (Vol 27) 1940 Cal 232 (233, 234): 2 L R (1940) 1 Cal 575: 41 Cr L Jour 625 (DB).

(5) If such information or explanation is not furnished within the specified time, or if after perusal of such information or explanation the registrar is of opinion that the document in question discloses an unsatisfactory state of affairs, or that it does not disclose a full and fair statement of the matters to which it purports to relate, the registrar shall report in writing the circumstances of the case to the [Central Government].

^a(6) If it is represented to the registrar in materials placed before him by any contributory or creditor that the business of a company is carried on in fraud of its creditors or in fraud of persons dealing with the company or for a fraudulent purpose, he may after giving the company an opportunity of being heard by written order call on the company for information or explanation on matters specified in the order within such time as he may specify in the order and the provisions of sub-sections (2), (3) and (5) of this section shall apply to such order. If upon investigation the registrar is satisfied that any representation on which he has taken action under this sub-section is frivolous or vexatious, he shall disclose the identity of the informant to the company.

(7) The provisions of this section shall apply *mutatis mutandis* to documents which a liquidator is required to file under this Act.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 77. [15-1-1937].*

[b] *Substituted by A. O. for "Local Government."*

Objects and Reasons.

"We have amended clause 133 (now section 137) so as to render it obligatory on past officers of the company to furnish information or explanation when called upon by the registrar, and we have made consequential alterations to give the same power to inspectors appointed under the Act."—S. C. R., 1913.

Amendments made in 1936.—"The first amendment provides for intervention by the Courts to secure production of documents for the information of the registrar: the second extends the powers of the registrar

and makes the section applicable to documents required by a liquidator."—S. C. R., 1936.

"We have amended the provisions to be inserted section 137, by providing that action by the registrar shall be taken only after the company has been given an opportunity of explanation, and as a check on frivolous charges that the registrar shall disclose the identity of his informant if he finds the allegations made to be frivolous or vexatious."—S. C. R., 1936.

INSPECTION AND AUDIT.

Investigation of affairs of company by inspectors. 138. The ^a[Central Government] may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the ^a[Central Government] may direct—

- (i) in the case of a banking company having a share capital, on the application of members holding not less than one-fifth of the shares issued;
- (ii) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;
- (iii) in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members;
- (iv) in the case of any company, on a report by the registrar under section 137, sub-section (5).

[1882—S. 82; (1908) Edw. VII, C. 69—S. 109 (1); (1929) 19 and 20 Geo. V. C. 28—S. 135(1)]

[a] *Substituted by A. O. for "Local Government."*

SECTION 138—Note 1.

Cognate Sections.

Inspection, application for, to be supported by evidence—139.

Inspectors, power of company to appoint—142.

Inspectors, report of, to be evidence—143.

[1] The rights conferred by section 138 upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company; see section 132 A sub-section (6).

[2] S. 138 does not bar a prosecution upon a private complaint of an offence under S. 282 (Vol 29) 1942 Sind 9 (10): 43 Cr L Jour 304.

[3] Section 3 of the Banking Companies (Inspection) Ordinance, No. IV of 1946 (15-1-1946) runs as follows: "Notwithstanding anything to the contrary contained in section 133 of the Indian Companies Act, 1913, the Central Government may at any time direct the Reserve Bank to cause an inspection to be made of any banking company and its books and accounts, and to make a report thereupon to the Central Government."

139. An application by members of a company under section 138 shall be supported by such evidence as the ^a [Central Government] may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation; and the ^a [Central Government] may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.

[1882—S. 83; (1908) 8 Edw. VII, C. 69—S. 109 (2); (1929) 19 and 20 Geo. V, C. 23—S. 135(2)].

[a] Substituted by A. O. for "Local Government".

140. (1) It shall be the duty of all persons who are or have been officers of the company to produce to the inspectors all books and documents in their custody or power relating to the company.

(2) An inspector may examine on oath any such person in relation to its business, and may administer an oath accordingly.

(3) If any person refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding fifty rupees in respect of each offence.

[1882—S. 84; (1908) 8 Edw. VII, C. 69—S. 109 (3), (4), (5); (1929) 19 and 20 Geo. V, C. 23—S. 135 (3), (4), (5)]

141. (1) On the conclusion of the investigation, the inspectors shall report their opinion to the ^a [Central Government], and a copy of the report shall be forwarded by the ^a [Central Government] ^b [to the registrar and another copy] to the registered office of the company, and a further copy shall, at the request of the applicants, for the investigation, be delivered to them.

(2) The report shall be written or printed, as the ^a [Central Government] directs.

(3) All expenses of, and incidental to the investigation shall be defrayed by the applicants unless the ^a [Central Government] directs the same to be paid by the company, which the ^a [Central Government] is hereby authorised to do.

^b [Provided that the expenses of and incidental to an investigation held in pursuance of clause (iv) of section 138 shall be paid out of the assets of the company and shall be recoverable as an arrear of land revenue.

(4) The registrar shall keep the copy of the report sent to him with the records of the company in his custody.]

[1882 S. 85; (1908) 8 Edw. VII, C. 69—S. 109; (6) (7); (1929) 19 and 20 Geo. V, C. 23—Ss. 135 (6), 136 (3)]

[a] Substituted by A. O. for "Local Government":

[b] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 78 [15-1-1937]

a[141A.] (1) If from any report made under section 138 it appears to ^b [Central Gov. ernment] that any person has been guilty of any offence in relation to the company for which he is criminally liable, the ^b [Central Government] shall refer the matter to the Advocate-General of the Public Prosecutor.

SECTION 140—Note 1.

[1] Where the appointment of an inspector under S. 138 by the Provincial Government is invalid by reason of the provisions of para 8 (2), India and Burma (Transitory Provisions) Order 1937, conviction under S. 140 (3) for refusal to produce books and documents before such inspector cannot be sustained. (Vol 26) 1939 Mad 589 (589, 590) : 40 Cr L Jour 885.

[2] Nothing that could be done either by the Board of Trade, or the Inspector appointed by them in the matter of an enquiry can be ground for a writ of prohibition. (1897) 76 LT 887 (889) (CA).

[3] As to the application of this section to an investigation made in pursuance of section 33 of the Insurance Act, 1938, see section 34, Insurance Act, 1938.

SECTION 141—Note 1.

[1] Before the insertion of the proviso to Sub-S. (3) in 1936 it was held by the Lahore High Court that under the law as it then stood the Government was not entitled to preferential payment in respect of expenses of investigation although the investigation was directed by the Government for the good of the company. (Vol 18) 1931 Lah 351 (352) : 12 Lah 678 (DB).

SECTION 141-A—Note 1.

[1] The words 'of any offence in relation to the company for which he is criminally liable' in S. 141-A mean, not only criminally liable under the Act, but criminally liable under the Penal Code as well. (Vol 29) 1942 Sind 9 (10) : 43 Cr L Jour 304.

[2] S. 141-A does not bar prosecutions by private individuals. (Vol 27) 1940 Cal 232 (233, 234) : ILR (1940)

(2) If the officer to whom the matter is referred considers that the case is one in which a prosecution ought to be instituted, he shall cause proceedings to be instituted, and it shall be the duty of all officers and agents of the company, past and present (other than the accused in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give.

(3) For the purposes of subsection (2), the expression "agents" in relation to a company shall be deemed to include the bankers and legal advisers of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

(4) Any director, manager or other officer of the company convicted as the result of a prosecution initiated under this section shall not without the leave of the Court be a director of or in any way whether directly or indirectly be concerned in or take part in the management of a company for a period of five years from the date of such conviction.]

[(1929) 19 and 20 Geo. V, C. 23—S. 136].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 79. [15-1-1937].

[b] *Substituted* by A. O. for "Local Government".

Power of company to appoint inspectors.

142. (1) A company may by a special resolution appoint inspectors to investigate its affairs.

(2) Inspectors so appointed shall have the same powers and duties as inspectors appointed by the a[Central Government], except that, instead of reporting to the a[Central Government], they shall report in such manner and to such persons as the company in general meeting may direct.

(3) All persons who are or have been officers of the company shall incur the like penalties in case of refusal to produce any book or document required to be produced to inspectors so appointed, or to answer any question, as they would have incurred if the inspectors had been appointed by the a[Central Government].

[1882—S. 86; (1908) 8 Edw. VII C. 69—S. 110; (1929) 19 and 20 Geo. V. C. 23—S. 137]

[a] *Substituted* by A. O. for "Local Government".

Report of inspectors to be evidence.

143. A copy of the report of any inspectors appointed under this Act authenticated by the seal of the company whose affairs they have investigated, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in the report.

[1882—S. 87; (1908) 8 Edw. VII, C. 69—S. 111; (1929) 19 and 20 Geo. V, C. 23—S. 138]

Qualifications and appointment of auditors.

144. (1) No person shall be appointed or act as an auditor of any company other than a private company a[not being the subsidiary company of a public company] unless he holds a certificate from the b[Central Government] entitling him to act as an auditor of companies :

^c[Provided that a firm ^d[whereof all the partners practising in India] hold such certificates may be appointed by its firm-name to be auditor of a company, and may act in its firm-name.]

Section 141A (contd.)

1 Cal 575 : 41 Cr L Jour 625 * (Vol 29) 1942 Mad 283 (284, 285) : 43 Cr L Jour 785. (The Madras Government notification No. 518 dated 6—6—1916 and G. O. Misc. No. 3070 dated 23—8—1932 do not purport to restrict a Magistrate in the exercise of his powers under S. 190, Criminal P. C.) * (Vol 29) 1942 Sind 9 (11) : 43 Cr L Jour 304.

[3] S. 141-A casts a duty upon the Advocate-General or the Public Prosecutor to cause proceedings to be instituted in certain circumstances. The terms of the section are quite different from those of Ss. 196, 198, Cr P C by which a bar is placed upon the jurisdiction of Criminal Courts. (Vol 27) 1940 Cal 232 (233, 234) : ILR (1940) 1 Cal 575 : 41 Cr L Jour 625 (DB).

[4] Where a special Act makes a special offence and a special procedure for the prosecution of offences under that Act, prosecutions not in accordance with that

special procedure are barred. (Vol 29) 1942 Sind 9 (10) 43 Cr L Jour 304. (*Obiter*).

SECTION 142—Note 1.

[1] The provision that the Company may appoint an Inspector by special resolution and that if it does so, the person appointed shall have certain drastic powers, does not necessarily imply that it may not do so by ordinary resolution, subject to this that the person appointed by ordinary resolution would not have those drastic powers. (Vol 32) 1945 Bom 475 (477) : ILR (1945) Bom 687.

SECTION 144—Note 1.

[1] The Articles of Association of a company provided for indemnity to the officers of the company except in case of their own wilful acts or defaults. The auditors of the company though appointed at a General Meeting of the company were not mentioned in the Articles of

^c[2] The ^b[Central Government] may, by notification in the ^a[Official Gazette] and after previous publication, make rules^f providing for the grant, renewal or cancellation of such certificates and prescribing conditions and restrictions for such grant, renewal or cancellation :

Provided that nothing contained in such rules shall preclude any person from being granted a certificate merely by reason that he does not practise as a public accountant.

(2A) In particular, and without prejudice to the generality of the foregoing power, such rules may—

- (a) provide for the maintenance of a Register of Accountants entitled to apply for such certificates ;
- (b) prescribe the qualifications for enrolment on the Register and the fees therefor ;
- (c) provide for the examination of candidates for enrolment, and prescribe the fees to be paid by examinees ;
- (d) prescribe the circumstances in which the name of any person may be removed from or restored to the Register ;
- (e) provide for the establishment, constitution and procedure of an Indian Accountancy Board, consisting of persons representing the interests principally affected or having special knowledge of accountancy in India, to advise ^g[it] on all matters of administration relating to accountancy, and to assist ^g[it] in maintaining the standards of qualification and conduct of persons enrolled on the Register ; and
- (f) provide for the establishment, constitution and procedure of local accountancy boards at such centres as the ^b[Central Government] may select, to advise ^g[it] and the Indian Accountancy Board on any matter that may be referred to them.

(2B) The holder of a certificate granted under this section shall be entitled to be appointed and act as an auditor of companies throughout British India.]

(3) Every company shall at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting.

(4) If an appointment of an auditor is not made at an annual general meeting, the ^b[Central Government] may, on the application of any member of the company, appoint an auditor of the company for the current year, and fix the remuneration to be paid to him by the company for his services.

(5) The following persons : that is to say,

- (i) a director or officer of the company; and
- (ii) a partner of such director or officer; and
- (iii) in the case of a company other than a private company, ^a[not being the subsidiary company of a public company] any person in the employment of such director or officer ; ^a[and
- (iv) any person indebted to the company ;]

shall not be appointed auditors of the company ^a[and if any person after being appointed auditor becomes indebted to the company his appointment shall thereupon be terminated].

(6) A person, other than a retiring auditor, shall not be capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member of the company to the company not less than fourteen days before such annual general meeting, and the company shall send a copy of any such notice to the retiring auditor, and shall give notice thereof to its members either by advertisement or in any other mode allowed by the articles not less than seven days before the annual general meeting :

Provided that, if after notice of the intention to nominate an auditor has been given to the company, an annual general meeting is called for a date fourteen days or less after the notice has been given, the requirements of this section as to time in respect of such a notice shall be deemed to have been satisfied, and the notice to be sent or given by the company may, instead of being sent or given within the time required by this section, be sent or given at the same time as the notice of the annual general meeting.

(7) The first auditors of the company may be appointed by the directors before the statutory meeting, and if so appointed shall hold office until the first annual general meeting, unless previously removed by a resolution of the members of the company in general meeting, in which case such members at that meeting may appoint auditors.

(5) The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues, the surviving or continuing auditor or auditors (if any) may act.

(9) The remuneration of the auditors of a company shall be fixed by the company in general meeting, except that the remuneration of any auditors appointed before the statutory meeting, or to fill any casual vacancy, may be fixed by the directors.

[(1908) 8 Edw. VII, C. 69—S. 112; (1929) 19 and 20 Geo. V, C. 23—Ss. 132, 133.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 80. [15-1-1937].

[b] *Substituted* by A. O. for "Governor General in Council."

[c] *Substituted* by the Indian Companies (Amendment) Act, 1930 (19 [XIX] of 1930), S. 2, for the original proviso to sub-sec. (1) and for the original sub-sec. (2).

[d] *Substituted* by the Indian Companies (Supplementary Amendment) Act, 1932 (1 [I] of 1932), S. 2, for "whereof the partners all."

[e] *Substituted* by A. O. for "Gazette of India."

[f] *See* the Auditors' Certificates Rules, 1932, published with the Notification of the Government of India, Commerce Department (Registration of Accountants) No. 213-II-T. and E. (A-3), dated 26th March 1932. (See Supplement to G. S. R. and O., Vol III, page 409).

[g] *Substituted* by A. O. for "him".

[h] *Substituted* by A. O. for "Local Government"

145. (1) Every auditor of a company shall have a right of access at all times to the books

Powers and duties of and accounts and vouchers of the company, and shall be entitled to auditors. require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors.

(2) The auditors shall make a report to the members of the company on the account examined by them, and on every balance-sheet ^a[and profit and loss account] laid before the company in general meeting during their tenure of office, and the report shall state:—

(a) whether or not they have obtained all the information and explanations they have required; and

b[(b) whether or not in their opinion the balance-sheet and the profit and loss account referred to in the report are drawn up in conformity with the law; and]

(c) whether ^a[or not] such balance-sheet exhibits a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company: ^a[and

Section 144 (contd.)

Association as officers. Owing to overdrawings and irregularities of Managing Agent and deliberate abstention on the part of auditors to examine documents the company had to wind up compulsorily. The official liquidators sued the auditors to make good the loss: Held that the auditors were not officers within the meaning of S 2 (11) of the Act and therefore could not claim to be officers of the company within the purview of the Article providing indemnity to officers so as to entitle them to claim indemnity. (Vol 16) 1929 All 826 (830) (DB).

[2] As to certificates granted to auditors before 1st of April 1932, see the Indian Companies (Amendment) Act, 1930 (19 [XIX] of 1930), S. 3.

SECTION 145—Note 1.

[1] The duty of an auditor is confined to ascertaining and stating the true financial position of the company at the time of the audit by examining its books. But he must first satisfy that they show the true financial position of the company. Failure in duty makes him jointly and severally liable with those

who are responsible for the management of the company although he is not guilty of any dishonesty (in liquidation.) (Vol 12) 1925 All 519 (532): 47 All 669 (DB).

[2] Auditors appointed by a company under the English Companies Act, S. 7 and spoken of as officers of the company in its articles of association are officers within the meaning of S. 10 English Companies (Winding up) Act and liable to be prosecuted for misfeasance under that section. (1895) 2 Ch 166 (171, 173, 175) (Affirmed in (1895) 2 Ch 673 (681).)

[3] Any article of a company or any contract with the company exempting any person employed by the Company as auditor from or indemnifying him against any liability arising out of law for negligence, default, breach of duty or breach of trust is declared void by section 86 C. As to power of Court to assess damages against delinquent auditor in a winding up proceeding, see Section 235.

[4] As to the powers and duties of an auditor who audits the revenue account and balance-sheet of a provident Society, see section 80. Insurance Act, 1938.

(d) whether in their opinion books of account have been kept by the company as required by section 130.]

a[(2A) Where any of the matters referred to in clauses (a), (b), (c) and (d) of sub-section (2) is answered in the negative or with a qualification, the report shall state the reason for such answer.]

(3) In the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in British India.

a[(4) The auditors of a company shall be entitled to receive notice of and to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and may make any statement or explanation they desire with respect to the accounts.

(5) If any auditors' report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one hundred rupees]

[(1908) 8 Edw. VII, C. 69—S. 113 (1), (2), (5), (a); (1929) 19 and 20 Geo. V. C. 23—S. 134]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 81. [15-1-1937]*

[b] *Substituted, ibid, for the original clause.*

OBJECTS AND REASONS.

Amendment made in 1936—Sub-section (4).— "We have added a provision requiring the Auditor to explain the reasons for his opinion where he is unable to report that the accounts of the company are in thoroughly satisfactory order." S. C. R., 1936.

Rights of preference shareholders, etc., as to receipts and inspection of reports, etc.

146. (1) Holders of preference shares and debentures of a company shall have the same right to receive and inspect the balance-sheets ^a[and profit and loss accounts] of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company.

(2) This section shall not apply to a private company, nor to a company registered before the commencement of this Act :

a[Provided that in the case of any public company whether registered before or after the commencement of this Act the trustees for holders or debentures shall have the right conferred by sub-section (1) on holders of preference shares and debentures of a company.]

[(1929) 19 and 20 Geo. V, C. 23—S. 130.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 82. [15-1-1937].*

CARRYING ON BUSINESS WITH LESS THAN THE LEGAL MINIMUM OF MEMBERS.

147. If at any time the number of members of a company is reduced, in the case of a private company, below two, or in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be sued for the same without joinder in the suit of any other member.

[1882—S. 73 ; (1908) 8 Edw. VII C. 69—S. 115 ; (1929) 19 and 20 Geo V. C. 23—S. 28].

SECTION 147—Note 1.

[1] A company may be wound up by the Court if the

number of members is reduced, in the case of a private company, below two or, in the case of any other company below seven ; see section 162 (iv).

SERVICE AND AUTHENTICATION OF DOCUMENTS.

Service of documents on company. **148.** A document may be served on a company by leaving it at, or sending it by post to, the registered office of the company.

[1882—S. 59; (1908) 8 Edw. VII. C. 69—S. 116; (1929) 19 and 20 Geo. V. C. 23—S. 370 (1)].

Service of documents on registrar. **149.** A document may be served on the registrar by sending it to him by post, or delivering it to him, or by leaving it for him at his office.

[1882—S. 59.]

Authentication of documents. **150.** A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal.

[1882—S. 91; (1905) 8 Edw. VII C. 69—S. 117; (1929) 19 and 20 Geo V. C. 23—S. 38.]

TABLES, FORM AND RULES AS TO PRESCRIBED MATTERS.

Application and alteration of tables and forms, and power to make rules as to prescribed matters. **151.** (1) The forms in the Third Schedule or forms as near thereto as circumstances admit shall be used in all matters to which those forms refer.

(2) The ^a[Central Government] may alter any of the tables and forms in the First Schedule, so that b[it] does not increase the amount of fees payable to the registrar in the said Schedule mentioned, and may alter or add to the forms in the Third Schedule,

(3) ^c[Any alteration or addition made under ^dsub-section (2)] shall be published in the official Gazette, and on such publication the table or form as so altered or the added form as the case may be, shall have effect as if enacted in this Act, but no alteration made by the ^a[Central Government] in Table A in the First Schedule shall affect any company registered before the alteration; or repeal, as respects that company, any portion of that table.

(4) In addition to the powers hereinbefore conferred by this section, the ^a[Central Government] may make rules ^eproviding for all or any matters which by this Act are to be prescribed by ^f[its] authority.

(5) Every such rule shall be published in the ^g[Official Gazette], and on such publication shall have effect as if enacted in this Act.

[1882—S. 95; (1908) 8 Edw. VII C. 69—S. 118 (2), (3), (1929) 19 and 20 Geo. V. C. 23—S. 379].

[a] Substituted by A. O. for "Governor General in Council."

[b] Substituted by A. O. for "he".

[c] Substituted by the Indian Companies (Amendment) Act, 1943 (30 [XXX] of 1943), S. 3 [27-11-1943]

[d] Substituted by the Repealing and Amending Act, 1945 (6) [VI] of 1945), s. 3 and Sch. II for "(1)", [16-4-1945]

[e] For such rules, see the Indian Companies Rules, 1941 [Gazette of India, 1941, Part I dated 22-2-1941].

[f] Substituted by A. O. for "his".

[g] Substituted by A. O. for "Gazette of India".

SECTION 148—Note 1.

[1] Service of summons on a company was effected by delivering and leaving with a director of the company, a duplicate copy of the writ of summons and a copy of its Gujarati translation at his private residence. The director accepted service on behalf of the company as its agent:

Held that the service was not properly effected under S. 89 of Act of 1882 which alone governed service of documents on companies registered under that Act: (1910) 12 Bom L R 730 (735) (DB).

[2] The service of a summons at the branch establishment of a company is not proper service. (1902) 1 K B 91 (93).

[3] As to service on corporation, see Civil P C Or. XXIX Rule 2.

SECTION 151—Note 1.

[1] Prior to the amendment made in this section by Act, 30 of 1943, it was held by the Bombay High Court

in (Vol 31) 1944 Bom 107 (113): ILR (1944) Bom 302 (FB) that the notification issued by the Central Government under this section and published in the Gazette of India dated 16—1—1937 directing alterations in Form F in Sch. III of the Act relieving banking companies from obligation to disclose bad and doubtful debts for which adequate provision had been made in their accounts to the satisfaction of the auditors was *ultra vires* as it amounted to introducing a new form and altering the provisions of section 132 which the Central Government had no power to do under section 151. In order to meet this objection section 151 has now been amended by Act 30 of 1943: See the objects and Reasons given under the section above.

[2] Per F.B. (Beaumont C. J. dissenting):

Where a Form in Sch. III of the Act is amended by the Central Government the publication of a notification merely stating that the Form shall be amended in the manner specified therein is substantial compliance with S. 151 (3). The notification need not give the altered Form. (Vol 31) 1944 Bom 107, (111, 113, 116): 45 Cr L Jour 612: ILR (1944) Bom 302 (FB).

OBJECTS AND REASONS.

Sub-section (3)—Amendment made in 1943.—“Following the recognised practice of banking companies in India and the United Kingdom, such companies were, by a notification issued in 1927 under section 151 of the Indian Companies Act 1913, relieved from the obligation to disclose in Form F in the third Schedule to the Act, those bad and doubtful debts for which adequate provision had been made in their accounts to the satisfaction of the auditors. When the Indian Companies (Amendment) Act, 1936, was brought into force in January, 1937, a similar notification was

issued on the 16th January 1937. In a recent judgment [see (Vol 31) 1944 Bom 107 : ILR (1944) Bom 302 (FB)] the Bombay High Court has held that the notification of the 16th January, 1937, issued under section 151 of the Indian Companies Act, 1913, is *ultra vires* in so far as it seeks to distinguish banks from other companies. The amendments to the Act sought to be made . . . are designed to meet the objections pointed out by the Bombay High Court and to legalise long-standing practice followed by the banks.”—S.O.R. 1943, *Gazette of India*, 1943, Part V, page 230.

ARBITRATION AND COMPROMISE.

Power for companies to refer matters to arbitration.

152. (1) A company may by written agreement refer to arbitration in accordance with the a [X] Arbitration Act [1940] an existing or future difference between itself and any other company or person.

(2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by their directors or other managing body.

(3) The provisions of the a[* + *] Arbitration Act b[1940] c[‘ ‘ ‘] shall apply to all arbitrations between companies and persons in pursuance of this Act.

[1882—Ss. 96 to 123].

[a] The word “Indian” was omitted by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940) S. 3 and Sch. II. [27-11-1940]

[b] Substituted by the Arbitration Act, 1940 (10 [A] of 1940), S. 49 and Sch. IV for 1939”.

[c] Omitted, *ibid.*

SECTION 152—Synopsis.

1. Applicability and scope.

2. Effect of amendment.

1. **Applicability and scope.**—[1] Section 152 empowers a Company to refer to arbitration an existing difference between itself and any other company or person. But a shareholder of a company has no such right against the company. (Vol 24) 1937 Mad 405 (406).

[2] Although a living company is allowed to refer matters in a difference to arbitration in a particular way an official liquidator may not be allowed to make a reference to private arbitration as he is not supposed to know the business of the company as much as the directors. (Vol 15) 1928 All 553 (553) 50 All 867.

[3] S. 152 applies to those cases only in which a joint stock company by written agreement refers to arbitration in accordance with the provisions of the Arbitration Act any dispute between itself and any other company or person. It does not apply to cases where the reference to arbitration is made by Court in a pending suit. (Vol 23) 1936 Lah 357 (258) (DB).

[4] A contract to refer arbitration any dispute which might arise between a company and an individual is not illegal on the ground that it is not under the seal of the company. (Vol 2) 1915 All 234 (236) : 37 All 278 (DB).

[5] Where a dispute was referred to arbitration but the parties had not agreed to do so in writing it was held that the decree was not a nullity and it was not open to the executing Court to go behind the decrec. (Vol 20) 1933 Lah 46 (46).

[6] The arbitration under S. 208C is for settling dispute between company in liquidation and one or more of its members while the arbitration contemplated by S. 152 (3) is between a company and either another company or an individual, a third party. (Vol 27) 1940 Cal 220 (222) : ILR (1940) 1 Cal 358.

2. **Effect of amendment.**—Before the enactment of the Arbitration Act, 1940, there was a conflict of decisions as to the applicability of the Arbitration Act, 1899, to references to arbitration by companies :

[i] One view was that the Arbitration Act, 1899 applied only if the subject matter of reference was situated in a Presidency Town or in an area to which the Act had been extended by notification by the Provincial Government. (Vol 18) 1931 Lah 555 (556). (Overruled in (Vol 20) 1933 Lah 44 : 14 Lah 248).

[ii] The second view was that the Act of 1899 applied irrespective of the locus of the property, which was the subject-matter of the reference. (Vol 31) 1944 Mad 308 (310) : ILR (1944) Mad 355 (FB). (Overruling (Vol 31) 1914 Mad 95) : (Vol 28) 1941 Cal 127 (128) : ILR (1940) 2 Cal 237 * (Vol 27) 1940 Cal 220 (222) : ILR (1940) 1 Cal 558 * (Vol 25) 1938 Pesh 54 (56, 57) * (Vol 22) 1935 Sind 228 (231) : 37 Cr L Jour 175 * (Vol 21) 1934 Pesh 107 (108) * (Vol 20) 1933 Lah 44 (45) : 14 Lah 248. (Overruling (Vol 18) 1931 Lah 555) (Vol 20) 1933 Pat 49 (50) * (Vol 16) 1929 Lah 246 (246).

[iii] The third view was that this section was an enabling section and the company had an option to refer either under the Arbitration Act, 1899, or under Schedule II, Civil PC. (Vol 23) 1936 Lah 721 (725) : 17 Lah 722 (FB) * (Vol 27) 1940 Lah 97 (98) * (Vol 25) 1933 Lah 827 (828).

This conflict has now been set at rest by the Arbitration Act, 1940, which repeals the arbitration Act, 1899, and Schedule II of the Civil Procedure Code. The Act of 1940 extends to the whole of British India and thus applies to all references to arbitration by the companies, without reference to the situation of the subject-matter of arbitration. The award can now be filed in any Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit.

153. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors, or class of creditors or of the members of the company or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company, or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

^a[(3) An order made under sub-section (2) shall have no effect until a certified copy of the order has been filed with the registrar, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.]

(4) If a company makes default in complying with sub-section (3) the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding ten rupees for each copy in respect of which default is made.

(5) The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.]

^b(6) In this section the expression "company" means any company liable to be wound up under this Act and the expression "arrangement" includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods, and for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.]

^c(7) An appeal shall lie from any order made by the Court exercising original jurisdiction under this section to the authority authorised to hear appeals from the decisions of the Court.]

[1882—S. 203 : (1908) 8 Edw. VII C. 69—S. 120 (1), (2), (3) ; (1929) 19 and 20 Geo. V C. 23—S. 153 (1), (2), (5)]

[a] Sub-section (3) to (5) were inserted and the original sub-section (3) was re-numbered as sub-section (6) by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936). S. 83. [15-1-1937].

[b] Substituted, *ibid*, 1942 (17 [XVII] of 1942), S. 3 for the original sub-section (6). [30-3-1942].

[c] Inserted *ibid*, 1936 (22 [XXII] of 1936), S. 83. [15-1-1937]

Objects and Reasons.

Amendment made in 1942—Sub section (6).—See the extract taken from the Statement of Objects and Reasons given under S. 54.

SECTION 153—Synopsis.

1. Appeal.
2. Applicability and scope.
3. Assent of share-holders or creditors.
4. Civil P. C., O. 21, R. 2—Scheme of adjustment.
5. Civil P. C., S. 47.
6. "Compromise or arrangement"—Meaning of.
7. "Class."
8. Court meetings.
9. Creditors — Meaning of.
10. Foreign Companies.
11. Procedure.

12. Proxy.
13. Sanction — Effect of.
14. Scheme—Sanction of—Powers and duties of Court.
15. Scheme sanctioned—Date of its operation.
16. Surety—Liability of, if affected by scheme.
17. Variation of scheme.
1. Appeal.—[1] An order of the Court sanctioning a scheme of reconstruction of an insurance company by creation of a new insurance company involving the transfer of money deposited by the dissolved company under S. 7, Insurance Act and the reduction of contracts of insurance, is an order under S. 153 read with S. 153 (A) and is appealable under S. 153 (7). (Vol. 29) 1942 Cal 578 (580) : ILR (1942) 2 Cal 85.
- [2] Order of Court rejecting proxy forms used at a Statutory meeting of the creditors under S. 153 and

Section 153 (contd.)

directing another meeting of the creditors to be held is a judgment within cl. 13 Letters Patent (Rangoon) and is appealable. (Vol 19) 1932 Rang 96 (96, 97): 10 Rang 189 (DB).

2. Applicability and scope.—[1] Under S. 153 (1) a certain discretion is vested in Court but the scope of that discretion is limited. A Court should not decline to order meeting of creditors unless the proposals are illegal and their circulation would cause waste of time and expenditure. (Vol 26) 1933 Mad 318 (331).

[2] Failure of a scheme of re-usucitation of a company is not by itself sufficient to justify a winding-up order being made. Section 153 makes provision not merely for scheme for the "reusucitation" or 'reorganisation' of companies, but it also provides for 'Scheme of agreement,' which provides an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for winding up, whether voluntary or under the Court. (Vol 22) 1935 Lah 779 (785) (SB).

[3] A scheme under S. 153 provides an alternative mode for winding up. It is a provision to avert a winding up and therefore a provision with respect to the winding up within S. 271. (Vol 26) 1939 Mad 318 (330, 331).

[4] The machinery provided by S. 153, is available where there is and where there is not a winding up in progress. S. 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up. (Vol 24) 1937 Bom 423 (427, 428).

[5] A scheme prepared by a company for the transfer of its undertaking to a new concern formed by the amalgamation of several companies carrying on like business, and for the reorganisation of rights of and distribution of assets among the different classes of share-holders, in the event of the company being wound up after the amalgamation can be sanctioned by the Court under S. 153, even if the scheme may involve winding up, and acts which will be *ultra vires* the company. But this rule is subject to the limitation that if the Companies Act contains express provisions enabling the doing in a particular way, the provisions of the enabling section and not those of S. 153 must be followed. (Vol 24) 1937 Bom 423 (428).

3. Assent of share-holders or creditors—[1] Company ordered to be wound up—Creditor proposing scheme to advance money on mortgage or by sale—Meeting of share-holders accepting scheme to advance 10 lakhs on mortgage—Claims of creditors exceeding the amount—Court adjourning matter to enable creditor to increase offer—Offer increased by Rs. 62,000—Court approving scheme—Scheme as approved held not to have been assented to by share-holders. (Vol 16) 1929 P O 356 (258) (PC).

[2] It is not obligatory on company or Court to serve notice of creditors' meeting on every creditor. Absence of any individual creditor because a notice was not served upon him does not invalidate a decision arrived at the meeting of the creditors and the company and sanctioned by the Court. If majority required by S. 153 (2) is present the decision becomes binding on every creditor or member and the Company. (Vol 24) 1937 Lah 442 (443).

4. Civil P. C., O. 21, R. 2—Scheme of adjustment—[1] A scheme framed by majority of creditors of bank and sanctioned by the Court and made binding on the opposing decree-holder depositor who is in the minority, does not amount to adjustment to the

satisfaction of the opposing depositor decree-holder within the meaning of O. 21, R. 2 Civil PC (Vol 24) 1937 Cal 211 (212): ILR (1937) 1 Cal 781.

5. Civil P. C., S. 47.—[1] Where a scheme framed by the majority of creditors of the bank in terms inconsistent with the consent decree obtained by one creditor against the bank is sanctioned by the Court an objection that the scheme supersedes consent decree can be taken under S. 47 Civil PC in proceedings in execution of the consent decree. (Vol 24) 1937 Cal 211 (212): ILR (1937) 1 Cal 781.

[2] Where a scheme sanctioned by the Court under S. 153 is set up against the execution of a decree the executing Court can consider only whether the execution is affected by the scheme and whether the order sanctioning the scheme was passed with jurisdiction. Subject to this it cannot go behind the sanctioned scheme.

Whereunder the preliminary order of the High Court under S. 153 a meeting of the creditors who had obtained decrees as well those who had not was to be convened for considering a scheme and such meeting was held and the scheme accepted at the meeting was sanctioned by the High Court it was held that the non-service of the notice of meeting on the judgment creditors seeking to execute his decree and the fact that no separate meeting of the two classes of creditors was held did not affect the jurisdiction of the High Court when it made the order under S. 153 sanctioning the scheme. This defect ought to have been pointed out to the High Court when the matter of sanction came before it or thereafter and could not be gone into by the executing Court. (Vol 24) 1937 Cal 507 (509) (DB).

6. "Compromise or arrangement."—Meaning of.—[1] The word 'arrangement' in S. 153 means something analogous in some sense to a compromise and there must be both give and take. (Vol 21) 1934 Sind 54 (56): 28 Sind LR 213.

[2] The mere fact that year after year the company, by appropriate means, as laid down in the memorandum various the rights of different classes of shares cannot be tantamount to a compromise or arrangement between the company and its members or to a variation of the conditions in the memorandum of association. (Vol 22) 1935 All 310 (319): 57 All 810.

7. Class.—[1] The word "class" in S. 153 (1) has not been defined in the Act. It must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. If different state of facts exist among different creditors which may differently affect their minds and their judgment they must be divided into different classes. (Vol 29) 1942 Cal 578 (582): ILR (1942) 2 Cal 85.

[2] Under S. 153, the scheme of composition is applicable to all creditors including those who have already obtained decrees. It is not necessary to convene a separate meeting of the decree-holder creditors in order to make the scheme binding on them. (Vol 29) 1942 Cal 442 (443).

[3] Holders of shares partly paid with the uncalled balance paid in advance of calls and carrying interest are a different class to holders of fully-paid shares. (1910) 2 Ch 477 (480).

[4] Prior to the amendment of S. 153 (6) by Act of 1936 there was a difference of opinion on the question whether an unsecured creditor who had obtained a decree belonged to the same class as one who had not obtained a decree. In view of the amendment which

Section 153 (*contd.*)

has set at rest the question the following decisions which held that unsecured creditors who had already obtained decrees formed a distinct class from those who had not obtained decrees are no longer good law. (1935) 39 Cal WN 690 (691) * (Vol 25) 1938 Cal 337 (340) : ILR (1938) 2 Cal 30 * (Vol 24) 1937 Cal 169 (172) (Vol 23) 1936 Cal 402 (403) * (Vol 23) 1936 Cal 162 (163, 164) * (Vol 22) 1935 Cal 398 (399) (Vol 22) 1935 Cal 117 (118).

[5] The Amending Act XXII of 1936, purports to explain the meaning of "creditors of the same class" in S. 153 and as such relates back to the time when the prior Act was passed. (Vol 29) 1942 Cal 442 (443).

[6] In view of the amendment of S. 153 (6) by Act of 1936 the following cases which were decided before the amendment and which held that unsecured creditors who had already obtained decrees were within the same class as unsecured creditors who had not obtained decrees are still good law :—(Vol 24) 1937 Cal 401 (404) * (Vol 24) 1937 Cal 124 (126) : ILR (1937) 1 Cal 368 * (Vol 22) 1935 Cal 777 (778) * (Vol 24) 1937 Lah 442 (444).

[7] Section 153 enables the majority of a class of creditors to bind the minority; it exercises a most formidable compulsion upon dissentient, or would-be dissentient creditors; and it therefore should be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority. But the body of persons who have made deposits on the same terms and similar agreements may be regarded as constituting such a class of creditors as the Legislature had in mind when it enacted S. 153. Where by a very large majority both in the number of persons and in the amount of capital voting, the depositors have accepted a scheme, the objection of the solitary objector can be overruled. (Vol 21) 1934 Sind 54 (56, 57) : 28 SLR 213.

[8] Where the directors are authorised to manage the business and to exercise all powers, a proposal under S. 153 by the board of directors in the company's name is valid and proper. (Vol 21) 1934 Sind 54 (56, 57) : 28 Sind LR 213.

8. Court meetings.—[1] Though "Court meetings" are subject to the direction of the Court where no express direction is given. The articles of the company must be looked to so far as they are applicable. (Vol 15) 1928 Bom 80 (86).

9. Creditors—Meaning of.—[1] Debenture-holders are creditors. (1890) 44 Ch D 402 (409).

[2] The word "creditors" includes every person having any pecuniary claim against the company whether actual or contingent. (1895) Ch 267 (276).

10. Foreign Companies.—[1] Since a foreign company is liable to be wound up as an unregistered company within the meaning of S. 271 the expression "Company" which means a company liable to be wound up under the Act would include a foreign company. Similarly the expression "Court" in case of an unregistered company including a foreign company would mean the Court in which the said Company is liable to be wound up. Therefore in case of a foreign company having its central office in British India, the High Court in whose jurisdiction such office is situated can entertain an application under S. 153 at the instance of a creditor or a member of such foreign company. (Vol 26) 1939 Mad 318 (321, 322).

[2] Bank incorporated in Travancore having central office at Madras—Order for winding up passed by Travancore Court—Proceedings for winding up pending in Madras High Court—Application under S. 153 held could be entertained by Madras High Court—Assuming Madras to be principal domicile of bank scheme held could be initiated and got provisionally sanctioned in Madras High Court—Madras High Court held could call meeting of all creditors within and without British India or at least of all British Indian creditors and get scheme approved by majority. (Vol 26) 1939 Mad 318 (324, 325, 326, 327).

[3] S. 153 confers jurisdiction on Courts to deal with a scheme, but how the scheme, when sanctioned, can be rendered effective and operative on the company as a whole does not affect the jurisdiction of the Court to deal with it. (Vol 26) 1939 Mad 318 (322).

[4] When once an application for winding up a foreign company is made in British Indian Courts, the expression "Court" in S. 153 must mean the Court in which the Company is being wound up and therefore such Court will have jurisdiction to entertain an application made by a member or creditor of such company under S. 153 even before an order for winding up is passed by such Court. In such a case the right to apply under S. 153 is not restricted only to a liquidator. (Vol 26) 1939 Mad 318 (322, 323).

11. Procedure.—[1] A petition under S. 153 was presented by the directors of a company to refer a scheme they had prepared to the share-holders and creditors for their consideration—On the date of hearing of the petition an application by creditors for compulsory winding up was made to the Court. The directors contended that it should not be considered until the scheme was placed before the creditors and share-holders.

Held that the application was to be considered at the earliest moment and also that even if an order for winding up was passed it will not interfere with a proper scheme being considered. (Vol 26) 1939 Mad 53 (59).

12. Proxy.—[1] The executors or administrators of a deceased member or the trustees in bankruptcy of a bankrupt member may exercise the voting rights of the deceased or bankrupt member. But where there are special provisions in the articles of a company which prevent an executor from exercising the voting rights of deceased share-holder such provisions of the articles must apply to voting at meetings and any vote given by an executor on behalf of a deceased member must be disallowed. The case of a liquidator or receiver cannot be put on a different basis. (Vol 15) 1928 Bom 80 (86, 87).

[2] In a meeting held under S. 153 written acceptance of arrangement by those share-holders and creditors who are not present either in person or by proxy, cannot be taken into account to make up majority in number representing three-fourths of share-holders and creditors. (Vol 4) 1917 Oudh 58 (59).

[3] Under S. 153 the Court is entitled to settle the terms of the instrument of proxy to be used at the meeting of the creditors in any form it thinks fit. Therefore any rule of the High Court which purports to fetter or restrict the jurisdiction of a Court in that behalf is inconsistent with S. 153 and *pro tanto* inoperative and *ultra vires*. (Vol 19) 1932 Rang 154 (156) : 10 Rang 488 (DB).

[4] Scrutineers appointed to help chairman whose decision under order of Court is to be final as to admissibility of any proxy at the statutory meeting of creditors under S. 153 have no *locus standi* to file petition

Section 153 (contd.)

for directions as to validity of certain proxies used at the meeting. (Vol 19) 1932 Rang 96 (97) : 10 Rang 189.

13. **Sanction—Effect of.**—[1] The words in S. 153 (2) give the scheme when sanctioned by the Court statutory operation. Such a scheme is not an adjustment or compromise within the meaning of O. 23, R. 3, Civil P. C. (Vol 24) 1937 Cal 381 (382).

[2] S. 153 provides in clear language that when a compromise between the company and its unsecured creditors including decree-holders has been sanctioned by Court such compromise shall be binding on the creditors. Hence the Court has power to stay the execution of a decree started by one of the decree-holder creditors questioning the compromise and issue injunction to restrain him from proceeding further with such proceedings. The injunction would remain so long as the scheme is in operation. (Vol 23) 1936 Cal 662 (663).

[3] A scheme of composition sanctioned by the Court applies to all the creditors of the company including judgment-creditors. Where therefore during the execution of a decree against the company a scheme of composition is filed under S. 153 the execution of the decree cannot proceed. The fact that the decree sought to be executed was passed long before the scheme of composition makes no difference. (Vol 23) 1936 Cal 282 (285).

[4] A scheme of arrangement sanctioned by the Court under S. 153, has the force of a judicial pronouncement and the executing Court cannot go behind it. (Vol 25) 1938 Cal 337 (340, 341) : ILR (1938) 2 Cal 30.

[5] A creditor is bound by an arrangement between the company and its creditors made under S. 153. The omission of the Company to raise a plea to this effect at the original trial is not fatal as to bar its being raised, in execution proceedings. (Vol 21) 1934 Lah 515 (515).

14. **Scheme—Sanction of—Powers and duties of Court.**—[1] A mere agreement on the part of the members or share-holders is not enough for the acceptance of a scheme. It is ultimately for the Court either to sanction it or not to sanction it. (Vol 17) 1930 All 330 (332) (DB).

[2] In sanctioning a scheme under S. 153 the first thing that the Court has to see is whether the provisions of the Statute have been complied with. Secondly, whether the persons present at the meetings have acted *bona fide* and done nothing injurious to the interest of the classes whom they represented. The Court has further to see whether the arrangement is fair and reasonable as regards the interests of all concerned. The Court has a wide discretion in the matter; but it will reject the scheme only where it is shown that there was something wrong (Vol 20) 1933 Lah 51 (52, 53) * (Vol 24) 1937 Bom 423 (430, 431) * (Vol 15) 1928 Bom 80 (90) * (Vol 29) 1942 Cal 578 (582) : ILR (1942) 2 Cal 85 * (Vol 22) 1935 Cal 777 (778) * (Vol 19) 1932 Rang 154 (158, 159) : 10 Rang 438 (DB) * (Vol 21) 1934 Sind 54 (55, 56) : 28 Sind LR 213.

[3] It is not the function of the Court to substitute its own scheme for the scheme presented to it for sanction and if the Court is of opinion that unless some radical amendment is effected or the scheme is fundamentally altered it ought not to be sanctioned it is the duty of the Court to reject the scheme. (Vol 19) 1932 Rang 154 (158) : 10 Rang 438 (DB).

[4] Under S. 153 the Court does not simply register the resolution come to by the creditors or the share-

holders as the case may be. But if the creditors are acting on sufficient information and with time to consider what they are about, and they are acting honestly they are much better judges of what is to their commercial advantage than the Court can be. (Vol 21) 1934 Sind 54 (57) : 28 Sind LR 213.

[5] The Court is not bound to accept the scheme, because it is approved by the majority of share-holders and creditors. That will of course carry weight but there may be more important considerations. (Vol 27) 1940 Mad 621 (622).

[6] Per Cunliffe J.—The Court should always prefer a living scheme to a compulsory liquidation without any hope of payment in full. (Vol 19) 1932 Rang 154 (162) : 10 Rang 438 (DB).

[7] The Court will not sanction a scheme which will have the effect of enabling a bank which is to all intents and purposes insolvent to continue carrying on business and attract new deposits which will go the way of the former deposits. It will not sanction schemes of composition and arrangement intended to keep afloat sinking banking companies of which the assets consist of moneys lent out on mortgage, simple bonds and promissory notes, decrees of Court and immovable properties but no cash. (1936) 63 Cal 99 (101).

[8] Court can sanction only *bona fide* and workable scheme. (Vol 3) 1916 Mad 1218 (1219) (DB).

[9] Scheme of reconstitution amounting to voluntary liquidation cannot be accepted and liquidation must be made officially. (Vol 17) 1930 Lah 777 (780) (DB).

[10] Any scheme which is put forward before the general body of creditors must be based upon correct information and data but that does not mean that the application for sanction should be rejected if the information is not accurate and complete. The Court can call for a report to get a fair idea of the affairs of the company and on that state of information the scheme as proposed or with amendments can be circulated along with the report. (Vol 26) 1939 Mad 318 (323).

[11] Before sanctioning the scheme the Court may impose certain conditions upon the Company for making some provision for the dissentients. The Court, however, does not necessarily make any provision in favour of dissentients, if it is satisfied that the scheme is reasonable and fair and in the interest of the general body of share holders. In any case under modern practice, such a provision is not a *sine qua non* to sanctioning the scheme if it is reasonable. (Vol 24) 1937 Bom 423 (431).

[12] Court need not issue notice before ordering a meeting of the class of creditors with whom it was proposed to make an arrangement. Where the Chairman certifies to Court that notice of the application and of the meeting has been sent to and acknowledged by all depositors, there is sufficient compliance with the law and the arrangement cannot be impugned on the ground that the meeting was not duly called. (Vol 21) 1934 Sind 54 (56) : 28 Sind LR 213.

[13] In considering a scheme only the wishes of creditors and contributories have to be consulted, and not the wishes of any person who may have propounded a scheme. (Vol 19) 1932 Bom 78 (79) : 56 Bom 16 (DB).

[14] The onus of showing that any scheme is unreasonable is on the objectors. (Vol 19) 1932 Rang 154 (162) : 10 Rang 438 (DB).

[15] Where one Judge of the Court has sanctioned a scheme another Judge exercising equal jurisdiction

a. [153A. (1) Where an application is made to the Court under section 153 for the sanctioning

Provisions for facilitating arrangements and compromises.

of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as a 'transferor company') is to be transferred to another company (in this section referred to as 'the transferee company'), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:—

- (a) the transfer to the transferee company of the whole or any part of the undertaking and the property of or liabilities of any transferor company;
- (b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- (d) the dissolution, without winding up, of any transferor company;
- (e) the provision to be made for any persons who, within such time and in such manner as the Court directs, dissent from the compromise or arrangement;
- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

Section 153 (contd.)

cannot declare, that the order sanctioning the scheme is to the extent that it affects a particular person a nullity. (Vol. 24) 1937 Cal 401 (404).

[16] Non-service of notice of meeting held in pursuance of the order of the High Court under S. 153 does not affect the jurisdiction of the High Court when it makes an order under S. 153 sanctioning the scheme. The defect should be brought to the notice of Court sanctioning the scheme at the time when the matter of sanction comes up or thereafter. (Vol. 24) 1937 Cal 507 (509).

[17] Scheme by company for transfer of its undertaking to new company formed by amalgamation of several companies and for reorganisation of rights of and distribution of assets among different classes of share-holders can be sanctioned by Court even if it involves winding up and *ultra vires* acts. (Vol. 24) 1937 Bom 423 (428).

15. Scheme Sanctioned—Date of its operation.—

[1] A scheme sanctioned by the Court takes effect from the date of the meeting of the creditors in which it was arrived at and not from the date of sanction. (Vol. 6) 1919 P.C. 9 (10): 46 Ind App. 135: 41 All 566: 22 Oudh Cas 106 (PC) *(Vol. 4) 1917 Lah 386 (387, 388) (DB).

[2] The agreement becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court. The agreement takes effect from the date when it is made and not from the date of sanction (Vol. 6) 1919 P.C. 9 (10): 46 Ind App. 135: 41 All 566: 22 Oudh Cas 106 (PC) *(738) ILR (1938) 1 Cal 121 (126, 128) (DB) *(Vol. 3) 1916 Oudh 276 (277): 180 Oudh Cas 275 (DB).

16. Surety—Liability of, if affected by scheme.—[1] A managing agent of a company passed

a writing in favour of the creditor of the company by which he stood guarantee for the debt due by the company to the creditor. Ultimately, a petition was presented to wind up the company and meetings of creditors and share-holders of the company were held to consider a scheme of reconstruction which was suggested. Under the scheme every creditor except preferential creditors was to receive half the sum in cash and other half in the shape of preference shares: Held that the fact that the creditor received from the company half the amount in cash and received also preference shares for the other half did not discharge the surety. (Vol. 27) 1940 Bom 247 (248): ILR (1940) Bom 387 (DB).

17. Variation of scheme.—[1] Under S. 153 the Court may either sanction or refuse to sanction a scheme approved by the Company and its creditors or its members. It has no power to modify or alter the scheme unless the company and its creditors or members have had an opportunity of reconsidering the scheme again along with such suggested modifications and have agreed thereto. (Vol. 24) 1937 Cal 124 (126): ILR (1937) 1 Cal 368 *(Vol. 24) 1937 Cal 401 (405) *(Vol. 24) 1937 Cal 667 (668, 669) *(Vol. 21) 1934 Cal 816 (817, 818): 61 Cal 918 (DB).

[2] A scheme upon confirmation by Court is binding upon the creditors, the share-holders and the company. Its terms can only be varied by order of Court after the variation had been approved at meetings or the creditors and share-holders and it is not possible for the company or its directors or share-holders whether by resolution or ratification or otherwise to alter the scheme. No variation or departure from that scheme can be validated by mere acquiescence of the share-holders or the creditors. (Vol. 25) 1938 PC 284 (288, 289): ILR (1939) Lah 1: ILR (1939) Kar PC 16 (PC).

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a certified copy thereof to be delivered to the registrar for registration within fourteen days after the completion of the order, and if default is made in complying with this sub-section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding fifty rupees.

(4) In this section the expression "property" includes property, rights and powers of every description, and the expression "liabilities" includes duties.

(5) Notwithstanding the provisions of [sub-section (6)] of section 153, the expression "company" in this section does not include any company other than a company within the meaning of this Act.]

[(1929) 19 and 20 Geo. V, C. 23—S. 154.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 84. [15-1-1937.]

[b] *Substituted, ibid*, for "sub-section (4)" 1938 (2 [11] of 1938). S. 10. [26-2-1938.]

Objects and Reasons.

"In sub-section (3) of new Section 153-A we have extended the time allowed for delivery of a copy of an order made under the section to the registrar, and have substituted the day of completion of the order for the day of the making of the order as that from which the time will run."—S. C. R., 1936.

a[153B. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company" to another company, whether a company within the meaning of this Act or not (in this section referred to as the "transferee company"), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than three-fourths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the

SECTION 153-B—Note 1

[1] What S. 153-B does is to provide that where a contract or scheme for acquisition by one company of shares in another company has been accepted by the statutory majority of shareholders in the latter company, the transferee company can acquire compulsorily the shares of the minority unless the Court orders otherwise. S. 153-B does not confer any right on the Court to consider the merits of the contract so far as concerns the majority of shareholders who have accepted it. In their case the matter is complete. As regards the minority the section is based on the view that *prima facie* the minority are acting unreasonably in refusing to come into line with the majority and ought to be forced into line unless the Court orders otherwise. The Court must consider whether the attitude of the minority is reasonable. The burden is on the dissentients to adduce reasons for thinking that the majority of shareholders were wrong. (Vol. 30) 1943 Bom 325 (326) : ILR (1943) Bom 581 (DB).

[2] In a petition under S. 153-B costs should follow the event in the normal course. (Vol. 30) 1943 Bom 325 (332) : ILR (1943) Bom 581 (DB).

[3] The Court under S. 153-B can direct that the transferee company is not to exercise the powers of compulsory purchase given by the sections over the shares of the dissenting : but the Court has no power

to direct the transferee Company to pay the dissenting members something which they have not offered. (Vol. 30) 1943 Bom 325 (327) : ILR (1943) Bom 581 (DB).

[4] Per Kania, J.—The Court's jurisdiction to intervene under S. 153-B is not limited to cases of misrepresentation and fraud. (Vol. 30) 1943 Bom 325 (330) : ILR (1943) Bom 581 (DB).

[5] The Court ought not to limit the class of cases in which the Court should take action under S. 153-B and refuse to accept the opinion of the majority of shareholders. The Court would be justified in not accepting the opinion of the majority of shareholders where their view is based on misrepresentation or there has been some unfair dealing or the majority of shareholders have some interest conflicting with that of the minority. (Vol. 30) 1943 Bom 325 (326) : ILR (1943) Bom 581 (DB).

[6] Where the Court starts with the presumption that the majority of shareholders were right it is no good allowing counsel for dissenting shareholders to indulge in detailed criticisms of the valuation on which the offer was based or accepted where all the facts on which those criticisms are founded were before the company when the majority of shareholders accepted the offer. (Vol. 30) 1943 Bom 325 (326) : ILR (1943) Bom 581 (DB).

notice was given the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company :

Provided that, where any such scheme or contract has been so approved at any time before the commencement of the Indian Companies (Amendment) Act, 1936, the Court may by order, on an application made to it by the transferee company within two months after the commencement of that Act, authorise notice to be given under this section at any time within fourteen days after the making of the order, and this section shall apply accordingly, except that the terms on which the shares of the dissenting shareholder are to be acquired shall be such terms as the Court may by the order direct instead of the terms provided by the scheme or contract.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

(4) In this section the expression 'dissenting shareholder' includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.]

[1929] 19 and 20 Geo. V, C. 23—S. 155.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936, S. 84 [15-1-1937]

[b] The Act came into force on the 15th January, 1937.

CONVERSION OF PRIVATE COMPANY INTO PUBLIC COMPANY.

^a[154 (1) If a company, being a private company, alters its articles in such manner that they no longer include the provisions which, under the provisions or clause (13) of sub-section (1) of section 2, are required to be included in the articles of a company in order to constitute it a private company, the company, shall, as on the date of the alteration, cease to be private company and shall, within a period of fourteen days after the said date, file with the registrar a prospectus or a statement in lieu of prospectus in the form and containing the particulars set out in the form marked II in the Second Schedule.

Section 153B (contd.)

[7] Where the minority attacks the decision of the majority to accept an offer for purchase of their shares on the ground that it was not fair and reasonable the burden of proof on them is not discharged by establishing that a wrong basis was accepted for valuation. That conclusion could not be arrived at merely by proving the adoption of the wrong basis in respect of a particular item but by a further proof that by adopting that wrong basis in respect of that particular item the valuation was materially low so as to affect the reasonableness of the offer. In valuing concerns where the assets are worth over two crores of rupees a difference in value of a few thousands or even a lakh or two on one item can hardly justify a Court in interfering because another expert might urge that on another item there was an over-valuation. (Vol. 30) 1943 Bom 325 (331) : ILR (1943) Bom 581 (DB).

SECTION 154—Note 1.

[1] The purpose of S. 154 is to ensure that when a company has been converted from a private company to a public company certain information must be sent to the Registrar of Joint Stock Companies and if such is not done certain penalties would follow. (Vol 30) 1943 Pat 278 (279) : 22 Pat 204 (DB).

[2] A public company can be converted into a private company by suitable amendments made to the Articles of Association of the company. S. 154 is no bar. It is not necessary to wind up the company and reconstitute it. Nor is it necessary to send the information which S. 154 requires to be sent to the Registrar. (Vol 30) 1943 Pat 278 (279, 280) : 22 Pat 204 (DB).

[3] Amendments to the Articles of Association converting a public into a private company do not require the confirmation of the High Court. (Vol 30) 1943 Pat 278 (279) : 22 Pat 204 (DB).

(2) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is knowingly and wilfully in default shall be liable to a fine not exceeding five hundred rupees.

(3) Where the articles of a company include the provisions aforesaid but default is made in complying with any of those provisions, the company shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions contained in this Act, and thereupon the provisions of this Act shall apply to the company as if it were not a private company:

Provided that the Court, on being satisfied that the failure to comply with the conditions was accidental or due to inadvertence or to some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any other person interested and on such terms and conditions as seen to the Court just and expedient, order that the company be relieved from such consequences as aforesaid.]

[(1929) 19 and 20 Geo. V, C. 23—S. 27.]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 85, for the original section. [15-1-1937]

PART V.

WINDING UP.

PRELIMINARY.

Mode of winding up. **155.** (1) The winding up of a company may be either—

- (i) by the Court ; or
- (ii) voluntary ; or
- (iii) subject to the supervision of the Court.

(2) The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up a company in any of these modes.

[(1908) 8 Edw. VII, C. 69—S. 122; (1929) 19 and 20 Geo. V. C. 23—S. 156].

CONTRIBUTORIES.

156. (1) In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say) :—

- [i] a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up ;

SECTION 155—Note 1.

[1] As to the meaning of the word 'company see' sections 2 (1) (2), 2 (1) (7), 251, 253 and 270.

[2] A company may be wound up either (i) by the Court (see section 162) or (ii) voluntary (see section 203); or (iii) subject to the supervision of the Court (see section 221).

[3] Registrar may strike defunct company off the register ; See section 247.

SECTION 156—Synopsis.

1. Applicability and scope.
2. "Assets of the company"
3. Interest.
4. Member—Liability of.
5. Past member—Liability of.
6. Set off.

Cognate sections.

Contributory—

Adjustment of rights of—192.

In case of death of member—160.

In case of insolvency of member—161,

Meaning of—159.

Nature of liability of—159.

Settlement of list of—184.

Directors whose liability is unlimited, liability of—157.

1. Applicability and scope.—[1] S. 156 proceeds on the assumption that the contributories are all innocent parties and that they must contribute equally towards the loss sustained by the company for no fault of theirs, subject however to certain equities which are contained in the exceptions to that section. Hence, whatever may be the effect of a plea of fraud

- (ii) a past member shall not be liable to contribute in respect of any debt, or liability of the company contracted after he ceased to be a member ;
- (iii) a past member shall not be liable to contribute unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;
- (iv) in the case of a company limited by share, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member ;
- (v) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up ;
- (vi) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract ;
- (vii) a sum due to any member of a company in his character of a member, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company ; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him.

[1882—S. 61; (1908) S Edw. VII C. 69—S 123 (1); (1929) 19 and 20 Geo. V. C. 23—S. 157 (1).]

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or misrepresentation as against managing agents, it does not affect the liability of contributories in a winding up of the Company. (Vol 21) 1934 Sind 39 (43, 44).

[2] The new liability to contribute under S. 156 arises for the first time upon the winding up and is unaffected by the fact that previous calls have been made by the Company and have become barred by limitation. (Vol 23) 1941 Cal 143 (143, 144) : ILR (1940) 2 Cal 175 * (Vol 28) 1941 Mad 565 (565, 566, 577) : ILR (1941) Mad 538 (DB) * (Vol 22) 1935 Lah 335 (336) : 16 Lah 1055 (DB) * (Vol 21) 1934 Lah 1015 (1015, 1016) * (1908) 81 Mad 66 (67) (DB).

[See however (Vol 23) 1936 Lah 226 (227)].

[3] It is no answer to a claim in winding up that there had been an arrangement made by the directors which could be set up as excluding the statutory liability which attaches upon the winding up. (Vol 19) 1932 Cal 691 (693) : 59 Cal 1099 (DB).

[4] Person transferring share remains liable until transferee's name is entered into the register. (Vol 23) 1936 Bom 24 (27) : 60 Bom 297.

[5] Non-observance of the requisite formalities for transfer of shares is a fatal defect—Such a transfer does not absolve the transferor from his liability as a contributory, particularly when he is himself one of the directors of the company. (Vol 2) 1915 Lah 320 (321).

[6] Contributories are liable to pay up to the balance of share-money uncalled, when Court is satisfied that call is necessary to discharge liabilities of the company. Until such order is made the share-holder is not liable to pay anything. The call then becomes a claim on the contributory. (Vol 17) 1930 All 617 (618).

[7] A person who subsequently died, was, at the commencement of the winding up and had for over three years entered on the register of share-holders as the result of a contract. The liability of a member under S. 156 in respect of the shares is absolute and flows from the fact of his being on the register in respect of those shares. The original contract may supply the reason for his name having been placed on the register, but after the winding his liability arises *ex lege* and not *ex contract*. (Vol 19) 1932 PC 240 (243) : 54 All 827 : 60 Ind App 1 (PC).

[8] The liquidators of a company obtained an order against a contributory and proceeded to execute it by attaching certain shares. But in the execution proceedings it was found that the son of the contributory was registered as the holder of those shares and was in actual possession of them. Thereupon the liquidators sought to prove that the transfer by the contributory in favour of his son was a fraudulent one. It was held that the proper course for the liquidators to follow was to proceed by way of a regular suit under C. P. C. O. 21 R. 63 if they had reason to believe that the transfer by the contributory was for any reason, ineffective, inoperative and void as against the creditors in the winding up. (Vol 33) 1946 Mad 174 (175) (Vol 7) 1920 Mad 748 : 43 Mad 760 (FB) (Disting.).

2. "Assets of the company".—[1] The unpaid or uncalled capital upon issued shares forms part of the capital or assets of the company. The fact that it has not been called before the winding up but remains unpaid until the Liquidator has exercised his powers under S. 156 does not exclude it from the assets to capital of the company. Hence, where under the articles of a Company the preference share-holders are entitled in winding up to return of capital in priority to other share holders the unpaid portion of the shares held by the ordinary share-holders can be called up to meet

157. In the winding up of a limited company any director whether past or present, whose liability of directors liability is, in pursuance of this Act, unlimited, shall, in addition to his whose liability is unlimited liability (if any) to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of the winding up a member of an unlimited company :

Provided that—

- (i) a past director shall not be liable to make such further contribution if he has ceased to hold office for a year or upwards before the commencement of the winding up ;
- (ii) a past director shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office ;

Section 156 (contd.)

the amount required to repay the preference shareholders. Such payment of course is subject to the discharge of all debts and charges ranking prior to the preference shares. (Vol 28) 1941 Mad 806 (807, 808).

3. Interest.—The liability created by S. 156 is new and no provision is made for interest therein. It may be that when a court makes a payment order under that section it could direct future interest on the amount fixed in the payment order until realization ; but it cannot include interest prior to that time. (Vol 23) 1936 Lah 739 (741) (DB).

4. Member, Liability of.—[1] Signatories to memorandum are deemed to become members and they can be placed on the list of contributories though no shares are allotted to them. (Vol 25) 1938 Sind 187 (188, 189) : 32 Sind LR 167 (DB).

[2] Once a member is upon the list of contributories unless he shows he is wrongly placed, he is liable to contribute to the assets for payment of debts and winding up expenses. (Vol 3) 1916 All 317 (318) : 38 All 347 (DB).

[3] A person signing Memorandum of Association on the understanding that he would be given certain number of shares as fully paid-up in consideration of assets transferred to the company, is not liable as contributory even if the contract to give such paid-up shares is subsequently cancelled. (Vol 13) 1926 All 524 (527) (DB) : 48 All 503.

[4] The person who signed the transfer form as the purchaser of shares and whose name is entered as owner of the shares in the share register with his knowledge and consent is the contributory liable in respect thereof. The fact that the consideration for the shares was paid by some other person does not affect his liability (Vol 23) 1936 Bom 24 (26) : 60 Bom 297.

[5] Where there is winding up of a Company where liability to contribute is limited by guarantee the member is liable as a contributory only to the extent of his guarantee. Other sums which may be due from him though under the articles can be recovered by suit but not as contribution. (1899) 2 Ch 593 (598).

[6] A subscriber to the memorandum of association remains a member of the company. He remains so till the company accepts the surrender of shares, or the subscriber pays for the shares and validly transfers them to some other person. (Vol 18) 1931 All 701 (702).

[7] Provisional official liquidator with powers conferred by S. 179 appointed after compulsory winding up of company took steps for settling the list of contributories. But before a formal order by Court calling money the liquidator issued a call to one of the members who paid. The successor sought to recover once again and it was held that he could not do so. (Vol 19) 1932 Cal 691 (694) : 59 Cal 1099 (DB).

[8] Where a shareholder obtains shares with collateral agreement for commission, breach or unenforceability of such collateral agreement does not interfere with his liability as contributory. (Vol 17) 1930 All 357 (360) : 52 All 406 (DB).

[9] The plea of voidability or illegality of contract to take shares cannot be taken after winding up to avoid liability as a contributory. The contract so vitiated should be sought to be set aside before the company goes into liquidation. Therefore where a member remains quiet for over three years, but after his death, his executors contested the liability on the ground that the contract was void and therefore they could not be placed on the list of contributories it was held that they could not do so. (Vol 19) 1932 PC 240 (243) : 60 Ind App 1 : 54 All 827 (PC) * (Vol 31) 1944 Pat 226 (228) : 23 Pat 18 (DB) * (Instrument of transfer improperly stamped and therefore inadmissible in evidence and cannot be acted upon—Illegality of transfer cannot be urged as exonerating the liability of a contributory especially when winding up takes place long after transfer.) * (Vol 11) 1924 Lah 649 (649) (649) * (Vol 1) 1914 Lah 480 (484) : 1914 Pun Re No 69 (DB).

[10] When a contributory dies, his legal representatives automatically become liable as such in his stead. It is not necessary to make a formal application to bring them on the record. (Vol 19) 1932 Lah 648 (649).

5. Past member—Liability of.—[1] A member of a company does not by his death become a past member within the meaning of S. 156. Though he dies, his estate continues to be liable as a member. (Vol 20) 1933 All 334 (336) : 55 All 417 (DB).

[2] Where in the case of winding up of a company existing members on list A are not called upon to contribute to the full extent of the unpaid amounts of their share money, a past member on list B cannot be liable to contribute till list A is exhausted. (Vol 23) 1936 Lah 739 (740) (DB) (Reversing (Vol 23) 1936 Lah 226).

[3] A shareholder is liable even after a transfer, forfeiture or surrender of the share if the liquidation takes place within one year of such transfer, etc., and if he is on the list of contributories. (Vol 11) 1924 Mad 703 (706) * (Vol 23) 1936 Lah 226 (227) (Shares forfeited for non-payment of call—Shareholder is not liable as past member for interest.)

6. Set off.—[1] Member of joint stock company or friendly society with limited liability under liquidation cannot set off paid up calls or calls to be paid up against a debt due by him to the company and thus give himself a preference over the other creditors of the company. This principle is equally applicable to a set off claimed in Court as well as out of Court. (Vol 5) 1918 Mad 995 (996) : 40 Mad 1004 (DB).

- (iii) subject to the articles a director shall not be liable to make such further contribution unless the Court deems it necessary to require that contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

[1882—S. 62 (See Section 70, 71 of this Act. (1908) 8 Edw. VII, C. 69—S. 123 (2); (1929) 19 and 20 Geo. V, C. 23—S. 157 (2).]

158. The term “contributory” means every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

[1882—S. 124; (1908) 8 Edw. VII, C. 69—S. 124; (1929) 19 and 20 Geo. V. C. 23—S. 158.]

Nature of liability of contributory.

159 ^a[(1) The liability of a contributory shall create a debt payable at the time specified in the calls made on him by the liquidator.]

(2) No claim founded on the liability of a contributory shall be cognizable by any Court of Small Causes sitting outside the Presidency-towns.

[1882—S. 125, (1908) 8 Edw VII, C. 69—S. 125; (1929) 19 and 20 Geo. V. C. 23—S. 159]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1935 (22 of 1936), S. 86, for the original sub-section. [15-1-1937].

Objects and Reasons.

Amendment made in 1936.—“We have amended section 159 in order to remove the difficulty created by the law as it stands, under which claims are frequently barred because the debt became payable at the time of call, which may have been more than three years before the winding up commenced. We think it should be provided that where calls have been made before the

date of the winding up the cause of action against a defaulter should be regarded as arising at the commencement of the winding up: on calls made after the commencement of the winding up the cause of action may properly arise from the date of the call.”—S.C.R., 1936.

SECTION 158—Note 1.

*[1] Where certain shares have been entered in the name of a person with his knowledge and consent in the share register of a company *prima facie* he is the contributory who is liable in respect thereof. The Company and the Liquidator where it is wound-up are not concerned with the person paying the consideration but with the person who has signed the transfer form as purchaser and whose name is entered as owner of the shares in the share register. (Vol 23) 1936 Bom 24 (26): 60 Bom 297.

[2] The term “contributory” in S. 158 does not necessarily mean a person whose liability as a contributory has been established. It includes any person alleged to be a contributory. (Vol 7) 1920 Lah 43 (44): 1 Lah 237.

[3] A fully paid up shareholder of a Company is a Contributory within the meaning of S. 158 for the purposes of presenting a petition for winding up. (Vol 3) 1916 Lah 78 (79): 1917 Pun Re No. 91.

[4] Fully paid share-holders are ‘contributories’ for purposes under Sec. 192 (Vol 21) 1934 Mad 476 (477): 57 Mad 955 (DB).

[5] Share-holders holding fully paid up shares at commencement of liquidation are not contributories for the purposes of acting as shareholders or contributories to elect a liquidator. (Vol 11) 1924 All 772 (774): 46 All 759 (DB).

[6] A person who agrees to be a member of a Company on some condition does not become a member if the condition is not fulfilled and cannot be placed on the list of contributories. (Vol 15) 1928 Lah 236 (236) * (Vol 15) 1928 Lah 234 (235).

[7] A mere debtor of a company in liquidation is not a ‘Contributory’ of the company. (Vol 13) 1926 All 101 (102).

SECTION 159—Synopsis.

1. Section 159 (1).

2. Section 159 (2).

1. Section 159 (1).—[1] When a Company carries on a business which is ultra vires and incurs losses, such transaction creates no debt either legal or equitable. ‘Contributories’ are not liable to pay such debts when the company is being liquidated. (Vol 13) 1931 Mad 792 (794).

[2] If an applicant for shares prescribes a condition precedent, he incurs no liability in the winding up proceedings if the condition is not fulfilled, more so when the company went into liquidation before an allotment of shares to him. (Vol 25) 1928 Lah 236 (236).

2. Section 159 (2).—[1] A suit against a shareholder for balance due on his shares is not cognizable by a Small Cause Court. (Vol 19) 1932 Cal 716 (719): 59 Cal 1186.

[But see (Vol 20) 1933 Lah 657 (658) (1881) 1881 Pun Re No. 97 (Disting)].

160. (1) If a contributory dies either before or after he has been placed on the list of Contributories in case contributories, his legal representatives and his heirs shall be liable in of death of member. due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly.

(2) If the legal representatives or heirs make default in paying any money ordered to be paid by them, proceedings may be taken for administering the property of the deceased contributory, whether moveable or immoveable, or both, and of compelling payment thereof of the money due.

^a[(3) For the purposes of this section the surviving coparceners of a contributory who is a member of a Hindu joint family governed by the Mitakshara School of Hindu Law shall be deemed to be his legal representatives and heirs.]

[1882—S. 126 and 154; (1908) 8 Edw. VII. C. 69—S. 126; (1929) 19 and 20 Geo. V, C. 23—S. 160]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 87. [15-1-1937.]*

Objects and Reasons.

Amendment made in 1936—Sub-section (3)—"We have inserted in section 160 of the Act a provision aimed at securing that a surviving co-parcener of a Hindu joint family under Mitakshara law cannot escape liability under this section by asserting that he is neither an heir or a legal representative."—S. C. R., 1936.

Contributories in case of insolvency of member. **161.** If a contributory is adjudged insolvent either before or after he has been placed on the list of contributories, then—

(1) his assignees shall represent him for all the purposes of the winding up, and shall be contributories accordingly, and may be called on to admit to proof against the estate of the insolvent, or otherwise to allow to be paid out of his assets in due course of law, any money due from the insolvent in respect of his liability to contribute to the assets of the company; and

(2) there may be proved against the estate of the insolvent the estimated value of his liability to future calls as well as calls already made.

[1882—S. 127; (1908) 8 Edw. VII. C. 69—S. 127; (1929) 19 and 20 Geo V, C. 23—S. 161].

SECTION 160—Note 1.

[1] Section 160 (1) does not deal with payment orders at all. A payment order against a deceased contributory is not executable. (Vol 28) 1941 Lah 480 (480); ILR (1942) Lah 807 (DB). (Decree against dead man is nullity—Remedy is to proceed against estate in due course of administration.)

[2] Where a share-holder dies before the list of contributories is settled and his name is included in the list in liquidation proceedings and the Court makes an order for payment of the balance it is open to the Court to recover it from his legal representatives and heirs under S. 160. The proper remedy is to take proceedings in the due course of administration of the estate of the deceased and not application for payment against the legal representative personally. (Vol 21) 1934 Bom 469 (471). *

[3] To fix a deceased contributory's estate with the liability, persons representing his estate should be brought on record, before an effective order may be made. (Vol 17) 1930 All 503 (504); 52 All 430 (DB).

[4] Where the deceased who had applied for shares of a Company had been placed on the list of contributories, he does not cease to be a contributory and forfeit the deposit that he had made upon application so as to

escape from the position of a contributory with future liability. In such a case the liability falls upon the representatives. (Vol 25) 1938 Pat 287 (288) (DB). (Fact that they were not substituted within 90 days is of no consequence, for to such cases Limitation Act does not apply.)

[See however (Vol 19) 1932 Lah 648 (649) [On the death of contributory the personal representatives of the deceased become automatically liable and no application is necessary for this purpose and therefore no question of limitation arises.]

[5] In this case decided before the introduction of Sub-S. (3) in 1936, where the manager of the Hindu family consisting of his sons and nephews, had agreed to take certain shares in a company by signing the memorandum of the company, the sons, on the death of the manager were held liable only to the extent of the separate property of the father which had come into their hands. (Vol 20) 1933 All 334 (336); 55 All 417 (DB) * (Vol 18) 1931 Pat 44 (48); 10 Pat 249 (DB).

SECTION 161—Note 1.

[1] As to the power of a liquidator to prove, rank and claim in the insolvency of a contributory, see section 179, Clause (e).

WINDING UP BY COURT.

Circumstances in which company may be wound up by Court.

162. A company may be wound up by the Court—

- (i) if the company has by special resolution resolved that the company be wound up by the Court:
- (ii) if default is made in filing the statutory report or in holding the statutory meeting:
- (iii) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year:
- (iv) if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven:
- (v) if the company is unable to pay its debts:
- (vi) if the Court is of opinion that it is just and equitable that the company should be wound up.

[1882—S. 128; (1908) 8 Edw. VII, C. 69—S. 129; (1929) 19 and 20 Geo. V, C. 23—S. 168]

SECTION 162—Synopsis

1. Section 162 (General).
2. Clause (i)—Special resolution.
3. Clause (ii)—Default.
4. Clause (iii)—“Suspends its business.”
5. Clause (iv).
6. Clause (v)—Inability to pay debts.
7. Clause (vi)—“Just and equitable.”
8. Winding up of insurance company.

1. S. 162 (General).—[1] Share-holders and Creditors is the main consideration for winding up a company. Hence the fact that many share-holders and creditors opposed the winding up should weigh with the Court. The mere fact that petitioner holds only a few shares is no bar to a winding up order (Vol 29) 1942 Bom 231 (234) * (Vol 19) 1932 Rang 75 (77): 10 Rang 143 (DB).

[2] One share-holder filed a petition alleging gross misconduct of the ex-managing director. Directors stated that they appointed Registered Auditors to investigate into the matter. Petitioner prayed that the petition be allowed to stand till the completion of the investigation. Held the petition should succeed or fail only on the material existing on the date of filing. It is open to the petitioner to present a fresh petition later on when he could gather more material. (Vol 29) 1942 Bom 231 (238).

[3] The question of directors exceeding the borrowing powers given by articles is a question of internal management and in a petition for winding up, the Court will not go into it especially when the Company had passed a resolution ratifying the borrowings of the directors taking the view that they have acted in the best interests of the Company. (Vol 29) 1942 Bom 231 (236).

[4] Rules of the Company, precluding the winding up of the Company for reasons for which, and under circumstances in which, this Act provides that a Company may be wound up, are *ultra vires*. (1902) 29 Cal 688 (692) (DB).

[5] In the case of a petition for winding up a company, the petitioner has got to make out a case for winding up on the petition. He cannot be allowed to fish out a case by cross-examination or by inspection of the accounts of the Company. (Vol 29) 1942 Bom 231 (237).

[6] A share-holder petitioning for winding up is under no disability as compared with a contributory, nor is he under any obligation to satisfy the Court that on a winding up there would be surplus assets. Share-holder's petition must be scrutinised much more carefully than a contributory. (Vol 29) 1942 Bom 231 (238).

[7] Where a certain company wound up its business voluntarily and the creditor of the company applied for the appointment of an official liquidator with the one appointed by the Company. Held the application could not be treated as an application for the compulsory winding up of the company because the rules of the High Court to be strictly observed had not been observed and the Court cannot waive the compliance with law. (Vol 23) 1936 Pat 468 (470).

[8] In the undermentioned English Case, it has been held that after a resolution has been passed for a winding up a company voluntarily, a share-holder cannot, as a general rule, obtain a compulsory order for winding up or an order for continuing the voluntary winding up under supervision. The only exceptions to the rule are where the resolution has been passed fraudulently or where creditors appear to support the petition. (1879) 11 Ch. D. 701 (CA) (716, 717, 718) (As for power to order winding up subject to supervision see S. 221).

2. Clause (i)—Special resolution.—[1] As to special resolution, See S. 81.

[2] When there is no valid resolution for voluntary winding up of a company, the Court will not pass an order for its compulsory winding up. (Vol 9) 1922 Cal 365 (375): 49 Cal 399 (DB) (Mere opinion of majority of share holders is not sufficient).

3. Clause (ii)—Default.—[1] As to statutory report and statutory meeting, see section 77.

[2] A petition for winding up a company on the ground mentioned in clause (ii) of this section shall not be presented by any person except a share-holder not before the expiration of fourteen days after the last day on which the meeting ought to have been held; see section 166, clause (b).

[3] If a petition is presented to the Court for winding up the company on the ground mentioned in clause (ii) of this section the Court may, instead of directing that the company be wound up, give directions for the statutory report to be filed or a meeting to be held, or make such other order as may be just; see section 77, sub-section (9).

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[4] Where the petition is presented on the ground mentioned in clause (ii) of this section, the Court may order the costs to be paid by any persons who, in the opinion of the Court, are responsible for the default; see section 170 (2).

4. Clause (iii)—“Suspends its business.”—

[1] Unless certain conditions are fulfilled, a company cannot commence any business or exercise any borrowing; see section 103.

[2] A company which has received incorporation, but carries on no trade should be wound up. (1871) 40 LJ Ch. 655 (673).

[3] A company can be wound up compulsorily on the ground that it has suspended business for a whole year only when there is no intention on the part of the company to carry on business. If suspension be due to temporary causes Court may refuse compulsory winding up. (Vol 7) 1920 Cal 722 (722) : 47 Cal 654 (DB).

[4] Where the firm of managing agents of a company is dissolved, fact that steps were taken to appoint new managing agents is sufficient indication that it is possible to carry on the business. (Vol 7) 1920 Cal 722 (722) : 47 Cal 654 (DB).

5. Clause (iv).—[1] As to the liability for carrying on business with fewer than seven or, in the case of a private company, two members, see section 147.

6. Clause (v)—Inability to pay debts.—[1] Under S. 162(v) a company may be wound up if it is commercially insolvent i.e. if it is unable to meet its current demands although the assets when realised including uncalled capital may exceed its liabilities. (Vol. 20) 1933 Lah 301 (303, 304).

[2] The test for determining whether a company should be wound up is, whether the company is commercially insolvent at the date of the petition for winding up. The expression ‘commercially insolvent’ means that the existing assets and liabilities of the company are such as to make it reasonably certain as to make the Court satisfied that the existing and probable assets would be insufficient to meet the existing liabilities. (Vol 29) 1942 Bom 231 (235) (1869) 9 Eq. 122 Relied on.)

[3] Other test to see whether company is commercially insolvent, is whether at the date of winding up petition, there was any reasonable hope that the object of trading at a profit could be attained. (Vol 29) 1942 Bom 231 (235).

[4] When the Court is asked to wind up a company on the ground that it cannot meet its debts, what has to be ascertained is not whether the company, if it converted all its assets into cash, would be able to discharge its debts, but whether in a commercial sense the company is solvent. The company is entitled to regard the money which it is entitled to call up on account of shares from the contributories as money available for the discharge of its debts. (Vol 28) 1941 Pat 603 (604) : 20 Pat 538.

[5] Where the only object of the creditor is to recover his debt out of assets available and he has no *mala fides* and the company is not in a position to pay the debt, the creditor is *prima facie* entitled to an order of winding up. (Vol 16) 1929 Lah 651 (652, 653) : 11 Lah 80 (DB).

[6] For the compulsory winding up of a company on the petition of a creditor on the ground that the company has failed to pay his debt after statutory notice,

the debt due by the company must be presently payable and the title of the creditor complete. The law requires that a demand must be made for a debt that is due and it is not permissible to support a petition by alleging that something else is due. (Vol 23) 1936 Cal 628 (629) : 62 Cal 294.

[7] Where a company has a *bona fide* defence to a creditor's claim the creditor's petition for its winding up must be dismissed. (Vol 12) 1925 Rang 128 (128) : 2 Rang 575 (DB).

[8] Creditors must sue where there is *bona fide* dispute as to the company's liability to pay the debt and would not be allowed to take advantage of Companies Act ; mere failure on the part of a company to comply with statutory demand does not entitle the creditor to ask as a matter of right for the winding up of the company. (Vol 16) 1929 Mad 265 (265, 266) * (1883) 23 Ch D 210 (215). (The winding up proceedings are not to be had recourse to for the purpose of recovering a disputed debt).

[9] Where the object of the creditor's petition to wind up the company is to bring pressure upon the company in order to make it pay the creditor's debt cheaply and expeditiously which the company desires to dispute in the Civil Court, the petition is an abuse of the process of the Court and should be dismissed. (Vol 12) 1925 Mad 199 (201) : 48 Mad 267 (DB).

[10] In ascertaining the debts of the company, the sums under items such as “calls in advance”, “share suspense”, “forfeited shares account” and “deposit against premium” which the company could not be called upon to pay immediately cannot be taken into account. The items such as “loans”, “advances” and “outstanding liabilities” must however, be considered. (Vol 23) 1941 Pat 603 (604) : 20 Pat 538.

[11] As to when a company is to be deemed unable to pay debts, see S. 163.

7. Clause (vi)—“Just and equitable.”—[1] The words “just and equitable” in S. 162 (vi) are not necessarily *ejusdem generis* with reasons given in the preceding clauses of the section. (Vol 12) 1925 Mad 489 (489, 490) : 48 Mad 448 (DB) * (Vol 16) 1929 Bom 8 (11).

[2] Though the Court is not bound to construe S. 162(vi) as only covering grounds of a like nature with those specified in S. 162 (i) to (v) yet it will require grounds of a like magnitude before acting under the clause, and it is only in extreme cases that it will, at the suggestion of the minority, disregard the wishes of the domestic forum, and condemn the company to extinction. (Vol 6) 1919 Low Bur 29 (30).

[3] No general rule can be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase “Just and equitable” for purposes of winding up. The decisive question must be whether at the date of the presentation of the winding up petition there is any reasonable hope that the object of trading at a profit with a view to which the company was formed can be attained. In considering that question the guarantee of the preference shares should be left out of sight except in so far as it may have biased the evidence on either side.

Where there was no question of a deadlock nor was there any question of share-holders who had the voting power using that power for their own commercial interests outside the company in disregard of the interests of a minority, nor was there any question of improper

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management of the company by the directors who were in control and the problem involved was of the nature of a business problem it was held if there was at the relevant time a reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit, there would be no sufficient reason why the Court should wind up the company under the just and equitable clause—Regarding future prospects the Court should not impose its views but form a best opinion on the evidence of people having practical knowledge of that trade. The desires of the shareholders should not be disregarded because preference shareholders are interested in liquidation. (Vol 23) 1936 PC 114 (121) (PC).

[4] The power under S. 162(vi) should not be exercised unless there is very strong ground for acting upon it, because the companies are governed by a majority of their own members and where there is a domestic tribunal which has powers to decide upon a question, it should if possible, be left to that domestic tribunal.

Where a company is not shown to have been conceived and brought forth in fraud or to be one whose substratum is gone, the mere fact that the applicants apprehended that the assets of the company will be frittered away and that loss instead of gain would result from the company continuing to work is no ground for winding up the company under S. 162(vi) (Vol 4) 1917 All 347 (349) : 39 All 334.

[5] To bring a company within the "just and equitable" clause it must be shown that the substratum of the company has gone or that a deadlock has arisen in the sense that it is not possible for the company to carry out the objects for which it was formed. (Vol 18) 1931 Cal 692 (696) : 58 Cal 716 (Held on facts that an order for winding up was not called for).

[6] The sub-stratum of the company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading at a profit can be attained, or (d) the existing and probable assets are insufficient to meet the existing liabilities. When none of these four tests can apply to the facts of the case, the company cannot be wound up. It is for the petitioner for winding up to prove that the test is satisfied. (Vol 29) 1942 Bom 231 (235, 236) + (Vol 7) 1920 Cal 722 (723) : 47 Cal 654 (DB).

[7] In a petition for winding up a company, the Court will refuse to give decision as to the probable success or non-success of the company as a commercial speculation. (Vol 29) 1942 Bom 231 (235).

[8] In the following cases it was held that it was "just and equitable" to wind up the company:—

(i) Where the directors exercised a dominating influence on the management of the company and the managing director was able to outvote the minority and retain profits, and shareholders did not receive a copy of the balance sheet, nor was the auditor's report read at the general meeting or attached to the balance sheet, and dividends were not regularly paid it was held that there were sufficient grounds to allow a winding up application. (Vol 12) 1925 Mad 489 (489, 490) : 48 Mad 448 (DB).

(ii) A bank had no properly constituted directorate and had not issued any balance sheet for more than

five years. Its accounts had not been properly audited. The cash balance had dwindled, and the business was almost at a stand still, and the meetings of the shareholders were not regularly held :

Held that a proper case was made out for an order for the compulsory winding up of the bank under S. 162 (vi). (Vol 19) 1932 Lah 571 (574) : 13 Lah 603.

(iii) Statutory demand under S. 163 (1) not complied with—Affairs of company in moribund condition—Company unable to pay debt and unable to raise money—No prospect of work being resumed for appreciable time—Company held should be wound up. (Vol 17) 1930 Lah 777 (779) (DB).

(iv) Where it appeared from the auditor's report that there had been defalcation of certain funds and that attempts were made to cover up the defalcation by various devices and charges of dishonesty and mismanagement were levelled against one another by the different parties, it was held that the case was one in which the conduct of some officers of the company would require investigation and as this could only be obtained in winding up by the Court, considerations of justice and equity were more in favour of a compulsory winding up than voluntary liquidation. (Vol 24) 1937 Oudh 377 (379).

(v) Where a person who was adjudicated insolvent transferred large estates to a private limited company in which he had 90 per cent of shares and over which he had complete control it was held that the Company should be wound up. (Vol 15) 1928 Rang 36 (39, 40) : 5 Rang 685 (DB).

(vi) A press which was a limited concern was leased to certain person who subsequently leased it to another at large profits—Numerous shareholders had also to file suits against the company for recovering dividends to them—Chairman was found not authorised to give receipt on behalf of persons named in the dividend warrant.

It was held that under S. 162 (vi) it was just and equitable that the company should be wound up. (Vol 17) 1930 Mad 240 (241, 242) : 53 Mad 38 (DB).

(vii) Where the main object of a company is the conduct of a lottery, the mere fact that some of its objects were philanthropic will not prevent the company from being ordered to be wound up as being one formed for an illegal purpose. The purpose would still be illegal even where the illegal business is merely annexed to the real one which is philanthropic. (Vol 20) 1933 Mad 16 (20) : 56 Mad 26 : 33 Cr L Jour 792 (DB).

(viii) It is particularly by the duty of the courts in India to see that directors and other officers of companies carry out their duties honestly and to punish them if they do not. Compulsory liquidation under the Court affords the best opportunity of performing this duty when there is a *prima facie* case of dishonesty against the officer of a company. (Vol 22) 1935 Lah 779 (783) : 16 Lah 1029 (SB).

(ix) Where as a result of an onerous contract with a creditor, the company loses its identity and the creditor becomes *de facto* the company with a power to bring it to an end whenever it suited him and in accordance with the stipulations of the contract seizes the machinery and plant of the company with the result that the company is unable to carry on its business and to pay its debts, it is just and equitable to wind up the company. (Vol 28) 1941 PC 104 (109) (PC).

Company when deemed
unable to pay its debts.

163. ^a[(Z)] A company shall be deemed to be unable to pay its debts—

- (z) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, b[by causing the same to be delivered by registered post or otherwise] at its registered office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor ; or
- (ii) if execution or other process issued on a decree or order of any Court in favour of a creditor of the Company is returned unsatisfied in whole or in part ; or
- (iii) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company.

Section 162 (contd.)

[9] In the following cases it was held that the company should not be wound up under S. 162 (vi) : —

(i) Mere fraud in the promotion, or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order, for, the majority of the share-holders may waive the fraud. (Vol. 9) 1922 Cal 365 (373) : 49 Cal 399 (DB).

(ii) The fact that the company is working at a loss is no ground for winding it up, especially when not a single share-holder has come forward to support the petition for winding up. (Vol 30) 1943 Lah 109 (113): ILR (1944) Lah 47 (DB).

(iii) In the absence of fraud in conception of a company or where it is not one whose substratum is gone, the mere fact that the applicants apprehended a loss from a further working is no ground for winding up the Company under this Clause. (Vol 4) 1917 All 347 (349) : 39 All 334.

(iv) An *ultra vires* transaction on the part of directors is of itself not sufficient reason for a winding up order since other remedies are available to aggrieved share-holders. (Vol 19) 1932 PC 1 (10) : 58 Ind App 416: 55 Mad 180 (PC).

(v) To justify a winding up order on the 'just and equitable' rule it is necessary to prove a lack of confidence in the conduct and management of the Company's affairs by the directors. The fact that a managing director has a preponderating voice in the company by reasons of his owning or controlling a large number of shares or that the dividends have not been paid regularly is by itself no reason for winding up a company. (Vol 19) 1932 PC 1 (6) : 58 Ind App 416 : 55 Mad 180 (PC) (Reversing (Vol 12) 1925 Mad 633 (DB)).

(vi) The fact that the dividends had not been paid regularly is no ground for winding up the company. (Vol 19) 1932 PC 1 (6) : 58 Ind App 416 : 55 Mad 180 (PC).

(vii) The misconduct of directors and the fact that the business has been carried on at a heavy loss, are *per se* not grounds on which the Court would order a winding up of the Company. (Vol 29) 1942 Bom 231 (237, 238).

(viii) Per Tek Chand J—Failure of a scheme for resuscitation of a company is not by itself sufficient to justify a winding up order being made. S. 153 provides not merely for resuscitation or re-organization of companies but also for scheme of arrangement which provides an alternative mode of liquidation. (Vol 22) 1935 Lah 779 (785) : 16 Lah 1029 (SB).

(ix) Court can in extreme case wind up a company at the instance of a share-holder though he is not supported by a majority of share-holders. But so long as the company has a chance of producing profit, there should be no interference. Where the company lost five out of total paid up capital of 7 lacs and a share-holder applied to wind up the company but the majority of the share-holders opposed it and under the management the company showed progress it was held that the Court should not interfere and wind up the company. (Vol 16) 1929 Bom 8 (10, 11).

(x) In considering whether company should be wound-up under the just and equitable clause the sums due to the company from the debtors, agent and policy holders and the value of its tangible assets in the form of furniture, motor cars, books, stationery etc. should be taken into account. (Vol 28) 1941 Pat 603 (604, 606) : 20 Pat 538.

(ix) Fraud in promotion, or fraudulent misrepresentation in the prospectus is not ground for winding up, for majority of share-holders may waive the fraud. (Vol 9) 1922 Cal 365 (373) : 49 Cal 399 (DB).

8. Winding up of Insurance company.—[1] When an insurance company is sought to be wound up under S. 162 (vi) the Court must satisfy itself by evidence whether there was any reasonable hope of trading at a profit. Where there are no hopeful prospects, the fact that the Insurance Superintendent has not taken any steps deserves consideration, though it is not a deciding factor. (Vol 28) 1941 Pat 603 (605) : 20 Pat 538.

[2] As to additional grounds for winding up an insurance company, see section 54, Insurance Act, 1938.

SECTION 163—Synopsis.

1. Clause (i)—Creditor's demand.
2. Clause (ii)—Execution of decree.
3. Clause (iii)—"Unable to pay its debts."

1. Clause (i)—Creditor's demand.—[1] S. 163 merely provides when a Company is to be deemed unable to pay its debts and lays down a special rule of evidence the effect of which is that if the notice provided for by S. 163 (1) (i) is given and default is made the company is conclusively presumed to be unable to pay its debts. Once a notice is properly given and default is made it is not open to the debtor to show that in spite of the non-payment of the debt, he is in a position to pay his debt. (Vol 14) 1927 Rang 306 (307) : 5 Rang 483.

c[(2) The demand referred to in clause (i) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by an agent or legal adviser duly authorised on his behalf, or in the case of a firm if it is signed by such agent or by a legal adviser or any one member of the firm on behalf of the firm].

[1882—S. 129; (1908) 8 Edw. VII. C. 69—S. 130; (1929) 19 and 20 Geo. V. C. 23—S. 169.]

[a] The original S. 163 was re-numbered as sub-section (1) of that section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 88.

[b] *Substituted ibid.*, for "by leaving the same".

[c] *Inserted, ibid.*

164. Where the High Court makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings to be had in District Court; and thereupon such District Court shall, for the purpose of winding up the company, be deemed to be "the Court" within the meaning of this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the High Court.

[1882—S. 212.]

Section 163 (contd.)

[2] The statutory demand under Cl. (1) (i) S. 163 must be in strict compliance with the provisions of that clause, and if those provisions are not literally complied with, the demand, though followed by neglect of the company to pay the debt cannot be made the basis of presumption that the company is unable to pay its debts. S. 163 Sub-S. (1) (i) imposes a penal obligation upon the company and has therefore, to be strictly construed. (Vol 23) 1936 All 840 (844): ILR (1937) All 210 * (Vol 18) 1931 Cal 692 (694): 58 Cal 716.

[3] Though a statutory notice under S. 163 (1) (i) has not been properly served, the petitioners for winding-up can show *aliunde* that the company is unable to pay its debts; and failure to pay an undisputed debt would be, as a rule conclusive of this. (Vol 18) 1931 Cal 692 (694): 58 Cal 716.

[4] Mere service of notice by a creditor on a solvent company does not entitle the creditor to a winding up order if the company *bona fide* disputes the existence of the debt. (Vol 23) 1936 All 840 (845): ILR (1937) All 210.

[5] Company must be in default at the time of service of notice of demand. (Vol 14) 1927 Cal 625 (626): 54 Cal 345 (DB).

[6] A limited liability company must necessarily act through its officers and authorised agents. A demand of debts due to company under the hand of its manager must, therefore, be deemed to be a demand under its hand within clause (i). (Vol 23) 1936 All 840 (844): ILR (1937) All 210.

[7] In view of Sub S. (2) newly inserted by the Act of 1936, the following cases decided before the amendment, are no longer good law:

A demand by the solicitors of a creditor is not sufficient. (Vol 14) 1927 Cal 625 (626): 54 Cal 345 (DB) * (Vol 18) 1931 Rang 306 (309): 9 Rang 323 (DB) * (Vol 18) 1931 Rang 306 (310): 9 Rang 323 (DB).

2. Clause (ii)—Execution of decree.—[1] In the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the Court is, in accordance with clause (ii) bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not barred from making a demand for payment of the judgment-debt by a notice in accordance with clause (i), without having recourse to execution proceedings. In such a case if the demand remains unsatisfied for three weeks, the presumption enjoined by this section necessarily follows. (Vol 23) 1936 All 840 (845): ILR (1937) All 210.

3. Clause (iii)—"Unable to pay its debts."—

[1] If the Court is satisfied that the company on a general perusal of its balance-sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that would enable the court to order its winding-up. (1910) 84 Bom 533 (538). (Case under S. 129 (c) of Act of 1882 (now S. 163 (1) (iii)) * (Vol 19) 1932 Lah 571 (574): 13 Lah 603.

[2] In a petition for winding up of a company the Court will not go behind the balance sheet duly audited by the auditors more so when it was open to the petitioner share-holder to question the same in other proceedings. (Vol 29) 1942 Bom 231 (235).

[3] While two suits were pending one by the company against the creditor and another by the creditor against the company, a winding up petition was presented by the creditor on the ground that the company was unable to pay its debts. On the company's application for removal of the creditor's petition from the file of the Court, the Court dismissed the creditor's petition: Held that the proper procedure was to stay the petition till the disposal of the suits. (Vol 7) 1920 Cal 1004 (1006) (DB).

[4] If on materials before Court there is no evidence to justify the finding that company is unable to pay its debts, creditor should not be allowed to lead oral evidence to prove it. (Vol 18) 1931 Rang 306 (309): 9 Rang 323.

[5] See also under S. 162 (v).

SECTION 164—Note 1.

[1] under S. 164, the District Judge has, for purposes of winding up, all the jurisdiction and powers of the High Court and therefore can order attachment before judgment of property situate beyond his jurisdiction. (Vol 15) 1928 Lah 376 (378).

[2] The additional District Judge has same jurisdiction as the District Judge to make orders in the winding up of a company. (Vol 9) 1922 PC 361 (362) (PC).

[3] When applications are made to the High Court for directing District Courts concerned to enforce payment orders made by another High Court in the matter of winding up of the company, the High Court cannot authorise the official liquidator to apply to the District Courts concerned for enforcing the order Under S. 184. The proper procedure is that the payment orders should be treated in the same manner as a decree passed by the High Court in which it is filed and transferred for execution to the respective District Courts. (Vol 14) 1927 Mad 271 (271, 272).

[But see (Vol 6) 1919 All 25 (26) (DB)].

Transfer of winding up from one District.

165. If during the progress of a winding up in a District Court it is made to the appear to the High Court that the same could be more conveniently prosecuted in any other District Court having jurisdiction to wind up companies, the High Court may transfer the same to such other Court, and thereupon the winding up shall proceed in such other District Court.

[1882—S. 219]

166. An application to the Court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by all or any of those parties, together or separately^a[or by the registrar] :

Provided that—

(a) a contributory shall not be entitled to present a petition for winding up a company unless—

(i) either the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven ; or

(ii) the shares in respect of which he is a contributory or some of them either were originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder ;

^a[(aa) the registrar shall not be entitled to present a petition for winding up a company—

(i) except on the ground that from the financial condition of the company as disclosed in its balance-sheet or from the report of an inspector appointed under section 138 it appears that the company is unable to pay its debts, and

(ii) unless the previous sanction of the ^b[Central Government] has been obtained to the presentation of the petition :

Provided that no such sanction shall be given unless the company has first been afforded an opportunity of being heard.]

SECTION 165—Note 1.

[1] Under this section the High Court may transfer proceedings from one District Court to another District Court. The power of the High Court to transfer such proceedings to its own file is governed by Section 141 read with Section 24, Civil P. C. (1886) 9 All 180 (182) (DB).

SECTION 166—Note 1.

[1] Petitioner must make out a case for winding up of company in the petition. He cannot fish out a case from deponents of the company or from inspection of the company's accounts. (Vol 29) 1942 Bom 231 (237).

[2] Members who have paid up their share capital fully can apply for winding up as they are contributories. The qualification in S. 156 (4) does not make him less a contributory. (Vol 17) 1930 Mad 240 (241) : 53 Mad 38 (DB).

[3] A person who holds a power-of-attorney from executor of a deceased share-holder and whose name has been entered in the share ledger can apply for winding up as a contributory. (Vol 24) 1937 Oudh 377 (378, 379).

[4] Share-holders whose shares have been forfeited but who had not ceased to be members for one year before commencement of winding up are contributories entitled to apply for winding up if the shares were held by them and registered in their names for more than six months before commencement of winding up. (Vol 19) 1932 Lah 571 (572).

[5] A petition by a share-holder for winding up stands on a different footing to a petition by a creditor. It should be more closely scrutinised on presentation. (Vol 1) 1914 Bom 190 (191) : 39 Bom 16 * (Vol 29) 1942 Bom 231 (238).

[6] A share-holder applying for winding up is under no disability as compared with contributory nor is he under any obligation to satisfy the Court that on winding up their would be surplus assets. (Vol 29) 1942 Bom 231 (238).

[7] If an application for winding up and liquidation is not *bona fide* the petitioner is to pay entire cost. In the absence of clear provision in Companies Act the matter is governed by Section 35, Civil P.C. (Vol 21) 1934 Lah 746 (750) (DB).

[8] One of the creditors of the company who was not supported by any of the other creditors, petitioned for winding-up order, alleging irregularities and that an investigation into its affairs was necessary. It was held that nothing substantial would result from winding-up order and that the petition must be dismissed. (1901) 1 Ch 102 (106).

[9] In the case of a demand by a creditor for his claim, the company believes it to be fraudulent and unreasonable at law, and in filing winding up application, his object is to bring pressure of insolvency proceedings of the company, the petition for insolvency of the company must be dismissed. (Vol 1) 1914 Bom 251 (252) : 39 Bom 47 (DB).

- (b) a petition for winding up a company on the ground of default in filing the statutory report or in holding the statutory meeting shall not be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held ;
- (c) the Court shall not give a hearing to a petition for winding up a company by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a *prima facie* case for winding up has been established to the satisfaction of the Court.

[1882—S. 131, 132 ; (1908) 8 Edw. VII, C. 69—S. 137 (1) ; (1929) 19 and 20 Geo. V, C. 23—S. 170 (1)].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 89. [15-1-1937].

[b] *Substituted* by A. O. for "Local Government."

Objects and Reasons.

Amendments made in 1936—Clause (aa).—"We consider that the local Government should not sanction the presentation of a petition by the registrar for winding up a company without first hearing what the company has to urge to the contrary." S.C.R., 1936.

167. An order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.

[(1908) 8 Edw. VII, C. 69—S. 138 ; (1929) 19 and 20 Geo. V, C. 23—S. 178.]

168. A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up.

[1882—S. 133 ; (1908) 8 Edw. VII C. 69—S. 139 ; (1929) 19 and 20 Geo. V, C. 23—S. 175 (2).]

169. The Court may, at any time after the presentation of the petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceeding against the company, upon such terms as the Court thinks fit.

[1882—S. 134 ; (1908) 8 Edw. VII, C. 69—S. 140 ; (1929) 19 and 20 Geo. V, C. 23—S. 172.]

170. (1) On hearing the petition the Court may dismiss it with or without costs, or adjourn the hearing, or make any interim order on the hearing conditionally or unconditionally, or make any other order that it deems just, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where the petition is presented on the ground of default in filing the statutory report or in holding the statutory meeting, the Court may order the costs to be paid by any persons who in the opinion of the Court, are responsible for the default.

SECTION 167—Note 1.

[1] In matter of liquidation the rules relating to bankruptcy, as far as possible, apply when company goes into liquidation ; a secured creditor may realise his security and prove for any outstanding balance. The remaining assets would be liable for such principal and interest as was due on the date of the winding up order. (Vol 9) 1922 Lah 281 (285) : 3 Lah 59 (DB).

SECTION 168—Note 1.

[1] A *voluntary* winding up shall be deemed to commence at the time of the passing of the resolution for the voluntary winding up ; see section 204.

[2] When the company is being wound up, the interest upon debts which carry interest ceases to run from the date of the winding up order unless the assets are enough to pay all debts in full. (Vol 17) 1930 Mad 1012 (1015) : 54 Mad 324.

SECTION 169—Note 1.

[1] When a company is being wound up voluntarily, stay of execution of decrees against it can be granted, except in very special circumstances. ('87) ILR (1937) 1 Cal 632 (633).

[2] Even in cases of voluntary liquidation the Court has power, in order to protect the assets of the bank for its other creditors, to stay the execution of the decree for costs passed against the bank after liquidation, in a suit by the bank prior to its going into liquidation. (Vol 12) 1925 Oudh 630 (630) : 28 Oudh Cas 197 (DB).

[3] As to stay of suit after winding up order is made see section 171.

SECTION 170—Note 1.

[1] Where a petition filed by a creditor of a company for compulsory winding up, was opposed by the company and certain other large creditors on the ground that the company though involved had, since the petition, entered into an agreement for sale of its property to a new company which was proposed to be formed and that the order if made would cause loss to the creditors and share-holders, the Court ordered the petition to stand over and allotted time, upon the company undertaking not to part with any portion of the purchase money except for preliminary expenses and the Company was allowed to complete the sale in the mean time. (Vol 11) 1924 Rang 108 (109).

a[(3) Where the Court makes an order for the winding up of a company it shall, except where a liquidator is appointed simultaneously, forthwith cause intimation thereof to be sent to the official receiver.]

[1892—S. 135; (1909) 8 Ewd. VII, C. 69—Ss. 141, 65 (9); (1929) 19 and Geo. V. C. 23—S. 171.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 90. [15-1-1937]

171. When a winding up order has been made a[or a provisional liquidator has been Suits stayed on winding appointed] no suit or other legal proceeding shall be proceeded with or up order. commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

[1892—S. 136; (1909) 8 Ewd. VII, C. 69—S. 142; (1929) 19 and 20 Geo. V, C. 23—S. 177.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 91. [15-1-1937.]

Objects and Reasons.

Amendment made in 1936.—Under the section as it stood before the amendment in 1936 it was only after a winding up order had been made that proceedings against a company were stayed. The amendment of

the section made in 1936 follows the English Act, 1929, in providing that the appointment of a provisional liquidator should operate as a stay.—See S. O. R., 1936, Cl. 71.

Section 170 (contd.)

[2] A fully paid up share-holder is entitled to appear and to be heard upon an application to wind-up the company. (Vol 18) 1931 Cal 391 (391): 58 Cal 62 (DB).

[3] An appeal will lie from an order refusing to wind up a company. (1914) 39 Bom 47 (50) (DB).

[4] A compulsory winding up order was made against a company upon a creditor's petition. The company did not appear in the winding up proceedings but appealed against the winding up order on the ground that the Court erroneously refused to hear a share-holder who was desirous of being heard at the time the winding-up order was made. The share-holder had not appealed.

Held that it would be entirely improper to allow the company to come in and appeal and fight the battle or grievances of an individual share-holder. (Vol 18) 1931 Cal 391 (392): 58 Cal 62 (DB).

[5] When a petition for winding up is dismissed, company is entitled to costs. Opposing share-holders and creditors are entitled to one set of costs. When counsel for the company and counsel for the share-holders are instructed by the same solicitors, costs of separate counsel may not be given. Of course, the Court can give in a proper case. (Vol 29) 1942 Bom 231 (239).

[6] As a general rule a successful party is entitled to costs; but a creditor appearing in a winding up petition is not entitled to costs unless he shows reasonable ground for appearing. 'A', creditor, made a winding up petition and notices were served on other creditors who wished to oppose. They appeared but supported the petition. 'A' was unwilling to pursue the petition and other creditors were not willing to undertake the burden of petition. Petition was dismissed. Held the supporting creditors were not entitled to costs. (Vol 25) 1938 Mad 96 (98): ILR (1938) Mad 284 (DB).

SECTION 171—Synopsis.

1. Applicability and scope.
2. Leave for suit when necessary.
3. Leave for suit when not necessary.
4. Leave for appeal or revision.
5. Leave granted subsequent to institution of suit.

6. Powers of Court.

7. Proceedings under section 145, Criminal P. C.

8. This section and section 232.

9. Waiver.

1. *Applicability and scope.*—[1] When there is a question as to whether S. 171 was intended to entail as a necessary consequence the dismissal of a suit instituted without leave, or whether it was intended that a suit should be stayed until leave was obtained, as the words in S. 171 were borrowed from English law where they had a recognised legal meaning the same meaning should be applied to the words occurring in the section. (Vol 29) 1942 Lah 289 (290): ILR (1942) Lah 517 (FB).

[2] S. 171 applies to liquidation under Court's supervision (see S. 225 (2) as well as to liquidation by the Court. (Vol 15) 1928 All 165 (165): 50 All 419.

[3] Knowledge of the winding up order is not necessary for the application of S. 171. Section has operation irrespective of the question of knowledge. (Vol 3) 1916 Pat 47 (48) (DB).

[4] "Suit" in section means proceedings instituted by the presentation of plaint in a court of original jurisdiction according to S. 26, Civil PC. (Vol 28) 1941 Lah 392 (394): ILR (1941) Lah 760 (FB).

[5] "Suit" and "action" are interchangeable terms so far as procedure in India is concerned. (Vol 29) 1942 Lah 289 (292): ILR (1942) Lah 517 (FB).

[6] The expression 'or other legal proceedings' in this section need not be confined to original proceedings in a Court of first instance, analogous to a suit instituted by means of a petition similar to a plaint. No narrow construction should be placed upon the words 'or other legal proceedings' in this section. The words can and should be held to cover distress and execution proceedings in the ordinary Courts (see S. 232). Such proceedings are other legal proceedings against the company as contrasted with ordinary suits against the company. (Vol 33) 1946 FC 16 (21) [(Vol 32) 1945 All 354: ILR (1945) All 352 (DB) affirmed; (Vol 28) 1941 Lah 392: ILR (1941) Lah 706 (FB) dissented from.]

[7] The words "commenced" in S. 171 was put in to show that no suit could be instituted or other legal proceedings commenced without the leave in question

Section 171 (*contd.*)

after the company has gone into liquidation. (Vol 23) 1936 Lah 401 (402) (DB).

[8] Objection as to want of leave not taken in Court of first instance cannot be raised in appeal. (Vol 20) 1933 Cal 809 (811) (DB).

2. Leave for suits when necessary.—[1] Where the winding up order has been made no suit or other proceedings may be proceeded with against the company except by the leave of the Court since s. 171 would apply. (Vol 19) 1932 Cal 76 (77) : 58 Cal 946.

[2] Leave under S. 171 of Act means leave by the winding up Court and when once given includes all subsidiary legal proceedings arising out of the suit. (Vol 6) 1919 All 337 (338) : 41 All 432 (DB).

[3] Heavy contested money claims against company and its agent—Fraud of agent alleged—Leave to sue should be granted. (Vol 14) 1927 Bom 167 (169) (DB).

[4] Suit under O. 21. R. 63, Civil P.C. against company in liquidation is suit within S. 171—Sanction of Court which ordered winding up is essential. (Vol 28) 1941 Lah 392 (396) : ILR (1941) Lah 760 (FB).

[5] A regular suit by an unsuccessful claimant of attached property against a company in liquidation is not a part of the execution proceeding and cannot be commenced without leave of the liquidation Court. (Vol 6) 1919 Lah 200 (201) : 1919 Pun. Re. No. 70. (DB).

[6] No suit can be brought against the voluntary and official liquidators after winding up orders without leave of Court. (Vol 4) 1917 Oudh 322 (323).

[7] The word 'proceeding' includes execution proceedings and require sanction for their continuation after winding up order. So where a bank as puisne mortgagee was impleaded as party to the suit as well as execution proceedings and the bank went into liquidation pending such proceedings it was held that sanction was necessary to continue the proceedings. (Vol 31) 1944 Maj 84 (85).

[8] Though an application for discharge may not be independent proceedings the section requires leave of the High Court even for the continuation of insolvency proceedings already taken. (37) 39 Pun LR 717 (717).

[9] There is no exception to S. 171 and the leave of the Court is essential for the purpose of proceeding in execution even in case of decree obtained by the Government in respect of a debt due to the Crown. (Vol 19) 1932 Pat 1 (3) (DB) * (Vol 19) 1932 Cal 430 (431) : 59 Cal 327.

[See however (Vol 13) 1926 Cal 781 (782) : 53 Cal 328.

3. Leave for suit when not necessary.—[1] When once an action by the Company in liquidation itself has been proceeded with and is successful there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their behalf, as the defendants cannot be said to proceed with or commence any legal proceedings against the Company. (Vol 24) 1937 Lah 926 (929) (DB).

[2] Winding up order is no bar to proceedings against servant of company as they are not the company itself. (Vol 31) 1944 Oudh 147 (152) : 19 Luck 385 : 45 Cr L Jour 333.

[3] Application for substitution as decree holder by a transferee of decree against a Company in liquidation must be made under S. 47 (3) Civil P C to the

executing Court and not to the winding up Court. (Vol 6) 1919 All 337 (337) : 41 All 432 (DB).

4. Leave for appeal or revision.—[1] Appeal or revision arising out of action by company is not within S. 171 and no leave is necessary. (Vol 23) 1938 Lah 754 (755) * (Vol 5) 1918 Lah 181 (182) : 1918 Pun Re No. 62 (FB) * (Vol 23) 1936 Pesh 97 (100).

[See however (Vol 28) 1941 All 154 (156) : ILR (1941) All 175 (Decree in favour of company—Appeal by judgment-debtor—Company wound up—Leave of Court is necessary for proceeding with appeal. * (Vol 28) 1941 All 335 (335) : ILR (1941) All 565. (Appeal against decree in favour of bank filed within time—Bank going into liquidation before filing of appeal—Application for leave to continue appeal is one to "commence" and not to "continue".)]

[2] Leave to commence an appeal after the expiry of limitation should not be granted. (Vol 28) 1941 All 335 (336) : ILR (1941) All 565.

[3] Where a company in liquidation itself starts execution proceedings, it is not entitled to rely on S. 171 Companies Act, to debar persons from raising of sections under O. 21, R. 58. Order refusing to entertain objections is open to revision. (Vol 23) 1936 Pesh 185 (186).

[See however (Vol 3) 1916 Lah 24 (24) : 1916 Pun Re No. 9 (DB) (Company suing petitioner for sum due and obtaining decree which is confirmed on appeal—Petitioner filing revision—Company becoming insolvent in the meanwhile and winding up order passed—Court's leave must be obtained to take revision proceedings.)

5. Leave granted subsequent to the institution of suits.—[1] Leave to continue action should be given only when there arises some question which cannot be determined satisfactorily in the winding-up proceedings. (Vol 5) 1918 Lah 364 (364) : 1918 Pun Re No. 93.

[2] Suit against Company in liquidation instituted without leave—Application made for leave before expiry of limitation but leave granted after limitation—Dismissal of suit is improper. (Vol 29) 1942 Lah 289 (291) : ILR (1942) Lah 517 (FB) ((Vol 23) 1936 Lah 401 (overruled).) * (Vol 17) 1930 All 503 (504) : 52 All 430 (DB).

[See however (Vol 27) 1940 Cal 166 (167) : ILR (1939) 2 Cal 425].

6. Powers of Court.—[1] Though ordinarily the Court should not exercise its discretion under the section, to permit proceedings which would have the effect of giving priority to any particular creditor, in exceptional cases it may. (Vol 19) 1932 Pat 1 (3) (DB).

[2] Judge to whom application for leave under S. 171 is presented can adjudicate upon question of title raised by unsecured creditor whose claim is disputed by official liquidator. (Vol 29) 1942 Oudh 417 (420) : 18 Luck 110 (DB).

[3] Secured creditors prayer for leave to sue should be granted unless share are special grounds for refusing it. (Vol 19) 1932 Lah 475 (476) (DB) * (Vol 16) 1929 All 353 (360) : 51 All 695 (FB).

[4] Order in suit against a company to be continued after winding-up order does not amount to permission to institute suit, Lower Court's discretion in the matter should not be interfered with in appeal unless order is altogether wrong. (Vol 4) 1917 Lah 391 (392) : 1917 Pun Re No. 13.

a[171A. (1) For the purposes of this Act, so far as it relates to the winding up companies Vacancy in the office by the Court, the term "official receiver" means the official receiver, of liquidator. attached to the Court, or, if there is no such official receiver, then such person as the b[Central Government] may, by notification in the [official Gazette], appoint for the purpose.

(2) On the making of a winding up order, the official receiver shall become the official liquidator of the company and shall continue to act as such until his further continuance is terminated by an order of the Court.

(3) The official receiver shall as such official liquidator forthwith take into his custody and control all the books, documents and the assets of the company.

(4) The official receiver shall be entitled to such remuneration as the Court shall fix.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 22. [15-1-1937].

[b] Substituted by A. O. for "Local Government."

[c] Substituted by A. O. for "Local official Gazette."

Objects and Reasons.

"Inconvenience has been experienced through the office of the official liquidator remaining vacant after a winding up order has been made. This clause is designed to secure that a public official shall automatically

become the liquidator until some other person is appointed by the Court and can undertake the work."—S. O. R., 1939

Copy of winding up order to be filed with registrar.

172. a[(1) On the making of a winding up order it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a copy of the order within a month from the date of the making of the order.]

Section 171 (contd.)

[5] Suits by secured creditors previously allowed to be proceeded with should not be stayed pending adjudication and priority among creditors by winding up Court. (Vol 12) 1925 Cal 916 (918, 919).

[6] Where leave was required by a person claiming two reliefs (1) specific performance of an agreement to mortgage and (2) Simple money demand against a company the effect of granting which would result in converting him from the position of an unsecured creditor into a secured one. It was held that the Court had discretion to grant leave on condition that he should elect between enforcing one of the two claims. (Vol 14) 1927 Bom 167 (173, 174) (DB).

[7] Leave granted or refused under S. 171—Only Appellate Court can question the propriety of it. (Vol 17) 1930 All 503 (504) : 52 All 430 (DB).

[8] Suit by the contributories after winding up order is not competent. The matter can be decided only by Court conducting the liquidation. (Vol 4) 1917 Lah 391 (392) : 1917 Pun Re No. 13.

[9] Creditor required to prove claim against liquidated company not doing it within time—He asked to be allowed to prove his claim by a suit—He failed to file a suit even within extended time—The creditor again applied to the Court to have his claim adjudicated in the liquidation proceeding itself.—The Court dismissed it.—This was appealed against. Held in appeal that having preferred to have his claim adjudicated by a suit he could not be allowed to ask the court to change the procedure he himself had chosen. (Vol 28) 1941 Mad 855 (856, 857) (DB).

[10] Where pronote in favour of a Bank under liquidation is endorsed in favour of another Bank and the latter contemplates to file a suit on the basis of the same against the original debtor of the bank in liquidation *prima facie* the bank in liquidation is a proper party to the suit and the latter bank apply for permission to take the Bank in liquidation a party to the suit the permission as a rule should be granted against the bank under liquidation. (Vol 21) 1934 Lah 328 (328).

7. Proceedings under S. 145 Criminal P. C.—

[1] S. 171 is not meant to override an express enactment in S. 145 Cr. PC by which a magistrate, if satisfied that a dispute likely to cause a breach of the peace exists, is bound to call on the parties to attend his court and put in their claims as regards actual possession. (Vol 20) 1933 Cal 433 (434) : 34 Cr L Jour 640 (DB).

8. This section and S. 232.—[1] S. 232 has nothing to do with S. 171. S. 232 simply says that certain proceedings shall be void but that, if they are by the Government, they shall not be void. S. 171 refers to any suit or legal proceeding. The initiation by the Income Tax Officer of steps to recover the amount of the assessment under S. 46, Income Tax Act, and the prosecution by the collector of those steps amount to "commencing" or "proceeding with" a "Suit or other legal proceeding". The income tax department cannot therefore without the leave of the winding up Court, continue the proceedings for summary collection of the Income Tax claimed outside the winding up. (Vol 32) 1945 All 354 (355, 359, 360, 363) : ILR (1945) All 352 (DB).

9. Waiver.—[1] The bar created by section 171 cannot be waived by liquidators in a way as to require them to admit a claim under decree rendered inoperative by that bar. (Vol 15) 1928 All 165 (166) : 50 All 419.

SECTION 171 A—Note 1.

[1] Official liquidator, like the official receiver appointed by the Court in insolvency proceedings is an official of the Court and has been vested with powers under the Companies Act and as such he is a public servant within the meaning of the term. (Vol 21) 1934 Oudh 158 (162) : 9 Luck 577.

SECTION 172—Note 1.

[1] If a company is wound up whether by the Court or voluntarily, any contract of management made with a managing agent shall be thereupon determined ; See section 87B (e).

(2) On the filing of a copy of a winding up order, the registrar shall make a minute thereof in his books relating to the company, and shall notify in the Official Gazette that such an order has been made.

(3) Such order shall be deemed to be notice of discharge to the servants of the company, except when the business of the company is continued.]

[1882—S. 137 ; (1908) 8 Edw. VII, C. 69—S. 143 ; (1929) 19 and 20 Geo. V, C. 23—S. 176.]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 93, for the original sub-section. [15-1-1937]

[b] Substituted by A. O. for "local official Gazette."

* Objects and Reasons.

Amendment made in 1936.—Under the old Section 172 the duty of filing with the registrar a copy of the winding up order was laid on the company. Such duty is now both on the company and the petitioner.—See S.C.R., 1936.

Power of Court to stay winding up.

173. The Court may at any time after an order for winding up, on the application of any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.

[1882—S. 138; (1908) 8 Edw. VII, C. 69 S. 144 ; (1929) 19 and 20 Geo. V, C. 23—S. 202 (1)].

Court may have regard to wishes of creditors or contributories.

174. The Court may, as to all matters relating to a winding up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

[1882—S. 140 ; (1908) 8 Edw. VII, C. 69—Ss. 145, 201, 219 ; (1929) 19 and 20 Geo. V, C. 23—S. 238.]

SECTION 173—Note 1.

[1] In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding up of a company, the Court should, so far as possible, act upon the principles which are applicable in exercising jurisdiction to annul an adjudication in insolvency against an individual. (1903) 2 Ch. 174 (180, 181).

[2] Courts in India have power to make order for stay of proceedings under voluntary winding-up under S. 216 read with S. 173. The Court has to see whether stay of proceedings will be conducive or detrimental to commercial morality and in the interest of public at large. Where the company was insolvent and its resolution to be wound up was passed with a view to its being started after the claims of the creditors had been satisfied, proceedings were stayed subject to the condition that all share-holders should be given option of retiring from the company or continuing to be its members. (Vol 6) 1919 Lah 305 (306) (DB).

[3] Application for winding up of a company on the ground of mismanagement must fail or succeed on the materials already adduced and cannot be made to stand over till after completion of the investigation into the affairs by Registered Auditors appointed by the directors. (Vol 29) 1942 Bom 231 (238).

[4] Where a petition filed by a creditor for the compulsory winding up of a company was opposed by the company and other large creditors the petition was stayed in order to enable the company to complete an agreement entered into by it for sale of its property to a new company which was proposed to be formed. (Vol 11) 1924 Rang 108 (109).

[5] As to what matters should be taken into consideration while refusing or postponing a stay of winding up proceedings, see (1903) 2 Ch 174 (194).

SECTION 174—Note 1.

[1] For the purpose of ascertaining their wishes the Court may direct meetings of the creditors and contributories to be called ; see s. 239.

[2] Object of compulsory winding up of company is closing down its business. In ordering compulsory winding up Court should have regard to wishes of majority of creditors and if petition for compulsory winding up is opposed by majority of creditors, Court should not ordinarily grant petition. (Vol 19) 1932 Rang 75 (77) : 10 Rang 143 (DB)* (Vol 29) 1942 Bom 231 (234).

[3] The wishes of the majority of the creditors are not binding upon the Court but the Court ought to give them serious consideration. (Vol 19) 1932 Rang 75 (77) : 10 Rang 143 (DB).

[4] In petitions for winding up by share-holders the Court has to consider that the internal management of a company is its own concern and it is a much better judge of business prospects of a trading venture than the Court ; where the majority of share-holders show confidence in the management and have faith in its future prospects court should not interfere. (Vol 29) 1942 Bom 231 (238).

[5] Where in a winding up of a company the contributories are alone interested in its results as there were no creditors, the liquidation is a peculiar one in which the Court, as to all matters affecting the contributories as a class would have regard to their wishes as proved by sufficient evidence. (Vol 10) 1932 PC 1 (10) : 58 Ind App 416 : 55 Mad 180 (PC).

[6] Any disposition of assets of the company after the winding up order is made and before the appointment of official liquidator is not regular as the property is then in custody of Court constructively. But

Official Liquidators.

Appointment of official liquidator.

175. (1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a person or persons ^a[other than the official receiver] to be called an official liquidator or official liquidators.

(2) The Court may make such an appointment provisionally at any time after the presentation of a petition and before the making of an order for winding up ^a[but shall before making any such appointment give notice to the company, unless for reasons to be recorded it thinks fit to dispense with notice.]

(3) If more persons than one are appointed to the office of official liquidator, the Court shall declare whether any act by this Act required or authorised to be done by the official liquidator is to be done by all or any one or more of such persons.

(4) The Court may determine whether any, and what, security is to be given by any official liquidator on his appointment.

(5) The acts of an official liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment: Provided that nothing in this sub-section shall be deemed to give validity to acts done by an official liquidator after his appointment has been shown to be invalid.

(6) A receiver shall not be appointed of assets in the hands of an official liquidator.

[1882—S. 141; (1908) 8 Edw. VII, C. 69—S. 149 (1), (2), (4), (10); (1929) 19 and 20 Geo. V, C. 23—Ss. 183, 184 (1), 189 (4), (5)].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 94. [15-1-1937]

Section 174 (contd.)

where the company has no creditors and the dividend is declared by the unanimous resolution of the contributories and paid to them, the dividend ought not to be ordered to be repaid to the official liquidator as the only persons interested are the contributories themselves. (Vol 19) 1932 PC 1 (11): 58 Ind App 416: 55 Mad 180 (PC).

[7] While the opinion of share-holders and creditors ought to be taken into consideration, these classes of persons in India require to be protected against being easily misled by fraudulent directors. Consequently even though the shareholders and creditors have agreed that the liquidation should be carried on by certain directors who themselves are indebted to the company, compulsory liquidation by Court can be ordered where it finds that those directors are not doing their work of collecting debts properly. (Vol 22) 1935 Lah 779 (782): 16 Lah 1029 (SB).

[8] A fully paid up share-holder has the right to appear and to be heard upon the application for winding up. He is in an entirely different position than a creditor or contributory who is still liable for calls. (Vol 18) 1931 Cal 391 (391, 392): 58 Cal 62 (DB).

[9] If there is petition by a creditor who is *prima facie* entitled to an order for winding up but the majority of creditors do not desire a winding up then the question arises for discretion of the Court. The same question would not arise if the majority of share-holders or majority of contributories did not desire winding up. (Vol 18) 1931 Cal 391 (392): 58 Cal 62 (DB).

SECTION 175—Note 1.

[1] Company suspended business and is plainly commercially and technically insolvent. Court is justified in appointing provisional liquidator under this section. (Vol 1) 1914 Lah 117 (119): 191 Lun Re. No. 31.

[2] Discretion of trial Court in the appointment of liquidator should not be interfered with except under

very special circumstances. (Vol 15) 1928 Rang 36 (40): 5 Rang 685 (DB).

[3] Where one of two persons appointed liquidators jointly, refuses to act, the resolution appointing them becomes abortive. One of them cannot take up the work alone. (Vol 15) 1928 All 165 (166): 50 All 419.

[4] Company authorised by memorandum of association to manage estate, can act as liquidator. Legality of appointment cannot be questioned in proceedings of a payment order under S. 186. (Vol 23) 1936 Lah 276 (276).

[5] S. 175(6) precludes the appointment of a Receiver at the instance of a secured creditor to oust the possession of the liquidator. In case of competition between the Court at the instance of a secured creditor the Court will ordinarily in exercise of its discretion, give preference to the liquidator. (Vol 19) 1932 Cal 76 (77): 58 Cal 946.

[6] After winding up order the Directors of a company cease to be such and cannot institute proceedings on its behalf. Managing Director of a Company wound up cannot appeal against order appointing Official Liquidator. (Vol 4) 1917 Mad 260 (260): 40 Mad 706 (DB).

[7] Company under voluntary liquidation—Application for the appointment of an official liquidator does not lie, as he can be appointed in compulsory winding up proceedings only. (Vol 23) 1936 Pat 468 (470).

[8] A person who has been appointed liquidator of a company ought not, after such appointment, to continue to act as *vakil* of a creditor whose right to prove against the company is in dispute in the liquidation. (1887) 9 All 180 (184, 185) (DB).

[9] An official liquidator is an official of the Court and is a public servant within the meaning of section 80, Civil P.C. (Vol 21) 1934 Oudh 158 (162): 9 Lusk 577.

Resignations, removals,
filling up vacancies and
compensation.

176. (1) Any official liquidator may resign or be removed by the Court on due cause shown.

(2) Any vacancy in the office of an official liquidator appointed by the Court shall be filled up by the Court ^aand until the vacancy is so filled up the official receiver shall be and act as the official liquidator.]

(3) There shall be paid to the official liquidator such salary or remuneration, by way of percentage or otherwise, as the Court may direct; and, if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the Court directs.

[1882—S. 142; (1908) 8 Edw. VII, C. 69—S. 149 (6), (7) (8); (1929) 19 and 20 Geo. V, C. 23—S. 188 (1), (2), (3)]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXI] of 1936) S. 95. [15-1-1937]

177. The official liquidator shall be described by the style of the official liquidator of the particular company in respect of which he is appointed, and not by his individual name.

[1882—S. 143; (1908) 8 Edw. VII, C. 69—S. 149 (9); (1929) 19 and 20 Geo. V, C. 23—S. 185 (6).]

^a[177A. (1) Where the Court has made a winding up order or appointed an official liquidator provisionally, there shall, unless the Court thinks fit to order otherwise be made to the liquidator, and so orders, be made out and submitted to the official liquidator a statement as to the affairs of the company verified by an affidavit and containing the following particulars, namely:—

(a) the assets of the company, stating separately the cash balance in hand and at the bank, if any;

(b) the debts and liabilities;

(c) the names, residences and occupations of the creditors stating separately the amount of secured debts and unsecured debts, and in the case of secured debts particulars of the securities, their value and the dates when they were given;

(d) the debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realised therefrom.

(2) The statement shall be submitted and verified by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary, manager or other chief officer of the company, or by such of the persons hereinafter in this subsection mentioned as the official liquidator, subject to the direction of the Court, may require to submit and verify the statement, that is to say, persons—

(a) who are or have been directors or officers of the company;

(b) who have taken part in the formation of the company at any time within one year before the relevant date;

(c) who are in the employment of the company, or have been in the employment of the company within the said year, and are in the opinion of the official liquidator capable of giving the information required;

(d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the company to which the statement relates.

SECTION 176—Note 1.

[1] An official liquidator cannot resign without leave of liquidating Court; otherwise he is liable to forfeit pay. (Vol 6) 1919 Lah 182 (183) : 1919 Pun Re No. 51 (DB).

[2] An official liquidator can resign only on due cause shown. (Vol 30) 1943 Sind 84 (84, 85) : ILR (1942) Kar 501 (DB).

[3] It is quite unreasonable to expect the Official

Liquidator to carry on the affairs of the company at his own expense when there is no prospect whatever of recovering the costs from the petitioner in the winding up proceedings who cannot be traced. In such a case, the Liquidator should be allowed to resign as 'due cause' is shown. (Vol 30) 1943 Sind 84 (84, 85) : ILR (1942) Kar 501.

[4] The judge in charge of the winding up may remove liquidator for partiality to persons involved in the winding up and make new appointment. (Vol 19) 1932 PG 1 (12) : 55 Mad 180 : 58 Ind App 416 (PC).

(3) The statement shall be submitted within twenty-one days from the relevant date, or within such extended time as the official liquidator or the Court may for special reasons appoint.

(4) Any person making or concurring in making the statement and affidavit required by this section shall be allowed, and shall be paid by the official liquidator or provisional liquidator, as the case may be, out of the assets of the company, such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the official liquidator may consider reasonable, subject to an appeal to the Court.

(5) If any person, without reasonable excuse, knowingly and wilfully makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding one hundred rupees for every day during which the default continues.

(6) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled by himself or by his agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section, and to a copy thereof or extract therefrom.

(7) Any person untruthfully so stating himself to be a creditor or contributory shall be guilty of an offence under section 182 of the Indian Penal Code and shall, on the application of the liquidator or of the official receiver, be punishable accordingly.

(8) In this section the expression "the relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment, and, in a case where no such appointment is made, the date of the winding up order].

[1882—S. 143; (1929) 19 and 20 Geo. V, C. 23—S. 181].

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936); S. 96 [15-1-1937].*

^a[177B. (1) In a case where a winding up order is made, the official liquidator shall, as soon as practicable after receipt of the statement to be submitted under section 177A, and not later than four, or with the leave of the Court, six months from the date of the order, or in a case where the Court orders that no statement shall be submitted, as soon as practicable after the date of the order, submit a preliminary report to the Court—

- (a) as to the amount of capital issued, subscribed, and paid up, and the estimated amount of assets and liabilities, giving separately under the heading of assets particulars of—
 - (i) cash and negotiable securities;
 - (ii) debts due from contributories;
 - (iii) debts due to and securities, if any, available to the company;
 - (iv) movable and immovable properties belonging to the company;
 - (v) unpaid calls; and
- (b) if the company has failed, as to the causes of the failure; and
- (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof.

(2) The official liquidator may also, if he think fit, make a further report, or further reports stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court.]

[(1929) 19 and 20 Geo. V, C. 28—S. 182].

[a]. *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 96. [15-1-1937].*

Custody of company's property.

178. (1) The official liquidator ^a[whether appointed provisionally or not] shall take into his custody, or under his control, all the property, effects and actionable claims to which the company is or appears to be entitled.

b(2) All the property and effects of the company shall be deemed to be in the custody of the Court as from the date of the order for the winding up of the company.]

[1882—S. 143; (1908) 8 Edw. VII, C 69—S. 150 (1); (1929) 19 and 20 Geo. V, C. 23—S. 189]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936, (22 [XXII] of 1936), S. 97. [15-1-1937.]

[b] *Substituted, ibid*, for the original sub-section.

a[**178A.** (1) The official liquidator shall within a month from the date of the order for the winding up of a company convene a meeting of the creditors of the company (as ascertained from the books and documents of the company) for the purpose of determining whether or not a committee of inspection shall be appointed to act with the liquidator, and who are to be members of the committee, if appointed.

(2) The official liquidator shall within a week from the date of the creditors' meeting convene a meeting of the contributories to consider the decision of the creditors and to accept the same with or without modifications.

(3) If the contributories do not accept the decision of the creditors in its entirety, it shall be the duty of the official liquidator to apply to the Court for directions as to whether there shall be a committee of inspection and, if so, what shall be the composition of the committee, and who shall be members thereof.

(4) A committee of inspection appointed under this section shall consist of not more than twelve members being creditors and contributories of the company or persons holding general or special powers of attorney from creditors or contributories in such proportions as may be agreed on by the meetings of creditors and contributories, or as, in case of difference, may be determined by the Court.

(5) The committee of inspection shall have the right to inspect the accounts of the official liquidator at all reasonable times.

(6) The committee shall meet at such times as they may from time to time appoint, and, failing such appointment, at least once a month, and the liquidator or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(7) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present.

(8) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(9) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

(10) A member of the committee may be removed by an ordinary resolution at a meeting of creditors if he represents creditors, or of contributories if he represents contributories, of which seven days' notice has been given, stating the object of the meeting.

(11) On a vacancy occurring in the committee the liquidator shall forthwith summon a meeting of creditors or of contributories, as the case may require, to fill the vacancy, and the meeting may, by resolution, re-appoint the same or appoint another creditor or contributory to fill the vacancy.

(12) The continuing members of the committee, if not less than two, may act notwithstanding any vacancy in the committee.]

[(1929) 19 and 20 Geo. V, C. 23—Ss. 198, 199.]

[a] *Inserted* by the Indian Companies (Amendment) Act 1936, (22 [XXII] of 1936), S. 98. [15-1-1937].

SECTION 178—Note 1.

[1] In liquidation proceedings all that is required by the Companies Act is that under S. 178, the official

liquidator shall take into his custody or under his control all the assets of the company, but the company's property does not vest in the liquidator. (Vol 28) 1941 Lah 134 (137) : ILR (1941) Lah 680 (DB).

Powers of official liquidator.

179. The official liquidator shall have power, with the sanction of the Court, to do the following things :—

- (a) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company ;
- (b) to carry on the business of the company so far as may be necessary for the beneficial winding up of the same ;
- (c) to sell the immoveable and moveable property of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ;
- (d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal ;
- (e) to prove, rank and claim in the insolvency of any contributory, for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors ;
- (f) to draw, accept, make and indorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi, or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business ;
- (g) to raise on the security of the assets of the company any money requisite ;
- (h) to take out, in his official name, letters of administration to any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company ; and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator himself : Provided that nothing herein empowered shall be deemed to affect the rights, duties and privileges of any Administrator General.
- (i) to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets.

[1882—Ss. 144, 154; (1908) 8 Edw. VII, C. 69—Ss. 151 (1) (a)-(c), 151 (2) (a)-(g), 151 (3), 214 (1) (i)-(iii) ; (1929) 19 and 20 Geo. V. C. 23—S. 191].

SECTION 179—Synopsis.

1. Clause (a).
2. Clause (b).
3. Clause (c).
4. Clause (e).
5. Clause (f).
6. Clause (g).
7. Clause (i).

1. Clause (a).—[1] Liquidators are officers of Court and not ordinary litigants at all. A liquidator appointed in winding up by the Court ought not to appeal in any case without permission of the winding up Court, and if he does so, he runs considerable risk, in the event of failure of having to pay the costs out of his own pocket. (Vol 8) 1921 All 149 (151) : 43 All 433 (DB).

[2] Liquidator has no right of audience in any proceeding in a suit brought by the company in the ordinary original jurisdiction of the High Court. (37) ILR (1937) 2 Cal 173 (175).

[3] Application under S. 150 of Act of 1882 (S. 186 of Act of 1913) by vendees of a Company as attorneys of the liquidator praying for an order to recover debts

and calls due from the contributories which were sold to them, is incompetent inasmuch as in reality it is not made 'in the name' and on behalf of the Company. (Vol 8) 1921 Lah 140 (141) (DB).

[4] A judge in winding up cannot grant the liquidator leave to bid, it being clearly a matter for the execution Court, but can sanction liquidator applying to the execution Court either in particular or generally in all cases for leave to bid as a decree-holder. It is clearly covered by S. 179 (a) and (b). (Vol 14) 1927 All 681 (681, 682) : 50 All 173.

[5] A decree was obtained by a Bank and transferred to another Court for execution. Then the bank went into liquidation. The liquidator applied to transferee Court for execution of the decree. The application was rejected under O. 21 R. 16 C.P.C. on the ground that liquidator was a transferee and should apply to Court which passed the decree. Held that he was not a transferee of the decree but was acting under S. 179 Companies Act in the name and on behalf of the Company and therefore the decree could be executed on his application. (Vol 23) 1936 Lah 152 (153).

[6] Cause of Action for the liquidator to realise contribution from the contributories arises on the appointment of the liquidator. (Vol 13) 1926 All 550 (551) : 48 All 580.

180. The Court may provide by any order that the official liquidator may exercise any of Discretion of official the above powers without the sanction or intervention of the Court, and, liquidator. where an official liquidator is provisionally appointed, may limit and restrict his powers by the order appointing him.

[1882—S. 145; (1908) 8 Edw. VII. C. 69—S. 151 (5); (1929) 19 and 20 Geo. V, C. 23—S. 184 (4).

Section 179 (contd.)

[7] A successful litigant against a company in liquidation is entitled to be paid his full costs in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank *pari passu* as regards the funds available for discharge of their debts. (Vol 29) 1942 Lah 10 (11) : ILR (1942) Lah 742 (DB).

[8] A proceeding started by a Liquidator is not initiated in his personal capacity but in the name and on behalf of the company and is deemed to be continued by the company. (Vol 20) 1933 All 789 (795) : 55 All 912 (DB)

[9] Liquidator of a company in liquidation being trustees for the creditors time to recover debt does not run after an order or resolution for winding up. Date for testing liability is the commencement of winding up. (Vol 14) 1927 All 161 (162) : 49 All 520 (FB).

2. Clause (b).—See notes under S. 212 (1) (b).

3. Clause (c).—[1] Any sales or contracts of sale affected by the official liquidator in pursuance of the Court's sanction previously obtained are not subject to subsequent confirmation by the Court. Hence where the Court gives to the Official Liquidator sanction to sell company's property and fixes a reserve price and the liquidator enters into contract of sale for a sum considerably in excess of the reserve price the Court cannot revoke its own sanction so as to nullify the contract of sale. (Vol 27) 1940 Mad 179 (182, 183) (DB) * (Vol 25) 1938 Mad 176 (177) (DB).

[2] Where the highest bidder for the purchase of a mill which was property of company under liquidation wanted immediate possession free from all disputes but unfortunately the lessees, from official liquidator for fixed period had got the whip hand and the purchaser had to take the property with all the burden of the lease and the further burden of any subsequent rights which the lessees had obtained, the sale to the lessees themselves for a lesser price is valid. (Vol 9) 1922 PC 361 (364) (PC).

[3] Where the official liquidator let out a mill for a fixed period, thinking to sell it when the market was favourable and before expiry of the lease, circumstances make a sale necessary, the Court should give the lessees an option to purchase and sanction the sale. (Vol 9) 1922 PC 361 (364) (PC).

[4] No order sanctioning a sale to the prejudice of contributors or creditors can be made *ex-parte* on the application of the Official Liquidator. (Vol 8) 1921 Mad 286 (287) (DB).

[5] In pursuance of an order in the winding up proceedings, the business as a going concern the Official Receiver caused an advertisement to be published that the tenders should be sent to him by Registered post so as to reach him on or before a certain date. It was not, however, stated that the highest tender will be accepted and there was no reserve price fixed. A's bid was the highest. The Official Receiver asked for an order from the Court for directions as

regards the offers submitted by A and others. The Official Receiver reported that others were willing to raise their offers. The Court directed that a week's further time should be given for the receipt of fresh offers or for increase of offers already made. It also directed that the offers should be made in sealed covers addressed to the Official Receiver and that they should be opened in Court : *Held* that it was not a question of confirmation of a sale as no sale had taken place. Other persons were entitled to make a further offer and hence the Court's order would stand. (Vol 30) 1943 Mad 365 (366) : ILR (1943) Mad 790 (DB). (Procedure for sale in winding up proceedings indicated).

[6] The sanction of the Court has to be exercised with Judicial discretion having regard to the interest of the company and its creditors. Whenever property is authorised to be sold by private contract it is the duty of the Court to satisfy itself that the price fixed is the best that could be expected unless so satisfied the only safe and proper course is an auction sale. (Vol 8) 1921 Mad 286 (287) (DB).

4. Clause (e).—[1] The Official Liquidator can recover calls not paid although they have become time-barred and ceased to be recoverable by the company. (Vol 3) 1916 All 317 (318) : 38 All 347 (DB) * (Vol 18) 1931 Pat 44 (48) : 10 Pat 249 (DB).

5. Clause (f).—[1] The power given to the Official Liquidator to endorse promissory notes is a power given by the statute and a statutory power cannot be delegated in the absence of a statutory provision for such delegation. Therefore the endorsement by the agents appointed by the liquidators conveys no title in law to the assignees. As such assignments are *ab initio* void, no subsequent ratification by liquidator can validate them. (Vol 27) 1940 Mad 882 (883).

6. Clause (g).—[1] Where on an order for winding up a company, K's offer to take mortgage of its mills was accepted, but on the settlement of the terms, K being dissatisfied appealed to the Privy Council and the Privy Council directed the whole scheme to be placed before the share-holders, but when the matter came back before the Court, K declined to keep his offer open any longer.

Held : that K was estopped from acting otherwise than was promised. The offer being accepted by the Court on behalf of the Official Liquidators the offer and acceptance should be regarded as valid and binding contract between K and Official Liquidators. (Vol 17) 1930 All 330 (335, 336) (DB).

7. Clause (i).—[1] Liquidation proceedings may be expected to come to an end at any time : but this does not excuse the liquidator from fixing the period of employment in the case of an employee and if no term is fixed, an employee on a monthly rate of salary is entitled to notice when his services are to be terminated. (Vol 22) 1935 Lah 917 (917).

[2] Official Liquidator is entitled to admit admissible claim and is not bound to call claimants and make enquiry. (Vol 26) 1939 Rang 46 (47) (DB).

181. The official liquidator may, with the sanction of the Court, appoint an advocate, attorney or pleader entitled to appear before the Court to assist him in the performance of his duties : Provided that, where the official liquidator is an attorney, he shall not appoint his partner, unless the latter consents to act without remuneration.

[1892—S. 146 ; (1929) 19 and 20 Geo V. C 23—S. 191, (1C.)]

182. ^a(1) The official liquidator of a company which is being wound up by the Court shall keep, in manner prescribed, proper books in which he shall cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor or contributory may, subject to the control of the Court, personally or by his agent inspect any such books.

^b(2) Every official liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Court an account of his receipts and payments as such liquidator.

(3) The account shall be in the prescribed form, shall be made in duplicate, and shall be verified by a declaration in the prescribed form.

(4) The Court shall cause the account to be audited in such manner as it thinks fit and for the purpose of the audit the liquidator shall furnish the Court with such vouchers and information as the Court may require, and the Court may at any time require the production of and inspect any books or accounts kept by the liquidator.

(5) When the account has been audited, one copy thereof shall be filed and kept by the Court, and the other copy shall be delivered to the registrar for filing, and each copy shall be open to the inspection of any creditor, or of any person interested.]

[(1908) 8 Edw. VII, C 69—S. 156 ; (1929) 19 and 20 Geo V. C. 23—Ss. 193, 195].

[a] The original S. 122 was *re-numbered* as sub-section (1) of that section by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 99. [15-1-1937]

[b] Sub-sections (2) to (5) were *added*, *ibid*.

183. (1) Subject to the provisions of this Act the official liquidator of a company which is being wound up by the Court shall, in the administration of the assets of the company and in the distribution thereof among its creditors, have regard to any directions that may be given by resolution of the creditors or contributories at any general meeting ^a[or by the committee of inspection, and any directions given by the creditors or contributories at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.]

SECTION 181—Note 1.

[1] The omission of the Official Liquidator to obtain sanction under this section for the appointment of a pleader does not affect the validity of the acts done by the pleader in instituting or conducting the case. (Vol 12) 1925 Lah 222 (222) : 5 Lah 414 (DB).

[2] Legal adviser is employee of liquidator and order fixing his remuneration by court being purely ministerial is not appealable. (Vol 30) 1943 Sind 82 (83) : ILR (1943) Kar 496 (DB).

[3] As to the matters which should be taken into consideration in selecting solicitors for the Official Liquidator, see (Vol 22) 1935 Bom 337 (339).

SECTION 182—Note 1.

[1] As to the filing of a statement by the Official Liquidator when the winding up is not concluded within one year of its commencement, see section 244; and as to the payment of money received by Official Liquidator into a bank, see section 244 A.

SECTION 183—Note 1.

] Debenture-holders are entitled to have their

debentures declared valid in winding up proceedings if Liquidators sought instructions of Court as to how these debenture-holders should be ranked. (Vol 27) 1940 All 458 : ILR (1940) All 568.

[2] Section 183 (5) cannot apply to a case in which the act of Official Liquidator has been performed in pursuance of Court's express sanction. (Vol 27) 1940 Mad 179 (180, 181) (DB).

[3] Where, as a result of a compulsory winding up of a company, the Official Liquidator under direction of Court sells a decree standing in the name of the directors by auction and assigns the decree to the purchaser the principles of O. 21, R. 90, Civil P. C. do not apply and the Court has no right to set aside the sale. (Vol 25) 1938 Mad 176 (177) (DB).

[4] Petitioning creditors are entitled under S. 183 (5) to apply for review of an *ex-parte* order, appointing a particular firm as attorneys. (Vol 22) 1935 Bom 337 (338).

[5] As to meetings to ascertain wishes of creditors or contributories, see Section 239.

(2) The official liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors or contributories, by resolution, may direct, or whenever requested in writing to do so by one-tenth in value of the creditors or contributories, as the case may be.

(3) The official liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising in the winding up.

(4) Subject to the provisions of this Act, the official liquidator shall use his own discretion in the administration of the assets of the company and in the distribution thereof among the creditors.

(5) If any person is aggrieved by any act or decision of the official liquidator, that person may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just in the circumstances.

[1908] 8 Edw. VII, C. 69—S. 158; (1929) 19 and 20 Geo. V, C. 23—S. 192.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 100. [15-1-1937.]

ORDINARY POWERS OF COURT.

184. (1) As soon as may be after making a winding up order, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected and applied in discharge of its liabilities.

(2) In settling the list of contributories, the Court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others.

[1882—Ss. 147, 148; (1908) 8 Edw. VII, C. 69—S. 163 (1), (2); (1929) 19 and 20 Geo. V, C. 23—S. 203]

SECTION 184—Synopsis.

1. **Assets.**
2. **Civil P. C., Section 86.**
3. **Costs.**
4. **List of contributories.**
5. **Notice.**
6. **"Power to rectify register of members."**

Cognate sections.

Contributories—156 to 161.

Evidence—Register of members and documents of company 40, 240.

Power of Court to rectify register—38.

1. **Assets.**—[1] Money deposited with a company as security for good behaviour of an employee constitutes trust money in the hands of the company and does not form part of its assets divisible among its creditors. (Vol 28) 1941 Oudh 126 (127, 128) (DB); 16 Luck 241 * (Vol 26) 1939 Mad 337 (345) (Security amount deposited by the employee under S. 282 B).

[2] It is the duty of the Judge in winding up to bring all assets of the company into the winding up and in authorising proceedings on behalf of the company to be careful to see that any action taken in the company's name under his authority is not merely vexatious or oppressive. (Vol 23) 1936 PC 322 (324).

2. **Civil P.C., Sec. 86.**—[1] S. 86, Civil P.C. does not apply to proceedings under S. 184, Companies Act, 1913. (Vol 23) 1936 All 826 (829): 53 All 742 (DB).

3. **Costs.**—[1] The costs of a contest by a person disputing his liability as a contributory and failing

must, except under very exceptional circumstances, be paid by such contributory. The ordinary rule that a party failing must pay the costs applies to such cases. (Vol 23) 1936 Bom 24 (29, 30): 60 Bom 297.

4. **List of contributories.**—[1] If a person holds out that he is a share-holder he is estopped from denying the fact when the company goes into liquidation on the ground that the transfer of shares was a colourable transaction and he cannot object to be included in the list of contributories. (Vol 23) 1936 Lah 480 (481): 17 Lah 576.

[2] Where in spite of irregularities in the issue of shares to a person, he has been treated as a share-holder and has acted as such he will be estopped from denying that he is a share-holder. Even illegality in the allotment does not affect when share-holder knowing the defect acts as a share-holder. (Vol 2) 1915 Lah 404 (406, 407): 16 Cr L. Jour 206.

[3] Where the forfeiture of shares by the managing director is *ultra vires* his powers, his act cannot bind the company and the share holder may be placed on the list of contributories in spite of such forfeiture. (Vol 2) 1915 Lah 109 (109): 1915 Pun Re No. 37 * (Vol 8). 1921 All 135 (136, 137) (DB).

(4) Where shares are pledged with the company the legal owner thereof is the share-holder and not the company; he alone must be held liable for all unpaid calls thereon. (Vol 1) 1914 Lah 480 (483): 1914 Pun Re No. 69 (DB).

[5] Signatories to a memorandum of association of a company are deemed to have agreed to become members of the company. The fact that no shares are allotted to them and that they have ceased to be treated as members for considerable time does not relieve him from liability of being placed on the list of contributories (Vol 25) 1938 Sind 187 (188): 32 Sind LR 167 (DB).

Section 186 (*contd.*)

provides a speedy procedure for recovering the amount due. But the Court cannot override the provisions of S. 86, Civil P.C. by making an order under S. 186. (Vol 23) 1936 All 826 (828) : 58 All 742 (FB).

[2] In considering the meaning and effect of S. 186, the features to be noticed are : (a) It is concerned only with monies due from a contributory, other than call-money (b) It creates a special procedure for obtaining payment of moneys and creates no new rights (c) The power of the Court to order payment is discretionary. (Vol 20) 1933 PC 63 (65) : 54 All 1067 : 60 Ind App 13 (PC)

[3] Under the section every objection is just as open to the person sought to be charged as it would have been if a suit were filed. (Vol 20) 1933 PC 63 (66) : 54 All 1067 : 60 Ind App 13 (PC).

[4] The provisions of S. 186 are not mandatory and the Court can grant or reject an application under S. 186. If the Court refuses to make an order under S. 186, the liquidator, in order to enforce his claim against the contributory, must proceed by way of a civil suit in which the contributory is entitled to maintain the ordinary legal defences to such a claim. (Vol 27) 1940 All 544 (549, 551) : ILR (1941) All 153 (FB) * (Vol 25) 1938 All 618 : ILR (1938) All 957 overruled.

[5] A payment order under S. 186 amounts to a decree by reason of S. 199 and enforceable as such and the provisions of the Civil P.C., relating to the execution of decrees are applicable to the execution of such orders. Consequently, the holder of a decree is entitled under the law to claim rateable distribution against the Official Liquidator as the holder of a payment order under S. 186. (Vol 28) 1941 Lah 273 (273, 274) : ILR (1942) Lah 460 (DB) * (Vol 27) 1940 Oudh 237 : 15 Luck 332 not approved * (Vol 27) 1940 Oudh 237 (239) : 15 Luck 332 (DB).

[See however (Vol 27) 1940 Oudh 237 (239) : 15 Luck 332 (DB) (An order under S. 186 cannot be a decree within the meaning of S. 73, Civil P.C.).

[6] To recover money from firm, summary procedure can be availed by selecting from among the partners one who is a contributory and calling upon him to liquidate the whole debt. The principle of S. 43, Contract Act applies. (Vol 11) 1924 Lah 148 (149) : 4 Lah 239 (DB).

[7] S. 186 confirms certain special privileges of which apparently a third party cannot take advantage. (Vol 8) 1921 Lah 140 (141) (DB).

[8] Where a company has been appointed to act as the liquidator of another company the legality of the appointment cannot be questioned in proceedings of a payment order under S. 186. (Vol 23) 1936 Lah 276 (276).

2. Liability of contributory.—[1] A shareholder settled on the list of contributories cannot in proceedings under S. 186 plead that he was improperly so settled. (Vol 10) 1923 Lah 85 (86).

[2] Contributory is liable, for payment of debts other than calls, only if the said debts are due in his personal capacity and not a member of firm which is not a contributory. (Vol 10) 1923 Lah 85 (87).

[3] Before the order of contribution is passed the liability of contributory is contractual liability. Subsequent to that order it is a statutory liability. (Vol 18) 1926 Oudh 289 (290) : 21 Luck 153 (DB).

[4] The principal partner settled on the list of contributories can be held liable for the whole debt though neither the firm nor the other partners are so settled. (Vol 11) 1924 Lah 148 (149) : 4 Lah 239 (DB).

[5] Contributories can be required not only to meet calls made on him, but also to pay debts owing by him to the company, for recovery of which court is not bound to proceed under this section but may direct the liquidator to sue for it. (Vol 2) 1915 Lah 198 (199) : 1915 Pun Re No. 59.

[6] The contributory can be summarily directed to pay all moneys due from him whether as a contributory or in his private capacity. 'Debt due on a promisor by contributory' comes under the section. The jurisdiction is permissive and must not ordinarily be refused. (Vol 2) 1915 Lah 271 (272, 273) : 1916 Pun Re No. 36 (DB).

[7] In the case of a contributory becoming insolvent for mutual dealings and set-off, see S. 47, Presidency Towns Insolvency Act, 1909, and S. 46, Provincial Insolvency Act, 1920.

3. Limitation.—[1] Words 'any money due from him or from the estate of the person whom he represents to the Company' in S. 186 must be confined to money due and recoverable in a suit by the company and they do not include any moneys which at the date of the application under S. 186 could not have been so recovered. (Vol 20) 1933 PC 63 (65) : 60 Ind App 13 : 54 All 1067 (PC).

[2] Terms 'money owing' or 'money due' in their primary sense denote existing debt, whether or not the right to recover the same is barred. Call is owing from date when it is made, although it may be payable at future date. (Vol 21) 1934 Bom 97 (98) (DB).

[3] S. 186 of the Act does not override provisions of the Limitation Act and Court cannot enforce by summary order the payment of a debt which it could not have enforced in an action at law. The section only provides a summary procedure for enforcing existing legal liabilities. The words "at any time" only mean at any time, during the course of liquidation proceedings commencing from date of winding up order. (Vol 11) 1924 Lah 53 (54) : 4 Lah 109 (DB).

[4] An application by the liquidators filed within three years from date of winding up order, if otherwise properly made, under and within the provisions of S. 186, Companies Act is not one which must be dismissed by reason of S. 3, Lim Act as it is either an application made within time or it is an application made for which no period of limitation is prescribed. (Vol 20) 1933 PC 63 (65) : 54 All 1067 : 60 Ind App 13 (PC).

4. Powers of Court.—[1] In proceedings under S. 186 the Court will not go into the question of validity of the liquidation. That question should be raised in proper proceedings. (Vol 29) 1942 All 186 (188) : ILR (1942) All 26.

[2] A payment order made after the assets of the Company are sold is a nullity and may be disregarded by Court whose help is sought for its execution. (Vol 8) 1921 Lah 57 (57).

[3] Court in liquidation proceedings is not bound to help third persons purchasing debts, to realise them. Payment order in respect of a debt sold to a third person cannot be made. A payment order can be disregarded by the Court which is applied for execution if the order is nullity. (Vol 8) 1921 Lah 57 (57).

187. (1) The Court may, at any time after making a winding up order, and either before Power of Court to or after it has ascertained the sufficiency of the assets of the company, make calls. make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of the contributories to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

(2) In making the call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay the call.

[1882—S. 151; (1908) 8 Edw. VII, C. 69—S 166 (1), (2); (1929) 19 and 20 Geo. V, C. 28—S. 206.]

Section 186 (contd.)

[4] Calls validly made by Directors prior to liquidation become, once the date for payment has passed, a debt due from share-holders which liquidator can realise. Under S. 186, the court cannot question liquidator as to purpose for which debt is being realised or withhold payment thereof though under S. 187 Court can consider whether liquidator really needs money. (Vol 29) 1942 All 136 (138) : ILR (1942) All 26.

[5] Ss. 186 and 235 empower the court to make an order against the person complained against, but neither of them professes to confer a new right on the person applying. The power of the court is restricted from proceeding *suo motu* (Vol 20) 1933 All 789 (794) : 55 All 912 (FB).

[6] Where the registered office of a company is situated within the jurisdiction of the District Judge, he has jurisdiction to pass orders in liquidation proceedings. Contributories residing outside British India are amenable to jurisdiction of District Judge. (Vol 21) 1934 Lah 362 (363) : 15 Lah 302.

5. Set off.—[1] There is nothing in S. 186 which can reasonably be construed as a general deprivation of contributories to companies in liquidation of the right of set-off. ((Vol 27) 1940 All 544 (550) : ILR (1941) All 153 (FB) * (Vol 25) 1938 All 613 : ILR (1938) All 957 overruled.)

[2] A share-holder is not entitled to set off what he might receive on a winding up, against moneys due by him. (Vol 25) 1938 Mad 962 (965) : ILR (1939) Mad 36.

[3] Defendants in a suit by liquidator on pronote are entitled to set off if they are creditors in respect of the money deposited as security, defendants not being contributories of the Bank and the court conducting the liquidation cannot recover by a summary process the money due from them on the pronote. (Vol 6) 1919 Lah 242 (243) (DB).

[4] The Court will not allow a person to whom the company is indebted to set off that indebtedness against what is due from him as a contributory in respect of calls. It is otherwise where the two debts are of a purely commercial nature. But where the debt to the company is in respect of calls the set off is never available to the contributory. (Vol 29) 1942 All 136 (138) : ILR (1942) All 26.

[5] A debtor who is not a member is entitled to plead by way of set off that an ascertained sum of money is then due to him from the company in an action by liquidator to recover dues from him. Such a suit by liquidator is only an ordinary suit not governed by Indian Companies Act. (Vol 2) 1915 Lah 204 (205) : 1915 Pun Re No. 63 (DB).

[6] A deposit by a Hindu husband in the name of himself and his wife payable to either or survivor in

the absence of evidence to the contrary must be presumed to belong to the husband and therefore can be set off against the amount due to the bank from the husband. (Vol 29) 1942 Mid 351 (351).

6. Transferee of order for payment.—[1] In the case of orders of payment under S. 186 the person to apply for the enforcement of an order or decree is the person in whose favour order or decree has been made or passed. Assignee or transferee cannot make such an application and until his name has been substituted for that of the person in whose favour the decree or order has been passed or made. Ss. 200 and 201 must be held to be subject to special provision of R. 15 of O. 21 of C P Code. Therefore a transferee of an order under S. 186 of Companies Act must, in the first instance, apply to the court which made the order (Vol 5) 1918 Lah 211 (213) : 1918 Pun Re No. 92.

[2] A person to whom the liquidator has transferred a payment order made under this section against a contributory is entitled to invoke the summary jurisdiction of the court under S. 199 for recovering the money. Dissolution of the company subsequently does not prevent the assignee from seeking relief from liquidation court. (Vol 8) 1921 Lah 78 (79) (DB.)

[3] Application under S. 186 by transferees from the liquidator of debts and calls due from contributories not being one on behalf of the company or for its benefit is not maintainable. (Vol 8) 1921 Lah 140 (141) (DB).

SECTION 187—Synopsis.

1. Applicability and scope.
2. Civil P. C., S. 86—Applicability.
3. Jurisdiction.
4. Time-barred calls.

1. Applicability and scope.—[1] S. 151 is not restricted to original calls but includes unpaid calls made before as well as after the winding up. The balance of the price of shares for which he a call has been made before liquidation can be recovered by a summary action by the Official Liquidator ('11) 12 Ind Cas 958 (959) : 1911 Pun Re No. 67 (DB).

[2] A share-holder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company and it is inconsistent with his position as a share-holder, where he remains as such to claim back any of that money. (Vol 4) 1917 Bom 132 (133) : 40 Bom 264 (DB).

[3] Where after the making of an order for compulsory winding up of a company money due by a contributory was demanded by the Official Liquidator and was paid to him as such an order was made by the Court under S. 187 the contributory cannot be asked to pay over again on a subsequent call by the court in the absence

188. The Court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into a[* * *] the account of the official liquidator b[in any scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934] instead of to the official liquidator, and any such order may be enforced in the same manner as if it had directed payment to the official liquidator.

[1882—S. 152; (1908) 8 Edw. VII, C. 69—S. 167 (1); (1929) 19 and 20 Geo. V, C. 23—S. 207 (1)]

[a] The words "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay, as the case may be, or any branch thereof, respectively, to" were *repealed* by the Indian Companies (Amendment) Act, 1936, (22 [XXII] of 1936), S. 101.

[b] *Inserted, ibid.*

Regulation of account with Court.

189. All moneys, bills, hundis, notes and other securities paid and delivered into a[the Bank where the liquidator of the Company may have his account], in the event of a company being wound up by the Court, shall be subject in all respects to the orders of the Court.

[1882—S. 153; (1908) 8 Edw. VII, C. 69—S. 167 (2); (1929) 19 and 20 Geo. V, C. 23—S. 207 (2)].

[a] *Substituted* for "the Bank of Bengal, the Bank of Madras or the Bank of Bombay, or any branch thereof by respectively," by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 102. [15-1-1937].

Order on contributory conclusive evidence. **190.** (1) An order made by the Court on a contributory shall (subject to any right of appeal) be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due.

(2) All other pertinent matters stated in the order shall be taken to be truly stated as against all persons, and in all proceedings whatsoever.

[1882—S. 155; (1908) 8 Edw. VII, C. 69—S. 168; (1929) 19 and 20 Geo. V, C. 23—S. 208]

Section 187 (contd.)

of evidence that the liquidator had misapplied the money. (Vol 19) 1932 Cal 691 (695) : 59 Cal 1099 (DB).

2. Civil P. Code, sec 86—Applicability.—[1] S. 86, Civil P. C. applies to all proceedings under S. 187 of Companies Act. (Vol 23) 1936 All 826 (829): 58 All 742 (FB).

3. Jurisdiction.—[1] S. 187 does not confer any higher jurisdiction on the court to enforce the remedy which was not open to the company before the liquidation proceedings against a person who is not amenable to the Court's jurisdiction. No order under S. 187 can, therefore, be made against the sovereign prince or ruling chief at all and no question of the consent of Governor-General-in-Council can arise as such case is not covered by sub-sec (2) of sec. 86, C.P.C. (Vol 23) 1936 All 826 (829) : 58 All 742 (FB).

[2] Where the defendant, a resident of British India, held shares in a company registered in an Indian State neither appeared nor submitted to the jurisdiction of the State Liquidation Court, but a call order was made by that Court: It was held that the order was without jurisdiction and could not be enforced as such in British India. (Vol 25) 1938 Lah 559 (560) (DB).

[3] A call, validly made by the directors prior to liquidation and when once the date for its payment has passed, it becomes a debt indistinguishable from any other. Hence the liquidator can realise it as any other debt without telling to court what he wants it for, of course, when he makes a call under S. 187, Court has jurisdiction to consider whether the liquidator really needs the moneys he says he needs. (Vol 29) 1942 All 136 (138, 139) : ILR (1942) All 26.

4. Time-barred calls.—[1] Liquidation gives the official liquidators a cause of action and unpaid calls though time barred against the company, can be enforced by them. (Vol 15) 1928 All 272 (273) : 50 All 476 * (Vol 3) 1916 All 317 (318) : 38 All 347 (DB) * Vol 18) 1931 Pat 44 (48) : 10 Pat 249 (DB).

[2] A claim which might be barred by Civil P. C. if brought by the company can be preferred by the official liquidators under the provisions of the Companies Act (Vol 15) 1928 All 272 (273) : 50 All 476.

SECTION 188—Note 1.

[1] S 188 does not give the Court power to direct payments from any persons other than those mentioned in S. 185. (Vol 27) 1940 All 514 (515) : ILR (1940) All 730.

[2] The word "purchaser" refers to the word contributory, which immediately precedes it and means the purchaser of the interest of a contributory. (Vol 23) 1936 All 808 (810) : 58 All 925 (DB).

[3] The words "or other persons from whom money is due" have a reference to a person from whom money is due under S. 185. (Vol 23) 1936 All 808 (810) : 58 All 925 (DB).

[4] Judicial decisions of matters which may arise with third parties owing to transactions entered into by the Official Liquidator are beyond the pale of jurisdiction to the company judge and no order can be made with regard to these matters either under S. 185 or 188. (Vol 23) 1936 All 808 (809) : 58 All 925 (DB).

[5] Persons entering into contract with the Liquidation do not come under S. 185 and hence an order directing them to pay the liquidator cannot be enforced under S. 185 or under S. 188. (Vol 23) 1936 All 808 (810) : 58 All 925 (DB).

[6] The words "and any such order may be enforced in the same manner as if it had directed payment to the Official Liquidator" in S. 188 do not give jurisdiction to enforce an order against persons other than contributories or persons mentioned in S. 185. The natural construction to place on these words is that if an order can be enforced which is an order directing payment to an official liquidator, the same order can be enforced if it directs payment to a Bank. (Vol 23) 1936 All 808 (810) : 58 All 925 (DB).

Power to exclude creditors not proving in time.

191. The Court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

[1882—S. 156; (1908) 8 Edw. VII, C. 69—S. 169; (1929) 19 and 20 Geo. V, C. 23—S. 20]

Adjustment of rights of contributories.

192. The Courts shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto.

[1882—S. 159; (1908) 8 Edw. VII, C. 69—S. 170; (1929) 19 and 20 Geo. V, C. 23—S. 211]

Power to order costs.

193. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as the Court thinks just.

[1882—S. 158; (1908) 8 Edw. VII, C. 69—S. 171; (1929) 19 and 20 Geo. V, C. 23—S. 213]

Dissolution of company.

194. (1) When the affairs of a company have been completely wound up, the Court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

(2) The order shall be reported within fifteen days of the making thereof by the official liquidator to the registrar, who shall make in his books a minute of the dissolution of the company.

(3) If the official liquidator makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which he is in default.

[1882—Ss. 159 to 161; (1908) 8 Edw. VII, C. 69—S. 172; (1929) 19 and 20 Geo. V, C. 23—S. 221]

SECTION 191—Note 1.

[1] The penalty for failure to come in within the time stated in the notice for proving the claim is that the claimant is excluded from the benefit of any distribution made before such debts are proved. He can only claim a proportionate share in such assets as may remain undistributed at the time when the proof is claimed and without disturbing any distribution made before such proof. (Vol 29) 1942 Mad 349 (350). (Claimant may be paid dividend without disturbing previous dividends) * (1904) 27 Mad 496 (498) (FB).

[2] It is an irregularity to pass an order admitting the proof of a particular creditor of the company before any liquidator has been appointed. (1887) 9 All 180 (184) (DB).

SECTION 192—Note 1.

[1] Fully paid share-holders are contributories and are entitled to have their rights adjusted under S. 192. (Vol 21) 1934 Mad 476 (477): 57 Mad 955 (DB).

[2] A transferee of shares whose name has not been entered in the register is not a contributory. (Vol 21) 1934 Mad 476 (477): 57 Mad 955 (DB).

SECTION 193—Note 1.

[1] Where a lease provided that if lessees (a company) caused delay in payment of rent, the landlords would be entitled to recover the arrears with interest from buildings which may have been erected on the

land; held that there was charge in equity giving priority to landlords over unsecured creditors of company in liquidation was created. (Vol 1) 1914 Bom 267 (268): 39 Bom 136 (DB).

SECTION 194—Note 1.

[1] A company which has been dissolved no longer exists as a separate entity capable of holding property or of being sued in any Court; but a company in liquidation, although the administration of its affairs has passed to the liquidator, retains its corporate existence. (Vol 26) 1939 Mad 318 (332).

[2] Although, after dissolution, the company and its officers become *functus officio*, yet the liquidator can complete a formal act like giving a transfer in writing for a decree already transferred while he was still a liquidator. (Vol 15) 1928 Mad 478 (478): 51 Mad 681 (DB).

[3] As to the power of the Court to declare dissolution of company void, see section 243.

[4] If liquidation should be annulled, the company will resume its powers. (Vol 26) 1939 Mad 318 (332).

[5] In this case the form of order under Companies Act for dissolution of a company in compulsory liquidation is laid down. (Vol 7) 1920 Cal 1002 (1002): 47 Cal 620 (DB).

[6] Under Section 153-A (1) (d) the Court may make a provision for the dissolution of any transferor company without winding up.

Extraordinary Powers of Court.

195. (1) The Court may, after it has made a winding up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company, or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

(2) The Court may examine him on oath concerning the same, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.

(3) The Court may require him to produce any documents in his custody or power relating to the company; but, where he claims any lien on documents produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.

(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful impediment (made known to the Court at the time of its sitting, and allowed by it), the Court may cause him to be apprehended and brought before the Court for examination.

[1882—Ss. 162, 163; (1908) 8 Edw. VII, C. 69—S. 174; (1929) 19 and 20 Geo. V, C. 23—S. 214]

SECTION 195—Synopsis.**1. Scope of the section.****2. Powers of Court.****3. Right of appeal.****4. Right to copy of deposition.**

1. Scope of the section.—[1] Examination under S. 195 is private and petitioning creditor should not be allowed to attend, where the liquidator has conduct of examination, except in extreme cases. Where latter cannot act former may be given conduct of examination. (Vol 11) 1924 Rang 24 (24, 25): 1 Rang 384.

[2] The scope of an examination under S. 195 is to seek information on matters which may be just or beneficial for the winding up of the company. S. 195 is intended to promote liquidation proceedings and S. 196 is intended to investigate conduct of those charged with its affairs. (Vol 18) 1931 Lah 8 (11).

[3] Before granting application under this section for discovery and the inspection of the books and papers of a company and for the examination of certain of its Directors, the court ought to be satisfied that the inquiry is just and beneficial for the purposes of the winding up and not merely intended to harass and annoy the Directors and Manager. (Vol 2) 1915 Lah 109 (112): 1915 Pun Re No. 40 (DB).

[4] Depositions made under S. 195 and obtained by liquidator under R. 174 of Chap XXXI, Original Side Rules, (Calcutta) are private documents and liquidator was not entitled to use them in proceedings for appointment of Receiver initiated by him. (Vol 27) 1940 Cal 488 (488): ILR (1940) 1 Cal 28.

2. Powers of Court.—[1] It is in the discretion of the Court conducting the winding up to determine whether it will exercise the powers vested in it by S. 195 but the discretion must be exercised judicially and not without consideration. (Vol 2) 1915 Lah 109 (112): 1915 Pun Re No. 40 (DB).

[2] Powers of Court under S. 195 are very wide and it is not necessary to determine before calling upon him whether the person deemed capable of giving the information possesses it. (Vol 18) 1931 Lah 8 (11).

[3] It is a matter entirely within the discretion of the District Judge whether the services of a counsel should be allowed to an official liquidator in an inquiry under S. 195. (Vol 18) 1931 Lah 8 (11).

[4] A creditor who refuses to give to liquidator all reasonable information as to past transactions, does so at his own peril and can be summoned under S. 195 and if necessary arrested. (Vol 18) 1931 Bom 2 (16): 54 Bom 718 (DB).

[5] Company Judge conducting proceedings under S. 195 is Court within S. 476, Criminal P.C. (Vol 28) 1941 Lah 52 (52): 42 Cr L Jour 351: ILR (1940) Lah 669 (DB).

3. Right of appeal—[1] An appeal lies against an order made for the examination of Directors, where the order impugned is vexatious or oppressive so far as the appellant is concerned and when it is not necessary or beneficial for the purposes of the winding-up. (Vol 2) 1915 Lah 109 (112): 1915 Pun Re No. 40 (DB).

[2] It is the final order that is appealable and not the preliminary order. (Vol 16) 1929 Lah 707 (710): 10 Lah 806 (FB) * (Vol 18) 1931 Lah 8 (10, 11). (Order deciding objections to be examined under S. 195 is, and one merely issuing summonses is not, appealable.)

[3] An order under S. 195 summoning directors of a company for examination is not judgment within Cl. 15 Letters Patent (Calcutta) and therefore is not appealable. (Vol 15) 1928 Cal 295 (296): 55 Cal 262 (DB).

[4] See also Section 202.

4. Right to copy of deposition.—[1] Each defendant deposing under S. 195 is entitled to copy of his own deposition upon his counsel undertaking on his behalf to prevent communication of his deposition to his co-defendants or their solicitors or counsel. (Vol 27) 1940 Cal 488 (489): ILR (1940) 1 Cal 28.

[2] Public officer charged with criminal investigation should be allowed to inspect and take notes but not copy the depositions made under S. 195 by person believed to be involved in a criminal offence. (Vol 17) 1930 Cal 521 (524): 57 Cal 424.

196. (1) When an order has been made for winding up a company by the Court, and the

Power to order public official liquidator has applied to the Court stating that in his opinion a examination of promo- fraud has been committed by any person in the promotion or formation of the company, etc. of the company or by any director or other officer of the company, in relation to the company since its formation, the Court may, after consideration of the application, direct that any person who has taken any part in the promotion or formation of the company or has been a director, manager or other officer of the company shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director, manager or other officer thereof.

(2) The official liquidator shall take part in the examination, and for that purpose may, if specially authorised by the Court in that behalf, employ such legal assistance as may be sanctioned by the Court.

(3) Any creditor or contributory may also take part in the examination either personally or by any person entitled to appear before the Court.

(4) The Court may put such questions to the person examined as the Court thinks fit.

(5) The person examined shall be examined on oath, and shall answer all such questions as the Court may put or allow to be put to him.

(6) A person ordered to be examined under this section may at his own cost employ any person entitled to appear before the Court, who shall be at liberty to put to him such questions as the Court may deem just for the purpose of enabling him to explain or qualify any answers given by him: Provided that if he is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may allow him such costs as in its discretion it may think fit.

(7) Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, and may thereafter be used in evidence against him in civil proceedings, and shall be open to the inspection to any creditor or contributory at all reasonable times.

(8) The Court, may, if it thinks fit, adjourn the examination from time to time.

(9) An examination under this section may, if the Court so directs, and subject to any rules in this behalf, be held before any District Judge or before any officer of the High Court, being an official referee, master, registrar or deputy registrar, and the powers of the Court under this section as to the conduct of the examination, but not as to costs, may be exercised by the person before whom the examination is held.

[(1908) 8 Edw. VII, C. 69—S. 175; (1929) 19 and 20 Geo. V, C. 23—S. 216.]

Objects and Reasons.

We have amended clause 197 (now Section 196) to provide that the Court shall act on an application from the official liquidator, and we have amended sub-clause (7) of this clause so that there can be no ques-

tion that the ordinary provision of the Indian law of evidence contained in the proviso to section 132 of the Indian Evidence Act, 1872, is not superseded thereby.—S.C.R., 1913.

SECTION 196—Synopsis

1. Applicability and scope.
2. Appeals.
3. Sub-section (1).
4. Sub-section (3).
5. Sub-section (5).
6. Sub-section (7).

1. Applicability and scope.—[1] If a company is not in liquidation according to provisions of the Act Court has no power to order the directors to be examined under this section. (Vol 21) 1934 Rang 271 (272).

[2] Section 196 is designed for a thorough investigation of the affairs of a company and the actions of its officers. (Vol 20) 1933 All 366 (368); 55 All 496 (DB).

[3] *Prima facie* case of fraud against particular person must be made out before order for public examination can be passed under S. 196 (1). General allegation of fraud in Company's management is not sufficient. Charge of fraud need not be set out with same particularity as in a criminal case. (Vol 20) 1933 All 366 (368); 55 All 496 (DB).

[4] A director who was a party to issue of shares in consideration of promissory notes can be publicly examined although he has resigned prior to the notice. Issue of such shares is a circumvention of the provisions of the Act and is contrary to the provisions of the Articles of Association. This in itself would not be sufficient to prove fraud; but it suggests fraud and would therefore justify the public examination of the directors concerned. (Vol 31) 1944 Mad 87 (87, 88); ILR (1944) Mad 540 (DB).

197. The Court, at any time either before or after making a winding up order on proof of probable cause for believing that a contributory is about to quit British India or otherwise to abscond, or to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, may cause the contributory to be arrested and his books and papers and movable property to be seized, and him and them to be safely kept until such time as the Court may order.

[1882—S. 164; (1908) 8 Edw. VII, C. 69—S. 176; (1929) 19 and 20 Geo. V, C. 23—S. 218.]

198. Any powers by this Act conferred on the Court shall be in addition to, and not in restriction of, any existing powers of instituting proceedings against any contributory or debtor of the Company or the estate of any contributory or debtor, for the recovery of any call or other sums.

[1882—S. 165; (1908) 8 Edw. VII, C. 69—S. 177; (1929) 19 and 20 Geo. V, C. 23—S. 219].

Enforcement of and Appeal from Orders.

199. All orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced.

[1882—S. 166; (1908) Edw. VII, C. 69—S. 178; (1929) 19 and 20 Geo. V, C. 23—S. 273]

Section 196 (contd.)

[5] A liquidator in a voluntary winding up of a company may, under section 216, ask the Court for an order under this section. (Vol 7) 1920 Bom 284 (284): 44 Bom 459 (DB).

[6] English decisions on the point of an investigation by a liquidator into the conduct of the officers of the company before liquidation cannot be held to be binding upon Indian Courts. (Vol 20) 1933 All 366 (368): 55 All 496 (DB).

2. Appeal.—[1] Order directing examination of person under S. 196 is not judgment within Cl. 13, Letters Patent (Rang) and is not appealable. (Vol 23) 1936 Rang 166 (167): 14 Rang 15 (DB).

[2] An order refusing an application for the inspection and copies of statement of persons examined under S. 196 is appealable. (Vol 13) 1926 Lah 246 (246) (DB).

[3] See also Section 202.

3. Sub-section (1).—[1] Notice of an application under the section is not compulsory before the Court can pass an order directing the public examination of the directors. (Vol 31) 1944 Mad 87 (87): ILR (1944) Mad 540 (DB).

[2] What should be contents of an application under S. 196 (1) depends on the facts of each particular case. (Vol 20) 1933 All 366 (368): 55 All 496 (DB).

4. Sub-section (3).—[1] Party entitled to conduct examination is entitled to do so with the help of Counsel. (Vol 18) 1931 Lah 8 (11).

5. Sub-section (5).—[1] Proceedings under S. 196(5) are meant to ascertain conduct of persons in management of company. (Vol 13) 1926 Lah 385 (388): 27 Cr L Jour 1383.

6. Sub-section (7).—[1] Only creditor, contributory or party to the proceedings is entitled to inspection of note of examination. (Vol 13) 1926 Lah 246 (246) (DB).

[2] Persons examined under S. 196 are not protected

under S. 132, Evidence Act, as in these proceedings there is no contest between two parties. (Vol 13) 1926 Lah 385 (388): 27 Cr L Jour 1383.

[3] Use of words "in civil proceedings" is to make the statement admissible unconditionally in civil proceedings and subject to Section 132 Evidence Act in criminal proceedings. (Vol 13) 1926 Lah 385 (388): 27 Cr L Jour 1383.

SECTION 199—Note 1.

[1] All orders made by a liquidation Court are enforceable like decrees. (Vol 22) 1935 Lah 975 (976): 17 Lah 341. (Call-order by a Baroda Court is not a foreign Judgment and a suit based thereon in British India is governed by Art. 120 of Limitation Act).

[2] A payment order though not a decree is to be executed in the same manner in which a decree can be executed. (Vol 8) 1921 Lah 78 (79) (DB).

[3] Executable order under S. 199 is not an order having the force of a decree for the purpose of Sch. II Art. 11, Court Fees Act. There is a distinction between an order "enforceable as a decree" and an order "having the force of a decree." (Vol 32) 1945 Lah 146 (148, 149) (FB).

[4] Decision overruling preliminary objections and proceeding with the case on merits and refusal to grant leave to proceed with a suit in another Court are decisions and not orders coming within the scope of S. 199. (Vol 32) 1945 Lah 146 (147) (FB). (Per Blacker, J in order of Reference).

[5] The effect of this section is that a company which holds an order made under Section 186 (1) may resort to any procedure for its enforcement which would be open to it if the order had been a decree made in a suit, with the result that the methods of enforcement provided by section 78, Civil PC., is open to the company. (Vol 32) 1945 PC 60 (61): 20 Luck 162: 72 Ind App 85: ILR (1945) Kar PC 148 (PC). ((Vol 27) 1940 Oudh 237: 15 Luck 332 reserved).

200. Any order made by a Court for or in the course of the winding up of a company shall

Order made in any be enforced in any place in British India other than that in which such Court to be enforced by Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same.

[1882—S. 167; (1908) 8 Edw. VII; C. 69—S. 180 (1), (2); (1929) 19 and 20 Geo. V, C. 23—S. 223 (1) (2)].

201. Where any order made by one Court is to be enforced by another Court, a certified

Mode of dealing with copy of the order so made shall be produced to the proper officer of the orders to be enforced by Court required to enforce the same, and the production of such certified other Courts. copy shall be sufficient evidence of such order having been made; and thereupon the last-mentioned Court shall take the requisite steps in the matter for enforcing the order, in the same manner as if it were the order of the Court enforcing the same.

[1882—S. 168; (1908) 8 Edw. VII, C. 69—S. 180 (3); (1929) 19 and 20 Geo. V, C. 23—S. 223 (3)]

202. Re-hearings of, and appeals from, any order or decision made or given in the matter

Appeals from orders. of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

[1882—S. 169; (1908) 8 Edw. VII, C. 69—S. 181 (1).]

Objects and Reasons.

"We have amended clause 203 of the Bill (now section 202) by striking out the last seven lines of that clause, thereby providing that notice of appeal will be governed by the ordinary rules as to notices of appeals to the Court in the exercise of its ordinary jurisdiction."—S. C. R., 1913.

SECTION 200—Note 1.

[1] S. 200 applies where an order made by the High Court of one Province is to be enforced in another Province; it can only be enforced by High Court of that other Province. (Vol 17) 1930 Mad 74 (75): 53 Mad 147 (DB).

[2] Where an order for payment in respect of a call is made by the High Court, it is the High Court alone that can take steps to enforce it under this section. A direct application to the District Court concerned does not lie. (Vol 17) 1930 Mad 74 (75): 53 Mad 147 (DB). (In this case a direct application was made to District Court of Tanjore) * (Vol 14) 1927 Pat 182 (183): 6 Pat 132 (DB). (Hence a decree of the Allahabad High Court in liquidation proceedings cannot be sent direct for execution to the District Court, Gaya within Patna High Court's jurisdiction).

[3] Where an application is made to the High Court for directing District Courts concerned to enforce the payment orders made by another High Court in the matter of the winding up of a company, the proper procedure is to treat the order as a decree passed by the High Court in which it is filed and transfer for execution to respective District Courts. In such a case the High Court cannot authorise the official liquidator to apply to the District Court concerned under Section 164. (Vol 14) 1927 Mad 271 (271, 272).

SECTION 201—Note 1.

[1] An order passed by a Court under the Act can be enforced by another Court on production of a certified copy of the order. (Vol 30) 1943 Sind 89 (90): ILR (1942) Kar 504 (DB).

[2] Where an order under the Act by a Court is sought to be enforced in another Court the procedure laid down in S. 39 and O. XXI Rr. 4 and 5 C P C need not be followed. (Vol 30) 1943 Sind 89 (90): ILR (1942) Kar 504 (DB).

SECTION 202—Synopsis.

1. Applicability and scope.
2. Court-fee.
3. District Court—Order of—Appeal against.
4. Limitation for appeal.
5. Parties to appeal.
6. Orders which are appealable.
7. Orders which are not appealable.
8. Right to appeal.
9. Re-hearing.
10. Review.
11. Revision.
12. Separate suit if barred.

1. Applicability and scope.—[1] Where liquidation of a company had begun before the commencement of the Companies Act, 1913, it was held that by virtue of section 284 (as it stood prior to its substitution in 1936) all the proceedings in the winding up including the course of appeal were governed by the old Act of 1882. (Vol 2) 1915 Lah 415 (415) * (Vol 5) 1918 All 342 (342) (DB).

[2] S. 202 differentiates between appeal against orders and appeal against decision and S. 199 applies only to order. (Vol 32) 1945 Lah 146 (147) (FB).

[3] Appeal from Orders passed in winding up proceedings under supervision of Court is competent like appeal from other orders when winding up is by Court. (Vol 22) 1935 Lah 174 (174).

[4] All orders not merely formal or interlocutory but finally deciding disputes or depriving party of substantial rights are appealable. (Vol 16) 1929 Lah 707 (710): 10 Lah 806 (FB) * (Vol 18) 1931 Lah 8 (10).

Section 202 (*contd.*)

[5] Orders which may be termed ministerial and not subject to appeal under S. 202, may be passed by a Judge when dealing with a company in liquidation. (Vol 30) 1943 Sind 82 (84) : ILR (1942) Kar 496 (DB).

2. Court-fee.—[1] Memoranda of appeals under this section are to be stamped under Sch. II Art. 11 Court Fees Act. (Vol 32) 1945 Lah 146 (147) (FB).

3. District Court—Order of—Appeal against.—[1] Only one appeal lies against the order or decision of a District Judge made in winding up proceedings. (Vol 1) 1914 Lah 39 (39) : 1913 Pun Re No. 34 (DB).

4. Limitation for appeal.—[1] An appeal under S. 202 against an order passed by single Judge of High Court on Original Side is governed by Art. 151, Lim. Act, which is subject to S. 12, Lim. Act. The appellant is entitled to deduct time requisite for obtaining copy of judgment even though under rules and orders of High Court no copy need be filed with memo of appeal. (Vol 28) 1941 Lah 257 (258, 259, 260) : ILR (1941) Lah 191 (FB) : ((Vol 8) 1921 Lah 26; 2 Lah 127 overruled).

[2]—Winding up—Order under S. 196 for public examination of directors made on Dec. 3, 1929—On Nov. 5, 1931, directors making protest, when one of them was examined in part—Protest rejected on Dec. 18, 1931—Appeal by directors on Jan. 5, 1932 against order of Dec. 3, 1929, contending time ran only from Dec 18, 1931 : *Held*, that appeal was barred by time. (1932) Ind Rul (1932) Lah 658 (2).

[3] Carelessness or ignorance of a pleader is not sufficient to extend time fixed by S. 169 of Act of 1882 (S. 202 of Act of 1913). Unless delay is caused either by conduct of the respondent or by mistake of the officials of the appellate Court, time cannot be extended for appeal. (Vol 11) 1924 Lah 379 (379).

[4] Delay in filing an appeal due to the appellant's negligence cannot be excused. (Vol 11) 1924 Lah 379 (379).

[5] Where there is no marked want of diligence the appellant should be granted an extension of time for appeal. (Vol 8) 1921 Lah 346 (348) : 1 Lah 368 (DB).

[6] Order respecting liquidation passed on 6th February—Official Liquidator applying same day for leave to appeal and getting it—Notice to respondent given on 18th February—Appeal filed on 20th May—Liquidator having done all he could to comply with provisions of law held entitled to extension of time. (Vol 8) 1921 All 107 (108) (DB).

[7] In the application of S. 169 of Act of 1882 a certain amount of latitude was allowed because in matters of winding up the previous orders of the Court are not based upon issues which have been formulated as they are in an ordinary suit with pleadings and the time for appealing was very short. (Vol 10) 1923 All 429 (429) (DB).

5. Parties to appeal.—[1] In an appeal against compulsory winding up order the official liquidator is not a necessary party. But it is desirable that as a general rule he should be made a party to such appeals. (Vol 28) 1941 Lah 134 (138) : ILR (1941) Lah 680 (DB).

[2] Directors of Company its sole share-holders—Appeal by some of directors against compulsory winding up order—Official Liquidator and company not impleaded—Rest of directors impleaded—Appeal held

competent. (Vol. 28) 1941 Lah 134 (137, 138) : ILR (1941) Lah 680 (DB).

6. Orders which are appealable.—[1] Order refusing to wind up a company. (Vol 1) 1914 Bom 251 (252) : 39 Bom 47 (DB).

[2] An order granting or revoking a sanction under S. 144 of Act of 1882 (S. 179 of Act of 1913) (Vol 8) 1921 Mad 286 (288) (DB).

[3] Order directing Official Liquidator to prosecute for criminal offence. (Vol 18) 1931 Sind 120 (120).

[4] Order refusing inspection and copies of statements of persons examined under S. 196. (Vol 13) 1926 Lah 246 (246) (DB).

[5] Order of High Court holding petition under S. 235 maintainable. (Vol 25) 1938 Lah 658 (669) (DB).

[6] Order refusing inspection and copies of statements under S. 196. (Vol 13) 1926 Lah 246 (246) (DB).

[7] Order depriving creditor of all rights to take advantage of winding up proceedings. (Vol. 14) 1927 Cal 689 (690, 691) (DB).

[8] Order rejecting proxy forms used at a meeting under S. 153 and requiring another meeting to be held. (Vol 19) 1932 Rang 96 (96) : 10 Rang 189 (DB).

[9] Order directing public examination of directors. (Vol 31) 1944 Mad 87 (87) : ILR 1944 Mad 540 (DB).

[10] An order under S. 153 rejecting a scheme is appealable both under S. 202 of Act and Cl. 13, Letters Patent. (Vol 19) 1932 Rang 154 (155) : 10 Rang 438 (DB).

[11] An order refusing to make a supervision order under section 221. (1906) 30 Mad 22 (23) (DB).

[12] Where the Court directed issue of summonses for the examination of the managing agents of a company under S. 195 and the managing agents appealed against the order rejecting their objections to their examination the appeal was held competent even though no appeal was preferred against the order directing issue of summonses for examination of the managing agents. (Vol 18) 1931 Lah 8 (10).

7. Orders which are not appealable.—[1] Order of District Judge as liquidation officer dismissing objections to attachment of property. (Vol 14) 1927 Lah 282 (282).

[2] Order refusing security for costs under S. 280. (Vol 29) 1942 Mad 405 (405) (DB).

[3] Order under S. 181 fixing remuneration of legal adviser. (Vol 30) 1943 Sind 82 (83) : ILR (1942) Kar 496 (DB).

[4] Liquidator's order reducing remuneration of his employees. (Vol 7) 1920 Lah 433 (434) : 1 Lah 73.

[5] Framing of issues by court in petition for winding-up of company under the Act (as it is not an "order" within S. 202). (1912) 16 Ind Cas 794 (795) (Mad) (DB).

[6] Order under S. 247 (6) refusing to restore Company on to register as it is not one given in the winding up of a company. (Vol 12) 1925 Lah 443 (444).

[7] Order of High Court Judge under S. 195 directing examination of directors as it is not a judgment within the meaning of Cl 14, Letters Patent (Calcutta). (Vol 15) 1928 Cal 295 (296) : 55 Cal 262 (DB).

Voluntary Winding Up.

Circumstances in which company may be wound up voluntarily.

203. A company may be wound up voluntarily—

- (1) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily;
- (2) if the company resolves by special resolution that the company be wound up voluntarily;

Section 202 (contd.)

[8] Right of appeal under the section is co-extensive with that in O. 21 R. 63 Civil P.C. Therefore where *L* was ordered to pay certain sum as contributory and in the order which was issued to another Court for execution *L* was described as proprietor of a firm and on attachment of certain goods *S* filed objection that he and not *L* was the proprietor and the execution Court refrained from enquiry it was held that the order of the execution Court was not appealable as it must be taken to be one under O. 21 R. 63, Civil P.C. (Vol 3) 1916 All 341 (341): 38 All 537 (DB).

8. Right of appeal.—[1] The right of appeal conferred by this section extends to all orders and decisions made or given in the matter of the winding up of a company whether the winding up be compulsory, voluntary or under supervision. (1907) 30 Mad 22 (23) (DB).

[2] Right of appeal under S. 202 is available only to a person who can show that he has got an interest which is adversely affected by the decree, or has got an interest in the subject matter of the litigation. (Vol 19) 1932 Bom 78 (79): 56 Bom 16 (DB) * (Vol 19) 1932 Bom 78 (79): 56 Bom 16 (DB).

[3] A company not in the course of being wound up, cannot appeal from order under S. 153. (Vol 12) 1925 Bom 442 (443) (DB).

[4] A creditor or contributory who was barred from participating in the proceedings because of non-compliance with R. 58 framed under S. 254 of the Act by the Punjab Chief Court and in fact did not participate has no *locus standi* to appeal. (Vol 6) 1919 Lah 180 (181): 1919 Pun Re No. 79 (DB).

[5] When a Company is convicted and not its Managing Director, the appeal against the conviction should be by the Company acting through a properly authorized agent and it cannot be deemed to be properly instituted when the appeal is filed by the Managing Director. (Vol 21) 1934 Cal 63 (63): 35 Cr L Jour 492.

[6] Where after winding up order, the majority of contributories declare themselves in a meeting in favour of appealing against the order in company's name the appeal is competent. Contributories may be regarded as the real appellants. (Vol 19) 1932 PC 1 (8): 58 Ind App 416: 55 Mad 180 (PC).

9. Rehearing.—[1] Rehearing of any order made in the matter of winding up of company can only take place before Court of appeal. But an order which has been obtained *ex parte* or which is in truth a nullity may be discharged by the Court which made it. S. 202 has no application to petitions for setting aside of *ex parte* decrees. (Vol. 7) 1920 Lah 51 (52, 53): 1 Lah 187 (DB).

[2] S. 169 does not bar an application to set aside an *ex parte* order. (Vol 10) 1923 All 429 (429) (DB).

10. Review.—[1] Company Law does not affect power of review vested in High Court under Civil PC (Vol 24) 1937 Lah 82 (83).

[2] Where on objection to a petition for compulsory winding up of a company, the Court ordered withdrawal of the petition company furnishing security to the satisfaction of the Registrar in Insolvency and the security was accepted by the Registrar it was held that the order could not be reviewed. (Vol 21) 1934 Cal 603 (603): 61 Cal 429. (Case under Calcutta High Court Rules and Orders (Original Side.))

[3] A Judge conducting liquidation is not precluded from recalling wrong order and rectifying a mistake. S. 202 is not intended to refer to cases in which a judge upon discovery of fresh matter considers it expedient to pass fresh order in place of an order passed by him. (Vol 6) 1919 Lah 255 (255) * (1894) 16 All 53 (57, 58).

11. Revision.—[1] An unappealable order passed by a District Court under the provisions of this Act is open to revision by High Court under section 115, Civil PC. (Vol 22) 1935 All 310 (315): 57 All 810 (DB) (Order under s. 54) * (Vol 12) 1925 Lah 443 (444). (Order under s. 247 (6)).

[See also Notes on S. 3].

12. Separate suit if barred.—[1] A question which has been decided by the liquidating Court cannot be reopened by a regular suit. Appeal is the only remedy. (Vol 5) 1918 Lah 45 (47): 1918 Pun Re No. 40 (DB).

[2] Order overruling the objection of contributories that they had ceased to be share-holders before the company went into liquidation, if not appealed against becomes final and operates as *res judicata*. (Vol 2) 1915 Lah 227 (227).

SECTION 203—Note 1.**Cognate sections.**

Extraordinary and special resolutions—81.

Voluntary winding up of unregistered company—271 (1) (ii).

Voluntary winding up—Notice of resolution—206.

Rights of creditors and contributories saved—218.

[1] Resolution under the section containing also other matters relating to the agreement of amalgamation with another company is not defective. (Vol 12) 1925 Bom 49 (56) (DB).

[2] Where there is no extra-ordinary resolution as required by Sub-s. (8) and the notice calling the general meeting did not show that the liquidation was to be proposed by way of an extraordinary resolution the company cannot be held to have gone into voluntary liquidation. (Vol 21) 1934 Rang 271 (272).

(3) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up;

^a[and the expression 'resolution for voluntarily winding up' when used hereafter in this Part means a resolution passed under clause (1), clause (2) or clause (3) of this section]

[1882—S. 173; (1908) 8 Edw. VII. C. 69—S. 182; (1929) 19 and 20 Geo. V, C. 23—S. 225 (1)]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 103. [15-1-1937]

Commencement of voluntary winding up. **204.** A voluntary winding up shall be deemed to commence at the time of the passing of the resolution ^a[for voluntarily winding up].

[1882—S. 174; (1908) 8 Edw. VII. C. 69—S. 183; (1929) 19 and 20 Geo. V, C. 23—S. 227].

[a] *Substituted* for "authorising the winding up" by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 104. [15-1-1937]

Effect of voluntary winding up on status of company. **205.** When a company is wound up voluntarily, the company shall, from the commencement of the winding up cease to carry on its business, except so far as may be required for the beneficial winding up thereof :

Provided that the corporate state and corporate powers of the company shall, notwithstanding anything to the contrary in its articles, continue until it is dissolved.

[1882—S. 175; (1908) 8 Edw. VII. C. 60—S. 184; (1929) 19 and 20 Geo. V, C. 23—S. 228]

206. (1) Notice of any special resolution or extraordinary resolution for winding up a company voluntarily shall be given by the company within ten days of the passing of the same by advertisement in the ^a[Official Gazette], and also in some newspaper (if any) circulating in the district where the registered office of the company is situate.

(2) If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues ; and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to a like penalty.

[1882—S. 176; (1908) 8 Edw. VII. C. 69—S. 185; (1929) 19 and 20 Geo. V, C. 23—S. 226 (1), (2)]

[a] *Substituted* by A. O. for "local Official Gazette".

Section 203 (contd.)

[3] If an extraordinary resolution passed under the section does not provide that, by reason of its liabilities, the company cannot continue its business and that it is advisable to wind up, the defect is very serious. (Vol. 4) 1917 Lah 405 (406) : 1917 Pun Re No. 35.

[4] If an irregularity in passing an extraordinary resolution, directing a voluntary winding up of the Company, is discovered after the supervision order has been made, the order may be discharged on application to the Court of Appeal, and the time for making the appeal may, if necessary, be extended. (Vol 4) 1917 Lah 405 (405, 406) : 1917 Pun Re No. 35.

[5] Where a company goes into voluntary liquidation during the pendency of a petition by the creditors for winding up, the liquidators appointed by the company *pendente lite* cannot contest the order directing the compulsory winding up, in pursuance of the petition. (Vol 1) 1914 Lah 36 (38).

[6] Company fraudulently wound up by resolution of its members—Landlord re-entering into possession of land leased to the company on ground of breach of covenant due to winding up of company—Subsequently Court declaring the resolution as void—*Held* that acts done by the landlord such as granting of leases to other persons were not valid. (Vol 24) 1937 Cal 129 (137, 138) : ILR (1937) 1 Cal 203 (DB).

[7] Section 54, Insurance Act, 1938, runs as follows: "Notwithstanding anything contained in the Indian Companies Act, 1913, an insurance company shall not be wound up voluntarily except for the purpose of effecting an amalgamation of a reconstruction of the company or on the ground that by reason of its liabilities it cannot continue its business."

SECTION 204—Note 1.

[1] For the two kinds of voluntary winding up, namely, 'a member's voluntary winding up' and 'a creditors' voluntary winding up,' see section 207 (3).

[2] For the commencement of a winding up by Court, see section 168.

SECTION 205—Note 1.

[1] Voluntary liquidation does not suspend right to commence or continue legal proceedings against the Company. (Vol 18) 1931 Cal 569 (570) : 58 Cal 913 (DB).

[2] Where a company goes into liquidation pending a suit against it, the liquidation effects no change in its position in the suit. The only change that happens is that in the conduct of its defence the liquidator will act instead of the directors. (Vol 22) 1935 P C 79 (85) : 62 Ind App 100 : 13 Rang 256 (PC).

[See also (Vol 13) 1926 Nag 303 (303) (Company as plaintiff.)]

[3] On the appointment of a liquidator all the powers of the directors shall cease, except as allowed under the provisions of section 208A (2) and section 209D (2).

a[207. (1) Where it is proposed to wind up a company voluntarily, the directors of the company or, in the case of a company having more than two directors, the majority of the directors may, at a meeting of the directors held before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out b[*] make a declaration verified by an affidavit to the effect that they have made a full inquiry into the affairs of the company, and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding three years, from the commencement of the winding up.

(2) Such declaration shall be supported by a report of the company's auditors on the company's affairs, and shall have no effect for the purposes of this Act unless it is delivered to the registrar for registration before the date mentioned in subsection (1) of this section.

(3) A winding up in the case of which a declaration has been made and delivered in accordance with this section is in this Act referred to as 'a members' voluntary winding up', and a winding up in the case of which a declaration has not been made and delivered as aforesaid is in this Act referred to as 'a creditors' voluntary winding up.'

[(1929) 19 and 20 Geo. V, C. 23—S. 230]

[a] Ss. 207 to 218 were substituted for the original Ss. 207 to 219 by the Indian Companies (Amendment) Act 1936 (22 [XXII] of 1936), S. 105. [15-1-1937.]

[b] Word 'to' was omitted by the Repealing and Amending Act, 1939 (34 [XXXIV] of 1939), S. 2 and Sch. I.

Members' Voluntary Winding Up.

Provisions applicable to a members' voluntary winding up.

a208. The provisions contained in sections 208A to 208E, both inclusive, shall apply in relation to a members' voluntary winding up.

[a] See legislative remark under S. 207.

Power of company to appoint and fix remuneration of liquidators.

a208A. (1) The company in general meeting shall appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him or them.

(2) On the appointment of a liquidator all the powers of the directors shall cease, except so far as the company in general meeting, or the liquidator, sanctions the continuance thereof.

[1882—S. 177; (1929) 19 and 20 Geo. V, C. 23—S. 232]

[a] See legislative remark under S. 207.

Power to fill vacancy in office of liquidator.

a208B. (1) If a vacancy occurs by death, resignation or otherwise in the office of liquidator appointed by the company, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy.

(2) For that purpose a general meeting may be convened by any contributory or, if there were more liquidators than one, by the continuing liquidators.

(3) The meeting shall be held in manner provided by this Act or by the articles, or in such manner as may, on application by any contributory or by the continuing liquidators, be determined by the Court.

[1882—S. 184; (1929) 19 and 20 Geo. V, C. 23—S. 233]

[a] See legislative remark under S. 207]

SECTION 208A—Note 1.

[1] Although a director loses most of his powers on his appointment as liquidator, he does not cease to be a director. (Vol 29) 1942 Mad 702 (703): 44 Cri L J 503.

[2] A liquidator in voluntary liquidation must not by the resolution appointing him be restricted in the exercise of his statutory duties. Thus where to work out a scheme of amalgamation liquidator was appointed in respect of the transferee Company subject to the super-

vision of the Directors of the transferor and transferee Company, it was held that such restriction was highly objectionable. (Vol 15) 1928 P C 180 (185): 55 Ind App 274: 52 Bom 571 (PC).

[3] As to notice by liquidator of his appointment see section 214.

SECTION 208B—Note 1.

[1] As to the powers of the Court to appoint and remove a liquidator in a voluntary winding up, see S. 213.

a208 C. (1) Where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company, whether a company within the meaning of this Act or not (in this section called "the transferee company"), the liquidator of the first-mentioned company (in this section called "the transferor company") may, with the sanction of a special resolution of that company conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive, in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests or in addition thereto participate in the profits of or receive any other benefit from the transferee company.

(2) Any sale or arrangement in pursuance of this section shall be binding on the members of the transferor company.

(3) If any member of the transferor company who did not vote in favour of the special resolution expresses his dissent therefrom in writing addressed to the liquidator and left at the registered office of the company within seven days after the passing of the special resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration in manner hereafter provided.

(4) If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

(5) A special resolution shall not be invalid for the purposes of this section by reason that it is passed before or concurrently with a resolution for voluntary winding up or for appointing liquidators, but if an order is made within a year for winding up the company by or subject to the supervision of the Court, the special resolution shall not be valid unless sanctioned by the Court.

(6) The provisions of the b[Arbitration Act, 1940] other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations in pursuance of this section.

[1882—Ss. 204 to 211 ; (1929) 19 and 20 Geo. V, C. 23—S. 234].

[a] See legislative remark under S. 207.

[b] Substituted by the Repealing and Amending Act, 1940 (32 [XXXII] of 1940), S. 3 and Sch. II for Indian Arbitration Act, 1899. [27-11-1940].

a208D. (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and of each succeeding year, or as soon thereafter as may be convenient within ninety days of the close of the year, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the liquidation.

SECTION 208C—Note 1.

[1] Every company has a right of amalgamation with another company irrespective of its own constitution but the amalgamation will not bind the transferee company unless its constitution empowers it to effect such an acquisition. (Vol. 15) 1928 P C 180 (184) : 55 Ind App 274 : 52 Bom 571 (P C) * (Vol. 12) 1925 Bom 49 (55) (DB).

[2] Resolution mixing voluntary winding up with other matters relating to the agreement of amalgamation with another company is legal. (Vol. 12) 1925 Bom 49 (56) (DB).

[3] Resolution authorising liquidators to adopt agreement and carry same into effect, is quite legal and that authorization need not be in words of the section. (Vol. 12) 1925 Bom 49 (56, 61) (DB).

[4] The arbitration contemplated in this section is one between the company in liquidation and one or more of its members. It is an arbitration to settle an internal dispute or difference as distinguished from an arbitration under section 162 (3) which is one between a company and either another company or an individual, a third party. (Vol. 27) 1940 Cal 220 (222) : ILR (1940) 1 Cal 358 (DB).

[5] Machinery provided by S. 153 is available whether there is or is not a winding up in progress whereas this section is applicable only in view or in course of a winding up. (Vol. 24) 1937 Bom 423 (427).

SECTION 208D—Note 1.

[1] As to the filing of a statement by a liquidator in Court or with registrar if the winding up is not concluded within one year after its commencement, see section 244.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

[1882—S. 188 ; (1929) 19 and 20 Geo. V, C. 23—S. 235.]

[a] See legislative remark under S. 207.

208E. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company for the purpose of laying before it the account, and giving any explanation thereof.

(2) The meeting shall be called by advertisement specifying the time, place and object thereof, and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for publication of a notice under that sub-section.

(3) Within one week after the meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues :

Provided that, if a quorum is not present at the meeting, the liquidator shall, in lieu of the said return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall be deemed to have been complied with.

(4) The registrar on receiving the account and either of the returns mentioned in sub-section (3) shall forthwith register them and on the expiration of three months from the registration of the return the company shall be deemed to be dissolved :

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within twenty-one days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails so to do he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[1882—Ss. 186, 187; (1929) 19 and 20 Geo. V, C. 23—S. 236.]

[a] See legislative remark under S. 207.

Creditors' Voluntary Winding Up.

Provisions applicable to a creditors' voluntary winding up. **209.** The provisions contained in sections 209A to 209H, both inclusive, shall apply in relation to a creditors' voluntary winding up.

[a] See legislative remark under S. 207.

SECTION 208-E—Note 1.

[1] Under S. 208E where Liquidator in voluntary liquidation sends a return to Registrar of the final meeting and dissolution of company and a Registrar registers it the company is deemed to be dissolved on expiration of three months from the registration of the return. (Vol 18) 1981 Lah 500 (501) : 13 Lah 190 (DB).

[2] As to disposal of documents of the company see section 242 (1) (b).

SECTION 209—Note 1.

[1] Where owing to oversight, provisions of Ss. 209A to H have not been observed in winding up proper course to follow is to order a meeting of creditors and send notices of it by post to them. The Company should be directed to advertise notice of meeting as laid down in S. 206 (1). The directors should cause a list of creditors with the estimated claims of theirs be prepared and laid before the meeting. They shall also appoint one of their numbers to preside. At that meeting the creditors would consider all matters arising under Ss. 209B to 209H. (Vol 28) 1941 Cal 30 (31) : ILR (1940) 2 Cal 325.

***209A.** (1) The company shall cause a meeting of the creditors of the company to be summoned for the day, or the day next following the day, on which there is to be held the meeting at which the resolution for voluntary winding up is to be proposed, and shall cause the notices of the said meeting of creditors to be sent by post to the creditors simultaneously with the sending of the notices of the said meeting of the company.

(2) The company shall cause notice of the meeting of the creditors to be advertised in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) The directors of the company shall—

(a) cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before the meeting of creditors to be held as aforesaid ; and

(b) appoint one of their number to preside at the said meeting.

(4) It shall be the duty of the director appointed to preside at the meeting of creditors to attend the meeting and preside thereat.

(5) If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors, held in pursuance of sub-section (1) of this section, shall have effect as if it had been passed immediately after the passing of the resolution for winding up the company.

(6) If default is made—

(a) by the company in complying with sub-sections (1) and (2) ;

(b) by the directors of the company in complying with sub-section (3);

(c) by any director of the company in complying with sub-section (4) ; the company, directors or director, as the case may be, shall be liable to a fine not exceeding one thousand rupees and, in the case of default by the company, every officer of the company who is in default shall be liable to the like penalty.

[(1929) 19 and 20 Geo. V, C. 23—S. 238]

[a] See legislative remark under S. 207.

209B. The creditors and the company at their respective meetings mentioned in section 209A may nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors shall be liquidator, and if no person is nominated by the creditors the person, if any nominated by the company shall be liquidator :

Provided that in the case of different persons being nominated, any director, member or creditor of the company may, within seven days after the date on which the nomination was made by the creditors, apply to the Court for an order either directing that the person nominated as liquidator by the company shall be liquidator instead of or jointly with the person nominated by the creditors, or appointing some other person to be liquidator instead of the person appointed by the creditors.

[1882—S. 179; (1929) 19 and 20 Geo. V, C. 23—S. 238.]

[a] See legislative remark under S. 207.

SECTION 209A—Note 1.

[1] An omission to convene the creditors' meeting as provided by sub-section (1) is only an irregularity which can be cured and not an illegality which vitiates the resolution winding up the company. The proper course is to require a meeting of the creditors to be called when that has been omitted but it is not necessary to have a second meeting of the company. (Vol 33) 1946 Nag 196 (197, 198) : ILR (1946) Nag 286 (DB).

[2] Creditors' voluntary winding up—Company calling meeting under section 203 to pass resolution of winding up—Creditors' meeting not having been sum-

moned on that date, fresh meeting summoning creditors called and resolution passed—Liquidation commences from date of former meeting and not from date of fresh meeting. (Vol 33) 1946 Nag 196 (198) : ILR (1946) Nag 286 (DB).

SECTION 209B—Note 1.

[1] The condition precedent to moving Court for removal of liquidator is a meeting of creditors under sub-s (1) of S. 209 where they shall determine whether application shall be made to Court for appointment of any person as liquidator in place of, or jointly with, the liquidator appointed by the company. (Vol 28) 1936 Fat 468 (471).

209C. The creditors at the meeting to be held in pursuance of section 209A or at any subsequent meeting may, if they think fit, appoint a committee of inspection consisting of not more than five persons, and if such a committee is appointed the company may, either at the meeting at which the resolution for voluntary winding up is passed or at any time subsequently in general meeting, appoint such number of persons as they think fit to act as members of the committee not exceeding five in number :

Provided that the creditors may, if they think fit, resolve that all or any of the persons so appointed by the company ought not to be members of the committee of inspection, and, if the creditors so resolve, the persons mentioned in the resolution shall not, unless the Court otherwise directs, be qualified to act as members of the committee, and on any application to the Court under this provision the Court may, if it thinks fit, appoint other persons to act as such members in place of the persons mentioned in the resolution.

[(1929) 19 and 20 Geo. V, C. 23—S. 240.]

[a] See legislative remark under S. 207.

209D. (1) The committee of inspection, or if there is no such committee, the creditors may fix the remuneration to be paid to the liquidator or liquidators, and where the remuneration is not so fixed, it shall be determined by the Court.

(2) On the appointment of a liquidator, all the powers of the directors shall cease, except so far as the committee of inspection, or if there is no such committee, the creditors, sanction the continuance thereof.

[1882—S 177; (1929) 19 and 20 Geo. V, C. 23—S. 241]

[a] See legislative remark under S. 207.

209E. If a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, other than a liquidator appointed by or by the direction of, the Court, the creditors may fill the vacancy.

[1882—S. 184; (1929) 19 and 20 Geo. V. C. 23—S. 241.]

[a] See legislative remark under S. 207.

209F. The provisions of section 208C shall apply in the case of a creditors' voluntary winding up as in the case of a members' voluntary winding up with the modification that the powers of the liquidator under the said section shall not be exercised except with the sanction either of the Court or of the committee of inspection.

[(1929) 19 and 20 Geo. V, C. 23—S. 243.]

[a] See legislative remark under S. 207.

209G. (1) In the event of the winding up continuing for more than one year, the liquidator shall summon a general meeting of the company and a meeting of creditors at the end of the first year from the commencement of the winding up, and of each succeeding year or as soon thereafter as may be convenient, and shall lay before the meetings an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement in the prescribed form containing the prescribed particulars with respect to the position of the winding up.

(2) If the liquidator fails to comply with this section, he shall be liable to a fine not exceeding one hundred rupees.

[1882—S. 188; (1929) 19 and 20 Geo. V. C. 23—S. 244.]

[a] See legislative remark under S. 207.

209H. (1) As soon as the affairs of the company are fully wound up, the liquidator shall make up an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of, and thereupon shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and giving any explanation thereof.

(2) Each such meeting shall be called by advertisement specifying the time, place and object thereof and published one month at least before the meeting in the manner specified in sub-section (1) of section 206 for the publication of a notice under that sub-section.

(3) Within one week after the date of the meetings, or, if the meetings are not held on the same date, after the date of the later meeting, the liquidator shall send to the registrar a copy of the account, and shall make a return to him of the holding of the meetings and of their dates, and if the copy is not sent or the return is not made in accordance with this sub-section the liquidator shall be liable to a fine not exceeding fifty rupees for every day during which the default continues :

Provided that, if a quorum (which for the purposes of this section shall be two persons) is not present at either such meeting the liquidator shall, in lieu of such return, make a return that the meeting was duly summoned and that no quorum was present thereat, and upon such a return being made the provisions of this sub-section as to the making of the return shall, in respect of that meeting, be deemed to have been complied with.

(4) The registrar on receiving the account and in respect of each such meeting either of the returns mentioned in sub-section (3) shall forthwith register them, and on the expiration of three months from the registration thereof the company shall be deemed to be dissolved :

Provided that the Court may, on the application of the liquidator or of any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

(5) It shall be the duty of the person on whose application an order of the Court under this section is made, within ten days after the making of the order, to deliver to the registrar a certified copy of the order for registration, and if that person fails to do so he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[1882—Ss. 186, 187; (1929) 19 and 20 Geo. V, C. 23—S. 245].

[a] See legislative remark under S. 207.

Members' or Creditors' Voluntary Winding Up.

Provisions applicable to every voluntary winding up. ***210.** The provisions contained in sections 211 to 218, both inclusive, shall apply to every voluntary winding up whether a members' or a Creditors' winding up.

[a] See legislative remark under S. 207.

***211.** Subject to the provisions of this Act as to preferential payments, the property of a Distribution of property company shall, on its winding up, be applied in satisfaction of its liabilities of company. *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

[1882—S. 177; (1929) 19 and 20 Geo. V. C. 23—S. 247]

[a] See legislative remark under S. 207.

SECTION 211—Note 1.

[1] The provision that the assets of the Company in voluntary liquidation shall be applied in satisfaction of its liabilities *pari passu* is intended for the guidance of the private liquidator and does not control the Court's power to entertain applications for execution against the assets of the company to the detriment of other creditors. (Vol 18) 1931 Cal 569 (569) : 58 Cal 913 (DB).

[2] A company, though private, is distinct from the persons composing it and the liquidator cannot as a normal course of a liquidation, pay the creditors merely a dividend of their debts, when large surplus assets remain in hand, and then allow the contributories without definition of their interests to take possession for themselves of these surplus assets. (Vol 18) 1931 PC 203 (207) (PC).

[3] Where certain assets including a leasehold interest were distributed among the share-holders, it was held that the so-called "distribution" without the execution of any instrument of assignment did not make the "share-holders" the legal assignees of the original lessees. (Vol 18) 1931 PC 203 (205) (PC).

[4] As regards rent due before date of winding up, lessor is only entitled to rateable distribution along with other creditors—As for rents falling due after that date, he is entitled to have them in full. (Vol 23) 1936 Oudh 11 (12) : 11 Luck 515 (DB).

[5] This section does not bar execution proceedings against a company gone into voluntary liquidation, unless a competent Court has granted leave for winding up or stay of proceedings. A liquidator, or dissatisfied creditor can move the Court. (Vol 3) 1916 All 174 (174, 175) : 38 All 407 (DB).

Powers and duties of
liquidator in voluntary
winding up.

a212. (I) The liquidator may—

- (a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and in the case of a creditors' voluntary winding up, with the sanction of either the Court or the committee of inspection, exercise any of the powers given by clauses (d) (e) (f) and (h) of section 179 to a liquidator in a winding up. The exercise by the liquidator of the powers given by this clause shall be subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers;
 - (b) without the sanction referred to in clause (a), exercise any of the other powers by this Act given to the liquidator in a winding up by the Court;
 - (c) exercise the power of the Court under this Act of settling a list of contributories, and the list of contributories shall be *prima facie* evidence of the liability of the persons named therein to be contributories;
 - (d) exercise the power of the Court of making calls;
 - (e) summon general meetings of the company for the purpose of obtaining the sanction of the company by special or extraordinary resolution or for any other purpose he may think fit.
- (2) The liquidator shall pay the debts of the company and shall adjust the rights of the contributories among themselves.
- (3) When several liquidators are appointed, any power given by this Act may be exercised by such one or more of them as may be determined at the time of their appointment, or, in default of such determination, by any number not less than two.

[1882—Ss. 177 and 183; (1929) 19 and 20 Geo. V, C. 23—S. 243]

[a] See legislative remark under S. 207.

Section 211 (*contd.*)

[6] As a mere attachment creates no charge or lien upon the attached property in favour of the attaching creditor, until the property is actually sold, an attaching creditor of a company stands on the same footing as one who has a money claim against judgment-debtor. (Vol 18) 1931 Lah 589 (590).

[7] When a company goes into liquidation, though a voluntary one, the remedy of the creditor is only to take what he can take under the scheme of liquidation and nothing more. A creditor who obtains a decree against the company going into liquidation cannot recover the whole amount due under the decree but only a share of the decree in the terms of the scheme of liquidation. (Vol 17) 1930 Lah 299 (301).

[8] Decree held by company attached in execution of decree passed against company after its voluntarily going into liquidation—Application by liquidators for removal of attachment should be granted. (Vol 12) 1925 Oudh 483 (484).

[9] As to costs, charges and expenses properly incurred in the winding up including the remuneration of the liquidator see section 217.

SECTION 212—Note 1.

[1] It is not necessary that the liquidator should be expressly authorised by the company to exercise powers which the Companies Act gives him. Accordingly a suit filed by the voluntary liquidator to recover balance of share money due from a member is not invalid on the ground that no express power to file suits was given

to him by the resolution by which certain powers were conferred on him by the company. (Vol 19) 1932 All 342 (343) : 54 All 541 (DB) * (1907) 9 Bom LR 825 (828) (DB).

[2] Share-holder failing to pay for shares allotted can, in the event of company going into liquidation, be placed on the list of contributories and liquidator can make a call upon him for money due to company and Court can enforce the call without requiring the liquidator to have recourse to a suit. (Vol 28) 1941 Mad 565 (566, 567) : ILR (1941) Mad 538 (DB).

[3] A share-holder who had been induced to take shares by the fraudulent misrepresentation of directors, cannot repudiate his shares, nor seek to rescind a contract in respect of them, nor can he recover money paid for shares. (1877) 3 C.P.D. 282 (294, 295) (A.C.) (The principles in voluntary winding up and compulsory winding up or winding up subject to supervision by Court are same.)

[4] Before voluntary winding up, directors made calls without giving the person to whom they were to be paid and the place. No notice of the calls was given. After winding up liquidator gave notice to shareholders specifying all particulars. *Held* the liquidator had power to enforce calls made by directors. (1877) 3 C. P. D. 282 (299) (C. A.) * (Vol 15) 1928 All 165 (166) : 50 All 419.

[5] Liquidator in a voluntary winding up has no right to ask the Court to pass an order compulsorily winding up the Company. (Vol 25) 1938 All 623 (625) : ILR (1938) All 945.

Power of Court to appoint and remove liquidator in voluntary winding up.

^a213. (1) If from any cause whatever there is no liquidator acting, the Court may appoint a liquidator.

(2) The Court may, on cause shown, remove a liquidator and appoint another liquidator.
[1882—S. 185; (1929) 19 and 20 Geo. V. C. 23—S. 249]

[a] See legislative remark under S. 207.

Notice by liquidator of his appointment.

^a214. (1) The liquidator shall, within twenty-one days after his appointment, deliver to the registrar for registration a notice of his appointment in the form prescribed.

(2) If the liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[(1929) 19 and 20 Geo. V. C. 23—S. 250.]

[a] See legislative remark under S. 207.

^a215. (1) Any arrangement entered into between a company about to be, or in the course of being, wound up and its creditors shall, subject to the right of appeal under this section, be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors.

(2) Any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the Court against it, and the Court may thereupon, as it thinks just, amend, vary or confirm the arrangement.

[1882—Ss. 180, 181; (1929) 19 and 20 Geo. V. C. 23—S. 251]

[a] See legislative remark under S. 207.

Power to apply to Court to have questions determined of powers exercised.

^a216. (1) The liquidator or any contributory or creditor may apply to the Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court.

(2) The liquidator or any creditor or contributory may apply for an order setting aside any attachment, distress or execution put into force against the estate or effects of the company after the commencement of the winding up.

SECTION 213—Note 1.

[1] In company's voluntary winding-up liquidator can be removed by Court on cause shown with reference to interest of liquidation and purpose of his appointment. (Vol 11) 1924 Bom 339 (340): 48 Bom 471 (DB).

[2] Court can extend time for making an application for the appointment of a person as joint liquidator in a voluntary winding up, but the Court has no jurisdiction to make an appointment with retrospective effect. When application is made for appointment of a joint liquidator, the Court is not required simply to register by a formal order the recommendation of the creditors as to the person to be appointed as joint liquidator or the Court may or may not act on the resolution of the creditors. The matter is entirely discretionary with the Court. Till an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator and such assumption does not give him any rights whatever. (Vol 12) 1925 Cal 809 (812): 53 Cal 106.

SECTION 214—Note 1.

[1] Disputing validity of his own appointment will not save liquidator's liability to penalty for default in giving notice of appointment under the section. (Vol 4) 1917 All 93 (94): 39 All 412: 18 Cr L Jour 510.

[2] Before any proceedings can be taken up against the Directors under this section, it must be shown that the Company was prejudiced by the act complained of. (Vol 4) 1917 Lah 383 (384) (DB).

SECTION 215—Note 1.

[1] The provisions of section 215 are mandatory; where they are not complied with, parties cannot seek to enforce the transactions by invoking the doctrine of part performance. Where the original composition deed was modified at a meeting of the debenture holders but it appeared that the resolution was not acceded to by three-fourths in number and value of the creditors, *held* that the resolution was not binding on the creditors, and that the fact that the original scheme was modified by an application to the Court did not matter. (Vol 18) 1931 All 59 (62) (DB).

SECTION 216—Synopsis.

1. Sub-Section (1).
2. Sub-Section (2).
3. Sub-Section 2 (6).

1. Sub-Sec. (1).—[1] Section 216 is exhaustive of the persons who are entitled to make applications, and the Registrar of Companies has no *locus standi* to make

Such application shall be made—

(a) if the attachment, distress or execution is levied or put into force by a High Court, to such High Court, and

(b) if the attachment, distress or execution is levied or put into force in any other Court, to the Court having jurisdiction to wind up the company.

(3) The Court, if satisfied that the determination of the question or the required exercise of power or the order applied for will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.

[1882—S. 182; (1929) 19 and 20 Geo. V, C. 23—S. 252]

[a] See legislative remark under S. 207.

Section 216 (contd.)

an application to remove the liquidator. (Vol 28) 1941 Bom 25 (26) : ILR (1941) Bom 39.

[2] This section does not indicate that assistance of Court is the only method open to the Voluntary liquidator and that ordinary powers that he may have under the law are taken away from him. Suits for enforcing calls can be instituted by him. (Vol 15) 1923 All 675 (676) : 51 All 406.

[3] The powers of a Court under the section are strictly limited to assistance in winding up. There is no power under the Act for the creditors to come and say that the winding up resolution is bad. (Vol 23) 1936 Pat 468 (470).

[4] Voluntary liquidator is entitled to ask the Court, under S. 216 to make any order for public examination of Directors, etc., which the court may make on an application of Official Liquidator under Sec. 196. (Vol 7) 1920 Bom 284 (284) : 44 Bom 459 (DB).

[5] In the case of a voluntary liquidation, if the liquidator is confronted with a decree which has to be satisfied out of the assets of the company before distribution of the assets among the creditors, his proper remedy is to approach the Court, for proper direction. (Vol 18) 1931 Cal 539 (570) : 58 Cal 913 (DB).

[6] Liquidator can ask Court sitting in insolvency jurisdiction to go behind judgment made against company showing that there ought not to be a judgment, in addition to the grounds of fraud or collusion. (Vol 19) 1932 Bom 253 (254) (DB).

[7] Liquidators dissatisfied with Registrar's decision under S. 208-E or creditors and contributors dissatisfied with the conduct of the liquidator can apply to the Court under S. 216 for a proper order. (Vol 18) 1931 Lah 500 (501) : 13 Lah 190 (DB).

[8] In a case of compulsory liquidation, the creditor is debarred from proceeding by way of action unless he can show special grounds why he should be permitted to do so. In the case of voluntary liquidation, the onus is on the liquidator to show that an order should be made staying an action brought against the company since *prima facie* the ordinary tribunal is the proper one to decide upon claim against the company. Proceeding may be stayed when liability is substantially admitted and the dispute is only as to what is the exact amount due. (Vol 2) 1915 Lah 344 (345) : 1915 Pun Re No. 31.

[9] An application by liquidator of a company in voluntary liquidation to order a contributory to pay call-money was dismissed by the District Judge. Later on he acted on his own initiative and ordered payment. *Held* : S. 161 (S. 187 of the present Act) had no application to voluntary winding up and the procedure laid down in S. 177 and 182 (S. 212 and 216 of the present Act) only governed such matters. The District Judge

could not act in the absence of an application from the liquidator as required by S. 182 (S. 216). (Vol 2) 1915 Lah 291 (292).

2. Sub-Sec (2).—The mere fact that the company went into voluntary liquidation is in itself no bar to the progress of execution proceedings against the company and the proper course for the voluntary liquidator is to obtain an order for stay from the High Court before the execution sale is completed. Having been unsuccessful in the executing Court and also in appeal the liquidator cannot approach the High Court for a declaration that the auction sale was invalid. (Vol 22) 1935 Lah 991 (991) (DB).

[2] Where a Bank has gone into voluntary liquidation and a mortgage decree which it holds has been attached in execution of a decree passed against the Bank after liquidation, the High Court can and ought to order the removal of such attachment. (Vol 12) 1925 Oudh 483 (484).

[3] Court has wide discretion to prevent execution against a company in voluntary liquidation and the discretion must be exercised according to sound judicial principles. Ordinarily execution is stayed. (Vol 18) 1931 Lah 589 (590).

[4] A liquidator may obtain a supervision order to protect him against actions which are threatened and to save the expense of applying for the stay or restraint of proceedings against the company. (Vol 2) 1915 Lah 593 (593).

[5] Under this section strictly construed, Court cannot issue an order staying execution against the company. But the general practice is to stay execution when the company is in voluntary liquidation. This section gives the Court the power in voluntary liquidation to stay further proceedings. Such a power does not exist in compulsory liquidation. (Vol 15) 1928 All 265 (266) : 50 All 482.

[6] The voluntary winding-up of a company does not by itself prevent a person who holds a money-decree against the Company from taking out or continuing execution proceedings against it. The invariable practice of the Court is to stay execution proceedings in such a case unless there exist exceptional reasons for exercising its discretion otherwise. (Vol 18) 1931 Lah 589 (590) (The mere fact that the decree-holder had attached certain properties of the Company before the Company went into liquidation is not a special circumstance justifying a departure from the ordinary rule.)

3. Sub-sec. 2(b).—[1] Registered office of Company within jurisdiction of District Judge—District Judge has jurisdiction to pass orders in liquidation proceedings—Some of the contributories though residing outside are amenable to the jurisdiction of District Judge. (Vol 21) 1934 Lah 862 (863) : 15 Lah 302.

Cost of voluntary winding up.

a217. All costs, charges and expenses properly incurred in the winding up, including the remuneration of the liquidator, shall, subject to the rights of secured creditors, if any, be payable out of the assets of the company in priority to all other claims.

[1882—S. 188; (1908) 8 Edw. VII, C. 69—S. 196 (1); (1929) 19 and 20 Geo. V. C. 23—S. 254]

[a] See legislative remark under S. 207.

Saving for rights of creditors and contributories.

a218. The winding up of a company shall not bar the right of any creditor or contributory to have it wound up by the Court, but in the case of an application by a contributory, the Court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.]

[1882—S. 189; (1908) 8 Edw. VII, C. 69—S. 197; (1929) 19 and 20 Geo. V, C. 23—S. 255]

[a] Sections 207 to 218 were substituted for original Ss. 207 to 219 by Act 22 of 1936, s. 105.

a 219.

[15-1-1937]

[a] See Legislative remark under S. 218.

Power of Court to adopt proceedings of voluntary winding up.

220. Where a company is being wound up voluntarily, and an order is made for winding up by the Court, the Court may, if it thinks fit, by the same or any subsequent order, provide for the adoption of all or any of the proceedings in the voluntary winding up.

[1882—S. 190; (1929) 19 and 20 Geo. V. C. 23—S. 175 (1)]

Winding up subject to supervision of Court.

221. When a company has by special or extraordinary resolution resolved to wind up voluntarily, the Court may make an order that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories or others to apply to the Court, and generally on such terms and conditions as the Court thinks just.

[1882—S. 191; (1908) 8 Edw. VII, C. 69—S. 199; (1929) 19 and 20 Geo. V, C. 23—S. 256]

SECTION 217—Note 1.

[1] By virtue of section 216, the Court may, under this section read with section 193, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges and expenses incurred in the winding up in such order of priority as it thinks just.

[2] *Prima facie* the whole of the expenses of the winding up ought to be paid before the remuneration of the liquidator. (1934) 103 L J Ch D 187 (192).

[3] *Maugham, J.*—"Nor do I think the Court ought to be unwilling to declare that the liquidator is entitled to retain the remuneration which he has paid himself out of the assets of the company at a time when he had no reason to suppose that there would be an insufficient amount available for the payment of the costs, charges and expenses incurred in the winding-up." (1934) 103 L J Ch D 187 (192).

[4] Income-tax on the profits earned during the winding up is one of the expenses of the liquidation. (1934) 103 L J Ch D 187 (190).

[5] A company in liquidation, if it earns profits, is liable to pay income-tax. (Vol 21) 1934 All 170 (172) : 56 All 685 (DB.)

SECTION 218—Note 1.

[1] A creditor is not entitled as of right to ask a Court to convert a voluntary winding up into a compulsory winding up. He must show that he could secure compulsory liquidation, had there been no voluntary liquidation. A creditor who could have asked in the first instance for a compulsory winding up order

can always ask that the voluntary winding up should be converted into a compulsory one. (Vol 25) 1938 All 623 (624) : ILR (1938) All 945.

[2] Whether a company should be allowed to go into voluntary liquidation or the Court should wind it compulsorily, depends upon the facts of each case. (Vol 17) 1930 Sind 71 (72).

[3] Where partiality was shown by a bank in advancing loans and creditors were desirous of official liquidation, winding up of the Bank by Court was held to be desirable. (Vol 17) 1930 Sind 71 (72).

[4] To make liquidation by Court compulsory it must be shown that rights of creditors or contributories are prejudiced by voluntary winding up and it is not enough that allegations are made in application to that effect filed before the company decided to go in voluntary liquidation. (Vol 12) 1925 Lah 527 (528) : 6 Lah 340 (DB.)

[5] Rights of creditors or contributories not shown to be prejudiced by voluntary winding-up—Court should not order compulsory winding up even on a petition filed before decision to wind up voluntarily. (Vol 12) 1925 Lah 527 (528) : 6 Lah 340 (DB.)

SECTION 221—Note 1.

[1] Winding up order can be set aside on ground of fraud and fraud must be specifically alleged and proved. (Vol 15) 1928 PC 261 (263) (PC.)

[2] A creditor made petition for order for winding up of a company under supervision of Court—Notice as required under rules of the original side of the Madras High Court was issued inviting creditors who wished

222. A petition for the continuance of voluntary winding up subject to the supervision of the Court shall, for the purpose of giving jurisdiction to the Court over suits, be deemed to be a petition for winding up by the Court.

[1882—S. 192; (1908) 8 Edw. VII, C. 69—S. 200; (1929) 19 and 20 Geo. V, C. 23—S. 257]

223. The Court may, in deciding between a winding up by the Court and a winding up subject to supervision, in the appointment of liquidators, and in all other matters relating the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence.

[1882—S. 193; (1929) 19 and 20 Geo. V, C. 23—S. 288]

224. (1) Where an order is made for a winding up subject to supervision, the Court may by the same or any subsequent order appoint any additional liquidator.

(2) A liquidator appointed by the Court under this section shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if he had been appointed by the company.

(3) The Court may remove any liquidator so appointed by the Court or any liquidator continued under the supervision order, and fill any vacancy occasioned by the removal, or by death or resignation.

[1882—S. 194; (1908) 8 Edw. VII, C. 69—S. 202; (1929) 19 and 20 Geo. V, C. 23—S. 259]

225. (1) Where an order is made for a winding up subject to supervision, the liquidator may, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.

(2) Except as provided in sub-section (1), and save for the purposes of section 196, any order made by the Court for a winding up subject to the supervision of the Court shall for all purposes, including the staying of suits and other proceedings, be deemed to be an order of the Court for winding up the company by the Court, and shall confer full authority on the Court to make calls or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the Court.

(3) In the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the official liquidator, the expression "official liquidator" shall be deemed to mean the liquidator conducting the winding up subject to the supervision of the Court.

[1882—S. 195; (1908) 8 Edw. VII, C. 69—S. 203; (1929) 19 and 20 Geo. V, C. 23—S. 260]

Section 221 (contd.)

to oppose the petition.—But the creditors supported the petition, and, when petitioning creditor withdrew from proceedings none of the other creditors were willing to undertake the burden of petition which was then dismissed by Court; *Held* that creditors who supported the petition were not entitled to costs. (Vol 25) 1938 Mad 96 (97); ILR (1938) Mad 284 (DB).

[3] Irregularities are not a matter for the Court but for a majority of the company to deal with. The Courts will interfere only if the rights of the shareholders are infringed or if a case of a fraud or *ultra vires* action is made out. (Vol 11) 1924 Bom 102 (103); 47 Bom 915.

[4] A supervision order can be made only where there is valid winding up. Hence where a creditor challenges the voluntary winding up proceedings as being void he cannot apply for a supervision order. (Vol 28) 1936 Pat 468 (471).

[5] An order for voluntary liquidation under supervision of Court passed consequent upon the resolution

passed at the extraordinary meeting of the company is not without jurisdiction merely by reason of the fact that the meeting was convened within 14 days of the issue of notice or that the resolution was conditional. It may be a bad order. (Vol 17) 1930 Lah 721 (724).

[6] So far as the Court does not interfere, a winding up under supervision remains essentially a voluntary winding up; but the Court in a winding up under supervision has full authority to interfere and to exercise to any extent the power which it might have exercised if an order had been made for winding up the company by the Court. (1881-82) 6 Bom 640 (643).

[7] An order refusing to make a supervision order under this section is appealable under section 202 (1907) 30 Mad 22 (23) (DB).

SECTION 225—Note 1.

[1] Orders passed in winding up proceedings under supervision of Courts are appealable, (Vol 22) 1935 Lah 174 (174).

226. Where an order has been made for the winding up of a company subject to supervision, and an order is afterwards made for winding up by the Court, the Court may, by the last-mentioned order or by any subsequent order, appoint the voluntary liquidators or any of them, either provisionally or permanently, and either with or without the addition of any other person, to be official liquidator in the winding up by the Court.

[1882—S. 196; (1908) 8 Edw. VII, C. 69—S. 204; (1929) 19 and 20 Geo. V, C. 23—S. 187 (3)]

Supplemental Provisions.

227. (1) In the case of voluntary winding up every transfer of shares, except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company made after the commencement of the winding up shall be void.

(2) In the case of a winding up by or subject to the supervision of the Court, every disposition of the property (including actionable claims) of the Company, and every transfer of shares, or alteration in the status of its members, made after the commencement of the winding up shall, unless the Court otherwise orders, be void.

[1882—S. 197; (1908) 8 Edw. VII, C. 69—S. 205 (1); (1929) 19 and 20 Geo. V, C. 23—S. 229.]

SECTION 227—Synopsis.

1. Dispositions of property : What are.
2. Distinction between S. 227 and S. 57, Presidency Towns Insolvency Act.
3. Transfers not ab initio void.
4. "Unless the Court otherwise directs".
5. Rectification of register.

1. Dispositions of property : What are—[1] Where between the commencement of winding up and the date of order of winding up, an insurance company makes payments to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by the company to its creditors, are not only void but cannot be validated as they clearly amount to dispositions of property within the meaning of S. 227 (2). (Vol 26) 1939 Sind 196 (197) : ILR (1939) Kar 460.

[2] Contracts for the purchase of goods are not "dispositions of property" within the meaning of this section. (Vol 17) 1930 Mad 1012 (1016) : 54 Mad 324.

[3] A Bank employed a treasurer and the treasurer in turn, employed a cashier. The cashier furnished security on being so required by the treasurer by charging his deposit account in the Bank in favour of the treasurer. When the treasurer's employment came to an end he ceased to employ the cashier. But the cashier was retained by the Bank by making an arrangement which released the deposit amount from the charge of the treasurer and made it his personal property which was ultimately converted into a deposit security account. This transaction took place between the date of the application for winding up the bank and before the passing of the winding up order. Held that the transaction amounted to a "disposition" by the company of its property. (Vol 29) 1942 All 1-1 (143) : ILR (1942) All 86.

2. Distinction between S. 227 and S. 57 Presidency Towns Insolvency Act.—[1] There is a vital difference between S. 57, Presidency Towns Insolvency Act and S. 227, Companies Act; while *bona fide* payments to creditors by an insolvent are permissible and valid payments to creditors by a company from the commencement of the presentation of a winding up petition

become improper alienation and void. For the purposes of S. 227 it is wholly immaterial whether the person making or receiving the payment had notice of the presentation of the petition for winding up whereas it would be essential under S. 57, Presidency Towns Insolvency Act for a person claiming the protection to show that the transaction was without notice of the presentation of any petition. (Vol 26) 1939 Sind 196 (198-199) : ILR (1939) Kar 460.

3. Transfers not ab initio void.—[1] The plain reading of the section means that it is within the jurisdiction of the Court at any time after the transfer of the shares to order that the transaction is a good transaction and shall stand. Every transfer of shares, therefore, without previous sanction, is not void. (Vol 21) 1934 All 161 (162).

4. "Unless the Court otherwise directs"—[1] S. 227 (2) is a discretionary section by virtue of the words "unless the Court otherwise directs". That gives the Court discretion at any time to make an order in a proper case validating a disposition, notwithstanding that it is one made after the commencement of the winding up. (Vol 29) 1942 All 141 (143) : ILR (1942) All 86.

[2] S. 227 (2) intends to prevent any improper alienation and disposition of the property of a company during the period which must elapse before a winding up petition can be heard. However any *bona fide* transaction carried out and completed in the ordinary course of current business can be sanctioned. (Vol 18) 1931 Bom 2 (18) : 54 Bom 718 (DB) * (Vol 17) 1930 Mad 1012 (1016) : 54 Mad 324.

[3] After a petition is presented, situation of course of business changes and, it is no longer in ordinary course of business to pay one creditor in full to the detriment of his fellow creditors. (Vol 18) 1931 Bom 2 (15) : 54 Bom 718 (DB).

[4] Transactions which a Court would validate under S. 227 (2), are transactions *bona fide* entered into by a company for its benefit and those interested in its assets for preserving its business and not to the detriment of other creditors. (Vol 26) 1939 Sind 196 (199) : ILR (1939) Kar 460.

[5] "Bona fides" of creditors—Knowledge of presentation of the petition is not necessarily conclusive

228. In every winding up (subject in the case of insolvent companies to the application in Debts of all descrip- accordance with the provisions of this Act of the law of insolvency) all tions to be proved. debts payable on a contingency, and all claims against the company, present or future, certain or contingent, shall be admissible to proof against the company a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency or for some other reason do not bear a certain value.

[(1908) 8 Edw. VII, C. 69—S. 206; (1929) 19 and 20 Geo. V, C. 23—S. 261]

Section 227 (contd.)

to show want of *bona fides*. (Vol 18) 1931 Bom 2(19): 54 Bom 718 (DB).

[6] The payments to a creditor on decree after the petition for winding up cannot be held to be valid merely because he could have recovered the money before the date of presentation of the petition. (Vol 27) 1940 All 514 (516): ILR (1940) All 730.

[7] Petitioning creditor cannot utilise his petition to gain pecuniary benefit to himself in interval before winding-up order. (Vol. 18) 1931 Bom 2(9): 54 Bom 718 (DB).

[8] The test for the exercise of such a discretion is whether the Court would have sanctioned the transaction on an application in that behalf. (Vol 29) 1942 All 141 (144): ILR (1942) All 86.

[9] The Court should exercise a judicial discretion in allowing or disallowing disposition of property, and the appellate court can interfere in appropriate cases. Principles which should guide Courts in such cases stated with reference to English Case law. *Held* on facts that the dispositions were not strictly necessary for carrying on business and should be set aside. (Vol 18) 1931 Bom 2 (18): 54 Bom 718 (DB).

[10] In exercising the discretion under S. 227 (2) the Court must have in mind the fundamental principle that the assets of the company shall be, so far as is possible and subject to certain well recognised exceptions, distributed *pari passu* between the creditors and, subject as aforesaid, no creditor shall obtain an advantage over any other creditor. (Vol 29) 1942 All 141 (143): ILR (1942) All 86 * (Vol 27) 1940 All 514 (515, 516): ILR (1940) All 730.

[11] Petition by some share holders for winding up dismissed—Company subsequently granting lease of a *certain property* by a resolution at a general meeting—Winding up order made in appeal in the meantime—Lessee in possession and paying rent regularly—Lease should not be declared void, where company had no creditors, and the shareholders had by an unopposed resolution approved of the lease. (Vol 19) 1932 PC 1 (10): 58 Ind App 416; 55 Mad 180 (PC).

[12] A Bank employed a treasurer and the treasurer in turn, employed a cashier. The cashier had Rs. 1000 on his deposit account in the bank and that was charged in favour of the treasurer as security—On termination of the treasurer's employment, the cashier ceased to have his own employment too. But the Bank retained the cashier and an arrangement was made in the accounts of the bank which released the deposit account of the cashier from the charge of the treasurer and made it a personal account before it was ultimately taken to the Deposit security account. This transaction took place between the date of the application for winding up the bank and before the passing of the winding up order.

Held, that this was not fit for the exercise of discretion under this section inasmuch as if the bank had applied to the Court for sanction to employ the cashier upon the terms that it should convert his ordinary unsecured deposit account into a deposit security account, the Court would, knowing the facts, not have given that sanction. (Vol. 29) 1942 All 141 (144): ILR (1942) All 86.

5. Rectification of register.—[1] The Court may exercise the power given by S. 38 to rectify the register after the commencement of voluntary liquidation. And in ordering rectification of the register, the Court has, in a proper case, power to fix a particular date at which the registration shall become operative, even to the extent of making it retrospective, but subject, if necessary, to conditions protecting rights of third persons. (1904) 1 Ch 598 (606, 607)

SECTION 228—Note 1.

[1] The expressions "rules—under the law of insolvency" in S. 229, and law of insolvency in S. 228 cannot be widened to include the whole law of insolvency. The expression in S. 228 should be narrowed so as to include only "rules" as given in S. 229. All the provisions of the insolvency law and particularly S. 28(2) are not incorporated into the Company Law. (Vol 23) 1936 Pesh 57 (60) (DB).

[2] Where a decree is passed after a regular contest against the Company, the official liquidator cannot go behind the decree and reopen the case. (Vol 14) 1927 All 426 (428): 49 All 728.

[3] It is the duty of the liquidators to decide what is properly due from the company to various claimants and they are entitled to go behind decrees which they consider were not properly obtained. (Vol 27) 1940 All 514 (517): ILR (1940) All 730* (Vol. 14) 1927 All 426 (428): 49 All 728. (Where judgment is obtained on the admission of the insolvent the liquidator can ask for proof).

[4] No secured creditor need or can be forced to prove his debt, and can stand wholly outside the liquidation proceedings if he so elects and rely upon his security or decree if he has obtained one provided he has obtained leave to proceed from the winding-up judge. (Vol 16) 1929 All 353 (360): 51 All 695 (FB)

[5] Where by the debenture issued by a Company it bound itself and the successors and its real and personal estate for repayment if seems due and also there was a proviso that the debenture holders were entitled to repayment of the principal and interest *pari passu*: *Held*: that they were entitled to prove with other creditors against the general assets with respect to the portion of the debt unsatisfied from out of the security. (1880) 15 Ch. D 465 (472).

[6] As to the valuation of the liabilities of an insurance company, see section 55, Insurance Act, 1938.

229. In the winding up of an insolvent company the same rules shall prevail and be observed

Application of insolvency rules in winding up of insolvent companies.

with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and

all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.

[(1908) 8 Edw. VII, C. 69—S. 207; (1929) 19 and 20 Geo. V, C. 23—S. 262]

SECTION 229—Synopsis.

1. Applicability and scope.
2. Debenture holders—Claim of.
3. Debts—Proof of.
4. Director as creditor.
5. Floating charge.
6. Fraudulent transfer.
7. Interest.
8. Power of winding up Judge to decide question of title.
9. Priority—Crown debts.
10. Priority—Trust money.
11. Secured creditor.
12. Set-off.

1. Applicability and scope.—[1] Ordinary bankruptcy rules apply to companies in liquidation. (Vol 8) 1921 Lah 346 (348) : 1 Lah 368 (DB) * (Vol 28) 1941 Mad 622 (623) * (Vol 28) 1941 Mad. 18 (19) : ILR (1941) Mad. 328 (DB).

[2] The phrase "Same rulesunder the law of insolvency" in S. 229 includes rules contained in the sections of the Provincial Insolvency Act, rules made under power conferred by that Act and rules of practice, unless the companies Act itself provides for the matter in question or is in conflict with the rule which it is sought to import. (Vol 16) 1929 All 353 (356) : 51 All 695 (FB) * (Vol 29) 1942 Oudh 417 (421) : 18 Luck 110 (DB) (Word "rules" in S. 229 should be understood in the sense of provisions, and should not be restricted to "rules made under an Act" (Vol 28) 1936 Pesh 57 (DB). (Not followed).

[But see (Vol 28) 1936 Pesh 57 (60) (DB). (S. 229 does not import all the provisions of the Provincial Insolvency Act into company Law and S. 28(2) of the Provincial Insolvency Act is not so imported.)

[3] Section 229, makes the rules of bankruptcy applicable as far as may be to the winding up of companies. In case of conflict between the companies Act and the Insolvency Act the provisions of the former must prevail. (Vol 18) 1931 Lah 351 (352) : 12 Lah 678 (DB).

2. Debenture holders—Claim of.—[1] The debenture-holders are not bound by anything done by the official liquidators, but they have no better claim than the company itself. They have a charge on the assets of the company but what those assets are depends on the right of the company. The debenture-holders can have no greater rights than the company from which their rights are derived. (Vol 27) 1940 All 490 (493) (DB).

3. Debts—Proof of.—[1] The provisions of S. 34 (2) Provincial Insolvency Act apply to all debts including

judgment debts and by S. 229 Companies Act that provision is applicable to Insolvent Companies. (Vol 22) 1935 Oudh 451 (452).

[2] A judgment is always *prima facie* proof of debt. An official liquidator can go behind the judgment of the Court and look into the consideration for a judgment-debt in case where there had been no real contest between a claimant and the company which goes into liquidation later, or there was an absence of real trial on the merits of the case or there was absence of *bona fides* or there was a miscarriage of justice. (Vol 22) 1935 Oudh 451 (452) * (Vol 14) 1927 All 426 (428) : 49 All 728.

[3] The Liquidator in a voluntary winding up, who occupies the same position of a trustee in bankruptcy, is entitled to ask the Court sitting in insolvency jurisdiction to go behind a judgment passed against a company. Fraud need not be shown. It is sufficient if it can be shown that there ought not to have been a judgment. (Vol 19) 1932 Bom 253 (254) (DB).

[4] A liquidation court can go behind assessments of income tax though the latter are *prima facie* evidence that certain income was earned and that an amount of tax is due. The onus, of proving that the assessment does not represent the real taxable income rests on the Liquidator. (Vol 30) 1943 Lah 228 (231, 232) : ILR (1943) Lah 706 (SB).

[5] Where the assessment of income tax on a company before its winding up, had been made on an estimated income without the accounts being looked into and the accounts show a loss instead of profits the official Liquidator can question the validity of the assessment debt and call for its proof. (Vol 22) 1935 Oudh 451 (452).

[6] But in a subsequent case the Oudh Chief Court has held that where a company has been assessed under S. 28(4) of Income-Tax Act, on the basis of the estimated income of the previous year and the order of assessment is not appealed against, the assessment becomes final and cannot be challenged or reopened in liquidation proceedings. (Vol 28) 1941 Oudh 260 (262) : 16 Luck 599 (DB).

[7] As to fixing time for proof of debts, see Section 191.

[8] As to debts provable see S. 46, Presidency Towns Insolvency Act, 1909, and S. 34 Provincial Insolvency Act, 1920.

4. Director as creditor.—[1] The Courts do not look with favour on agreements between directors for their own advantage, and certainly not on those which would prejudice other creditors in the event of liquidation; Where a director claims by virtue of a promise by a co-director to pay a big sum if anything went wrong with the company, the claim will not be allowed unless the formalities have been observed. (Vol 22) 1935 Lah 917 (918).

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[2] A contract by which the director of a company lends money to the company and becomes its creditor is in the nature of a contract between a trustee and his *Cestui que trust*; the trustee by discharging a small portion of the *Cestui que trusts'* indebtedness puts himself in the position of a secured creditor and prevents it from paying off its creditors equitably. It is not right that the director should have such rights and therefore he will not be allowed to enforce his security as against an innocent purchaser for value in execution of debt due to an unsecured creditor. (Vol 24) 1937 Pat 151 (154) : 15 Pat 762 (DB).

5. Floating charge.—[1] S. 52 Presidency Towns Insolvency Act does not apply to floating charges created by company registered under the companies Act before its liquidation in favour of its bank. (Vol 12) 1925 Mad 271 (271, 272).

6. Fraudulent transfer.—[1] The unsecured creditors can challenge through the liquidator, who represents them, a transfer of property belonging to the company if the transfer is fraudulent. If the liquidator refuses they may do it themselves with the leave of the Court under S. 54A Provincial Insolvency Act. (Vol 29) 1942 Oudh 417 (420) : 18 Luck 110 (DB).

7. Interest.—[1] Where a company has been wound-up, the creditors of the company should be allowed interest from the date of the winding up on the outstanding debts before the preferential share-holders can get anything interest of 6 per cent may be allowed ; a rate of 4 per cent is proper. (Vol 21) 1934 All 189 (189, 190) : 56 All 423.

[2] Company in liquidation becomes solvent when it has paid off its liabilities existing at the date of the winding up order ; ordinary bankruptcy rules are applicable to companies in liquidation and when the liabilities existing at the date of the winding up order have been discharged, creditors are entitled to subsequent interests on debts carrying interest. (Vol 8) 1921 Lah 346 (348) : 1 Lah 368. (DB) * (Vol 18) 1931 Rang 334 (335, 336) : 9 Rang 318 (DB).

[3] When a company has been ordered to be wound up interest upon debts carrying interest ceases to run from date of the winding up order, unless the assets are enough to pay all debts in full. Where the estate is insolvent, nothing should be allowed for interest. If there is a surplus account must be taken as between the company and the creditors in the ordinary way by applying each dividend in the first place to the payment of interest due at the date of the dividend and surplus, if any, to the reduction of the principal. (Vol 17) 1930 Mad 1012 (1015) : 54 Mad 324.

[4] S. 229 is only applicable to insolvent companies and interest accruing after the commencement of liquidation is not a provable debt under the Act. (Vol 18) 1931 Rang 334 (335, 336) : 9 Rang 318 (DB).

8. Power of winding up Judge to decide question of title.—[1] Winding up Judge can adjudicate upon a question of title raised by an unsecured creditor whose claim is disputed by the official liquidator, the question being expressly covered by S. 229. (Vol 29) 1942 Oudh 417 (420) : 18 Luck 110 (DB).

9. Priority—Crown debts.—[1] Crown cannot claim priority in payment of its claims save that expressly conferred by the Act itself, in particular by S. 230 and S. 232 (2) (Vol 33) 1946 FC 16 (19) FC) * ('37) ILR (1937) 1 Cal 684 (688) * (Vol 18) 1931 Lah 351 (352) : 12 Lah 678 (DB) * (Vol 14) 1927 Bom 606 (608) (Priority of all Crown debts which prevails in insolvency,

under S. 49 Presidency Towns Insolvency Act obtains equally in the winding up of a company by reason of S. 229, and that is not confined to the debts mentioned in S. 230)].

10. Priority—Trust money.—If security deposit made with a company is impressed with trust or held by the company in fiduciary capacity the depositor can get it back from the company's assets in priority over other creditors. His right is not affected because the deposit was not ear-marked by the company but was mixed up with the other funds. Whether the deposit is to be treated as a trust or as a loan depends on the facts and circumstances of each case, or on construction of a written contract, if any. (Vol 30) 1943 Cal 105 (106) : ILR (1943) 1 Cal 313 (DB).

[2] On the principle that money placed by customer with bank with specific purpose is impressed with trust the deposit by its employee or selling agent with the company for good behaviour or performance of other obligations must be regarded as trust money unless other terms and conditions show it to be a debt. The mere stipulation for interest on the deposit or the fact that the company would be entitled to liquidate its claim from out of it would not establish the relation of debtor and creditor. (Vol 30) 1943 Cal 105 (108) : ILR (1943) 1 Cal 313 (DB).

[3] Money deposited by an employee with the bank as security for his good behaviour constitutes trust money in the hands of the bank and does not form part of its assets divisible among its creditors. The depositor is entitled to priority over other creditors. The fact that the money deposited was to carry interest does not affect the position. (Vol 26) 1939 Mad 337 (345) * (Vol 28) 1941 Oudh 126 (127, 128) : 16 Luck 241 (DB) * (Vol 25) 1938 Mad 651 (652).

[4] Selling agent appointed by company depositing security for fulfilment of his obligations under agreement—Deposit carrying interest and refundable on expiry of agreement—No fiduciary relation held was created—Agent held not entitled to preferential treatment. (Vol 25) 1938 All 574 (576) : ILR (1938) All 596.

[5] Security deposit by selling agent with company due discharge of terms of agreement carrying interest—Money not to be ear-marked but could be used by company for its purposes—No fiduciary relation held created between company and agent—Agent held could not claim preference in respect of deposit. (Vol 19) 1932 Bom 311 (314).

[6] Cashier depositing security for appointment in bank—Deposit to carry interest and remain separate from other deposits and to be held by bank as trustee—Fact of use of deposit by bank though known to cashier held could not alter fiduciary relationship—Cashier held entitled to preference. (Vol 24) 1937 Cal 221 (222) : ILR (1937) 2 Cal 305.

[7] The fact that the depositor is a trustee and that the money deposited is trust money does not affect the relation which the law creates between a bank and an ordinary customer namely the relation of a debtor and creditor and does not give the depositor a right to preferential payment when the bank goes into liquidation. The legal effect of notice to the bank that money deposited is trust money is only to cast a duty on the bank not to participate in a breach of trust by the trustees. (Vol 27) 1940 Mad 178 (179).

[8] Where money is deposited by a company with a bank as a result of the statutory obligation imposed upon the company by S. 232-B (1), the Company is not

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entitled to rank in the liquidation of the bank in priority to the ordinary creditors. (Vol 28) 1941 Mad 48 (48, 49) : ILR 1941 Mad 125 (DB).

[9] Where money was paid to an insurance company for revival of a policy and the company went into liquidation before the policy was revived it was held that no trust had been created and hence no preference could be given in respect of the money paid. (Vol 29) 1942 Mad 210 (211).

[10] Company agreeing to hire film to T on deposit of Rs. 1,000-T sending Rs. 250 as earnest money—Company unable to complete contract—Insolvency of Company—T admitted as creditor claiming whole amount—Company having at its credit Rs. 1,100 at winding up order—Company held trustee for T for Rs. 250—T held entitled to whole amount under S. 229 read with S. 52 (1) Insolvency Act. (Vol 24) 1937 Mad 833 (835).

[11] Company having current account with Travancore Bank at Nagarcoil—Bank suspending business on June 20, 1938 and in process of liquidation under Court's order for its compulsory winding up—Company having no account with Bank's Bombay branch—On June 14, 1938, company instructing Bombay branch to collect amount of cheque in its favour on Indian Bank at Bombay and remit proceeds to Bank's Nagarcoil branch to credit of company's account—Bombay branch of Bank collecting amount next day but not remitting it to Nagarcoil—After Bank's liquidation amount remaining with Bombay branch—Bank's position held was of agent holding his principal's money for special purpose—Company held entitled to amount of cheque. (Vol 29) 1942 Mad 646 (648) : ILR (1943) Mad 187 (DB).

[12] Provident fund established by a bank for payment to their employees or their legal representatives is in the nature of a trust. Fund does not form part of assets of Bank by combined operation of S. 229 Companies Act and S. 52 Presidency Towns Insolvency Act and cannot be taken into account during administration of assets during liquidation. (Vol 26) 1939 Mad 352 (356).

[13] Where the company in liquidation was an agent to another company for sale of its goods and was to pay the sale proceeds in due course and return the goods not sold, the principal company was held to have priority in respect of the price of goods to be received from the agent company. (Vol 12) 1925 Mad 271 (271, 272).

[14] Where realisation of assets of a bank subsequent to its liquidation are really only the previously existing assets, present in the bank's strong rooms changed, into different form, the charge in respect of trust moneys deposited with the bank extends also to these subsequent realisations of assets. (Vol 28) 1941 Oudh 126 (128) : 16 Luck 241 (DB).

11. Secured creditor.—[1] A secured creditor, must confine his claim when he seeks to recover against other property as an unsecured creditor to the principal and interest accrued up to the date of adjudication, or liquidation deducting therefrom the amount realised by the sale of the property. (Vol 17) 1930 Rang 20 (21) : 7 Rang 514. (Affirmed in 1930 Rang 47 : 7 Rang 514, (DB).

[2] A secured creditor in the case of a liquidation is on the same footing as in that of insolvency proceedings. The property hypothecated would thus be liable

for the whole claim and it is only the liability of the remaining assets that could be affected by the winding up order. (Vol 9) 1922 Lah 281 (285) : 3 Lah 59 (DB).

[3] Secured creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or his decree, provided he has obtained leave to proceed from the winding up judge. (Vol 16) 1929 All 353 (360) : 51 All 695 (FB).

[4] An attaching creditor is not a secured creditor. An attachment creates no charge in favour of the attaching creditor and confers no right on alienation. The attaching creditor must take *pro rata*. (Vol 17) 1930 Bom 16 (18) * (DB) (Vol 29) 1942 Pat 508 (511) : 21 Pat 287 (DB).

12. Set-off.—[1] Before a set off can be claimed there must be mutuality of debts or creditors or dealings, i.e., the set off is available only between the same parties in the same right as the claim. (Vol 28) 1941 Mad 654 (655).

[2] Under O. 8, r. 6 Civil PC it is a condition precedent to a set-off that the money should be "legally recoverable" by the defendant from the plaintiff. But the set-off which the Official Liquidator exercises is not controlled by such condition precedent. The Official Liquidator can appropriate the sum that the depositor owes to the company in satisfaction of what the company owes to the depositor even if the company's claim is time-barred. (Vol 28) 1941 All 278 (279) : ILR (1941) All 415.

[3] A debt, although not presently payable can be set-off against moneys owing to a company in liquidation ; such a set-off is not a fraudulent preference. (Vol 27) 1940 Mad 157 (158, 159).

[4] Debtor is entitled to claim set-off in respect of amount due to him from the company. The fact that another person has stood surety for his debt does not deprive him of this right. (Vol 27) 1940 Mad 266 (268).

[5] Liability of principal debtor and Surety to company joint and several—Surety himself creditor of Company in separate dealing—Dealings between them are mutual within S. 46 Pro. Insolvency Act—Surety is entitled to set-off. (Vol 27) 1940 Mad 266 (268).

[6] A joint debt and a several debt cannot be set-off against each other; but where a debt is joint and several a set-off can be allowed. Where several partners of a firm which has incurred a debt from a bank are sued by the bank, one of the partners can set-off against the claim of the bank the amount due to him from the bank in as much as the liability of partners is joint and several. (Vol 28) 1941 Mad 654 (657).

[7] A had a personal account with a Bank on which he had overdrawn. He was also interested in another account in the name of a firm of which he was a partner and which he alone operated. The liquidators of the Bank sued for the amount due under his personal account. He claimed to set-off the amount due to him by the bank under the firm's account on which the bank was indebted.

Held, that S. 229 made the provisions of S. 46 (Provincial Insolvency Act 1920 applicable to the case, that the dealings in question were not "mutual dealings" within the meaning of S. 46 and the set-off claimed could not be allowed. (Vol 14) 1927 Lah 228 (230) : 18 Lah 105 (DB).

[8] Where an amount is payable by A in his individual account with a bank and an amount is payable

Preferential payments.

230. (1) In a winding up there shall be paid in priority to all other debts—

- (a) all revenue, taxes, cesses and rates, whether payable to the crown or to a local authority, due from the company at the date hereinafter mentioned and having become due and payable within the twelve months next before that date;
- (b) all wages or salary of any clerk or servant in respect of service rendered to the company within the two months next before the said date, not exceeding one thousand rupees for each clerk or servant;^a [*].
- (c) all wages of any labourer or workman, not exceeding five hundred rupees for each, whether payable for time or piecework, in respect of services rendered to the company within the two months next before the said date;
- (d) compensation payable under the Workmen's Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company;
- (e) all sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company; and
- (f) the expenses of any investigation held in pursuance of clause (iv) of section 188 of this Act].

(2) The foregoing debts shall—

- (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportion; and
- (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge,

(3) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

Section 229 (contd.)

to A and B in their joint account with the bank the two accounts can be set off if it can be shown that though the joint account is in the name of A and B, A is solely entitled to the amount. (Vol 27) 1940 Mad 436 (435).

[9] Bank lending Rs. 2,000 to G—P having Rs. 4,300 in fixed deposit with Bank giving same as security and allowing Bank to set it off against loan advanced to G—Liquidation of Bank—G, claiming to set-off his loan against amount due by Bank to P—Set-off cannot be allowed under S. 229 (Equity of case demanded that bank should adjust dividend payable under deposit towards amount due and recover balance alone) (Vol 28) 1941 Mad 622 (624, 625).

[10] S to supply cotton to company for spinning, pay spinning charges at certain rate, making advances to company to keep it going on and deduct advances from sum payable by him as spinning charges—Company going into liquidation—S held entitled to deduct advances from sum payable as spinning charges. (Vol 27) 1940 All 490 (494) (DB).

[11] As to set-off, See S. 47, Presidency Towns Insolvency Act, 1909 and S. 46, Provincial Insolvency Act, 1920.

SECTION 230—Synopsis.

1. Sub-section (1) (a).
2. Sub-section (1) (b).
3. Sub-section (1) (c).
4. Sub-section (2).
5. Sub-section (3).
6. Sub-section (5).

1. Sub-section (1) (a).—[1] The priority of payments of all crown debts which prevails in insolvency under S. 49, Presidency Towns Insolvency Act, obtains equally in the winding up of the company in liquidation by reason of Section 229, Companies Act, and that priority is not confined to the debts mentioned in S. 230. (Vol 14) 1927 Bom 606 (609).

[2] In the winding up of a company only those crown debts which are specifically mentioned in S. 230 of the Indian Companies Act have priority. ('37) ILR (1937) 1 Cal 684 (687).

[3] Income-tax not payable until after the winding up order has been made is not a debt for which priority can be claimed. (Vol 30) 1943 Lah 228 (229) : ILR (1943) Lah 706 (SB).

(4) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof :

Provided that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(5) The date hereinbefore in this section referred to is—

(a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding up order; and

(b) in any other case, the date of the commencement of the winding up.

[1882—S. 200-A; (1903) 8 Edw. VII. C. 69—S. 209; (1929) 19 and 20 Geo. V. C. 23—S. 264]

[a] The word "and" was repealed by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 106. [15-1-1937]

[b] *Inserted, ibid.*

Objects and Reasons.

Amendments made in 1936—Sub-section (1) (d)—"It is equitable that compensation payable under the Workmen's Compensation Act should not be treated as an ordinary debt provable in the winding up but should have priority. This view is taken in England."—S. O. R., 1936.

Sub-section (1) (e).—"We have inserted amongst the items receiving priority in winding up sums due to an employee from a provident fund. This supplements the provision made by section 282 B (2) in the interests of provident fund subscribers."—S. C. R., 1936.

Section 230 (contd.)

[4] Word "revenue" is not necessarily *ejusdem generis* with words that follow and means income. (Vol 17) 1930 All 884 (885) : 53 All 92.

[5] Rent of Government telephone lines and also charge for trunk calls is revenue. (Vol 17) 1930 All 884 (888) : 53 All 92.

[6] A claim for moving the telephone lines is for work and labour done and cannot come within the words "Revenue taxes, cesses and rates" in the section. (Vol 17) 1930 All 884 (884, 885) : 53 All 92.

2. Sub-section (1) (b).—[1] Servants of the company who have lost their appointments at the date of the voluntary winding up have a claim in priority to the extent of two months' salary. (Vol 21) 1934 All 114 (114) : 56 All 692.

3. Sub-section (1) (e).—[1] Where the security deposit made with the company by its employee or selling agent is regarded as impressed with a trust, or a deposit can be regarded as being held by the depositary in a fiduciary capacity the depositor would in a competition with the creditors of the company get the whole of his money. Whether the security deposit will be considered as trust money in the hands of the company or as a loan to it would depend upon the facts and circumstances of each case, and where there is a written contract, the question would have to be decided on a construction of that instrument. (Vol 30) 1943 Cal 105 (106) : ILR (1943) 1 Cal 313 (DB).

[2] The test of whether amounts deposited by an employee with Company as security for discharge of his obligation is to be held as a trust fund or not is to see whether it was intended that it should remain a segregated fund or whether it should become the property of the Company and be compensated for by the company's covenant to repay it. In the former case only a trust is created. (Vol 29) 1942 All 119 (120, 121) : ILR (1942) All 242 (FB).

[3] On the principle that where money is placed by a customer in the hands of a bank with a specific purpose a trust is impressed, the money deposited by its

employee or selling agent with the company as security for good behaviour or for the performance of other obligations must be regarded as trust money in the hands of the employer or the company, unless there are other terms and conditions which would make the relation between them to be that of creditor and debtor. (Vol 80) 1943 Cal 105 (108) : ILR (1943) 1 Cal 313 (DB).

[4] A person by agreement was appointed the sole selling agent of a company. He deposited certain sum as security on condition that it would be refunded after expiry of agreement. On expiry of the agreement he ceased to be selling agent and demanded a refund of the security money. Subsequently company was wound up. *Held*, no trust was created and he was not entitled to preferential payment. (Vol 25) 1938 All 574 (576) : ILR (1938) All 896.

[5] Whether an employee is entitled to be paid out of the provident fund will depend upon the rules of the fund but so far as the applicability of the section is concerned it is enough if he is an employee on the date of winding up. It is immaterial when he entered service. (Vol 26) 1939 Mad 352 (354)

[6] When a foreign company is wound up in more jurisdictions than one the Court of each jurisdiction will be governed by the forensic rules which govern the conduct of its own liquidation. S. 230 (1) (e) is a forensic rule. It is applicable in the matter of winding up of foreign bank wound up in British India. (Vol 26) 1939 Mad 352 (354).

4. Sub-section (2).—[1] Receiver appointed on behalf of debenture-holder—Debenture secured by fixed as well as floating charge—Priority given to preferential debts (such as wages of workman) applies only to assets subject to floating charge. (Vol 25) 1938 All 609 (611) : ILR (1938) All 869.

[2] Where a company creates a fixed charge by mortgaging its immovable properties and also gives the mortgagee a floating charge over its book debts, S. 230 applies to the floating charge. Consequently, the debts mentioned in S. 230 (1) must be given priority over the floating charge on the book debts. (Vol 28) 1941 Mad 586 (587) (DB).

^a[230.A. (1) Where any part of the property of a company which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he had endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the Court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property :

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Court.

(2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the company, and the property of the company, in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person.

(3) The Court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Court thinks just.

(4) The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight days after the receipt of the application or such further period as may be allowed by the Court, given notice to the applicant that he intends to apply to the Court for leave to disclaim, and in the case of a contract, if the liquidator, after such an application as aforesaid, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it.

Section 230 (contd.)

[3] Action by holders of debentures issued by company under security of fixed and floating charge over its assets—Receiver appointed by Court acting under Court's order and obtaining loan to pay off arrears of wages of employees—Lender held entitled to charge in priority to debenture-holders. (Vol 32) 1945 PC 121 (123) : ILR (1945) All 597 : 72 Ind App. 133 (PC). (Vol 25) 1938 All 609 : ILR (1938) All 869 reversed).

[4] As to the payment of certain debts out of assets subject to floating charge, in priority to claims under the charge, See S. 129.

5. Sub-section (3).—[1] A successful litigant against a company in liquidation is entitled to be paid his costs in full in priority over other ordinary creditors. Where other creditors are in the same position, they rank *pari passu* as regards fund available for the discharge of their debts. (Vol 29) 1942 Lah 10 (11) : ILR (1942) Lah 742 (DB).

6. Sub-Section (5).—[1] Date of commencement of winding up, in the case of a compulsory winding up preceded by voluntary winding up, is the date on which the resolution for voluntary winding up was passed. (Vol 21) 1934 All 114 (114) : 56 All 692.

[2] Where on 8-10-1878 winding up petition was presented followed by the appointment of a provisional liquidator on the following day and on 18-10-1878 a

resolution for voluntary winding up was passed and it continued under the supervision of the Court; it was held that the winding up started on the same date on which liquidator was appointed. (1880) 15 Ch D 465 (472).

SECTION 230A—Note 1.

[1] A customer of a bank putting in an application under section 230A, after an order for the compulsory winding up of the bank is passed, for rescinding a contract between him and the bank and praying for damages is entitled to have his application heard. If the Court then comes to the conclusion that the contract has already been rescinded it would have no power to pass an order on the application and the applicant would have to be relegated to the ordinary procedure provided by the Act for proving any debt in the winding up. The applicant cannot be relegated to the procedure of filing a suit unless he is heard. (Vol 28) 1941 Mad 18 (19) : ILR (1941) Mad 328 (DB).

[2] The creditor of a company in liquidation was asked to prove his claim by a suit which he failed to do within time. The Court refused to grant any further extension. The creditor relying on S. 230A applied again to the court to have his claim inquired into and adjudicated in liquidation proceedings. It was held that if the creditor had at the beginning insisted on adjudicating his claim without recourse to the suit, his case would have fallen within S. 230A. (Vol 28) 1941 Mad 355 (355) (DB).

(5) The Court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company; make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) The Court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose;

Provided that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the company whether as under-lessee or as mortgagee except upon the terms of making that person—

- (a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or
- (b) if the Court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the Court shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company.

(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up.]

[(1929) 19 and 20 Geo. V, C. 23—S. 287.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 107. [15-1-1937].

231. (1) Any transfer, delivery of goods, payment, execution or other act relating to property Fraudulent prefer- which would, if made or done by or against an individual, be deemed in ence. his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

SECTION 231—Note 1.

[1] In order to ascertain whether there has been fraudulent preference the act complained of must be done by volition. The preference should be voluntary and not brought on by pressure. (Vol 20) 1933 Cal 809 (810) (DB).

[2] Where the proper inference to draw from the facts is that the dominant motive actuating the debtor, is that in making the transfer to his creditor, he (the debtor) is doing what he felt himself bound or compelled to do, the case is not of fraudulent preference. (Vol 20) 1933 Cal 809 (810, 811) (DB).

[3] The fact that two of the creditors at least were left unpaid while the rest were satisfied is sufficient to justify finding that there was an intent to prefer. (Vol 20) 1943 Mad 54 (55); ILR (1944) Mad 853 (DB).

[4] A debt although not presently payable can be set off against moneys owing to a company in liquidation; such a set-off is not fraudulent preference. (Vol 27) 1940 Mad 157 (158, 159).

[5] Contract of purchase entered into by company between presentation of winding up petition and winding up order will be confirmed if goods were purchased in ordinary course of business and delivery taken and a claim for the price of goods should be allowed by the Court. (Vol 17) 1930 Mad 1012 (1016): 54 Mad 324.

[6] Per Niamatullah, J.—A winding up Court, unlike an insolvency Court, cannot take cognisance of an adjudication the title of third persons except to the limited extent mentioned in Ss. 231 and 232. (Vol 16) 1929 All 353 (362): 51 All 695 (FB). To impeach such title, the liquidators must have recourse to regular suits in ordinary civil Courts.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to supervision of the Court, and a resolution for winding up in the case of a voluntary winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

[1882—S. 213 ; (1908) 8 Edw. VII. C. 69—S. 210 ; (1929) 19 and 20 Geo. V, C 23—S. 265].

232. (1) Where any company is being wound up by or subject to the supervision of the Court, Avoidance of certain any attachment, distress or execution put in force without leave of the Court attachments, executions, against the estate or effects ^a [or any sale held without leave of the Court etc. of any of the properties] of the company after the commencement of the winding up shall be void.

(2) Nothing in this section applies to proceedings by ^b[the Crown].

[1882—S. 212 ; (1908) 8 Edw. VII C. 69—S. 211 ; (1929) 19 and 20 Geo V. C. 23—S. 174 (1)].

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 108. [15-1-1937]

[b] *Substituted*, by A. O. for "the Government."

Objects and Reasons.

Amendment made in 1936—The section as it stood had been construed [See (Vol 8) 1921 All 149 : 43 All 433] as not covering sales held after the winding up. The amendment to the section made in 1936 is designed to forbid such sale.—See S.O.R., 1936, Cl., 85.

233. Where a company is being wound up a floating charge on the under-taking or property Effect of floating of the company created within three months of the commencement of the charge. winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent, per annum.

[(1908) 8 Edw. VII, C. 69—S. 212 (1929) 19 and 20 Geo. V. C. 23—S. 266]

Section 231 (*contd.*)

[7] Money paid to creditor by way of fraudulent preference—Remedy of liquidator—No summary method of recovering money—Regular suit should be filed. (Vol 19) 1932 Sind 106 (107) : 26 Sind LR 102.

[8] Written statements which are filed opposing application by official liquidator to set aside certain fraudulent transfers need no court-fee stamps. (Vol 21) 1934 All 332 (333) : 56 All 747.

[9] Where a voluntary winding up by a company is followed by a petition for its winding up by or subject to the supervision of the Court, the crucial date for determining whether a transfer by the company was within three months of the act of insolvency is the date of the petition for compulsory winding up. (Vol 30) 1943 Mad 54 (55) : ILR (1943) Mad 353 (DB).

SECTION 232—Note 1.

Cognate Sections.

Attachment, distress or execution, setting aside 216 (2).

Supervision order, effect of—225.

Winding up, commencement of—168, 204.

Winding up order, suits stayed on—171.

[1] Any attachment, distress or execution put in force against a company without leave of the Court after the commencement of the winding up shall be void only in cases in which the company is being wound up either by the Court or subject to the supervision of the Court, and a voluntary shall not *ipso facto* put an end to an attachment already in force. (Vol 11) 1924 Oudh 406 (407)* (Vol 3) 1916 All 174 (175) : 38 All 407 (DB).

[2] Leave of the Court under section 171 is essential for the purpose of proceeding to execution even in case of decree obtained by the Government. (Vol 19) 1932 Pat 1 (3) (DB).

[3] A sale without permission of Court in contravention of S171—Assets after winding-up order in execution of decree passed before order, is voidable at the instance of the Liquidator—Want of knowledge of the winding up order does not validate such a sale. (Vol 3) 1916 Pat 47 (48) : 2 Pat L Jour 77 (DB)

[4] Company in liquidation—Income-tax officer assessing such company to income-tax and proceeding to recover tax under section 46, Income-tax Act—Income-Tax department cannot proceed to do so without leave of winding up Court. (Vol 32) 1945 All 354 (359); ILR (1945) All 352 (DB).

234. (1) The liquidator may, with the sanction of the Court when the company is being wound up by the Court or subject to the supervision of the Court, and with the sanction of an extraordinary resolution of the company in the case of a voluntary winding up, do the following things or any of them :

- (i) pay any classes of creditors in full ;
- (ii) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, whereby the company may be rendered liable ;
- (iii) compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) The exercise by the liquidator of the powers of this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of these powers.

[1882—Ss. 201, 202 : (1908) 8 Edw. VII C. 69—S. 214 (1) (a) (i) (iii)—151 (3), 186 (iv)—(vii) ; (1929) 19 and 20 Geo. V C. 23—Ss. 191 (1) (d) (e) (f), (3) and 248.]

235. (1) Where, in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory ^a[made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is

SECTION 234—Note 1.

[1] Though the creditors referred to in S. 230 are persons entitled to priority under statute and as of right, the Court has under S. 234 a discretion to order payment in full to any class of creditors other than those referred to in S. 230 (Vol 23) 1936 Oudh 338 (340) : 12 Luck 233 (DB).

[2] Sanction by extraordinary resolution as under S. 234 is necessary in order that a compromise between a liquidator of a company and a contributory should bind the liquidator. (Vol 11) 1924 Lah 148 (149) : 4 Lah 239 (DB) * (Vol 10) 1923 Lah 85 (86).

[3] The liquidator must show that the compromise will be beneficial to the company. (Vol 26) 1939 Lah 497 (497) : ILR (1939) Lah 324.

[4] The Court cannot compel an unwilling liquidator to compromise a debt due to the Company. (Vol 26) 1939 Lah 497 (497) : ILR (1939) Lah 324.

[5] An official liquidator is not allowed to refer matters in difference to private arbitration under S. 234 (Vol 15) 1928 All 553 (553) : 50 All 867.

[6] High Court should be very slow to interfere under S. 234 with the exercise of discretion by the lower court unless it is satisfied that the discretion was unreasonably exercised. (Vol 23) 1936 Oudh 338 (340) : 12 Luck 233 (DB).

SECTION 235—Synopsis.

1. Applicability and scope.
2. Director, manager, etc.—Liability of.
3. Legal representative—Liability of.
4. Jurisdiction.
5. Joint trial.
6. Limitation.
7. Misfeasance.
8. Onus.
9. Petitions—Amendment of.
10. Promoters, auditors and share brokers.
11. Right to appeal.
12. Right to costs.
13. Res judicata.

1. Applicability and scope.—[1] This section is, as amended in 1936, a section of procedure containing a rule of limitation which together with the rule of limitation contained in the old unamended section is adjective and not substantive law and has, therefore, a retrospective operation. (Vol 33) 1946 All 269 (274) (DB).

[2] S. 235 is a procedure section only and creates no new or additional liability but provides a summary mode of enforcing existing rights. (Vol 17) 1930

longer.] examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

[b] [* * * * *]

[1882—S. 214; (1908) 8 Edw. VII C. 69—S. 215; (1929) 19 and 20 Geo. V. C 23—S. 276].

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22-XXII) of 1936), S. 109. [15-1-1937].

[b] Sub-section (3) was repealed, *ibid*.

Objects and Reasons.

Amendments made in 1936—Sub-section (3) of the section as it stood by applying to an application under the section the limitation imposed on a suit allowed delinquent directors in many cases to evade

their civil liabilities. The amendment made to the section in 1936 allows three years for the making of an application dating from the first appointment of a liquidator.—See S.O.R., 1936, Cl. 86.

Section 235 (contd.)

Bom 572 (591) : 54 Bom 226 (DB) * (Vol 14) 1927 Lah 433 (434) : 8 Lah 167 (DB) * (Vol 10) 1923 Lah 58 (60) (DB).

[3] The application contemplated in S. 235 is one filed really on behalf of the company and not in exercise of any new right conferred upon the liquidator. (Vol 20) 1933 All 789 (803) : 55 All 912 (FB).

[4] This section contemplates a loss to the company before an order for the delivery of the property of the company can be passed under the section. (Vol 28) 1941 Mad 53 (54) : ILR (1941) Mad 120 (DB) * (Vol 4) 1917 Lah 383 (385) (DB) (Prejudice to the interest of the company by the acts of directors must be shown before taking any proceeding against directors).

[5] Orders passed under S. 235 do not bar suit against third party. (Vol 22) 1935 All 995 (999) : 53 All 342 (DB).

[6] The barring of an application under this section does not debar the liquidator from seeking the remedy by a regular suit. (Vol 13) 1926 Lah 624 (626) : 8 Lah 549.

[7] Petition under S. 285 neither accompanied by affidavit nor a statement that information contained therein had been derived from sworn evidence as required by R. 77 of the Lahore High Court—*Held* that the rule did not require the affidavit to be filed along with the petition or that it should not be received at a later date and hence the defect was held not to vitiate the proceedings. (Vol 25) 1938 Lah 658 (669, 670) (DB.) (Per Young C. J. and Tekchand J.)

[8] A petition by liquidator under S. 235 is not bad because he does not state specific amount claimed. But he must however bring all facts on which the claim is based to the notice of court. The amount of compensation is to be assessed not by the liquidator but by the Court. (Vol 25) 1938 Lah 658 (664, 665) (DB) (Per Munroe, J.)

[9] An application under S. 235 is governed by the express provision provided for by the Companies Act, and the rules thereunder, for its contents and formalities. Civil PC is inapplicable though it is in the nature of a plaint. (Vol 25) 1938 Lah 658 (663) (DB) (Per Munroe, J.)

[10] Court can deliver property to the liquidator if company is *prima facie* entitled to it though its title is not admitted. The final decision as to title may

be made subsequently under S. 186 or S. 235. (Vol 23 1936 Lah 408 (409) (DB).

[11] Where a petition under S. 235 does not state particulars on which claim is based or sums sought to be recovered from the persons against whom the petition is presented and is not supported by affidavit, the absence of these does not render the proceedings defective. (Vol 25) 1938 Lah 658 (669, 670) (DB).

[12] Summary procedure contained in this section is inapplicable to every claim which the company has against its officers and the same can be resorted to only when such are in the nature of misfeasance or breach of trust in the performance of their duties. (1928) Ch 861 (871, 872).

2. Director, manager, etc.—Liability of.—[1] Directors must treat company's work as his own. He is not liable for error of judgment or unavoidable absence or imprudence not amounting to gross negligence. A director (a) must act honestly (b) must exercise such degree of skill and diligence as would amount to the reasonable care, which 'an ordinary man might take on his own behalf; (c) he ought to attend meetings when reasonably able to do so; and (e) he is in the absence of grounds for suspicion justified in trusting other Officials properly empowered to perform duties honestly. (Vol 13) 1926 Oudh 153 (156).

[2] Directors of a company acting within their powers and with reasonable care and honesty in the interest of the company, are not personally liable for losses the company may suffer by reason of their mistakes or errors in judgment. Hence where the act, in itself imprudent, is one which is authorised, they cannot be held responsible for the consequence. (Vol 13) 1926 Lah 153 (156).

[3] Directors of a company cannot be held personally liable on the ground that they have trusted the regularly authorised officers of the company and that they have failed to detect, and been misled by misrepresentation or concealment by such officers, if there was no reason for doubting their fidelity. (Vol 13) 1926 Oudh 243 (244) : 1 Luck 334. (DB).

[4] Where a director accepts fixed deposit receipts from the bank in view of the claim against a person who is allowed overdraft, and subsequently cashes it, then he is liable to refund the amount realised. (Vol 13) 1926 Oudh 153 (156).

Section 235 (contd.)

[5] Managing director allowing overdraft with motives of personal gain is liable to compensate the bank. (Vol 13) 1926 Oudh 153 (157).

[6] Directors party to fraud in floating company—Wilful contravention of S. 101 and guilty of misfeasance—Directors must discharge every creditor and return the money of the shareholders. (Vol 21) 1934 All 855 (863, 864) (DB).

[7] Where the directors permitted the company to commence business in spite of their knowledge that permission to do so had been obtained owing to false declaration and that the directors had not paid what was due in respect of their respective shares and consequently the company suffered loss, the directors were held liable to make repayment. The directors must be deemed to know the law. (Vol 25) 1938 Mad 124 (128) : ILR (1938) Mad 292 (DB)

[8] Directors wilfully shutting their eyes to the acts of agents or managing agents and recklessly sanctioning acts of such agents consciously, thereby aiding misfeasance, misappropriation and falsification of balance sheets are guilty of wilful conduct and are liable to pay compensation if that state of affairs continues over a series of years. (Vol 17) 1930 Bom 572 (585) : 54 Bom 226 (DB).

[9] A director is not a trustee of the loans advanced by a company before his acceptance of office as such. (Vol 2) 1915 Lah 132 (134) : 1915 Pun Re. No. 60.

[10] The directors are in a limited manner trustees. Their liabilities are governed by the Articles of Association and the written constitution of the company. The liability under S. 235 thus arises out of a contract which is partly in writing and partly not so. (Vol 24) 1937 Pat 293 (301).

[11] Although the position of directors differs from that of trustees in some respects yet to the extent of their being entrusted with the moneys of the company they are trustees and are jointly and severally liable for breach of trust. (Vol 24) 1937 Pat 293 (299).

[12] A Managing Director occupies the position of a trustee for the company and he is bound to exercise his powers only for the benefit of the company. If he takes a mortgage in his name with a part of company's amount representing that the entirety of the moneys advanced on the mortgage were moneys belonging to himself, he is guilty of breach of trust. (Vol 12) 1925 Cal 852 (855)

[13] Ex-director sought to be made liable on ground of not disclosing his indebtedness to company—Loss or damage must be proved to have resulted from non-disclosure. (Vol 2) 1915 Lah 132 (134) : 1915 Pun Re. No. 60.

[14] The section applies to the conduct of director as such, and any thing done by him during the period of his directorship in his capacity as a debtor cannot be made a ground of liability under the section. (Vol 2) 1915 Lah 132 (133) : 1915 Pun Re No. 60.

[15] The section cannot be applied for enforcing sums due under contracts between the company and other persons, whether they happen to be directors or not. Therefore arrears of rent due by a director under a contract of tenancy entered into in his private capacity is not recoverable under this section. (Vol 12) 1925 Lah 194 (195) : 5 Lah 461 (DB).

[16] Where Managing Director of a Bank induces

shareholders to pay dividend partly out of what was really capital, he 'misapplied' the company's money and is guilty of misfeasance and breach of trust and he could be compelled by court to contribute a reasonable sum by way of compensation. (Vol 2) 1915 Lah 471 (474) : 16 Cri L Jour 473 : 1915 Pun Re No. 28 (Cr) (DB).

[17] Where auditor was appointed at a general meeting of share-holders without proper quorum, it is a mere irregularity and does not vitiate appointment : so they are not only *de facto* but also *de jure* auditors and are liable for misfeasance. (Vol 1) 1914 Low Bur 138 (139) : 8 Low Bur Rul 80 (DB).

[18] Directors applying assets to other than defined objects are responsible as for breach of trust. (Vol 24) 1937 Pat 293 (299).

[19] The directors are liable to replace the moneys of the Company which they had misapplied by applying them to a purpose which is *ultra vires*. (1894) 18 Bom 119 (129) (DB).

[20] Unauthorised use of money by directors and managing agents does not by itself render them liable to make good the loss. Loss to company and use of money have to be connected as cause and effect. (1934) 3 All W. R. 222 (237) (DB).

[21] As to the power of the Court where the amount of the life insurance fund has been wrongfully diminished in contravention of the provisions of Insurance Act to proceed against every person who was at the time of the contravention a director manager, liquidator or an officer of the insurance company, see section 106, Insurance Act, 1938.

[22] As to the power of the Court to grant relief in certain cases to directors, see S. 281.

3. Legal representative—Liability of.—[1] Where a liquidator dies pending proceeding under S. 235 for alleged misfeasances, his personal representatives cannot be made liable. (Vol 31) 1944 Bom 193 (194) : ILR (1944) Bom 284 (DB).

[2] Proceedings contemplated in section 235 are intended to apply only to the director and not to his legal representatives. The right to bring summary proceedings under section 235 does not survive as against the personal representatives or heirs of a deceased director. In proper cases, however, there is nothing to prevent the liquidator from instituting a regular suit against the legal representatives or heirs of a deceased director. (Vol 26) 1939 All 1 (4) : ILR (1939) All 6.

[3] Action can be taken against representative of promoter or director only if he comes within the definition of promoter or director. (Vol 13) 1926 Lah 624 (626) : 8 Lah 549.

[4] On the death of a director pending the proceedings started against him under this section, the proceedings cannot be continued against his heirs (1946) 1 Mad L Jour 53 (53).

4. Jurisdiction.—[1] In an application relating to misfeasance of the directors of a company, the High Court of the Province wherein the registered office of the company is situate has got jurisdiction over the directors of the company who, at the time when the application is made, were residing outside the Province in India. But the High Court has no jurisdiction over the director residing in foreign countries. (Vol 24) 1937 Pat 196 (198, 199) : 15 Pat 630,

Section 235 (*contd.*)

[2] Where an official liquidator makes an application under S. 235 and he is ordered to state particulars of charge as against each of such persons and to make an affidavit, but instead of complying with the order the official liquidator institutes a criminal complaint under Penal Code, his conduct is a clear attempt to divest the Court of its jurisdiction. High Court cannot permit such an attempt to succeed. (Vol. 15) 1928 Oudh 104 (107) : 29 Cri L Jour 102 : 3 Luck 287.

5. Joint-trial.—[1] Where in a proceeding under S. 235 against certain persons, matters alleged against some of them differed entirely from those alleged against others, it was held that there could not be a joint trial of the claims against all. (Vol. 25) 1938 Lah 658 (671) (DB).

6. Limitation.—[1] Under Sub-section (3) of this section which made the Limitation Act, applicable to applications under this section, there was conflict of decisions whether applications under this section were governed by Act 36, 115, 116, or 120 Limitation Act. This has been removed by the Amendment Act 1936 which omits Sub-S. (3) of this section and provides in sub-S. (1) a special period of limitation of three years, from the date of the appointment of a liquidator or of misapplication, retainer, misfeasance or breach of Trust whichever is longer. The cases under old sub S. (3) having now become obsolete have been omitted.

[2] When in an application under S. 235 to High Court, the names of certain persons are added subsequently but documents relating to them fulfilling the requirements of rule under S. 235 are not filed at that time but later on, the date of the application against the added defendants is the date on which the documents are filed. (Vol. 25) 1938 Lah 658 (665) (DB).

[3] The official liquidators of a company are entitled to have the conduct of any promoter, director, manager or officer of the company examined under this section and to claim compensation for the wrongful act of any such person, discovered and proved as a result of such inquiry, notwithstanding that a cause of action on the act would, in a suit by the company itself, have been barred by the law of limitation in force prior to the coming into operation of the amendment, provided that the express provision as to limitation of the amended sub-section (1) are themselves observed. (Vol. 33) 1946 All 269 (276) (DB).

[4] The three persons enumerated in S. 235 are not representatives of company. Consequently if a suit by the company be time-barred, it does not necessarily follow that a suit by the official liquidator or a creditor or a contributory is necessarily time-barred. ('84) 3 All W. R. 222 (227, 229) (DB).

[5] On the true construction of the amended sub-section (1), the only period of limitation to be applied in cases governed by the amended section is that contained in sub-section, itself. That of course does not mean that the section has ceased to be a discretionary section. And it may be in a proper case, the Court might still view lapse of time as a sufficient reason for refusing to exercise its jurisdiction in the liquidator's favour. (Vol. 33) 1946 All 269 (272) (DB).

7. Misfeasance.—[1] The section does not exclude non-feasance and would apply to every act of commission or omission resulting in loss to the company. Hence where a director not only did not exercise care in ascertaining the true state of affairs of the company but also wilfully shut his eyes to it until a very late stage it was held that he was guilty of gross negligence

which would amount to misfeasance. (Vol. 29) 1942 Mad 365 (367) (DB).

[2] Distribution of dividends out of capital and other funds not being profits amounts to misapplication of funds. (Vol. 12) 1925 All 519 (520) : 47 All 669 (DB).

[3] Becoming a director by accepting a gift of shares without paying for them is misfeasance. (Vol. 29) 1942 Mad 365 (367) (DB).

[4] A misfeasance proceeding is merely an examination by the Court into the conduct of an officer of the company, though as a result of that examination the Court may order the officer to restore the money or the property of the company as the Court may think just. Security for costs cannot be asked of the official liquidator. (Vol. 20) 1933 All 205 (206) : 55 All 250.

[5] Giving advance by directors on a promise to execute a mortgage instead of the mortgage itself is no misfeasance. (Vol. 13) 1926 Oudh 153 (156).

[6] A person who had signed the prospectus resigned before the declaration under S. 103 was sent to the Registrar. Held that the person could not be said to be guilty of any misfeasance by reason of which any pecuniary loss was sustained by company by virtue of payments made after his resignation. (Vol. 29) 1942 Mad 365 (367) (DB).

[7] Act, or omission to do an act, is wilful, where the person who acts, or omits to act, knows that he is doing and intends to do, what he is doing; but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty. (Vol. 13) 1926 Oudh 243 (245) : 1 Luck 334 (DB).

[8] Misfeasance under S. 235 is not independent of contract inasmuch as the relation between a director and the company is based on contract. (Vol. 20) 1933 Sind 103 (107).

[9] Allotment of shares made without the application and allotment money not being paid is illegal. And directors who make such allotment are guilty of misfeasance. (Vol. 21) 1934 All 855 (862) (DB).

[13] A director who is a party to a calculated and deliberate fraud in the flotation of the company and in the conduct of its business is guilty of misfeasance. (Vol. 21) 1934 All 855 (863) (DB).

8. Onus.—[1] The onus is on the applicant to prove the facts which bring the case within the section. (Vol. 2) 1915 Lah 132 (134) : 1915 Pun Re No. 60.

9. Petition—Amendment of.—[1] An order allowing an amendment of a petition under S. 235 entirely altering its character after a period of two and a half years, is highly unjudicial. (Vol. 16) 1929 Lah 710 (711) (DB).

10. Promoters, auditors and share-brokers.—[1] For the purpose of this section an auditor is an officer; see section 2 (1) (11.)

[2] Auditor doing the work of audit under an appointment as such by the company cannot be heard to say that his appointment was invalid and improper. (1913) 13 Mad L Tim 282 (288, 289) (DB).

[3] The share-broker of a company is not an officer for the purpose of S. 235. Hence, when moneys had been wrongly paid to him the official liquidator is not entitled to use S. 235 for recovering them. (Vol. 25) 1938 Mad 154 (156, 157) : ILR (1938) Mad 192 (DB).

236. If any director, manager, officer or contributory of any company being wound up des-
 Penalty for falsification troys, mutilates, alters or falsifies or fraudulently secretes any books,
 of books, papers or securities, or makes or is privy to the making of any false
 or fraudulent entry in any register book of account or document belonging to the company with
 intent to defraud or deceive any person, he shall be liable to imprisonment for a term which may
 extend to seven years, and shall also be liable to fine.

[1882—S. 215; (1908) 8 Edw. VII C. 69—S. 216; (1929) 19 and 20 Geo V. C. 23—S. 272.]

^a[237. (1) If it appears to the Court in the course of a winding up by, or subject to th^e
 Prosecution of delinqu- supervision of, the Court that any past or present director, manager o^r
 ent directors. other officer, or any member, of the company has been guilty of any offence^e
 in relation to the company for which he is criminally liable, the Court may, either on the applica-
 tion of any person interested in the winding up or of its own motion, direct the liquidator either
 himself to prosecute the offender or to refer the matter to the registrar.

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or
 present director, manager or other officer, or any member of the company has been guilty of any
 offence in relation to the company for which he is criminally liable, he shall forthwith report the
 matter to the registrar and shall furnish to him such information and give to him such access to
 and facilities for inspecting and taking copies of any documents, being information or documents
 in the possession or under the control of the liquidator relating to the matter in question, as he
 may require.

Section 235 (contd.)

[4] Where a person did not take any steps to bring
 company into being, but thereby signed memorandum
 of association and subscribed for certain shares, the fact
 that money so subscribed had been utilised in paying
 part of expenses of formation does not make him a
 promoter. (Vol 25) 1938 Mad 154 (156) : ILR (1938)
 Mad 192 (DB).

11. Right to appeal.—High Court passing order
 holding application under S. 235, by liquidator to be
 maintainable—Order is appealable under S. 202 and the
 aggrieved party is entitled to appeal to a division bench
 under Cl 10 Letters Patent. (Vol 25) 1938 Lah 658
 (669) (DB).

12. Right to costs.—[1] Unsuccessful appeal by
 directors in winding up proceeding of the company—No
 order as to costs—Directors can claim reasonable costs
bona fide incurred for company and are not to that
 extent bound to make up company's amount in their
 hands. (Vol 16) 1929 Rang 139 (140) : 7 Rang 34
 (DB).

14. *Res judicata*.—[1] On a company being wound
 up the remedy against a delinquent director whether
 for negligence, fraud or misfeasance is under S. 235,
 Companies Act. Once such proceedings are taken up, no
 subsequent action can lie against him on the principle
 of *res judicata* for compensation for his delinquency
 (Vol 25) 1938 Lah 577 (578, 579) (DB).

SECTION 236—Note 1.

[1] The liquidator of the company which had gone
 into voluntary liquidation, who was prosecuted under
 S. 236, was also a contributory. It was argued that
 though the accused was once a director, he ceased to be
 so when once liquidation proceedings had begun—Held,
 that the liquidator was an officer of the company and
 that whether as director, officer or contributory S. 236
 applied. (Vol 29) 1942 Mad 702 (703) : 44 Cr L Jour
 508.

[2] Where there is nothing in the special Act to
 exclude the operation of the general criminal law, it
 cannot be inferred that there was an intention on the
 part of the legislature to exclude it. Where therefore

there were specific charges of cheating, attempting to
 cheat, forgery, falsification of accounts and criminal
 misappropriation against certain promoters of the com-
 pany but none of them were awarded a sentence for
 forgery or falsification of accounts in excess of seven
 years, it was held that the prosecution of the accused
 for the offences of forgery and falsification of accounts
 under the Indian Penal Code was legal. (Vol 24) 1937
 All 714 (716) : ILR (1937) All 779 : 39 Cr L Jour 38
 (DB).

[3] The Companies Act nowhere lays down that
 there can be no prosecution on a criminal charge other-
 wise than upon a direction by the company judge or
 judges. (Vol 24) 1937 All 714 (716) : ILR (1937) All
 779 : 39 Cr L Jour 38 (DB).

SECTION 237—Note 1.

[1] The whole scheme of S. 237 is enabling rather
 than mandatory or exclusive. The Court may order
 the Liquidator to prosecute or refer the matter to the
 Registrar. The Registrar may refuse to prosecute and
 the liquidator with previous sanction of the Court
 may prosecute. (Vol 29) 1942 Sind 9 (10) : 43 Cr L
 Jour 304.

[2] S. 237 is not limited to the criminal liability of
 the directors under the Act, and hence is not confined
 to the special offences created under the Act. (Vol 29)
 1942 Sind 9 (10) : 43 Cr L Jour 304.

[3] Order under S. 237, directing the official liqui-
 dator to prosecute a person for a criminal offence is
 more of a criminal than of a civil nature and S. 109 C.
 Civil PC is not applicable. An appeal to Privy Council
 is not competent. (Vol 18) 1931 Sind 120 (120),}

[4] The Companies Act nowhere lays down that
 there can be no prosecution on a criminal charge other-
 wise than upon a direction by the company Judge or
 Judges. (Vol 24) 1937 All 714 (716) : ILR (1937) All
 779 : 39 Cr L Jour 38 (DB).

[5] Before any proceedings can be taken against that
 Directors of a company under this section it must be
 shown that the company was prejudiced by the act
 complained of. (Vol 4) 1917 Lah 383 (385) (DB).

(3) Where any report is made under sub-section (2) to the registrar, he may, if he thinks fit, refer the matter to the ^b[Central Government] for further inquiry, and the ^b[Central Government] shall thereupon investigate the matter and may, if they think it expedient, apply to the Court for an order conferring on any person designated by the ^b[Central Government] for the purpose with respect to the company concerned all such powers of investigating the affairs of the company as are provided by this Act in the case of a winding up by the Court.

(4) If on any report to the registrar under sub-section (2) it appears to him that the case is not one in which proceedings ought to be taken by him, he shall inform the liquidator accordingly, and thereupon, subject to the previous sanction of the Court, the liquidator may himself take proceedings against the offender.

(5) If it appears to the Court in this course of a voluntary winding up that any past or present director, manager or other officer, or any member, of the company has been guilty as aforesaid, and that no report with respect to the matter has been made by the liquidator to the registrar, the Court may, on the application of any person interested in the winding up or of its own motion, direct the liquidator to make such a report, and on a report being made accordingly, the provisions of this section shall have effect as though the report has been made in pursuance of the provisions of sub-section (2).

(6) If, where any matter is reported or referred to the registrar under this section, he considers that the case is one in which a prosecution ought to be instituted, he shall place the papers before the Advocate General or the public prosecutor and if advised to do so institute proceedings, ^c[* * * *].

Provided that no prosecution shall be undertaken without first giving the accused person an opportunity of making a statement in writing to the registrar and of being heard thereon.

^c[* * * *].

^d[7] Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section, it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section, the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any person employed by the company as auditor, whether that person is or is not an officer of the company.]

^e[(8) If any person fails or neglects to give assistance in manner required by ^f[sub-section (7)], the Court may, on the application of the registrar, direct that person to comply with the requirements of the said sub-section, and where any such application is made with respect to a liquidator, the Court may, unless it appears that the failure or neglect to comply was due to the liquidator not having in his hands sufficient assets of the company to enable him so to do, direct that the costs of the application shall be borne by the liquidator personally.]

[1882—S. 216 ; (1903) 8 Edw. VII, C. 69—S. 217 ; (1929) 19 and 20 Geo. V, C. 23—S. 277].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 110 for the original section. [15-1-1937.]

[b] Substituted by A. O. for "Local Government":

[c] Omitted, by the Indian Companies (Amendment) Act, 1938 (22 [XXII] of 1938), S. 11. [26-2-1938.]

[d] Sub-sec. (7) was inserted *ibid*, see 11 (b).

[e] Existing sub-sec. (7) was re-numbered as sub-sec. (8), *ibid*. Sec. 11 (c).

[f] Substituted, *ibid*, for "sub-section (6)."

Section 237 (contd.)

[6] No protection is afforded by S. 237 to company promoters and directors against prosecution for criminal breach of trust. Consequently police do not require any sanction to prosecute any one for that offence. The section is intended to safeguard the interest of the shareholders of a company, which has failed to prevent what remains of their money from being wasted by the liquidator on unprofitable criminal prosecutions. The Court, under the directions of which the company is being wound up by a liquidator, must be satisfied that prosecution is worthwhile before it will allow the liquidator to, or before it will itself, institute proceedings and incur

expenditure in the matter. ('37) 1937 Mad WN 1122 (1124).

[7] The dissolution of a company does not debar the liquidator from taking action in respect of the assets realized after the dissolution of the company. (Vol 4) 1917 Lah 383 (384) (DB).

[8] As to the power of the Court where the amount of the life insurance fund has been wrongfully diminished in contravention of the provisions of the Insurance Act to proceed against every person who was at the time of the contravention a director, manager, liquidator or an officer of the Insurance company, see section 106, Insurance Act, 1938.

238. If any person, upon any examination upon oath authorised under this Act, or in any Penalty for false affidavit, deposition or solemn affirmation, in or about the winding up of evidence. any company under this Act, or otherwise in or about any matter arising under this Act, intentionally gives false evidence, he shall be liable to imprisonment for a term which may extend to seven years, and shall also be liable to a fine.

[1882—S. 217 ; (1929) 19 and 20 Geo. V, C. 23—S. 363.]

^a**[238-A]** (1) If any person, being a past or present director, managing agent, manager or other officer of a company which at the time of the commission of the Penal provisions. alleged offence is being wound up, whether by or under the supervision of the Court or voluntarily, or is subsequently ordered to be wound up by the Court or subsequently passes a resolution for voluntary winding up—

- (a) does not to the best of his knowledge and belief fully and truly discover to the liquidator all the property, real and personal, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary way of the business of the company ; or
- (b) does not deliver up to the liquidator, or as he directs, all such part of the real and personal property of the company as is in his custody or under his control, and which he is required by law to deliver up ; or
- (c) does not deliver up to the liquidator, or as he directs, all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up ; or
- (d) within twelve months next before the commencement of the winding up or at any time thereafter conceals any part of the property of the company to the value of one hundred rupees or upwards or conceals any debt due to or from the company ; or
- (e) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently removes any part of the property of the company to the value of one hundred rupees or upwards ; or
- (f) makes any material omission in any statement relating to the affairs of the company ; or
- (g) knowing or believing that a false debt has been proved by any person under the winding up, fails for the period of a month to inform the liquidator thereof ; or
- (h) after the commencement of the winding up prevents the production of any book or paper affecting or relating to the property or affairs of the company ; or
- (i) within twelve months next before the commencement of the winding up or at any time thereafter, conceals, destroys, mutilates or falsifies, or is privy to the concealment, destruction, mutilation or falsification of any book or paper affecting or relating to the property or affairs of the company ; or
- (j) within twelve months next before the commencement of the winding up or at any time thereafter makes or is privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company ; or
- (k) within twelve months next before the commencement of the winding up or at any time thereafter fraudulently parts with, alters or makes any omission in, or is privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company ; or

SECTION 238A—Note 1.

[1] Under S. 238-A—(1) (b), accused must have in his custody or under his control, articles when the

company was being wound up. (Vol 31) 1944 Mad 424 (424) : 46 Cri L Jour 347.

[2] As to the penalty for wrongful withholding of property. See S. 282-A.

- (l) after the commencement of the winding up or at any meeting of the creditors of the company within twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses; or
- (m) has within twelve months next before the commencement of the winding up or at any time thereafter, by any false representation or other fraud, obtained any property for or on behalf of the company on credit which the company does not subsequently pay for; or
- (n) within twelve months next before the commencement of the winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or
- (o) within twelve months next before the commencement of the winding up or at any time thereafter pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing is in the ordinary way of the business of the company; or
- (p) is guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding up;

he shall be punishable, in the case of the offences mentioned respectively in clauses (m), (n) and (o) of this subsection, with imprisonment for a term not exceeding five years, and in the case of any other offence, with imprisonment for a term not exceeding two years;

Provided that it shall be a good defence to a charge under any of clauses (l), (c), (d), (f), (n) and (o), if the accused proves that he had no intent to defraud, and to a charge under any of clauses (a), (h), (i) and (j), if he proves that he had no intent to conceal the state of affairs of the company or to defeat the law.

(2) Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under clause (o) of subsection (1) every person who takes in pawn or pledge or otherwise receives the property knowing it to be pawned, pledged or disposed of in such circumstances as aforesaid shall be punishable with imprisonment for a term not exceeding three years.]

[(1929) 19 and 20 Geo. V. C. 23—S. 271.]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 111. [15-1-1937]

239. (1) Where by this Act the Court is authorised in relation to winding up to have regard Meetings to ascertain to the wishes of creditors or contributories, as proved to it by any sufficient evidence, the Court may, if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the Court directs, and may appoint a person to act as chairman of any such meeting and to report the result thereof to the Court.

(2) In the case of creditors, regard shall be had to the value of each creditor's debt.

(3) In the case of contributories regard shall be had to the number of votes conferred on each contributory by the articles.

[(1908) 8 Edw. VII. C. 69—S. 145, 201, 219; (1929) 19 and 20 Geo. V. C. 23—S. 288.]

240. Where any company is being wound up, all documents of the company and of the Documents of company liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded.

[1882—S. 198; (1908) 8 Edw. VII. C. 69—S. 220; (1929) 19 and 20 Geo. V. C. 23—S. 282].

SECTION 240—Note 1.

[1] Onus lies—heavily upon those who seek to show entries in the books of the company to be incorrect and had been made fraudulently or without sufficient cause. [Vol 22] 1935 Lah 157 (158) (DB).]

[2] Onus is on the contributory denying transaction to rebut and disprove the entries. The mere fact that contributory has repudiated the transaction will not save him from his liability. (Vol 24) 1937 Lah 61 (61, 62).]

241. After an order for a winding up by or subject to the supervision of the Court, the Court Inspection of documents may make such order for inspection by creditors and contributories of the company of its documents as the Court thinks just, and any documents in the possession of the company may be inspected by creditors or contributories accordingly, but not further or otherwise.

[1882—S. 200 ; (1908) 8 Edw. VII. C. 69—S. 221; (1929) 19 and 20 Geo. V, C. 23—S. 212]

242. (1) When a company has been wound up and is about to be dissolved the documents of the company and of the liquidators may be disposed of as follows (that is to say) :—

(a) in the case of winding up by or subject to the supervision of the Court, in such way as the Court directs ;

(b) in the case of a voluntary winding up, in such way as the company by extraordinary resolution directs.

(2) After three years from the dissolution of the company, no responsibility shall rest on the company or the liquidators, or any person to whom the custody of the documents has been committed, by reason of the same not being forthcoming to any person claiming to be interested therein.

[1882—S. 199 ; (1908) 8 Edw. VII, C. 69—S. 222; (1929) 19 and 20 Geo. V. C. 23—S. 283 (1)].

Objects and Reasons.

“ We have amended clause 243 (now S. 242) of the Bill so as to shorten the period after which no responsibility attaches to any person to whom the custody of documents of a company has been committed. This seems to us a reasonable reduction, regard being had to the shorter period of limitation in India.”—S. C. R., 1913.

243. (1) Where a company has been dissolved, the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

(2) It shall be the duty of the person on whose application the order was made, within twenty-one days after the making of the order, to file with the registrar a certified copy of the order, and if that person fails so to do, he shall be liable to a fine not exceeding fifty rupees for every day during which the default continues.

[1908—8 Edw. VII C. 69—S. 223 ; (1929) 19 and 20 Geo. V. C. 23—S. 294.]

SECTION 241—Note 1.

[1] Section 241, places matter of ordering inspection of documents entirely in the discretion of the Court and if this discretion has once been exercised in favour of a contributory or creditor, it cannot be interfered with on the ground that he may use the information thus got on inspection, in the interest of directors yet to be examined. This circumstance would not be a bar to the exercise of the right by persons authorised under the law to inspect the documents and other records which the law permits. (Vol 24) 1937 Lah 82 (84)

SECTION 243—Note 1.

[1] An order of the Court declaring the dissolution of a company to have been void does not affect the validity of proceedings taken during the interval between the dissolution and its avoidance. ('27) 1927 App Cas 251 (257, 258).

[2] Where a company is fraudulently wound up by a resolution of its members and the landlord reenters into possession of land leased to the company on ground of breach of covenant due to winding up of the company and subsequently Court declares the resolution as void the acts done by the landlord such as granting of leases to other person are not valid. (Vol 24) 1937 Cal 129 (137, 138) : ILR (1937) 1 Cal 203 (DB).

[3] The dissolution of a company does not debar a liquidator from taking action in respect of the assets realised after the dissolution. (Vol 4) 1917 Lah 383 (384) (DB).

[4] Where an action is brought after complete winding up and dissolution and the official liquidator refuses to appear on the ground he is *functus officio* the Court will treat him as still a party to proceedings and proceed *ex parte* against him. (Vol 4) 1917 Lah 383 (384) (DB).

244. (1) Where a company is being wound up, if the winding up is not concluded within one year after its commencement, the liquidator shall, a[once in each year] and at intervals of not more than twelve months, until the winding up is concluded, b[file in Court or with the registrar, as the case may be,] a statement in the prescribed form and containing the prescribed particulars with respect to the proceedings in and position of the liquidation.

(2) Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement, and to receive a copy thereof or extract therefrom; but any person untruthfully so stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall be punishable accordingly on the application of the liquidator.

(3) If a liquidator fails to comply with the requirements of this section, he shall be liable to a fine not exceeding five hundred rupees for each day during which the default continues.

c[(4) When the statement is filed in Court a copy shall simultaneously be filed with the registrar and shall be kept by him along with the other records of the company.]

[(1908) 8 Edw. VII, C. 69—S. 224; (1)—(3); (1929) 19 and 20 Geo. V, C. 23—S. 284.]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 112 for "at such intervals as may be prescribed" [15-1-1937]

[b] *Substituted, ibid.*, for "file with the registrar."

[c] *Inserted. ibid.*

Objects and Reasons.

Amendment made in 1936.—This section provides that the interim report of the liquidator shall be submitted to the Court or the registrar, as the case may be, but that a copy should in any case be given to the registrar and defines the time when the report shall be made. The form and the particulars to be contained

in these statements are prescribed by the High Courts which have followed rules 193 to 195 of the English Companies (Winding up) Rules and have prescribed a form similar to the English Form 92 drawn up under those Rules.—See S.O.R., 1936.

a[**244A.** (1) Every liquidator of a company which is being wound up by the Court shall, in Payments of liquidator such manner and at such times as may be prescribed, pay the money into bank. received by him into a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934 :

Provided that if the Court is satisfied that for the purpose of carrying on the business of the company or of obtaining advances or for any other reason it is for the advantage of the creditors or contributories that the liquidator should have an account with any other bank, the Court may authorise the liquidator to make his payments into or out of such other bank as the Court may select and thereupon those payments shall be made in the prescribed manner.

(2) If any such liquidator at any time retains for more than ten days a sum exceeding five hundred rupees or such other amount as the Court may in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Court, he shall pay interest on the amount so retained in excess at the rate of twenty per cent. per annum and shall be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court and shall be liable to pay any expenses occasioned by reason of his default.

(3) A liquidator of a company which is being wound up shall open a special banking account and pay all sums received by him as liquidator into such account.]

[(1929) 19 and 20 Geo. V, C. 23—S. 194.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 113. [15-1-1937.]

SECTION 244A—Note 1.

[1] A bank is deemed to know that official liquidator under this section and R. 66 Madras High Court rules framed under Companies Act must have a bank account and can collect the amount of any cheque paid during the course of liquidation only

through his bank. Hence the bank would be guilty of neglect if it makes payment direct to the Official liquidator and he misappropriates the amount subsequently. (Vol 32) 1945 Mad 80 (31, 32) : ILB (1945) Mad 328 (DB). (S. 85, Neg. Instru. Act, does not protect him).

Objects and Reasons.

This section requires the liquidator to pay moneys received by him during a winding up into scheduled banks; and prohibits him from paying any such moneys into his private account. The powers given by the proviso to sub-section (1) and by sub-section (2) are to be exercised by the Court. Sub-section (3) applies to all windings up.—See S. C. R., 1936.

244B. (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable, the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 144A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled, may make an order for the payment to that person of the sum due :

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf calling on the officer to show cause, within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government ; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under this section shall pay interest on the amount retained at the rate of twenty per cent. per annum and shall also be liable to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single Province which are not trading corporations.]

Objects and Reasons.

The Indian Companies Act, 1913, did not contain provisions for the custody of unclaimed dividends and undistributed assets of companies in liquidation or for the disposal of subsequent lawful claims to such money and in the absence of such provisions there was a considerable diversity of opinion as to the law applicable to these matters in British India. The new section 244-B

is designed to rectify this unsatisfactory position. It follows generally the lines of the English Companies Act 1929, sections 285 and 300 and the relevant provisions of the English Companies (Winding-up) Rules, 1929 (Rule. 193 to 201), with such modifications as are suited to Indian conditions.—See S. O. R., *Gazette of India*, dated 9—11—1940, Part V.

245. (1) Any affidavit required to be sworn under the provisions or for the purposes of this Part may be sworn in British India, or elsewhere within the dominions of His Majesty, before any Court, Judge or person lawfully authorised to take and receive affidavits, or in any part of India other than British India before any Court authorised or continued by a[the Central Government or the Crown Representative], or in any place outside His Majesty's dominions before any of His Majesty's Consuls or vice-Consuls.

(2) All Courts, Judges, Justices, Commissioners, and persons acting judicially in British India shall take judicial notice of the seal or stamp or signature (as the case may be) of any such Court, Judge, person, Consul or Vice-Consul, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Part.

[1882—Ss. 170 & 172 ; (1908) 8 Edw. VII, C. 69—S. 228 ; (1929) 19 & 20 Geo. V, C. 23—S. 293]

[a] *Substituted* by A.O. for "the Governor-General in Council".

Rules.

246. (1) The High Court may, from time to time, make rules consistent with this Act and with the Code of Civil Procedure, 1908, concerning the mode of proceedings to be had for winding up a company in such Court and in the Courts subordinate thereto, ^a[and for voluntary winding up (both members and creditors), for the holding of meeting of creditors and members in connection with proceedings under section 153 of this Act,] and for giving effect to the provisions hereinbefore contained as to the reduction of the capital and the sub-divisions of the shares of a company ^a[and generally for all applications to be made to the Court under the provisions of this Act] ^b[and shall make rules providing for all matters relating to the winding up of companies which, by this Act, are to be prescribed].

(2) Without prejudice to the generality of the foregoing power, the High Court may by such rules enable or require all or any of the powers and duties conferred and imposed on the Court by this Act, in respect of the matters following, to be exercised or performed by the official liquidator, and subject to the control of the Court, that is to say, the powers and duties of the Court in respect of—

- (a) holding and conducting meetings to ascertain the wishes of creditors and contributors ;
- (b) settling lists of contributories and rectifying the register of members where required, and collecting and applying the assets ;
- (c) requiring delivery of property or documents to the liquidator ;
- (d) making calls ;
- (e) fixing a time within which debts and claims must be proved :

Provided that the official liquidator shall not, without the special leave of the Court, rectify the register of members, and shall not make any call without the special leave of the Court.

[1882—S. 254; (1908) 8 Edw. VII, C. 69—S. 173, 237 ; (1929) 19 and 20 Geo. V, C. 23—S. 305.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 114. [15-1-1937.]

[b] *Inserted* by the Repealing and Amending Act, 1915 (11 [XI] of 1915), S. 2 and Sch I.

SECTION 246—Note 1.

[1] Power of High Court to make rules relating to company was limited to making rules concerning mode of proceeding to be had for winding-up a company and for giving effect to the provisions contained as to reduction of capital and sub-division of shares of company. For the purpose of regulating costs in other

proceedings in company matters, recourse had to be made to rules framed by High Court under its general powers. (Vol 2) 1915 Bom 66 (66) : 39 Bom 333 (DB).

Cases decided under High Court Rules.

[2] The period of 30 days mentioned in S. 58 framed by Allahabad High Court for an application for removal of applicant's name from the list of contribu-

Removal of defunct Companies from Register.

247. (1) Where the registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the *a*[Official Gazette] with a view to striking the name of the company off the register.

(3) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the *a*[Official Gazette], and send to the company by post a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months after notice by the registrar demanding the returns has been sent by post to the company, or to the liquidator at his last known place of business, the registrar may publish in the *a*[Official Gazette] and send to the company a like notice as is provided in the last preceding sub-section.

Section 246 (contd.)

tories will not commence to run till service of notice under R. 57. (Vol 19) 1932 PC 240 (248): 54 All 827: 60 Ind App 1 (PC).

[3] The rules framed by the Lahore High Court under S. 246 Companies Act, relating to the winding up of a company, contained in Chap. I, Vol. 2, Rules and Orders of the High Court, should be made expressly applicable to appeals and it should be provided therein that in the case of appeals against compulsory winding up orders, the official liquidator should be made a party. (Vol. 28) 1941 Lah 134 (188): ILR (1941) Lah 680 (DB).

[4] An order for a call on contributories disregarding the rules as to notice under S. 246 cannot be maintained. (Vol 5) 1918 Lah 302 (304): 1918 Pun Re. No. 1.

[5] An application for leave to appeal to the Privy Council against an order for winding up is not a proceeding in winding up under the rules and orders of the High Court. Even assuming it to be so R. 95 Vol 2 would apply, in conformity to which the petition should state the names of respondents, as it did not contain the name of the respondent, it should be dismissed. (Vol 23) 1936 Lah 322 (323, 324) (DB).

[6] In liquidation proceedings person entered in the list of contributories—Notice was issued to put forth this objection but objection was disallowed as he failed to get his name registered as per R. 85 framed by the Lahore High Court—*Held* that the case should have been decided on merits and application of R. 85 was held doubtful. (Vol 19) 1932 Lah 123 (123).

[7] R. 5 of the rules framed under the Companies Act makes the High Court fees rules applicable to proceeding under the Companies Act or the rules under it. The official liquidator who is directed by the Court

to settle the list of creditors acts in a judicial capacity while settling it and an advocate who has appeared for a creditor in the proceedings is entitled to apply for his bill of costs being taxed. (Vol 31) 1944 Mad 367 (368): ILR (1945) Mad 24 (DB).

[8] Notice referred to in R. 27 of the rules of the Madras High Court under the Companies Act is intended to issue only to persons who wish to oppose and not to support a petition for winding up and therefore supporting creditors are not entitled to costs. (Vol 25) 1938 Mad. 96 (97): ILR (1938) Mad 284 (DB).

SECTION 247—Note 1.

[1] The Registrar is not bound to remove the company from the registrar on discovering that it is not carrying on business or that its members have been reduced to less than 7. (Vol 12) 1925 Lah 443 (444).

[2] The mere fact that the share-holders of a company become less than seven does not render the company defunct. (Vol 12) 1925 Lah 443 (444).

[3] A company can be wound up even after it has been dissolved, with this difference that in the case of a defunct company it can be done on the application of an erstwhile share-holder. (Vol 15) 1928 Nag 194 (195): 24 Nag LR 100 (DB).

[4] Only person who can legally put in an appearance on behalf of company in proceedings under S. 247 (6) on the application of a share-holder is either secretary of the company or one of its directors though they may not be parties to original proceedings. The Registrar cannot represent the company. (Vol 16) 1929 Nag 185 (190) (DB).

[5] An order refusing to restore the company to the register is not an order made or given in the matter of winding up of a company by the Court. (Vol 12) 1925 Lah 443 (444).

(5) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the ^a[Official Gazette] and, on the publication in the ^a[Official Gazette] of this notice, the company shall be dissolved : Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved.

(6) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off ; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

(7) A letter or notice under this section may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director, manager or other officer of the company, or, if there is no director, manager or other officer of the company whose name and address are known to the registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

[(1908) 8 Edw. VII, C. 69—S. 242 ; (1929) 19 and 20 Geo. V, C. 23—S. 295.]

[a] Substituted by A. O. for " Local Official Gazette."

PART VI

REGISTRATION OFFICE AND FEES.

248. (1) For the purposes of the registration of companies under this Act, there shall be office at such places as the ^a[Central Government] thinks fit, and no company shall be registered except at an office within the province in which, by the memorandum, the registered office of the company is declared to be established.

(2) The ^a[Central Government] may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties.

(3) The salaries of the persons appointed under this section shall be fixed by the ^a[Central Government].

(4) The ^a[Central Government] may direct a seal or seals to be prepared for the authentication of documents required for or connected with the registration of companies.

(5) Any person may inspect the documents kept by the registrar on payment of such fees as may be appointed by the ^a[Central Government], not exceeding one rupee for each inspection ; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar on payment for the certificate, certified copy or extract, of such fees as the ^a[Central Government] may appoint, not exceeding three rupees for a certificate of incorporation, and not exceeding six annas for every hundred words or fractional part thereof required to be copied.

(6) Whenever any act is by this Act directed to be done to or by the registrar it shall, until the ^a[Central Government] otherwise directs, be done to or by the existing registrar of joint-stock companies or in his absence to or by such person as the ^a[Central Government] may for the time being authorise ; but, in the event of the ^a[Central Government] altering the constitution of the existing registry offices or any of them, any such act shall be done to or by such officer and at such place with reference to the local situation of the registered offices of the companies to be registered as the ^a[Central Government] may appoint.

[1882—S. 220 ; (1908) 3 Edw. VII, C. 69—S. 242 (1) (s), (1929) 19 and 20 Geo. V, C. 23—Ss. 312, 314].

[a] Substituted by A. O. for "Local Government."

SECTION 248—Note 1.

[1] Rule 15 made by the C. P. Government under S. 248 does not bar a competent person from filing

a complaint. A share-holder who is aggrieved can file a complaint. (Vol 15) 1928 Nag 186 (187) : 29 Cri L Jour 581. . .

249. (1) There shall be paid to the registrar in respect of the several matters mentioned in Table B in the First Schedule the several fees therein specified, or such smaller fees as the [Central Government] may direct.

(2) All fees paid to the registrar in pursuance of this Act shall be accounted for to the Crown. [(1908) 8 Edw. VII, C. 69—S. 244; (1929) 19 and 20 Geo. V, C. 23—S. 313.]

[a] *Substituted by A. O. for "Governor-General in Council".*

a[249.A. (1) If a company, having made default in complying with any provision of this Act which requires it to file with, deliver or send to the registrar any returns and documents to registrar, fails to make good the default within fourteen days after the service of a notice on the company requiring it to do so, the Court may on an application made to the Court by any member or creditor of the company or by the registrar, make an order directing the company and any officer thereof to make good the default within such time as may be specified in the order.

(2) Any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officers of the company responsible for the default.

(3) Nothing in this section shall be taken to prejudice the operation of any enactment imposing penalties on a company or its officers in respect of any such default as aforesaid.]

[(1929) 19 and 20 Geo. V, C. 23—S. 315].

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 115. [15-1-1937].*

PART VII.

APPLICATION OF ACT TO COMPANIES FORMED AND REGISTERED UNDER FORMER COMPANIES ACTS.

250. In the application of this Act to existing companies, it shall apply in the same manner in the case of a limited company, other than a company, companies formed under limited by guarantee, as if the company had been formed and former Companies Acts. registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

Provided that—

(1) nothing in Table A in the First Schedule shall apply to a company formed and registered under Act XIX of 1857 and Act VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882;

(2) reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under Act No. XIX of 1857 and Act No. VII of 1860, or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, as the case may be.

[1882—S. 221; (1908) 8 Edw. VII. C. 69—S. 245; (1929) 19 and 20 Geo. V, C. 23—S. 316].

251. This Act shall apply to every company registered but not formed under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, or under the Indian Companies Act, 1866, or the Indian Companies Act, 1882, in the same manner as it is hereinafter in this Act declared to apply to companies registered but not formed under this Act:

Provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the said Acts or any of them.

- S. 22; (1929) 19 and 20 Geo. V, C. 23—S. 317].

... in the case of a limited company, other than a company, companies formed under limited by guarantee, as if the company had been formed and former Companies Acts. registered under this Act as a company limited by shares; in the case of a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and, in the case of a company, other than a limited company, as if the company had been formed and registered under this Act as an unlimited company:

[1882—S. 221; (1908) 8 Edw. VII. C. 69—S. 245; (1929) 19 and 20 Geo. V, C. 23—S. 316 (1).]

PART VIII.

COMPANIES AUTHORISED TO REGISTER UNDER THIS ACT.

Companies capable of being registered. 253. (1) With the exceptions and subject to the provisions mentioned and contained in this section,—

- (i) any company consisting of seven or more members, which was in existence on the first day of May, eighteen hundred and eighty-two, including any company registered under Act No. XIX of 1857 and Act No. VII of 1860 or either of them, and
- (ii) any company formed after the date aforesaid whether before or after the commencement of this Act, in pursuance of any Act, of Parliament or ^a[Indian law] other than this Act, or of Letters Patent, or being otherwise duly constituted according to law, and consisting of seven or more members;

may at any time register under this Act as an unlimited company or as a company limited by shares, or as a company limited by guarantee; and the registration shall not be invalid by reason that it has taken place with a view to the company being wound up:

(2) Provided as follows:

- (a) a company having the liability of its members limited by Act of Parliament or ^a[Indian law] or by Letters Patent, and not being a joint-stock company as hereinafter defined, shall not register in pursuance of this section;
- (b) a company having the liability of its members limited by Act of Parliament or ^a[Indian law] or by Letters Patent shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;
- (c) a company that is not a joint-stock company as hereinafter defined shall not register in pursuance of this section as a company limited by shares;
- (d) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the articles) at a general meeting summoned for the purpose;
- (e) where a company not having the liability of its members limited by Act of Parliament or ^a[Indian law] or by Letters Patent is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person or by proxy at the meeting;
- (f) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceased to be a member, and of the costs and expenses of winding up, and for the adjustment of the rights of the contributories among themselves such amount as may be required not exceeding a specified amount.

(3) In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the articles.

(4) A company registered under the Indian Companies Act, 1882, shall not be registered in pursuance of this section.

[1882—Ss. 224, 225; (1908) 8 Edw. VII, C. 69—S. 249; (1929) 19 & 20 Geo. V, C. 23—S. 321.]

[^a] Substituted by A. O. for "Act of the Governor-General in Council".

254. For the purposes of this Part as far as relates to registration of companies as companies limited by shares, a joint-stock company means a company having a permanent paid up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company, when registered with limited liability under this Act, shall be deemed to be a company limited by shares.

[1882—S. 256; (1908) 8 Edw. VII, C. 69—S. 250; (1929) 19 & 20 Geo. V, C. 23—S. 322]

Requirements for registration by joint-stock companies.

255. Before the registration in pursuance of this Part of a joint-stock company, there shall be delivered to the registrar the following documents (that is to say) :—

- (1) a list showing the names, addresses and occupations of all persons who, on a day named in the list, not being more than six clear days before the day of registration, were members of the company, with the addition of the shares or stock held by them respectively, distinguishing, in cases where the shares are numbered, each share by its number ;
- (2) a copy of any Act of Parliament, a[Indian law], Royal Charter, Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company ; and
- (3) if the company is intended to be registered as a limited company, a statement specifying the following particulars (that is to say) :—
 - (a) the nominal share capital of the company and the number of shares into which it is divided or the amount of stock of which it consists ;
 - (b) the number of shares taken and the amount paid on each share ;
 - (c) the name of the company, with the addition of the word “ limited ” as the last word thereof ; and
 - (d) in the case of a company intended to be registered as a company limited by guarantee, the resolution declaring the amount of the guarantee.

[1882—S. 227 ; (1908) 8 Edw. VII, C. 69—Ss. 252 ; (1929) 19 and 20 Geo. V, C. 23—S. 323.]

[a] Substituted by A. O. for “ Act of the Governor-General in Council.”

Requirements for registration by other than joint-stock companies.

256. Before the registration in pursuance of this Part of any company not being a joint-stock company, there shall be delivered to the registrar—

- (1) a list showing the names, addresses and occupations of the directors of the company ; and
- (2) a copy of any Act of Parliament, a[Indian law], Letters Patent, deed of settlement, contract of co-partnery or other instrument constituting or regulating the company ; and
- (3) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of the guarantee.

[1882—S. 228 ; (1908) 8 Edw. VII, C. 69—S. 253 ; (1929) 19 and 20 Geo. V, C. 23—S. 324].

[a] Substituted by A. O. for “ Act of the Governor-General in Council ”.

Authentication of statement of existing companies.

principal officers of the company.

257. The list of members and directors and any other particulars relating to the company required to be delivered to the registrar shall be duly verified by the declaration of any two or more directors or other

[1882—S. 230 ; (1908) 8 Edw. VII, C. 69—S. 254 ; (1929) 19 and 20 Geo. V, C. 23—S. 325]

Registrar may require evidence as to nature of company.

258. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether any company proposing to be registered is or is not a joint-stock company as hereinbefore defined.

[1882—S. 231 ; (1908) 8 Edw. VII, C. 69—S. 255 ; (1929) 19 and 20 Geo. V, C. 23—S. 326.]

259. (1) Where a banking company, which was in existence on the first day of May

On registration of banking company with limited liability, notice to be given to customers.

at, or delivering it at, his last known address.

eighteen hundred and eighty-two, proposes to register as a limited company, it shall, at least thirty days before so registering, give notice of its intention so to register to every person who has a banking account with the company, either by delivery of the notice to him or by posting it to him

(2) If the company omits to give the notice required by this section, then as between the company and the person for the time being interested in the account in respect of which the notice ought to have been given, and so far as respects the account down to the time at which notice is given but not further or otherwise, the certificate of registration with limited liability shall have no operation.

[1882—S. 232; (1908) 8 Edw. VII, C. 69—S. 256; (1929) 19 and 20 Geo. V. C. 23—S. 359.]

260. No fees shall be charged in respect of the registration in pursuance of this Part of a company if it is not registered as a limited company, or if before its registration as a limited company the liability of the shareholders was limited by some Act of Parliament or a [Indian law] or by Letters Patent.

Exemption of certain companies from payment of fees.

[1882—S. 233; (1908) 8 Edw. VII, C. 69—S. 257; (1929) 19 and 20 Geo. V, C. 23—S. 327.]

[a] Substituted by A. O. for "Act of the Governor-General in Council".

Addition of "Limited" to name.
part of its name.

261. When a company registers in pursuance of this Part with limited liability, the word "Limited" shall form and be registered as

[1882—S. 234; (1908) 8 Edw. VII C. 69—S. 258; (1929) 19 and 20 Geo. V. C. 23—S. 328.]

262. On compliance with the requirements of this Part with respect to registration, and on payment of such fees, if any, as are payable under Table B in the First Schedule, the registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and in the case of a limited company that it is limited, and thereupon the company shall be incorporated, and shall have perpetual succession and a common seal.

Certificate of registration of existing companies.

[1882—S. 235; (1908) 8 Edw. VII, C. 69—S. 259; (1929) 19 and 20 Geo. V, C. 23—S. 329.]

263. All property, movable and immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to or be vested in a company at the date of its registration in pursuance of this Part, shall, on registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

Vesting of property on registration.

[1882—S. 237; (1908) 8 Edw. VII, C. 69—S. 259; (1929) 19 and 20 Geo. V, C. 23—S. 329.]

264. The registration of a company in pursuance of this Part shall not affect the rights or liabilities of the company in respect of any debt or obligation incurred or any contract entered into, by, to, with, or on behalf of, the company before registration.

Saving of existing liabilities.

[1882—S. 238; (1908) 8 Edw. VII, C. 69—S. 261; (1929) 19 and 20 Geo. V, C. 23—S. 331.]

265. All suits and other legal proceedings which at the time of the registration of a company in pursuance of this Part are pending by or against the company, or the public officer or any member thereof, may be continued in the same manner as if the registration had not taken place; nevertheless execution shall not issue against the effects of any individual member of the company on any decree or order obtained in any such suit or proceeding; but in the event of the property and effects of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company.

Continuation of existing suits.

[1882—S. 239; (1908) 8 Edw. VII, C. 69—S. 262; (1929) 19 and 20 Geo. V, C. 23—S. 332.]

Effect of registration under Act.

266. When a company is registered in pursuance of this Part—

- (i) all provisions contained in any act of Parliament, a [Indian law], deed of settlement, contract of co-partnery, Letters Patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidence as if so much thereof as would, if the company had

been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles ;

- (ii) all the provisions of this Act shall apply to the company and the members, contributories and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject as follows (that is to say) :—
- (a) the regulations in Table A in the First schedule shall not apply unless adopted by special resolution ;
 - (b) the provisions of this Act relating to the numbering of shares shall not apply to any joint-stock company whose shares are not numbered ;
 - (c) subject to the provisions of this section, the company shall not have power to alter any provision contained in any Act of Parliament or ^a[Indian law] relating to the company ;
 - (d) subject to the provisions of this section, the company shall not have power, without sanction of the ^b[Central Government], to alter any provision contained in any Letters Patent relating to the company ;
 - (e) the company shall not have power to alter any provision contained in a Royal Charter or Letters Patent with respect to the objects of the company ;
 - (f) in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability ; or to pay or contribute to the payment of the cost and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid ; and every contributory shall be liable to contribute to the assets of the company, in the course or the winding up, all sums due from him in respect of any such liability as aforesaid ; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and with reference to the assignees of insolvent contributories, shall apply ;
- (iii) the provisions of this Act with respect to—
- (a) the registration of an unlimited company as limited ;
 - (b) the powers of an unlimited company on registration as a limited company to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called up except in the event of winding up ;
 - (c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called up except in the event of winding up ; shall apply notwithstanding any provisions contained in any Act of Parliament, ^a[Indian law], Royal Charter, deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company ;
 - (iv) nothing in this section shall authorise the company to alter any such provisions contained in any deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act ;
 - (v) nothing in this Act shall derogate from any lawful power of altering its constitution or regulations which may, by virtue of any Act of Parliament, ^a[Indian law], deed of settlement, contract of co-partnery, Letters Patent or other instrument constituting or regulating the company, be vested in the company.

[1882—S. 240; (1908) 8 Edw. VII, C. 69—S. 263; (1929) 19 and 20 Geo. V, C. 23—S. 333]

[a] Substituted by A. O. for "Act of the Governor-General in Council".

[b] Substituted by A. O. for "Governor-General in Council".

267. (1) Subject to the provisions of this section, a company registered in pursuance of this Part may by special resolution alter the form of its cons. memorandum and articles of settlement by substituting a memorandum and articles for a deed of settlement.

(2) The provisions of this Act with respect to confirmation by the Court and registration of an alteration of the objects of a company shall, so far as applicable, apply to an alteration under this section with the following modifications:—

(a) there shall be substituted for the printed copy of the altered memorandum required to be filed with the registrar a printed copy of the substituted memorandum of articles; and

(b) on the registration of the alteration being certified by the registrar, the substituted memorandum and articles shall apply to the company in the same manner as if it were a company registered under this Act with that memorandum and those articles, and the company's deed of settlement shall cease to apply to the company.

(3) An alteration under this section may be made either with or without any alteration of the objects of the company under this Act.

(4) In this section the expression "deed of settlement" includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, an [Indian law], a Royal Charter or Letters Patent.

[1908] 8 Edw. VII, C. 69—S. 264; (1929) 19 and 20 Geo. V, C. 23—S. 334.]

[a] Substituted by A. O. for "Act of the Governor-General in Council".

268. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

[1882—S. 241; (1908) 8 Edw. VII, C. 69—S. 265; (1929) 19 and 20 Geo. V, C. 23—S. 335.]

269. Where an order has been made for winding up a company registered in pursuance of this Part, no suit or other legal proceeding shall be commenced or proceeded with against the company or any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

[1882—S. 242; (1908) 8 Edw. VII, C. 69—S. 266; (1929) 19 and 20 Geo. V, C. 23—S. 336.]

PART IX.

WINDING UP OF UNREGISTERED COMPANIES

270. For the purposes of this Part, the expression "unregistered company" shall not include a railway company incorporated by Act of Parliament or by any [Indian law], nor a company registered under the Indian Companies Act, 1866, or under any Act repealed thereby, or under the Indian Companies Act, 1882; or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members.

[1882—S. 243; (1908) 8 Edw. VII, C. 69—S. 267; (1929) 19 and 20 Geo. V, C. 23—S. 337.]

[a] Substituted by A. O. for "Act of the Governor-General in Council."]

SECTION 269—Note 1.

[1] S. 269 applies to a suit brought by third person against Company or its Contributory but not to a suit brought by a Company. Company's suit need not be stayed owing to winding up order. (Vol 7) 1920 Lah 48 (44) : 1 Lah 237.

[2] Dismissal of suit against registered company after liquidation is no bar to maintenance of claim before the Official Liquidator. (Vol 1) 1914 All 439 (440) (DB).

SECTION 270—Note 1.

[1] In a proper case Court can order winding up of a partnership, association or company under S. 271 only if it consists of more than seven members on the date of the presentation of petition. (Vol 18) 1981 Rang 77 (78) : 8 Rang 658 (DB) ((Vol 17) 1980 Rang 337 : 8 Rang 409 reversed)

[2] "Company" in the second part of section must mean a body which has no corporate existence not being registered under the Act. But a foreign Company

271. (1) Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:—

- (i) an unregistered company shall, for the purpose of determining the Court having jurisdiction in the matter of the winding up, be deemed to be registered in the province where its principal place of business is situate or, if it has a principal place of business situate in more than one province, then in each province where it has a principal place of business; and the principal place of business situate in that province in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company;
- (ii) no unregistered company shall be wound up under this Act voluntarily or subject to supervision;
- (iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say):—
 - (a) if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
 - (b) if the company is unable to pay its debts;
 - (c) if the Court is of opinion that it is just and equitable that the company should be wound up;
- (iv) an unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—
 - (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the satisfaction of the creditor;
 - (b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due or claimed to be due, from the company or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Court may approve or direct, the company has not within ten days after service of the notice paid, secured or compounded for the debt or demand, or procured the suit or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

Section 270 (contd.)

is a Corporate body and a legal entity and it can sue and be sued. Words "shall include" will not exclude a foreign Company not registered under the Act and such Company must fall within the expression "unregistered Company" whatever may be the number of its members. High Court has jurisdiction to make order for winding up the Company irrespective of the number of its members and the mere fact that order for winding up has been made by a Competent Court of the place of Company's incorporation cannot make any difference to the jurisdiction. (Vol 24) 1937 Dom 15 (17-18).

[3] A bank which has its Central Office in British India is subject to the jurisdiction of the High Court in that part of India though its registered office and place

of incorporation may be outside British India. (Vol 26) 1939 Mad 318 (322).

SECTION 271—Note 1.

[1] In case of unregistered company, winding up order can be made only (1) when company is dissolved or about to be dissolved, (2) when it is unable to pay debts, and (3) when the court thinks that the company should be wound up. (1909) 2 Ind Cas 164 (165) (Mad).

[2] If unregistered company ceases to take new business, it does not mean that it is about to be wound up, and an order for winding it up is not justified. (1909) 2 Ind Cas 164 (165) (Mad).

[3] An unregistered company carrying on business 'as a sealed series' does not incur the winding up order

(c) if execution or other process issued on a decree or order obtained in any Court in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied; and

(d) if it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) Nothing in this Part shall affect the operation of any enactment which provides for any partnership, association or company being wound up, or being wound up as a company or as an unregistered company, under any enactment repealed by this Act, except that references in any such first-mentioned enactment to any such repealed enactment shall be read as references to the corresponding provision (if any) of this Act.

[(3) Where a company incorporated outside British India which has been carrying on business in British India ceases to carry on business in British India it may be wound up as an unregistered company under this Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the company under which it was incorporated.]

[1882—S. 243; (1908) 8 Edw. VII. C. 69—S. 268; (1929) 19 and 20 Geo. V. C. 23—S. 336]

[a] Inserted by the Indian Companies (Amendment) Act, 1936, (22 [XXII] of 1936), S. 116. [15-1-1937.]

272. (1) In the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to pay or contribute to the payment of the costs and expenses of winding up the company, and every contributory shall be liable to contribute to the assets of the company all sums due from him in respect of any such liability as aforesaid.

(2) In the event of any contributory dying or being adjudged insolvent, the provisions of this Act with respect to the legal representatives and heirs of deceased contributories, and to the assignees of insolvent contributories shall apply.

[1882—S. 244; (1908) 8 Edw. VII. C. 69—S. 269; (1929) 19 and 20 Geo. V. C. 23—S. 339].

273. The provisions of this Act with respect to staying and restraining suits and legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order shall, in the case of an unregistered company, where the application to stay or restrain is by a creditor, extend to suits and legal proceedings against any contributory of the company.

[1882—S. 245; (1908) 8 Edw. VII. C. 69—S. 270; (1929) 19 and 20 Geo. V. C. 23—S. 340]

Section 271 (contd.)

if the company is solvent. (1909) 2 Ind Cas 164 (165) (Mad).

[4] If a mutual Life Insurance Company is solvent, it cannot be ordered to be wound up against the wishes of the minority of share-holders. (1909) 2 Ind Cas 164 (165) (Mad).

[5] A scheme under S 153 provides an alternative mode of winding up a company. It is a provision to avert winding up and is therefore a provision with respect to winding up within the meaning of S. 271. (Vol 26) 1939 Mad 318 (327).

[6] Where a company has ceased to exist by an Act of the country by whose Acts and under whose law it was made a juristic entity, it must be treated as non-existent by all Courts administering English law. (Vol 28) 1941 PC 88 (89) (PC). (Companies Ordinance (Hong Kong) 1932, S. 313 (2) (Corresponding to Indian Companies Act, 1913, S. 271 (3)—Company incorporated under laws of Republic of China having head-office in Chinese Province and branch at Hong Kong—Company dissolved by Decree of Chinese Court—Petition

for winding up in Supreme Court of Hong Kong—*Held* Supreme Court had power to wind up company.)

[7] As a foreign company is liable to be wound up as an unregistered company within the meaning of S. 271, the expression "company" in S. 153 which means a company liable to be wound up under the Act, would include a foreign company. (Vol 26) 1939 Mad 318 (321).

[8] A Court has a jurisdiction to wind up as an unregistered company, a foreign company whatever the number of its members, if it has an office and assets within its jurisdiction, and the mere fact that the order for winding-up the company has been made by a competent Court of the place of the company's incorporation cannot make any difference to the jurisdiction of the Court. (Vol 24) 1937 Bom 15 (18).

[9] Court has jurisdiction in a proper case to order the winding up of a partnership association or company under S. 271 if and only if at the time when the petition for the winding up is presented it consists of more than seven members. (Vol 18) 1931 Rang 77 (78) : 8 Rang 658 (DB). ((Vol 17) 1930 Rang 337 : 8 Rang 409 reversed.)

274. Where an order has been made for winding up an unregistered company, no suit or other suits stayed on winding legal proceedings shall be proceeded with or commenced against any contributory of the company in respect of any debt of the company, except by leave of the Court, and subject to such terms as the Court may impose.

[1882—S. 246; (1908) 8 Edw. VII, C. 69—S. 271; (1929) 19 and 20 Geo. V, C. 23—S. 341]

275. If an unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the Court may, by the winding up order, direct that all or any part of the property, movable or immovable, including all interests and rights in, to and out of property, movable and immovable, and including obligations and actionable claims as may belong to the company or to trustees on its behalf, is to vest in the official liquidator by his official name, and thereupon the property or the part thereof specified in the order shall vest accordingly; and the official liquidator may, after giving such indemnity (if any) as the Court may direct, bring or defend in his official name any suit or other legal proceeding relating to that property, or necessary to be brought or defended for the purposes of effectually winding up the company and recovering its property.

[1882—S. 247; (1908) 8 Edw. VII, C. 69—S. 272; (1929) 19 and 20 Geo. V, C. 23—S. 190].

276. The provisions of this Part with respect to unregistered companies shall be in addition to, and not in restriction of, any provisions hereinbefore in this Act contained with respect to winding up companies by the Court, and the Court or official liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed and registered under this Act; but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

[1882—S. 248; (1908) 8 Edw. VII, C. 69—S. 273; (1929) 19 and 20 Geo. V, C. 23—S. 342].

PART X.

COMPANIES ESTABLISHED OUTSIDE BRITISH INDIA

277. (1) Every company incorporated outside British India, which at the commencement of this Act has a place of business in British India, and every such company which after the commencement of this Act establishes such a place of business within British India, shall, within six months from the commencement of this Act or within one month from the establishment of such place of business, as the case may be, file with the registrar in the province in which such place of business is situated,—

- (a) a certified copy of the charter, statutes or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and managers (if any) of the company;
- (d) the names and addresses of some one or more persons resident in British India authorised to accept on behalf of the company service of process and any notices required to be served on the company;

SECTION 277—Note 1.

[1] A company registered in foreign state is entitled to file suits and maintain action in British India. It does not cease to be a legal body in India even though it is unregistered. (Vol 24) 1987 Bom 24 (24).

[2] Where an insurance company incorporated outside British India has got itself registered under S. 277, Companies Act, and has employed a firm carrying on business in India as agents, and authorised them to

accept proposals, issue cover notes and issue policies and pay claims, and is paying rent for office and pays license-tax to the corporation and keeps a sign board and maintains separate accounts:

Held, that the company carried on business at that place. (Vol 24) 1987 All 208 (215 217) : ILR (1937) All 234 (DB).

[3] The only mode of service on foreign companies is that prescribed by Ss. 277 and not by CP Code. (Vol 15) 1928 Sind 114 (113) (DB).

^a[(e) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company ;]

and, in the event of any alteration being made in any such instrument ^b [or in any such address] or in the directors or managers or in the names or addresses of any such persons as aforesaid, the company shall, within the prescribed time, file with the registrar a notice of the alteration.

(2) Any process or notice required to be served on the company shall be sufficiently served, if addressed to any person whose name has been so filed as aforesaid and left at or sent by post to the address which has been so filed.

(3) Every company to which this section applies shall in every year file with the registrar of the province in which the company has its principal place of business—

(i) in a case where by the law, for the time being in force, of the country in which the company is incorporated such company is required to file with the public authority an annual balance-sheet,—^c[three copies of that balance-sheet] ^d[and if the balance-sheet does not contain all the information provided for in the form marked H in the Third Schedule, such supplementary statements [in triplicate] as shall furnish such information] ; or

(ii) in a case where no such provision is made by the law, for the time being in force, of the country in which the company is incorporated,—such a statement ^e[in triplicate] in the form of a balance-sheet as such company would, if it were a company formed and registered under this Act, be required to file in accordance with the provisions of this Act :

f [* * * * *]

(4) Every company to which this section applies and which uses the word “ Limited ” as part of its name, shall—

(a) in every prospectus inviting subscriptions for its shares or debentures in British India, state the country in which the company is incorporated ; and

(b) conspicuously exhibit on every place where it carries on business in British India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place ; and

(c) have the name of the company and of the country in which the company is incorporated mentioned in legible English characters in all bill heads and letter paper, and in all notices, advertisements and other official publications of the company.

^g[(5) Every company to which this section applies shall if the liability of the members of the company is limited cause notice of that fact to be stated in legible characters in every prospectus inviting subscriptions for its shares, and in all bill heads and letter paper, notices, advertisements and other official publications of the company in British India, and to be affixed on every place where it carries on business.]

^g[(6) If any Company to which this section applies fails to comply with any of the requirements of this section, the company, and every officer or agent of the company, shall be liable to a fine not exceeding five hundred rupees or, in the case of a continuing offence, fifty rupees for every day during which the default continues.

^g[(7) For the purposes of this section—

(a) the expression “ certified ” means certified in the prescribed manner to be a true copy or a correct translation ;

(b) the expression “ place of business ” includes a share transfer or share registration office ;

—(c) the expression “ director ” includes any person occupying the position of director, by whatever name called ; and

(d) the expression "prospectus" means any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of the company.

s!(8)] There shall be paid to the registrar for registering any document required by this section to be filed with him a fee of five rupees or such smaller fee as may be prescribed.

[(1908) 8 Edw. VII, C. 69—S. 274; (1929) 19 and 20 Geo. V, C. 25—Ss. 343, 344, 346, 347, 348, 349, 351, 352.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1938 (2 [II] of 1938), S. 12. [26-2-1938]

[b] *Substituted* *ibid.*, for "or in such address."

[c] *Substituted*, *ibid.*, for "a copy of that balance sheet."

[d] *Inserted*, *ibid.*, 1936 (22 [XXII] of 1936), S. 117. [15-1-1937.]

[e] *Inserted* *ibid.*, 1938 (2 [II] of 1938), S. 12.

[f] Proviso was *repealed* *ibid.*, 1936 (22 [XXII] of 1936) S. 117.

[g] Sub-section (5) was *inserted* and the original sub-sections (5), (6) and (7) were *re-numbered* as sub-sections (6), (7) and (8) respectively, *ibid.*

Objects and Reasons.

"We have amended sub-clause (1) so as to include companies already carrying on business in British India within the scope of the clause, and we have added to the requirements prescribed by that clause a list of the managers and the full address of the registered office of the company. We have re-drawn sub-clause (3) to make it clear that where a company to which this clause applies is required by the law of the country in which it is incorporated to file an annual balance-sheet, a copy of that balance-sheet must be filed in this country, and, where no such provision is made, that the company must file such a balance-sheet as companies under [the Act] are required to file . . ."—S. C. R., 1913.

Amendments made in 1936.—"In view of the difficulty which, it is represented, would be experienced by certain companies incorporated abroad if they were required to prepare and file balance-sheets in the form required from companies incorporated in British India when the balance-sheet prescribed by the law under which they are incorporated is of a widely divergent nature, we have considered it sufficient to secure that

they shall file with the registrar a copy of their own proper balance-sheet, but shall supplement it if necessary by further documents giving the information which is deemed essential and which has now been tabulated in new form inserted as Form H in the Third Schedule of the Act. Where any such company is not required by the law of the country in which it is incorporated to file a balance-sheet, the company must comply with the requirements of the British Indian law in this respect.

We consider that the provision of the New Zealand Companies Act of 1933 requiring these companies to keep books of account in relation to the business done in the country where they are trading should be incorporated in the Act, and we have provided accordingly by an addition to proposed section 277D.

We have also incorporated the provisions of section 348 (4) of the English Act regarding full disclosure of the fact that the liability of the members of any such company is limited."—S.O.R., 1936

Restriction on sale and offer for sale of share.

^a[277A. (1) It shall not be lawful for any person—

(a) to issue, circulate or distribute in British India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside British India whether the company has or has not established or when formed will or will not establish, a place of business in British India unless—

(i) before the issue, circulation or distribution of the prospectus in British India a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body, has been delivered for registration to the registrar ;

(ii) the prospectus states on the face of it that the copy has been so delivered ;

(iii) the prospectus is dated ; and

(iv) the prospectus otherwise complies with this Part ; or

(b) to issue to any person in British India a form of application for shares in or debentures of such a company or intended company as aforesaid, unless the form is issued with a prospectus which complies with this Part :

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures.

(2) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

(3) Where any document by which any shares in or debentures of a company incorporated outside British India are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 98A to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus, or for the issue of a form of application for shares or debentures, in contravention of the provisions of this section shall be liable to a fine not exceeding five thousand rupees.

(6) In this section and in section 277B, the expressions 'prospectus', 'shares' and 'debentures' have the same meanings as when used in relation to a company incorporated under this Act.

[(1929) 19 and 20 Geo. V, C. 23—S. 354]

[a] S. 277 A was inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 118. [15-1-1937]

Requirements as to *277B. (1) In order to comply with this Part a prospectus, in addition to complying with the provisions of sub-clauses (i) and (ii) of clause (a) of sub-section (1) of section 277A, must—

- (a) contain particulars with respect to the following matters :—
 - (i) the objects of the company ;
 - (ii) the instrument constituting or defining the constitution of the company ;
 - (iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected ;
 - (iv) an address in British India where the said instrument, enactments or provisions, or copies thereof, and if the same or in a foreign language a translation thereof in the English language certified in the prescribed manner, can be inspected ;
 - (v) The date on which and the country in which the company was incorporated ;
 - (vi) whether the company has established a place of business in British India, and, if so, the address of its principal office in British India :

Provided that the provisions of sub-clauses (i), (ii) and (iii) of this clause shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business ;

- (b) subject to the provisions of this section, state the matters specified in sub-section (1A) of section 93 and set out the reports specified in that section :

Provided that—

- (i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed, and
- (ii) in section 93 of this Act a reference to the articles of the company shall be deemed to be a reference to the constitution of the company.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void.

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

- (a) as regards any matter not disclosed, he proves that he was not cognizant thereof ; or
- (b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part, or
- (c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or were otherwise, such as ought, in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused :

Provided that in the event of failure to include in a prospectus a statement with respect to the matters specified in clause (n) of sub-section (1) of section 98, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed,

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section.

[(1929) 19 and 20 Geo. V, C. 23—S. 355.]

[a] *Inserted* by the Indian Companies (Amendment) Act 1936, (22 [XXII] of 1936), S. 118. [15-1-1937]

Restriction on canvassing for sale of shares. ^{a277C} (1) It shall not be lawful for any person to go from house to house offering shares of a company incorporated outside India for subscription or purchase to the public or any member of the public.

(2) In this sub-section the expression 'house' shall not include an office used for business purposes.

(3) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees one hundred.

[(1929) 19 and 20 Geo. V, C. 23—S. 356.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 118. [15-1-1937.]

a277D. b[(1)] The provisions of sections 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on properties in British India which are created and to charges on property in British India which is acquired after the commencement of the Indian Companies (Amendment) Act, 1936, by a company incorporated outside British India which has an established place of business in British India.

b[Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company :

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub clause (i) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109A shall apply as if the property wherever situated were situated outside British India,

(2) This section shall be deemed not to have come into force until the d [commencement of the Indian Companies (Amendment) Act 1936 :

Provided that where the provisions of section 109 and sections 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the d[commencement of the Indian Companies (Amendment) Act, 1936].

[(1929) 19 and 20 Geo. V, C. 23—S. 90.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 118. [This section is deemed to have come into force on 26-2-1938; see sub-s. (2) of this section.]

[b] S. 277 D was renumbered as sub-section (1) and provisos and sub-section (2) were added *ibid.*, 1938 (2 [II] of 1938), S. 13 [26-2-1938].

[c] For the purpose of this section, the amending Act of 1936 is deemed to have come into force on 26-2-1938 (See sub-sec. (2) of this section).

[d] The amending Act of 1936 came into force on 26th February 1938.

^a277E. The provisions of sections 118 and 119 shall *mutatis mutandis* apply to the case of all companies incorporated outside British India but having an established place of business in British India and the provisions of section 180 shall apply to such companies to the extent of requiring them to keep at their principal place of business in British India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to its business in British India.]

^bProvided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 118 [15-1-1937].*

[b] *Proviso was added, ibid., 1938 (2 [II] of 1938), S. 14.*

[26-2-1938]

^a[PART XA.]

BANKING COMPANIES.

^a277F. A 'banking company' means a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, notwithstanding that it engages in addition in any one or more of the following forms of business, namely :—

- (1) the borrowing, raising or taking up of money ; the lending or advancing of money either upon or without security ; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hundees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not ; the granting and issuing of letters of credit, travellers, cheques and circular notes ; the buying, selling and dealing in bullion and specie ; the buying and selling of foreign exchange including foreign bank notes ; the requiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds ; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others ; the negotiating of loans and advances ; the receiving of all kinds of bonds, scrips or valuables on deposit, or for safe custody or otherwise ; the collecting and transmitting of money and securities ;
- (2) acting as agents for Governments or local authorities or for any other person or persons ; the carrying on of agency business of any description other than the business of a managing agent ^b[of a company not being a banking company] including the power to act as attorneys and to give discharges and receipts ;
- (3) contracting for public and private loans and negotiating and issuing the same ;
- (4) the promoting, effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, Municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue ;
- (5) carrying on and transacting every kind of guarantee and indemnity business ;
- (6) promoting or financing or assisting in promoting or financing any business undertaking or industry, either existing or new, and developing or forming the same either through the instrumentality of syndicates or otherwise ;

SECTION 277F—Note 1.

[1] As to the power of the Central Government to

cause an inspection of the affairs of banking companies to be made in certain circumstances, see the Banking Companies (Inspection) Ordinance, No. IV of 1946.

- (7) acquisition by purchase, lease, exchange, hire or otherwise of any property immovable or movable and any rights or privileges which the company may think necessary or convenient to acquire or the acquisition of which in the opinion of the company is likely to facilitate the realisation of any securities held by the company or to prevent or diminish any apprehended loss or liability ;
- (8) managing, selling and realising all property movable and immovable which may come into the possession of the company in satisfaction or part satisfaction of any of its claims ;
- (9) acquiring and holding and generally dealing with any property and any right, title or interest in any property movable or immovable which may form part of the security for any loans or advance or which may be connected with any such security ;
- (10) undertaking and executing trusts ;
- (11) undertaking the administration of estates as executor, trustee or otherwise ;
- (12) taking or otherwise acquiring and holding shares in any other company having objects similar to those of the company ;
- (13) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or *ex.* employees of the company or the dependents or connections of such persons ; granting pensions and allowances and making payments towards insurance; subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object ;
- (14) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company ;
- (15) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company ;
- (16) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this section ;
- (17) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company.]

e[Provided that any company which uses as part of the name under which it carries on business the word "bank", "banker" or "banking" shall be deemed to be a banking company notwithstanding that the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, is not, or is not shown to be the principal business of the company.]

[a] Part X A consisting of sections 277F to 277N was inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 119 [15-1-1937.]

[b] Inserted. *ibid.*, 1936 (2 [II] of 1936) S. 15 [26-2-1936]

[c] Proviso was added by the Indian Companies (Second Amendment) Act, 1942 (21 [XXI] of 1942) S. 2. [The amending Act of 1942 came into force on 1-11-1943; See S. 1 (2) of the Act and Com. Dept. notification No. 24 (8) Tr. (CL) 43 in *Gazette of India, Part I, dated 26th June 1943.*]

Objects and Reasons.

Amendment made in 1942.—The definition of banking companies in this section had created considerable difficulties in deciding whether a company was a banking company or not. The chief difficulty arose out of the use of the term 'principal business' in this section. Registrars of Companies had often found it difficult to decide, particularly in the case of smaller institutions calling themselves banks, whether or not in terms of this definition they were banking companies. The result had been that a very great number of such institutions which might be regarded as non-scheduled banks operating in British India were not subject to the obligations imposed by law on banking companies as for example, maintaining a minimum cash reserve. There

were others which claimed that for one reason or another they did not fall within the definition of banking companies, and this contention had, in some cases, been upheld by the Courts. With the object of removing these difficulties the section has been amended in 1942 by adding a proviso to the section. And according to a suggestion that adequate time should be given to allow companies using any of the words 'bank', 'banker' or 'banking' to make necessary changes in their nomenclature, the date of the amending Act of 1942 was postponed to a date not earlier than one year from the date of its publication in the official Gazette. —See S.O.R., *Gazette of India* 1942, Part V. Page 137.

^a[277G. (1) No company formed after the commencement of the Indian Companies (Amendment) Act, 1936, for the purpose of carrying on business as a banking company or which uses as part of the name under which it proposes to carry on business the word 'bank', 'banker' or 'banking' shall be registered under this Act, unless the memorandum limits the objects of the company to the carrying on of the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or otherwise along with some or all of the forms of business specified in section 277-F.

(2) No banking company whether incorporated in or outside British India shall after the expiry of two years from the commencement of the said Act carry on any form of business other than those specified in section 277-F :

Provided that the ^c[Central Government] may, by notification in the ^d[Official Gazette] specify in addition to the businesses set forth in clauses (1) to (17) of section 277-F other forms of business which it may be lawful under this section for a banking company to engage in.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 119. [15-1-1937.]

[b] The Act came into force on 15-1-1937.

[c] *Substituted* by A. O. for "Governor-General in Council".

[d] *Substituted* by A. O. for "Gazette of India".

Banking company not to employ managing agent. ^a277H. No banking company shall after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1936, employ or be managed by a managing agent other than a banking company for the management of the company.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 119. [15-1-1937.]

[b] *i.e.* 15-1-1937.

^a[277HH. No banking company, whether incorporated in or outside British India, which carries on business in British India, shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, employ or be managed by a managing agent, or any person whose remuneration or part of whose remuneration takes the form of commission or a share in the profits of the company, or any person having a contract with the company for its management for a period exceeding five years at any one time :

Provided that the period of five years shall, for the purposes of this section, be computed from the date on which this section comes into force :

Provided further that any such contract may be renewed or extended for a further period not exceeding five years at a time if and so often as the directors think fit."

[a] *Inserted* by the Indian Companies (Amendment) Act, 1944 (4 [IV] of 1944) S. 2 [This Act came into force on 1-7-1944, See *Gazette of India*, 1944, Part I dated 10-6-1944, Com. Dept. No. 24 (22)-Tr-(CI) 144.]

[b] This Act came into force on 1st July 1944.

Objects and Reasons.

"Certain undesirable features in the structure and management of banking companies have of late come to notice, such as (i) the appointment of managing directors or managers on long term contracts on payment of remuneration by commission or share in the profits, (ii) the fixation of the authorised capital at a very high figure as compared with the subscribed and paid up capital, (iii) the possessing of large voting rights by an individual or a small group of individuals, usually partly-paid ordinary or deferred share-holders. The first of these is contrary to the spirit of section

277H, though not at present expressly prohibited. The second gives the public a false impression of the status and importance of the bank. The third enables an individual or a small group of individuals to concentrate in his or their hands the control of the companies' activities, thereby facilitating the undertaking of unsafe or speculative business, to the detriment of the interests of the depositors." In order to remove these objectionable features, this section was newly inserted, section 277 I was substituted and section 277L was amended.—*See S.O.B., Gazette of India 1944, Part V, Page 3.*

^a[277I. Notwithstanding anything contained in section 103, no banking company incorporated under this Act on or after the 15th day of January 1937, shall commence business unless shares have been allotted to an amount sufficient to yield a sum of at least fifty thousand rupees as working capital, and unless a declaration duly verified by an affidavit signed by the directors and the manager that such a sum has been received by way of paid up capital has been filed with the registrar.

(2) No banking company, whether incorporated in or outside British India, if incorporated on or after the 15th day of January 1937 shall, after the expiry of two years from the commencement of the Indian Companies (Amendment) Act, 1944, carry on business in British India unless it satisfies the following conditions, namely :—

- (a) that the subscribed capital of the company is not less than half the authorised capital, and the paid up capital is not less than half the subscribed capital, and
- (b) that the capital of the company consists of ordinary shares only, or ordinary shares and such preference shares as may have been issued before the commencement of the Indian Companies (Amendment) Act, 1944, only, and
- (c) that the voting rights of all shareholders are strictly proportionate to the contribution made by the shareholder, whether a preference shareholder or an ordinary shareholder, to the paid up capital of the company.”]

[a] *Substituted* for the original section by the Indian Companies (Amendment) Act, 1944 (4 [IV] of 1944). S. 3. [1-7-1944]

[b] This Act came into force on 1st July 1944. (See Gazette of India, 1944, Part I, dated 10-6-1944) Com. Dept. No. 24 (22). Tr. (GL) 144.]

Objects and Reasons.

For Objects and Reasons See under S. 277HH.

Prohibition of charge on unpaid capital. a, 277J. No banking company shall create any charge upon any unpaid capital, paid capital of the company, and any such charge shall be invalid.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 119. [15-1-1937].

Reserve fund.

a[277K (1) Every banking company shall, after the commencement of the Indian Companies (Amendment) Act, 1936, maintain a reserve fund.

(2) Every banking company shall out of the declared profits of each year and before any dividend is declared transfer a sum equivalent to not less than twenty per cent. of such profits to the reserve fund until the amount of the said fund is equal to the paid up capital.

(3) A banking company shall invest the amount standing to the credit of its reserve fund in Government securities or in securities mentioned or referred to in section 20 of the Indian Trusts Act, 1882, or keep deposited in a special account to be opened by the company for the purpose in a scheduled bank as defined in clause (e) of section (2) of the Reserve Bank of India Act, 1934 :

Provided that the provision of the subsection shall not apply to a banking company incorporated before the commencement of the Indian Companies (Amendment) Act, 1936, till after the expiry of two years from the commencement of the said Act.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 119. [15-1-1937]

[b] i.e. 15-1-1937.

a[277L (1) Every banking company shall maintain by way of cash reserve in cash a sum equivalent to at least one and a half per cent of the time liabilities and

Cash reserve.

five per cent. of the demand liabilities of such company and shall file with the registrar before the tenth day of every month [three copies] of a statement of the amount so held on the Friday of each week of the preceding month with particulars of the time and demand liabilities of each such day.

(2) For the purposes of subsection (1) ‘demand liabilities’ means liabilities which must be met on demand, and ‘time liabilities’ means liabilities which are not demand liabilities.

SECTION 277K—Note 1.

[[1] The word ‘maintain’ in subsection (1) means ‘maintain intact and necessarily prohibits the utilisation of the reserve fund in any way other than in accordance with subsection (3). (Vol 30) 1943 Mad 629 (630) : 45 Cri L Jour 391.

[2] As regards a banking company incorporated before January 15, 1937, i.e., the date of the commencement of the Companies Amendment Act of 1936,

S. 277-K (3) came into operation on January 15, 1939. (Vol 30) 1943 Mad 629 (630) : 45 Cri L Jour 391.

SECTION 277L—Note 1.

[1] Where the evidence does not warrant the conclusion that a director was knowingly and wilfully a party to the default to maintain the requisite cash reserve, he cannot be convicted under section 277-L. (1940) 1 Mad L Jour 478 (478).

(3) Nothing in this section or in section 277K shall apply to a scheduled bank as defined in clause (e) of section 2 of the Reserve Bank of India Act, 1934.

(4) If default is made in complying with the requirements of section 277G, section 277H [section 277HH, section 277I] section 277J, section 277K or section 277M or with the requirements of this section as to the maintenance of a cash reserve, every director or other officer of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees for every day during which the default continues, and if default is made in complying with the requirements of this section as to the filing of the statement referred to in sub-section (1), to a fine not exceeding one hundred rupees for every day during which the default continues.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 119. [15-1-1937].*

[b] *Inserted, ibid., 1938 (2 [II] of 1938) S. 16.*

[26-2-1938]

[c] *Inserted, ibid., 1944 (4 [IV] of 1944), S. 4.*

[1-7-1944]

a, 277Mb [(1)] c[A banking company shall not form any subsidiary company except a subsidiary company formed for the purpose of undertaking and executing trusts, undertaking the administration of estates as executor, trustee or otherwise and such other purposes set forth in section 277F as are incidental to the business of accepting deposits of money on current account or otherwise.]

b[(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of that company :

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 1936.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 119. [15-1-1937]*

[b] *Sec. 277 M was re-numbered as sub-section (1) of that section and sub-section (2) was added. ibid., 1938 (2 [II] of 1938) S. 17. [26-2-1938]*

[c] *Substituted, ibid.*

[d] *i.e., 15th January 1937.*

a[277N. (1) The Court may on the application of a banking company which is temporarily unable to meet its obligations make an order staying the commencement or continuance of all actions and proceedings against the company for a fixed period of time on such terms and conditions as it shall think fit and proper and may from time to time extend the period.

(2) No such application shall be maintainable unless accompanied by a report of the registrar :

Provided, however, the Court may, for sufficient reasons, grant interim relief, even if the application is not accompanied by such report.

(3) The registrar shall for the purposes of his report be entitled at the cost of the company to investigate the financial condition of the company and for such purpose to have the books and documents of the company examined by an accountant holding a certificate issued under section 144.]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 119. [15-1-1937]*

SECTION 277N—Note 1.

[1] Unless the Court is satisfied that the position of the company is embarrassed only temporarily, no order under S. 277-N can be passed. Mere fact that Directors are attended by just motives and that they

think that their arrangement is best suited to meet the liabilities, is not sufficient. Company in an insolvent position cannot be allowed under S. 277-N to continue its operation under the protection of the Court. (Vol. 24) 1938 All India Reports (1937) All India Reports.

PART XI.

SUPPLEMENTAL.

Legal proceedings, offences, etc.

Cognizance of offences.

278. (1) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act.

(2) If any offence which by this Act is declared to be punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held.

(3) Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall, for the purpose of the said Code, be deemed to be non-cognizable.

[1882—S. 252]

Objects and Reasons.

"We have re-drawn sub-clause (1) of this clause and merely provided that no Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under the [Act]. It was strongly pressed upon us that offences under the [Act] should

be made non-cognizable, and we have adopted this amendment following in this respect the analogy of section 477A of the Indian Penal Code."—S. C. R., 1913.

279. The Court imposing any fine under this Act may direct that the whole or any part thereof be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding of the person on whose information the fine is recovered.

[1882—S. 253; (1908) 8 Edw. VII, C. 69—S. 277; (1929) 19 and 20 Geo. V, C. 23—S. 367].

280. Where a limited company is plaintiff or petitioner in any suit or other legal proceed-

Power to require limited company to give security for costs.

ing, any Court having jurisdiction in the matter may, if it appears that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

[1882—S. 93; (1908) 8 Edw. VII C. 69—S. 278; (1929) 19 and 20 Geo. V. C. 23—S. 371].

a[281. (1) If in any proceeding for negligence, default, breach of duty or breach of trust

Power of Court to grant relief in certain cases. against a person to whom this section applies, it appears to the court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

SECTION 278—Note 1.

[1] A Magistrate of the First Class can try offence under S. 134. The Magistrate should exercise wise discretion in trying case summarily and ordinarily he ought to restrict such trials to simple cases. (1913) 35 All 173 (176); 14 Cri L Jour 105. (Case under S. 74 of 1882 Code.)

[2] An offence, under the Companies Act, punishable with fine and imprisonment can be tried summarily by the Presidency Magistrate, unless he imposes an appealable sentence. (Vol 31) 1944 Bom 129 (130): IIR (1944) Bom 382; 45 Cri L Jour 631 (FB).

[3] Though offences under the Act, are non-cognizable and cannot be investigated under Chap XIV Criminal PC the mere fact that the offences were wrongly investigated and sent up by the police is no obstacle to their being tried by the Magistrate. (Vol 26) 1939 Rang 273 (274); 40 Cr L Jour 789.

[4] As the office of the Registrar with whom the balance sheet should be filed is in Calcutta, Presidency

Magistrate in Calcutta can try charges under section 134 although Company is situated outside Calcutta. (Vol 4) 1917 Cal 1 (1): 45 Cal 486; 18 Cr L Jour 787 (DB)* (Vol 4) 1917 Cal 2 (2): 45 Cal 490; 18 Cr L Jour 787 (DB).

SECTION 280—Note 1.

[1] Misfeasance proceedings under S. 235 are not "suit or other legal proceeding" within S. 280 and so the Court cannot require security for costs from the Liquidator. (Vol 20) 1933 All 205 (206): 55 All 250.

[2] No appeal lies from an order dismissing the petition for taking security under S. 280. (Vol 29) 1942 Mad 405 (405) (DB).

SECTION 281—Synopsis.

1. Applicability.
2. Breach of Duty.
3. Breach of Trust.
4. Negligence.
5. Honestly and honestly.

(2) Where any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

(3) The persons to whom this section applies are the following :—

- (a) directors of a company ;
- (b) managers and managing agents of a company ;
- (c) officers of a company ;
- (d) persons employed by a company as auditors, whether they are or are not officers of the company.]

[(1908) 8 Edw. VII, C. 69—S. 279; (1929) 19 and 20 Geo. V, C. 23—S. 372 (1)]

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 120, for the original section. [15-1-1937.]

282. Whoever in any return, report, certificate, balance-sheet or other document, required by Penalty for false state- or for the purposes of any of the provisions of this Act, wilfully makes a ment. statement false in any material particular, knowing it to be false, shall be punishable with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[(1908) 8 Edw. VII, C. 69—S. 281; (1929) 19 and 20 Geo. V, C. 23—S. 362]

Section 281 (contd.)

1. **Applicability.**—[1] S. 281 is not designed to cover gross neglect of a director's ordinary duties over a long series of years. (Vol 17) 1930 Bom 572 (581) : 54 Bom 226 (DB).

[2] An innocent director cannot be held liable for fraud of co-directors in issuing false reports and balance sheets provided that books are properly kept and audited and there are no circumstances arousing suspicion. (Vol 31) 1944 Mad 536 (538) : ILR (1945) (Mad 107 (DB)).

[3] Where a company entered into contract of lease with a third person and after the contract one of the secretaries entered into a partnership with the lessee, it was held that the Secretary could not be charged by the company with the whole profits of the partnership but only his individual share in the profits. (Vol 19) 1932 PC 244 (245, 246) (PC).

2. **Breach of Duty.**—[1] Before S. 281 can be invoked it must be shown that the directors have acted reasonably as well as honestly, while the directors are not trustees in the technical sense they hold a fiduciary position with regard to the assets of the company and they are guilty of a grave breach of duty if they allow the Managing Director to dissipate the company's funds by gambling in differences. (Vol 31) 1944 Mad 536 (538) : ILR (1945) Mad 107 (DB).

3. **Breach of Trust.**—[1] Directors entering into contract and making payments on it during winding up must be assumed to do so with knowledge that such payments are likely to be void and are in this sense guilty of breach of trust. Absence of dishonesty on their part is no excuse. (Vol 24) 1937 Pat 293 (298). (Relief under S. 281 cannot be granted).

4. **Negligence.**—[1] In a suit by a company against its directors, with respect to decrees allowed to be time barred by them it was necessary for the company to show that the failure to do this was due to the negligence of the directors. (Vol 19) 1932 PC 244 (246) (PC).

[2] A director can be charged with wilful negligence only if he knew that he was committing breach of duty and was recklessly careless. A director is justified in trusting the integrity, skill and competence of officials. Insolvency does not necessarily mean that the official is dishonest. (Vol 25) 1938 Mad 124 (127) : ILR (1938) Mad 292 (DB).

[3] Auditor should satisfy himself whether the books submitted to him show a true state of affairs. If he fails in his duty he will be jointly and severally responsible with officers of the company though he is not guilty of dishonesty. (Vol 12) 1925 All 518 (535) : 26 Cri L Jour 1061.

5. **Reasonably and honestly.**—[1] Directors made responsible by the articles of the company, for the management of the company blindly trusting a dishonest manager, keeping themselves in utter ignorance of the affairs, cannot be said to act reasonably. (Vol 12) 1925 All 519 (520) : 47 All 669 (DB).

[2] In a suit against its director, the rate of interest on a loan raised by a director was impugned but no attempt was made on behalf of the company that the money urgently needed, could have been raised at any lower rate. It was held that the rate of interest was proper. (Vol 19) 1932 PC 244 (245) (PC).

SECTION 282—Synopsis.

1. Applicability.
2. Auditor's liability.
3. Director's liability.
4. False Statement.
5. Liquidator's liability.
6. Manager's liability.

1. **Applicability.**—Section 187 has no relation to a prosecution for an offence under S. 282, nor does S. 188 or S. 141 A bar a prosecution upon a private complaint of an offence under S. 282. (Vol 29) 1942 Sind 9 (10) : 43 Cr L Jour 304 (DB).

***[282A.** Any director, managing agent, manager or other officer or employee of a company Penalty for wrongful who wrongfully obtains possession of any property of a company, or withholding of property. having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised

Section 282 (contd.)

[2] It is the effect upon the ordinary investor regarding the statements made in a balance-sheet in an ordinarily careful manner in which an investor would do which has to be considered, when one is making up one's mind as to whether the breach of S. 282 has been committed. (Vol 23) 1936 Cal 680 (684) : ILR (1937) 1 Cal 328 : 38 Cr L Jour 151 (DB).

[3] The expression "wilfully" in S. 282 does not embody the idea of criminal mentality, but it means nothing more nor less than the spontaneous action of a person who is a free agent. It is a term which must be interpreted according to the facts of each case. It is not a term of art but a legal expression to be fitted to the circumstances being considered by the Court. (Vol 23) 1936 Cal 680 (683) : ILR (1937) 1 Cal 328 : 38 Cr L Jour 151 (DB).

[4] Prosecution under a penal enactment in a special Act is no bar to a prosecution under a general Act. (Vol 24) 1937 All 714 (716) : ILR (1937) All 779 (DB).

2. Auditor's liability.—[1] Auditors signing the report in a false balance sheet to the effect that it is correct makes a false statement wilfully and is liable to prosecution under S. 282. (Vol 19) 1932 Sind 4 (7) : 25 Sind L R 297.

3. Director's liability.—[1] Directors signing false balance sheets are liable to prosecution. The fact that they did not attend the meeting or had no knowledge of banking or accounts is immaterial. (Vol 19) 1932 Sind 4 (7) : 25 Sind L R 297.

[2] An omission to inform the registrar that some of the directors subscribing to the capital in the prospectus had not paid their share money makes a person applying for the commencement of business, after making the necessary declaration that all the directors have paid their dues, guilty of offence under S. 282. (Vol 11) 1924 All 314 (314) : 46 All 218 : 25 Cr L Jour 474 (DB).

[3] Directors are trustees of public money; so if they publish false balance sheets to conceal their misconduct they are guilty under S. 282. (Vol 23) 1936 Cal 680 (684, 686) : ILR (1937) 1 Cal 328 : 38 Cr L Jour 151 (DB).

[4] If persons join a board of directors and allow their names to be used as bait to induce the public to deal with the concern of which they are directors, they must take the consequences if they do not exercise due care and attention in signing a false balance sheet. (Vol 19) 1932 Sind 4 (7) : 25 Sind L R 297.

4. False Statement.—[1] S. 282 requires that false statements in a balance sheet should be made wilfully, knowing them to be false. Where the points involved are really technical matters, they do not normally fall within this section at any rate where no dishonesty or motive for dishonesty is shown and where the directors acted on the advice of counsel. (Vol. 16) 1929 Bom 443 (445) : 31 Cr L Jour 983 (DB).

[2] In the case of an offence under section 282 what the law makes punishable is a false statement, that is an untrue or incorrect statement, known to the framers of the balance sheet to be false. If there is reasonable likelihood of an honest difference of opinion, based on notions of right and wrong, correct

and incorrect, *mens rea* cannot be attributed by the holder of one view to the holder of the opposite view. Any *ex post facto* consideration of the view held by the directors with regard to the balance sheet should not be the determining factor in a case under section 282. (Vol. 20) 1933 Sind 12 (14) : 26 Sind L R 211 : 33 Cr L Jour 891.

[3] Showing false profit by adding irrecoverable amounts in a balance sheet is making a materially false statement. (Vol 19) 1932 Sind 4 (5) : 25 Sind L R 297.

[4] A loan and a deposit are two different things. One is an asset and the other is a liability. Consolidating the two and presenting them as one item to the readers is a striking case of non-disclosure, amounting to a suppression of the truth. (Vol 23) 1936 Cal 680 (684) : ILR (1937) 1 Cal 328 : 38 Cr L Jour 151 (DB).

[5] Showing bad debts, which are not paid and are not likely to be paid, as part of profits, amounts to making false statement. (Vol 19) 1932 Sind 4 (5) : 25 Sind L R 297.

[6] The proper ascertainment of profits in the case of a company is of great importance only in order to avoid the possibility of payment of dividend wholly or partially out of capital which is strictly forbidden. Where that is guarded against and there is no idea of declaring a dividend, showing of profit on paper may not be so vitally misstating the position of the bank (Vol 20) 1933 Sind 12 (15 & 16) : 26 Sind L R 211 : 33 Cr L Jour 891.

[7] It is not necessary that the statement in a balance sheet should be such as to deceive any one or that it should even be dishonestly made. Thus where after the company has begun to earn revenue, current expenditure has been debited to organisation expenses when it ought to have been debited in revenue accounts in the balance sheet the balance sheet contains a wilful false statement and a technical offence under section 282 is committed. (Vol 22) 1935 Cal 741 (742) : 37 Cr L Jour 115 (DB).

5. Liquidator's liability.—[1] Section 282 applies to a *de facto* Liquidator. A person who accepts an appointment as Liquidator of a company and who has acted in accordance with the powers granted to him, must be deemed to have accepted the duties and responsibilities of that office and so any wrongful act done by him is a wrongful act done by him as Liquidator even though his appointment was irregular. (Vol 29) 1942 Mad 702 (704) : 44 Cr L Jour 503.

6. Manager's liability.—[1] Where a person signs a balance sheet containing false statements as manager he renders himself liable to prosecution under S. 282, even though it was not necessary for him to sign the balance sheet and signed merely because the directors wished him to do so. (Vol 19) 1932 Sind 4 (6) : 25 Sind L R 297.

SECTION 282A—Note 1.

[1] Where a managing agent having possession of the articles of the company fails to hand them over to the liquidator, he wrongfully withholds them and is therefore guilty of an offence punishable under section 282 A. (Vol 31) 1944 Mad 424 (424) : 46 Cr L Jour 347.

by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years.]

[a] S. 282 A was inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936). S. 121. [15-1-1937].

^a[282B. (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company in a special account to be opened by the company for the purpose in a schedule bank as defined in clause (a) of section 2 of the Reserve Bank of India Act, 1934, and no portion thereof shall be utilised by the company except for the purposes agreed to in the contract of service.

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or accruing by way of interest or otherwise to such fund after the ^bcommencement of the Indian Companies (Amendment) Act, 1936 ^c[shall be either deposited in a Postal Savings Bank account or invested] in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882, and all moneys belonging to such fund at the commencement of the said Act ^d[which are not so deposited or invested shall be so deposited or] invested in such securities by annual instalments not exceeding ten in number and not less in amount in any year than one-tenth of the whole amount of such moneys.

^e[Provided that where one-tenth part of the whole amount of the moneys belonging to such fund exceeds the maximum amount which may be deposited in a Post Office Savings Bank account under the rules regulating such deposits for the time being in force, the amount of such excess may be kept or deposited in a special account to be opened for the purpose in a scheduled bank as defined in clause (a) of section 2 of the Reserve Bank of India Act, 1934.]

(3) Notwithstanding anything to the contrary in the rules of any fund to which sub-section (2) applies or in any contract between a company and its employees, no employee shall be entitled to receive in respect of such portion of the amount to his credit in such fund as is invested in accordance with the provisions of sub-section (2) interest at a rate exceeding the rate of interest yielded by such investment.

(4) An employee shall be entitled on request made in this behalf to the company to see the bank's receipt for any money or security such as is referred to in sub-section (1) and sub-section (2).

(5) Any director, managing agent, manager or other officer of the company who knowingly contravenes or permits or authorises the contravention of the provisions of this section shall be liable on conviction to a fine not exceeding five hundred rupees.]

SECTION 282B—Note 1.

[1] The fact that the depositor is a trustee and the money deposited is trust money does not affect the relation which the law creates between a bank and an ordinary customer namely that of a debtor and a creditor. The legal effect of a notice to a bank that the money deposited is trust money is only to cast a duty on the bank not to participate in a breach of trust by the trustee. (Vol 27) 1940 Mad 178 (179) * (Vol 28) 1941 Mad 48 (48) : I L R (1941) Mad 125 (DB). (A Company is not entitled to priority in liquidation of a bank in which it has deposited money under statutory obligation imposed by S. 282) * (Vol 27) 1940 Mad 184 (184). (The fact of notice to a bank that the money deposited is trust money does not make the bank a trustee in respect thereof.)

[2] Where amounts of provident fund lying in deposit in a bank to the credit of the company has not

been invested in the authorised securities as provided by S. 282B, the company is guilty of breach of trust and the bank with knowledge of this must be held to have participated in the breach of trust. (Vol 27) 1940 Mad 184 (185).

[3] Provident fund amount deposited in Bank after the coming into operation of S. 282B—The company renewing the deposit and the Bank failing—No question of breach of trust so far as the amount of the security deposit was concerned. (199) 1939 Mad W N 1069 (1070).

[4] A deposit by the employees under this section constitutes Trust money in the hands of the Company. (Vol 26) 1939 Mad 337 (345).

[5] Upon the Bank going into liquidation the employee has a preferential claim against the assets in respect of the amount deposited by him under this section. (Vol 26) 1939 Mad 337 (345).

†[(6) Nothing in sub-section (2) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognized provident fund within the meaning of clause (a) of section 58A of the Indian Income-tax Act, 1912, or, the rules of the fund contain provisions corresponding to rules 4, 5, 6, 7, 8 and 9 of the Indian Income-tax (Provident Funds Relief) Rules.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 121. [15-1-1937]

[b] *i.e.* 15-1-1937.

[c] *Substituted* by the Indian Companies (Amendment) Act, 1941 (26 [XXVI] of 1941), S. 3. [26-11-1941].

[d] *Substituted, ibid.*

[e] *Proviso was added, ibid.*, 1946 (13 [XIII] of 1946), S. 2.

[18-4-1946]

[f] *New sub-section (6) was added, ibid.*; 1945 (4 [IV] of 1945), S. 2.

[16-4-1945]

Objects and Reasons.

Amendment made in 1936—Sub-section (2).—“We have omitted from sub-section (2) the provision by which the whole of any provident fund was constituted a trust. We are impressed by the considerations that in many large and stable funds the contributors would have to suffer considerable loss from the inevitable lowering of the interest yield, and that the withdrawal from the business of the sums represented by such funds and at present functioning as a part of the company's reserves might be fraught with difficulty. We have provided merely that all future contributions by employees themselves to any provident fund shall be separately invested, and that the securities in which they are invested, shall be trust securities.”—S. C. R., 1936.

Amendment made in 1941—Sub-section (2).—There was a strong demand that Provident Fund moneys of employees of companies should be allowed to be deposited in the Post Office Savings Bank. Such deposits were not permissible under sub-section (2) of section 282-B which permitted investment of such Provident Fund moneys only in securities mentioned or referred to in clauses (a) to (e) of section 20 of the Indian Trusts Act, 1882. Deposits in the Post Office Savings Bank do not constitute securities for this pur-

pose. This position is now rectified by amending sub-section (2) of section 282-B to enable deposits of the nature mentioned above being made in the Post Office Savings Bank.—See S.O.R., 1941, *Gazette of India*, 1941, Part V, Page 199.

Amendment made in 1946—Proviso to sub-section (2).—As the up-ward limit of the amount that can be kept in the Post Office Savings Bank is Rs. 5,000 which is insufficient to meet the day to day running expenses in the case of provident funds of big concerns, the proviso to sub-section (2) is inserted so as to afford greater liquidity to a provident fund, where necessary, by allowing a part of its funds being kept in deposit in a scheduled bank.—See S. O R., *Gazette of India*, 23-3-1946, Part V, Page 65.

Amendment made in 1945—Sub-section (6).—Certain Registrars of Joint Stock Companies took the view that sub-section (2) of this section precluded the withdrawal by an employee of the money standing to his credit. This view, which is not only contrary to intention but is destructive of the normal operation of all provident funds maintained by companies is now displaced by the addition of sub-section (6) to this section.—See S. O. R., 1945.

283. If any person or persons trade or carry on business under any name or title of which Penalty for improper “Limited” is the last word, that person or those persons shall unless duly use of word “Limited”. incorporated with limited liability, be liable to a fine not exceeding fifty rupees for every day upon which that name or title has been used.

[1908] 8 Edw. VII, C. 69—S. 282; (1929) 19 and 20 Geo. V, C. 23—S. 364.]

284. The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act, 1936 had not been passed.]

[1932—S. 250, (1929) 19 and 20 Geo. V, C. 23—S. 383.]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1938 (2 [II] of 1938), S. 18 for the original Section. [26-2-1938]

[b] *i.e.*, 15-1-1937.

SECTION 283—Note 1.

[1] Offences under S. 4 (5) and S. 283 are non-cognizable and cannot be investigated by the police under Cl 14 Cr P C. However investigation of such offences by police does not debar magistrate from trying them. (Vol 26) 1939 Rang 273 (274) : 40 Cr L Jour 799.

SECTION 284—Note 1.

[1] In the following cases it was held that the

winding up proceedings commenced before the Act of 1913 came into force were governed by the provisions contained in the old Act. (Vol 7) 1920 All 257 (258) (Setting aside of decree obtained by official liquidator.) * (Vol 10) 1923 Lah 98 (99). (Appeal). * (Vol 2) 1915 Lah 213 (213) (Appeal) * (Vol 1) 1914 Lah 511 (512) : 1915 Pun Re No. 20. (No part of Act of 1913 applies to pending liquidations.)

Saving of document. 285. Every instrument of transfer or other document made before the commencement of this Act in pursuance of any enactment hereby repealed, shall be of the same force as if this Act had not been passed, and for the purposes of that instrument or document the repealed enactment shall be deemed to remain in full force.

[1882—S. 251.]

Former registration offices, registers and registrars, continued.

286. (1) The offices existing at the commencement of this Act for registration of joint-stock companies shall be continued as if they had been established under this Act.

(2) Registers of companies kept in any such existing offices shall respectively be deemed part of the registers of companies to be kept under this Act.

a[* * * * *]

[a] Sub-section (3) was repealed by A. O.

Savings for Indian Life Assurance Companies Act, 1912, and Provident Insurance Societies Act, 1912.

287. Nothing in this Act shall affect the provisions of the Indian Life Assurance Companies Act, 1912^a or of the Provident Insurance Societies Act, 1912^a.

[a] Both these Acts have now been repealed by the Insurance Act, 1938 (4 [IV] of 1938), S. 128.

Construction of "registrar of joint-stock companies" in Act XXI of 1860.

288. In sections 1 and 18 of Act No. XXI of 1860^a (*for the registration of Literary, Scientific and Charitable Societies*), the words "registrar of joint-stock companies" shall be construed to mean the registrar under this Act.

[1882—S. 255]

[a] The Societies Registration Act, 1860.

Act not to apply to Banks of Bengal, Madras or Bombay.

289. Save as provided in sections 188 and 189, nothing in this Act shall be deemed to apply to the *Bank of Bengal, the Bank of Madras and the Bank of Bombay.

[1882—S. 256]

[a] The reference to the Presidency Banks should now be construed as reference to the Imperial Bank of India : See the Imperial Bank of India Act, 1920 (47 [XLVII] of 1920), S. 32 (1).

Application of Act to non-trading companies with purely Provincial objects.

^a[289A. The powers conferred by this Act on the Central Government shall, in relation to Companies with objects confined to a single Province which are not trading corporations, be powers of the Provincial Government.]

[a] Inserted by A. O.

Repeal of Acts and Savings.

290. (1) The enactments mentioned in the Fourth Schedule are hereby repealed to the extent specified in the fourth column thereof :

Provided that the repeal shall not affect—

- (a) the incorporation of any company registered under any enactment hereby repealed ; nor
- (b) Table Ba in the Schedule annexed to Act No. XIX of 1857, or any part thereof, so far as the same applies to any company existing at the commencement of this Act ; nor
- (c) Table Ab in the First Schedule annexed to the Indian Companies Act, 1882, or any part thereof, so far as the same applies to any company existing at the commencement of this Act.

SECTION 287—Note 1.

[1] The effect of S. 287 and S. 22, Life Assurance Companies Act, is to incorporate into the Life Assurance Companies Act the relevant provisions about winding up contained in the Companies Act including the provisions contained in S. 166. (Vol 25) 1988 Bom 182 (184).

[2] A Company registered under the Companies Act 1913 is subject to all the provisions of the Act of 1913 and if it carries on life insurance business it is in addition subject to the further provisions contained in the Life Insurance Companies Act of 1912. (Vol 21) 1984 Cal 63 (64) : 35 Cr L Jour 492.

(2) All fees directed, resolutions passed and other things duly done under any enactment hereby repealed, shall be deemed to have been directed, passed or done under this Act.

(3) The mention of particular matters in this section or in any other section of this Act shall not prejudice the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

[1882—S. 2; (1929) 19 and 20 Geo. V, C. 23—S. 382].

[a] See Appendix I to this Act.

[b] See Appendix II to this Act.

[c] Repealed by this Act.

SCHEDULES.

THE FIRST SCHEDULE.

(See sections 2, 17, 18, 79, 266.)

TABLE A.

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Preliminary.

1. In these regulations, unless the context otherwise requires, expressions defined in the Indian Companies Act, 1913, or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined; and words importing the singular shall include the plural, and *vice versa*, and words importing the masculine gender shall include females, and words importing persons shall include bodies corporate.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Reg. 1]

Business.

2. The directors shall have regard to the restrictions on the commencement of business imposed by section 103 of the Indian Companies Act, 1913, if, and so far as, those restrictions are binding upon the company.

Shares.

3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share in the company may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital, or otherwise, as the company may from time to time by special resolution determine, and any preference share may with the sanction of a special resolution be issued on the terms that it is or at the option of the company is liable to be redeemed.]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 2]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122. [15-1-1937].

4. If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may, subject to the provisions of section 66A of the Indian Companies Act, 1913, be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 3]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122. [15-1-1937]

TABLE 'A' REGULATIONS.

TABLE A. (General)—Note 1.

[1] Any provision in the articles of association analogous to the provisions of Table 'A' would be valid as the legislature has given a general sanction to Table 'A'. (1896) 1 Ch 397 (406, 407).

(Note.—See S. 18 Indian Companies Act, 1913).

[2] By Table 'A' the statute expressly gives an example of what may be done, unless the company think proper to adopt articles of their own. Any lan-

guage used in the Articles if it conveys meaning as that in Table 'A' is valid. (1896) A C 461 (466).

REGULATION 3—Note 1.

[1] Where the articles of association provided that shares should be under the control of directors who might allot the same to such persons or on such terms as they deem fit, it was held that the articles gave power, also to control the character of shares and to issue preference shares. (Vol 20) 1933 P C 39 (42) (PC).

5. No share shall be offered to the public for subscription except upon the terms that the amount payable on application shall be at least five per cent. of the nominal amount of the share; and the directors shall, as regards any allotment of shares, duly comply with such of the provisions of sections 101 and 104 of the Indian Companies Act, 1913, as may be applicable thereto.

6. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the common seal of the company specifying the share or shares held by him and the amount paid up thereon : Provided that, in respect of a share or shares held jointly by several persons, the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint-holders shall be sufficient delivery to all.

[See S. 108 (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 4]

7. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 5]

8. a[Except to the extent allowed by section 54A of the Indian Companies Act, 1913,] no part of the funds of the company shall be employed in the purchase of, or in loans upon the security of, the company's shares.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 6]

[a] Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936). S. 122. §[15-1-1937]

Lien.

9. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company ; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this clause. The company's lien, if any, on a share shall extend to all dividends payable thereon.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 7]

10. The company may sell, in such manner as the director thinks fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists is presently payable, nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled by reason of his death or insolvency to the share.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 8]

REGULATION 7—Note 1.

[1] Where the articles provided "if any certificate be lost or destroyed, then upon proof to the satisfaction of the directors, or in default of proof on such indemnity as the directors may deem adequate being given a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate". It was held that the clause gave an absolute discretion to the directors as to the indemnity to be furnished with which the Court would not interfere. (Vol 14) 1927 Cal 947 (948).

REGULATION 8—Note 1.

[1] With certain safeguards created by the statute to protect the interests of creditors, shareholders and the public, the Act leaves the Company to determine the extent, mode and the incidence of reduction, the application or disposition of capital monies which the proposed reduction may set free. (1894) A C 399 (411, 412).

REGULATION 9—Note 1.

[1] Company has lien on shares and dividends due

on them but not on fees of directors. (Vol 24) 1937 Lah 62 (63).

[2] A provision in the articles of association which makes a shareholder's debt to the Company a charge upon his shares applies even to shares of a person who becomes a shareholder subsequent to event incurring debt in respect of those debts. (Vol 6) 1919 Mad 1161 (1163) (DB).

[3] Transmission of shares results by operation of law, and the shares on devolution continue to be subject to any lien on them for sums due to the company. (Vol 30) 1943 Mad 743 (747).

[4] If a member pledges his shares to a third party and the company has notice of the transaction the lien on the shares is lost subsequent to the knowledge of the transaction. A company is deemed to have knowledge, where the managing director having all the powers of the board pledges his shares although in his private capacity. (Vol 20) 1933 All 607 (607) : 55 All 810.

11. The proceeds of the sale shall be applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale. The purchaser shall be registered as the holder of the shares, and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

[(1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 10]

Calls on Shares.

12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares.

[(1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 11]

13. The joint-holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

[(1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 12]

14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

[(1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 13]

15. The provisions of these regulations as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

[(1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 14]

REGULATION 12—Note 1.

[1] Where the articles empower the board of directors to make calls upon the shareholders for the unpaid money on shares and fix liability to pay at the time and place appointed, a resolution of the board alone can call such money. (Vol 13) 1926 Bom 341 (343); 50 Bom 461.

[2] Resolution for call without fixing time or place of payment is valid. Such details may be provided by a subsequent resolution or even direction. (Vol 20) 1933 Bom 80 (82).

[See however (Vol 13) 1926 Bom 341 (343): 50 Bom 461 (DB)* (Vol 17) 1930 Bom 267 (270): 54 Bom 178 (DB). (The resolution making the call must fix the time, place and the person to whom it is to be paid).

[3] Where a resolution for call has already been passed, a formal resolution of the directors specifying the person to whom and the place where a call is to be made is not necessary when the agent signs in notice of calls "by order of the board" as there is the presumption that the agents act properly. Even if the resolution is necessary it can be waived by the party. (Vol 20) 1933 Bom 80 (83, 84): 57 Bom 413 (DB).

[4] Only a debt due *in praesenti* by the company can be set off against future calls on shares. (Vol 1) 1914 Lah 483 (485) (DB).

[5] When a suit to recover the call money has been barred by time, the fact that the name is kept in the register as a shareholder and the share is forfeited only subsequently, does not revive the debt, as limitation does not run from the date of forfeiture. (Vol 20) 1933 Oudh 285 (287): 8 Luck 723 (DB).

REGULATION 14—Note 1.

[1] Interest under Reg. 14 is payable by a person as a shareholder. Therefore where a person's shares are forfeited, he ceases to be a shareholder from the date of forfeiture and interest cannot be ordered subsequent to that date to the date of suit in the absence of any provision of law or contract. (Vol 19) 1932 All 342 (344): 54 All 541 (DB)* (Vol 12) 1925 Bom 321 (322): 49 Bom 715 (DB). (But by virtue of the provisions contained in the Articles of Association, he may become a debtor to the company for the amount of calls, instalments interest and expenses due at the time of forfeiture and on that account, a new cause of action arises under that special contract between him and the company.)

16. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

[See S. 49 (1) (1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 15]

17. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent.) as may be agreed upon between the member paying the sum in advance and the directors.

[See S. 49 (2) (1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 16]

Transfer and transmission of shares.

18. The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain holder of the share until the name of the transferee is entered in the register of members in respect thereof.

[See S. 34. (1923) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 17]

19. Shares in the company shall be transferred in the following form, or in any usual or common form which the directors shall approve :

I, A B of _____, in consideration of the sum of rupees _____ paid to me by C D of _____ (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share [or shares] numbered in the undertaking called the _____ Company, Limited, to hold unto the said transferee, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof, and I, the said transferee, do hereby agree to take the said share [or shares] subject to the conditions aforesaid. As witness our hands the _____ day of _____ witness to the signatures of, etc'

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 18]

REGULATION 16—Note 1.

[1] An agent of a company has no legal authority to enter into an agreement with a shareholder that the latter will not be liable for call money on shares subscribed. Such an agreement is a fraud upon the creditors and shareholders of the company. It amounts only to a personal arrangement between the shareholder and the agent. (Vol 4) 1917 P C 267 (269) (P C). (Case from Quebec).

REGULATION 17—Note 1.

[1] A company by the issue of a share creditors with a definite sum as paid thereon does not become a debtor to its shareholder in respect of that full amount. A company is in no sense debtor to capital. (Vol 17) 1930 P C 151 (157); 57 Ind App 152 : 54 Bom 437, (PC).

REGULATION 18—Note 1.

[1] A transfer not in compliance with the articles though it carries to the person who is subsequently entered as transferee the equitable and legal interest to require the company to register the transfer does not create a legal title to the share until registration. (Vol 15) 1928 All 481 (489); 50 All 695 (DB)

[2] When an order is issued under O. 21 R. 79 (3) Civil P C the company acting through the secretary or

proper officer, could not make a transfer of the shares to anybody else. (Vol 10) 1923 Mad 241 (244, 245); 45 Mad 537 (DB).

[3] Where the plaintiff by delivery of signed transfer forms in blank to the broker enables him to give title to the defendant, who is a *bona fide* purchaser for value without notice, plaintiff is estopped from asserting any right to the shares. (Vol 9) 1922 Bom 303 (319); 46 Bom 489 (DB).

[4] Delivery of share certificates in blank passes not the property in the shares but a legal and equitable title, which cannot be defeated by the registered owner, or others deriving title from him. (Vol 9) 1922 Bom 303 (313) : 46 Bom 489 (DB).

[5] When a share of a company is sold in Court auction, the court need not execute a transfer. (Vol 15) 1928 Mad 571 (578). (DB) ((Vol 3) 1916 Bom 147 : 41 Bom 76 and (Vol 10) 1923 Mad 241 : 45 Mad 537 Distinguished).

[6] Where shares are sold whether by private treaty or by public sale, to the exclusion of dividends due thereon the purchase cannot deprive the original owner of his right to dividend for the period anterior to the sale though declared subsequently. (Vol 17) 1930 All 615 (617) (DB).

20. The directors may decline to register any transfer of shares, not being fully-paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately-preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

(a) a fee not exceeding two rupees is paid to the company in respect thereof ; and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

^a[If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee and the transferor notice of the refusal.]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 19]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 122. [15-1-1937.]*

21. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor, shall be the only persons recognised by the company as having any title to the share.

[See S. 35 (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 20]

22. Any person becoming entitled to a share in consequence of the death or insolvency of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or insolvent person could have made ; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or insolvent person before the death or insolvency.

[See Ss. 35, 160, 161, (1929) 19 and 20 Geo. V.C. 23—Sc. I, Table A, Reg. 21]

23. A person becoming entitled to a share by reason of the death or insolvency of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

[(1929) 19 and 20 Geo. V, C 22—Se. I, Table A, Reg. 22]

REGULATION 20—Note 1.

[1] Whether sale of shares is made by a private individual or by a Court, the buyer gets merely the property in the shares plus limited right to have the transfer registered; provisions of O. 21 R 79 Civil P C do not mean that the directors are compellable to accept the purchaser as transferee. (Vol 3) 1916 Bom 147 (148, 149 150): 41 Bom 76 (DB).

[2] A transfer of a share cannot take effect without the sanction of the company. (Vol 14) 1927 Lah 797 (797) (DB).

[3] It is in the discretion of the company to recognise or not a transfer, whether the same is private or by court-auction. (Vol 10) 1923 Mad 241 (242): 45 Mad 537 (DB).

REGULATION 21—Note 1.

[1] Regulations 21 and 22 which follow closely Regs. 20 and 21 of Table A, English Companies Act of 1929, while appropriate to a system such as that prevailing in England under which a legal title from a deceased person can only be traced either through probate or through letters of administration are hardly

so appropriate to a system under which a legal title by devolution may be obtained apart altogether from and without either probate or letters of administration. (Vol 23) 1936 Rang 52 (53).

[2] It is not within the legal competence of any company to lay down any condition regulating the grant of letters of administration in contravention of any statutory enactment relating thereto. (Vol 17) 1930 All 82 (83) (DB).

[3] Where the property belongs to a joint Hindu family, a person claiming by survivorship is not entitled to a grant of the letters of administration to any portion of such property. This rule is applicable to cases where the property is joint and applies even where the property consists of shares of a company acquired by members or a joint Hindu family with joint funds. (Vol 17) 1930 All 82 (83) (DB). (Note: Such is the decision, even in case the articles of association provided that the executors or administrators of a deceased shareholder are the only persons recognised by the company as bearing a title to the shares)

[But see (Vol 23) 1936 Rang 52 (54)]

Forfeiture of Shares.

24. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

[(1929) 19 and 20—Geo. V, C. 23—Sc. I, Table A, Reg. 23]

25. The notice shall name a further day (not earlier than the expiration of fourteen days, from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 24.]

26. If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

[(1929) 19 and 20 Geo. V. C 23—Sc. I, Table A, Reg. 25.]

REGULATION 24—Note 1.

[1] Articles of association provided that a contract entered into by directors and assented to by the company in a general meeting be deemed absolutely unimpeachable; subsequently the directors contracted with a share-holder to cancel forthwith all his shares which were not fully paid up. It was assented to in a meeting. But the shares were not cancelled till the company went into liquidation. Held the agreement for cancellation of shares could not be impeached and that the share-holders name should not be on the list of contributories. (1868) 7 Eq 129 (187).

[2] The failure of the directors to appoint the place at which and the persons to whom the call money to be paid renders the resolution and the notices of calls invalid and there can be no forfeiture of the shares for non-payment of the calls. (Vol 29) 1942 Cal 516 (521) : I L R (1942) Cal 182.

[3] A notice is bad if it requires payment of too large a sum and of sums not due. A forfeiture based upon failure to pay in compliance with such a notice is *ultra vires*. (Vol. 29) 1942 Cal 516 (521) : I L R (1942) 1 Cal 132.

REGULATION 25—Note 1.

[1] The articles provide for issue of notices for the protection of share holders. The provisions can be waived by individual share-holders. (Vol 25) 1938 P C 284 (289): ILR (1939) Kar (PC) 16: ILR (1939) Lah 1 (PC).

[2] Mere notice of forfeiture does not excuse from payment of calls. (Vol 18) 1931 Pat 44 (46): 10 Pat 249 (DB).

[3] The company only has the option to forfeit or not; defaulting share-holder will continue to be a member until it is exercised though articles provide for forfeiture *ipso facto* on default. He cannot insist on the clause being acted upon. (Vol 2) 1915 Lah 358 (359): 1915 Pun Re No. 36.

REGULATION 26—Synopsis.**1. Forfeiture.****2. Surrender.**

1. **Forfeiture.**—[1] A forfeiture of shares which involves reduction of company's capital, can only be carried out under the articles of association of the company where the call has been validly made and that call

has not been paid. Where no call has been made the forfeiture is outside the powers of the company and hence invalid. (Vol 20) 1933 Bom 80 (81): 57 Bom 413* (Vol 2) 1915 Lah 358 (359): 1915 Pun Re No. 36. (For a valid forfeiture of shares there must be also intention to forfeit and intention must be actually carried into effect).

[2] In the matter of forfeiture, technicalities must be strictly observed. (Vol 25) 1938 PC 284 (288, 289) : ILR (1939) Kar (PC) 16: ILR (1939) Lah 1 (PC) * (Vol 29) 1942 Cal 516 (521): ILR (1942) 1 Cal 132 * (Vol 2) 1915 Lah 109 (109): 1915 Pun Re No. 37.

[3] Arrangement made with a share-holder that on payment of money his shares be declared forfeited on non-payment of a call, is *ultra vires* the power of directors and a fraud on the share-holders. Lapse of time makes no difference. (1866) 1 Ch 161 (169).

[4] Where memorandum of association gives directors no power to forfeit shares an unauthorized forfeiture can be set aside. (Vol 17) 1930 Bom 267 (270) : 54 Bom 178 (DB).

[5] It is not only the person whose shares are being forfeited that can insist on the conditions prescribed for the forfeiture but also a creditor. (Vol 25) 1938 P C 284 (289): ILR (1939) Kar PC 16: ILR (1939) Lah 1 (PC)* (Vol 29) 1942 Cal 516 (521) : ILR (1942) Cal 132.

[6] A share-holder may waive a notice as required to be served by Reg. 25 but thereby the directors will not be invested with power to forfeit shares for non-payment of calls not yet due. (Vol 25) 1938 PC 284 (289): ILR (1939) Kar (PC) 16: ILR (1939) Lah 1 (PC)* (Vol 29) 1942 Cal 516 (521): ILR (1942) 1 Cal 132.

[7] Where a company without any resolution forfeits the share of a person, and such person does not challenge the forfeiture for two years, the irregularity should be deemed to have been waived and the company cannot revoke the forfeiture. (Vol 20) 1933 Bom 80 (84) : 57 Bom 413 (DB).

[8] Forfeiture of shares in absence of a notice required by the articles is invalid. (Vol 8) 1921 All 135 (136) (DB).

[9] Although the notices issued by the Directors state that if the amounts called were not paid on the date specified the shares would be forfeited, in the absence of a resolution by the directors actually forfeiting the shares as required under the articles of

27. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Reg. 26.]

28. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company received payment in full of the nominal amount of the shares.

[(1929) 19 and 20 Geo. V. C. 23—Sc. I. Table A, Reg. 27.]

Regulation 26 (contd.)

association of the company, there is no valid forfeiture. (Vol 21) 1934 Lah 1015 (1018) * (Vol 18) 1931 Pat 44 (46) : 10 Pat 249 (DB).

[10] Forfeiture due to failure to pay in response to a notice wherein the place and day of payment are not mentioned is not legal. (Vol 31) 1944 Mad 322 (323) : ILR (1944) Mad 796 (DB).

[11] Where a valid resolution of the directors declares shares to be forfeited, mere continuance of the owner's name on the share register is of no consequence. (1867) 4 Eq. 233 (238).

[12] There can be no ratification of *ultra vires* acts of directors without an intention to ratify and there can be no intention to ratify without knowledge of the illegality of the forfeiture. (Vol 25) 1938 PC 234 (239) : ILR (1939) Kar (PC) 16 : ILR (1939) Lah 1 (PC).

[13] Certain share-holders who received notice that if there was failure to pay by a certain date call in respect of allotment money, shares would be forfeited failed to pay. The Board of directors passed a resolution forfeiting the shares of certain other persons but the names of these share-holders were not included. It was held that the company continued to treat these as share-holders. (Vol 27) 1940 Mad 873 (874).

[14] Where the Directors have once validly exercised the power of forfeiture, they or the company cannot revoke the forfeiture subsequently, without the consent of the share-holder, on the ground that there were some irregularities in their own procedure. (Vol 17) 1930 Bom 267 (270) : 54 Bom 178 (DB).

[15] Where certain signatories of the memorandum and articles of association of a company had undertaken to purchase a certain number of shares but there was no term in the articles by which the signatories were to pay the amount on a particular date nor was any date fixed by the board of directors and having failed to pay the prescribed amount before the prescribed date fixed by the directors their shares were forfeited. *Held* that such amount was not presently due and hence their shares were not liable to forfeiture. (Vol 26) 1939 All 739 (743).

[16] A compromise by director of unpaid calls under guise of forfeiture is *ultra vires* and invalid though beneficial to the company, unless expressly ratified by all the share-holders or unless all, with notice or knowledge acquiesced in what has been done. (Vol 17) 1930 Bom 267 (270) : 54 Bom 178 (DB).

2. Surrender.—[1] The principle applicable to to cases of surrender is that surrender is good if it amounts to forfeitures. A company cannot by a resolution

of its directors accept surrender of shares unless its act can be brought within rules relating to forfeiture—(Vol 15) 1928 Lah 240 (241). ((1870) 5 Ch App 22 Distinguishing) * (1928) 110 Ind Cas 421 (422) (Lah). * (Vol 11) 1924 Mad 703 (704) (Though the articles authorised acceptance of surrender, it will not be valid unless it took place in circumstances which will justify forfeiture). * (Vol 21) 1934 Sind 39 (43).

[2] Persons who set up a plea of surrender should prove that there was a surrender and that it was accepted by the directors. (Vol 25) 1938 Sind 187 (188) : 32 Sind LR 167 (DB).

REGULATION 27—Note 1.

[1] Where the language of the articles implied an interval between forfeiture and disposal of the shares it was held that there was no obligation on the directors to sell or ascertain the value of a forfeited share the moment it was forfeited. (Vol 22) 1935 Lah 190 (191)

REGULATION 28—Note 1.

[1] When forfeiture of shares occurs for non-payment of money and the share holder ceases to be a member of the Company, he ceases to be liable to pay any further moneys in his capacity as share-holder and any further liability of the defendant must be based on some separate contract making him liable to pay these moneys after he had ceased to be a share-holder. (Vol 21) 1934 Bom 97 (97) (DB) * (Vol 15) 1928 Bom 252 (253) : 52 Bom 477 (DB).

[2] When one ceases to be a share-holder as a consequence of forfeiture, no interest could be allowed after date of forfeiture and before the suit in the absence of any provision of law or contract. (Vol 19) 1932 All 342 (343, 344) : 54 All 541 (DB).

[3] Official liquidator cannot take advantage of any irregularity in the procedure of the directors in forfeiting the shares, so long as the directors were acting *intra vires* and *bona fide*. (Vol 16) 1929 Lah 70 (71).

[4] Subscriber of share failing to pay part of call money and shares forfeited—Company in voluntary liquidation—Suit by liquidator for recovery of balance within three years of forfeiture but beyond three years of default. *Held* that suit was governed by Art. 115 Limitation Act, and filed within time (Vol 19) 1932 All 342 (343) : 54 All 541 (DB) * (Vol 15) 1928 Bom 252 (253) : 52 Bom 477 (DB).

[5] A person whose shares have been forfeited is liable with regard to unpaid calls not as a contributory either as a present or past member but as a debtor to the company. (Vol 15) 1928 Bom 252 (253) : 52 Bom 477 (DB).

29. A duly verified declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share, and that declaration, and the receipt of the company for the consideration, if any, given for the share on the sale or disposition thereof, shall constitute a good title to the share, and the person to whom the share is sold or disposed of shall be registered as the holder of the share and shall not be bound to see to the application of the purchase-money (if any), nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 28]

30. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 29]

Conversion of shares into stock.

31. The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may with the like sanction re-convert any stock into paid-up shares of any denomination.

[See Ss. 50 (1) (c), 52; (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 30]

32. The holders of stock may transfer the same, or any part thereof, in the same manner, and subject to the same regulations, as and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit; but the directors may, from time to time fix the minimum amount of stock transferable and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 31]

33. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges and advantages as regards dividends, voting at meetings of the company, and other matters, as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 32]

34. Such of the regulations of the company (other than those relating to share-warrants), as are applicable to paid-up shares shall apply to stock, and the words "shares" and "shareholder" therein shall include "stock" and "stockholder."

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 33]

Share-warrants.

35. The company may issue share-warrants, and accordingly the directors may in their discretion, with respect to any share which is fully paid up, on application in writing signed by the person registered as holder of the share, and authenticated by such evidence (if any) as the directors may from time to time require as to the identity of the person signing the request, and on receiving the certificate (if any) of the share, and the amount of the stamp-duty on the warrant and such fee as the directors may from time to time require, issue under the company's seal a warrant, duly stamped, stating that the bearer of the warrant is entitled to the shares therein specified, and may provide by coupons or otherwise for the payment of dividends, or other moneys on the shares included in the warrant.

36. A share-warrant shall entitle the bearer to the shares included in it, and the share shall be transferred by the delivery of the share-warrant, and the provisions of the regulations of the company with respect to transfer and transmission of shares shall not apply thereto.

37. The bearer of a share-warrant shall, on surrender of the warrant to the company for cancellation, and on payment of such sum as the directors may from time to time prescribe, be entitled to have his name entered as a member in the register of members in respect of the shares included in the warrant.

38. The bearer of a share-warrant may at any time deposit the warrant at the office of the company, and so long as the warrant remains so deposited, the depositor shall have the same right of signing a requisition for calling a meeting of the company, and of attending and voting and exercising the other privileges of a member at any meeting held after the expiration of two clear days from the time of deposit, as if his name were inserted in the register of members or the holder of the shares included in the deposited warrant. Not more than one person shall be recognised as depositor of the share-warrant. The company shall, on two days' written notice, return the deposited share-warrant to the depositor.

39. Subject as herein otherwise expressly provided, no person shall, as bearer of a share-warrant, sign a requisition for calling a meeting of the company, or attend, or vote or exercise any other privilege of a member at a meeting of the company, or be entitled to receive any notices from the company; but the bearer of a share-warrant shall be entitled in all other respects to the same privileges and advantages as if he were named in the register of members as the holder of the shares included in the warrant, and he shall be a member of the company.

40. The directors may, from time to time, make rules as to the terms on which (if they shall think fit) a new share-warrant or coupon may be issued by way of renewal in case of defacement, loss or destruction.

Alteration of Capital.

41. The directors may, with the sanction of a [the company in general meeting], increase the share capital by such sum to be divided into shares of such amount, as the resolution shall prescribe.

[See S. 50 (1929) 19 and 20 Geo. V, C. 23—Sch. I, Table A, Reg. 34]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122, for "an extraordinary resolution of the company". [15-1-1937.]

42. Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

[(1929) 19 and 20 Geo. V, C. 23—Sch. I, Table A, Reg. 35]

43. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

[(1929) 19 and 20 Geo. V, C. 23—Sch. I, Table A, Reg. 36]

REGULATION 42—Note 1.

[1] Whether a suit by a share-holder for a declaration that allotment of new shares in consequence of a resolution, is in itself invalid, deciding to increase the capital of the company by issue of new shares to certain persons is illegal and that they cannot act as share-holders of

the company is not maintainable. Even assuming that such a suit lies, it is bad under the proviso of section 42, Specific Relief Act, for want of consequential relief such as rectification of the register, removal of the names of those share-holders and prayer for injunction. (Vol 19) 1932 Cal 714 (715) (DB).

44. The company may, by ^a[ordinary resolution],—

- (a) consolidate and divide its share capital into shares of larger amount than its existing shares ;
- (b) by sub-division of its existing shares or any of them, divide the whole or any part of its share capital into shares of smaller amount than is fixed by the memorandum of association, subject, nevertheless, to the provisions of paragraph (d) of sub-section (1) of section 50 of the Indian Companies Act, 1913 ;
- (c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person ;

[(1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Reg. 37]

b[* * * * * *]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122 for “special resolution”. [15-1-1937]

[b] Cl. (d), was *repealed, ibid.*

^a44A The company may, by special resolution, reduce its share capital in any manner and with, and subject to any incident authorised and consent required, by law.]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Reg. 38.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936, S. 122) [15-1-1937]

General Meetings.

45. The statutory general meeting of the company shall be held within the period required by section 77 of the Indian Companies Act, 1913.

46. A general meeting shall be held ^a[within eighteen months from the date of its incorporation and thereafter once at least in every year] at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 39]

[a] *Substituted* for “once in every year” by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122 [15-1-1937]

47. The above-mentioned general meetings shall be called ordinary meetings ; all other general meetings shall be called extraordinary.

[(1929) 19 and 20 Geo V, C. 23—Sc. I, Table A, Reg. 40]

48. The directors may, whenever they think fit, call an extraordinary general meeting, and extraordinary general meetings shall also be called on such requisition, or in default, may be called by such requisitionists, as provided by section 78 of the Indian Companies Act. 1913. If at any time there are not within British India sufficient directors capable of acting to form a quorum, any director or any two members of the company may call an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be called by the directors.

[See S. 78 (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 41]

Proceedings at General Meeting.

49. ^a[Subject to the provisions of sub-section (2) of section 81 of the Indian Companies Act, 1913, relating to special resolutions], fourteen days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day and the hour of meeting and, in case of special business, the general nature of that business, shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under ^a[the Indian Companies Act, 1913, or] the regulations of the company, entitled to receive

such notices from the company; but ^b[the accidental omission to give notice to or the non-receipt of notice] by any member shall not invalidate the proceedings at any general meeting.

[See Ss. 76, 79. (1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Regs. 42, 43.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 [22 [XXII] of 1936], S. 122. [15-1-1937]

[b] *Substituted, ibid.*, for “non-receipt of the notice”.

50. All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Reg. 44].

51. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, ^a[two members in the case of a private company and five members in the case of any other company] personally present shall be a quorum.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 45]

[a] *Substituted* for “three members” by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 122. [15-1-1937]

52. If within half an hour from the time appointed for the meeting a quorum is not present, the meeting, if called upon the requisition of members, shall be dissolved; in any other case, it shall stand adjourned to the same day in the next week at the same time and place, and, if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting, the members present shall be a quorum.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 46]

53. The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I. Table A, Reg. 47]

54. If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some of their number to be chairman.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 48.]

55. The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 49].

56. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded ^a[in accordance with the provisions of clause (c) of subsection (1) of section 79 of the Indian Companies Act, VII of 1913] and unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried, or carried unanimously, or by a

REGULATION 55—Note 1.

[1] Where the articles empower the chairman to adjourn any meeting with its consent, the chairman has discretion to adjourn, which he can exercise with the consent of the meeting. But if the meeting desires an adjournment the chairman is not necessarily bound to adjourn. (Vol 11) 1924 Bom 102 (104): 47 Bom 915.

[2] Mere absence of any provisions in the articles with regard to adjournment does not prohibit the

meeting to adjourn itself for *bona fide* purpose. (Vol 12) 1925 Mad 1215 (1220) (DB).

REGULATION 56—Note 1.

[1] The minutes of meeting are *prime facie* evidence of what happened at the meeting. (Vol 12) 1925 Bom 49 (60) (DB).

[2] This regulation is deemed to be included in all articles of association. See Sec. 17 (2).

particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 50]

[a] *Substituted*, for 'by at least three members' by the Indian Companies (Amendment) Act, 1938 (2 [II] of 1938) S. 19. [26-2-1938]

57. If a poll is duly demanded, it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 51]

58. In the case of an equality of votes, whether on a show of hands or on a poll, the chairman of the meeting at which the show of hands takes place, or at which the poll is demanded, shall be entitled to a second or casting vote.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 52]

59. A poll demanded on the election of a chairman or on a question of adjournment shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 53]

Votes of Members.

60. On a show of hands every member present in person shall have one vote. a[On a poll every member shall have one vote in respect of each share or each hundred rupees of stock held by him.]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 54]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 122, for 'On a poll every member shall have one vote for each share of which he is the holder.' [15-1-1937]

61. In the case of joint-holders, the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint-holders: and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 55]

62. A member of unsound mind, or in respect of whom an order has been made by any Court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by his committee or other legal guardian, and any such committee or guardian may, on a poll, vote by proxy.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 56]

63. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 57.]

64. . On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force.

[See S. 80 (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 58]

REGULATION 57—Note 1.

[1] If a poll is demanded it must be taken, and this is so even though the chairman refuses to grant the poll. If unforeseen circumstances prevent the poll being taken, there is no termination of the election and the chairman should appoint some other time for the taking of the poll. (Vol 19) 1932 Mad 100 (108) (DB).

[2] The taking of a poll is not a meeting of the company but in law, a mere continuation of the meeting at which the poll is demanded. It continues only for taking the poll and for no other purpose. (Vol 19) 1932 Mad 100 (108) (DB).

[3] As to demanding a poll, see Sec. 79 (1) (c).

[a] *Substituted* for the original words by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936) S. 122. [15-1-1937]

[(1929) 19 and 20 Geo. V. C. 23—Sc. I, Table A, Reg. 60]

Signed this _____ day of _____
 [(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 61]

[See S. 83A. (1929) 19 and 20 Geo. V, C.'23—Sc. I, Table A, Reg. 64]

[(1929) 19 and 20 Geo V. C. 23—Sc. I, Table A. Reg. 65]

[See S. 85 (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 66]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 67]

[1] A suit for injunction restraining the other directors from wrongfully exclud[ing] from acting as a director will lie at the instance of the aggrieved director. It is for the Court to decide whether the circumstances warrant such an order. (Vol 11) 1924 Cal 982 (983):51 Cal 916 (DB).

72. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors, but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 68]

73. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 69]

Regulation 71 (contd.)

[2] A director or managing director is in no way a servant of the company. He is the agent of the company for carrying on its business. (Vol 29) 1942 Lah 47 (50); I L R (1943) Lah 28 (DB) (Vol 27) 1940 Lah 243 reversed).

[3] Although directors differ from trustees in some respects yet to the extent of their being entrusted with the monies of the company they are trustees and they are jointly and severally liable for breach of trust. (Vol 24) 1937 Pat 293 (299).

[4] Directors of companies are not trustees in whom the property of the companies has become vested in trust for any specific purpose within the meaning of section 10, Limitation Act. (Vol 18) 1931 Mad 58 (59); 54 Mad 153 (DB).

[5] Suit against director who fraudulently sanctioned loan in violation of the rules is one for the breach of fiduciary obligation and not merely for compensation for the loss committed. (Vol 22) 1935 Lah 705 (707). (D B). (On the death of director, the suit survives against his legal representative by application of S. 306, Succession Act).

[6] Powers of directors managing the business of the company would include institution of suits as well when it becomes necessary, in the course of management to recover moneys due to the company. (Vol 25) 1938 Mad 962 (964); I L R (1939) Mad 36 (DB).

[7] Directors utilising company's money for their own interests are liable to account for such money to company. (Vol 22) 1935 Lah 705 (706) (DB).

[8] Where an article of association comprises the indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, in order to be guilty of wilful negligence the director must not only be guilty of negligence, but he must know that he is committing a breach of duty or is recklessly careless in the matter. A director is justified in trusting the integrity, skill and competence of the officials unless he has ground for suspicion. (Vol 25) 1938 Mad 124 (127); I L R (1938) Mad 292 (DB).

[9] Any person dealing with a company is supposed to be acquainted with its articles and memorandum and, therefore to be aware of the powers that the directors have company cannot be bound by any contract which is entered into by the directors and which is beyond their powers even though it subsequently ratified it. (Vol 25) 1938 Mad 227 (229) (*obiter*).

[10] A company is liable for all acts done by its directors even though unauthorized by it provided such acts are within the apparent authority of the directors and not *ultra vires* of the company. (Vol 19) 1932 All 141 (145); 53 All 1009 (DB).

[11] Where the articles provide for certain safeguards in regard to the borrowing powers of a company, viz, that manager or managing agent can borrow and directors to control them; then in the absence of an express provision delegating such powers to the directors, the directors cannot exercise those borrowing powers. (Vol 14) 1927 Cal 299 (301) (DB).

[12] See also notes on S. 86.

REGULATION 72—Note 1.

[1] Where one of the directors is authorized to dismiss or appoint servants of the company, dismissal of the general manager by him is valid and the recognition of him by some of the directors as general manager does not make him continue to be such. (Vol 20) 1933 All 344 (347); 55 All 399 (DB).

[2] A managing director is in no way a servant of the company; he is the agent of the company for carrying on its business. (Vol 29) 1942 Lah 47 (50); I L R (1943) Lah 28; (DB) (Vol 27) 1940 Lah 243 reversed).

REGULATION 73—Note 1.

[1] Regulation 73 cannot be interpreted narrowly to mean that the Court has no power to inquire into initial borrowing by the directors. The regulation fixes the limit at any time, and the words "for the time being" do not mean "when the claim is made" (Vol 23) 1936 Bom 62 (63); 60 Bom 326 (Per Kania, J).

[2] Where the principal (the company) through its agents (the directors or the managing agents) borrows money which the principal has not authorised the agents to borrow and the money having been borrowed and used by the principal, the principal (the company) cannot repudiate its liability to repay on the ground that the agents had no authority from the principal to borrow. When these facts are established a claim on the footing of money had and received would be maintainable. (Vol 23) 1936 Bom 62 (66); 60 Bom 326 (Per Kania, J).

[3] Regulation 73 limits the directors' authority to borrow. The requirement of the regulation is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the regulation is not satisfied by treating it as a direc-

74. The directors shall duly comply with the provisions of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and in particular with the provisions in regard to the registration of the particulars of mortgages and charges ^a[affecting the property of the company or created by it, and to keeping a register of the directors, ^b[and to sending to the registrar an annual list of members, and a summary ^c[of particulars relating thereto and notice of any consolidation ^d or increase ^e of share capital, or conversion of shares into stock, and copies of special resolutions ^f and a copy of the register of directors and notifications of any changes ^g therein.

[a] See Ss. 109, 125 [b] See S. 87 [c] See S. 32 [d] See S. 51 [e] See S. 53
[f] See S. 82 [g] See S. 87.

75. The director shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors ;
- (b) of the names of the directors present at each meeting of the directors and of any committee of the directors ;
- (c) of all resolutions and proceedings at all meetings of the company, and, of the directors' and of committees of directors ;

and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

[See S. 88 (1929) 19 and 20 Geo. V, C. 23—Se. I, Table A, Reg. 70]

The Seal.

76. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of at least two directors and of the secretary or such other person as the directors may appoint for the purpose ; and those two directors and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 71]

Disqualifications of Directors.

77. The office of director shall be vacated if the director—

- ^a[(a) fails to obtain within the time specified in subsection (1) of section 6[85] of the Indian Companies Act, 1913, or at any time thereafter ceases to hold, the share qualification, if any, necessary for his appointment ; or
- (b) is found to be of unsound mind by a Court of competent jurisdiction ; or
- (c) is adjudged insolvent ; or
- (d) fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made ; or

Regulation 73 (contd.)

tion that beyond the specified limit further borrowing, though not prohibited, are to be expended in reduction of existing loans. (Vol 25) 1938 PC. 159 (164): ILR. (1938) Bom 421: 32 Sind LR. 517 (PC).

[4] Where, however, the loans, although in excess of the authority of the directors, are not *ultra vires*, the money having been received by the company and applied for its purposes, the official liquidator of the company cannot, during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced. (Vol 25) 1938 PC 159 (164): ILR. (1938) Bom 421: 32 Sind LR. 517 (PC).

[5] The question of the directors exceeding borrowing powers conferred upon them by articles of association is essentially a question of internal management and Court will not go into that question on a winding up petition, especially when company has by resolution

ratified the borrowings and has taken the view that the directors have acted in the best interests of the company. (Vol 29) 1942 Bom 231 (236).

REGULATION 76—Note 1.

[1] A document though defective with respect to the seal affixed thereto, is not bad for all purposes and if the Court is satisfied that the parties intended and had power to make the contract it will give effect to the intention. The position is further strengthened if the document has been acted upon by the company. (Vol 17) 1930 Cal 782 (787): 57 Cal 1101 (DB). (Only one director present and signing).

[2] The point that Regn 76 of Table A of Sch 1 Companies Act, was applicable to the company depends upon the question whether there was a special resolution of the company adopting Table A. (Vol 80) 1948 Cal 455 (456): 44 Cr L Jour 790: ILR. (1948) Cal 59 (DB).

- (e) without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker ; or
- (f) absents himself from three consecutive meetings of the directors or from all meetings of the directors for a continuous period of three months, whichever is longer, without leave of absence from the board of directors ; or
- (g) accepts a loan from the company ; or]
- ^a[(h)] is concerned or participates in the profits of any contract with the company ; or
- ^a[(i)] is punished with imprisonment for a term exceeding six months :

Provided, however, that no director shall vacate his office by reason of his being a member of any company which has entered into contracts with, or done any work for, the company of which he is director, but a director shall not vote in respect of any such contract or work, and if he does so vote, his vote shall not be counted.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 72.]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122, for the Original Cls. (a) to (d). [15-1-1937].

[b] *Substituted, ibid.*, 1938 (2 [II] of 1938), S. 19 for "84". [26-2-1938]

[c] The original clauses (e) and (f) were *relettered* (h) and (i), *ibid.*, 1936 (22 [XXII] of 1936), S. 122. [15-1-1937]

Rotation of Directors.

78. At the first ordinary meeting of the company, the whole of the directors shall retire from office, and at the ordinary meeting in every subsequent year, one-third of the directors for the time being or, if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office.

[See Section 17 (2) and 83-B (2) (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 73.]

[a] See Reg. 47.

79. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

[See S. 17 (2) (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 74]

80. A retiring director shall be eligible for re-election.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 75]

81. The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 76.]

82. If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and if at the adjourned meeting the places, of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting.

[See S. 17 (2).]

83. a[Subject to the provisions of sections 83.A and 83.B of the Indian Companies Act, 1913] the Company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 77.]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122. [15-1-1937.]

REGULATION 82—Note 1.

[1] In case of non-election of directors for a particular year, directors of previous years continue in office ; and suit by a shareholder for declaring Acts by such directors to be illegal does not lie. (Vol 15) 1928 Cal 868 (869, 870)..(DB).

[See (1890) 44 Ch D. 472 (482).]

REGULATION 83—Note 1.

[1] Regulation 83 contemplates a change being made in the original number of directors and that change to be made by a general meeting and not by a special resolution. (Vol 20) 1933 All 344 (345): 55 All 399. (Per Bennet (DB).

84. Any casual vacancy occurring on the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 78]

85. The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 79.]

86. The Company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 80.]

Proceedings of Directors.

87. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of directors.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 81]

88. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall (when the number of directors exceeds three) be three.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 82.]

REGULATION 84—Note 1.

[1] A casual vacancy means in general any vacancy occurring by death, resignation or bankruptcy and not by effluxion of time. (Vol 19) 1932 Mad 100 (103). DB).

REGULATION 85—Note 1.

[1] The election of a person by directors as a director entitles him to hold office till the next general meeting while if he is elected at the general meeting of the shareholders he is entitled to hold office for three years. (Vol 20) 1933 All 344 (346); 55 All 899 : (DB).

REGULATION 87—Note 1.

[1] *Prima facie* due notice must be given convening a meeting of directors, and in default, the meeting is irregular. But no notice is necessary if absent director had knowledge of meeting otherwise. Generally Court is entitled to assume that everything has been done regularly and in due course. (Vol 23) 1936 Bom 24 (28); 60 Bom 297 * (Vol 25) 1938 Mad 962 (965); I L R (1939) Mad 86 (DB).

[2] It is not necessary as a matter of law, though as a matter of prudence it is very often done, to state in the notice convening the meeting of the director what the business to be transacted at that meeting is to be. (Vol 15) 1928 Mad 372 (374); 51 Mad 68 (DB).

[3] A company cannot confirm or ratify anything which is beyond its powers, express or implied in the memorandum or conferred by statute. Transactions beyond directors' powers can, however, be ratified by general meeting. (Vol 21) 1934 Bom 248 (247).

[4] Meeting of directors—Director interested in re-

solution cannot vote—Company may agree that debt due to a shareholder might be set off against future calls to be paid by him—*Held* in the circumstances of this case that one of the directors who was also managing agent was in fiduciary relation to company and hence incompetent to decide whether resolution touching his own shares moved in directors' meeting was for company's benefit. (Vol 29) 1942 Mad 95 (97); I L R (1942) Mad 230 (DB).

[5] It is a cardinal rule of corporation law that *prima facie* a majority of its members is entitled to exercise the powers of the corporation and when no special provision is made, the whole are bound not only by the major part, but by the major part of those present at a regular corporate meeting whether the number present be a majority of the whole or not. This rule applies to a company, save so far as its constitution or articles, or the Companies Act itself, exclude or modify it. (Vol 29) 1942 Lah 68 (70); I L R (1948) Lah 123 (DB).

REGULATION 88—Note 1.

[1] In the absence of a specific provision in the articles of association in respect of the requisite number of directors for a quorum, the number usually acting in the conduct of business will constitute quorum. (1867) 4 Eq. 233 (237).

[2] Where rules lay down a quorum for directors meeting a lesser number cannot transact any binding business by circulation, even though the rules permitting despatch of business by circulation do not stipulate as to the number to whom the papers ought to be circulated. (Vol 11) 1924 Mad 703 (704).

89. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 83]

90. The directors may elect a chairman of their meetings and determine the period for which he is to hold office ; but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairman of the meeting.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 84]

91. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit ; any committee so a[formed] shall in the exercise of the power so delegated, conform to any regulations that may be imposed on them by the directors.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 85]

[a] *Substituted* by the Repealing and Amending Act, 1914 (10 [X] of 1914), Sc. I, for "found".

92. A committee may elect a chairman of their meetings : if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 86.]

93. A committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes, the chairman shall have a second or casting vote.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 87.]

94. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

[See S. 86 (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 88.]

Dividends and Reserve.

95. The company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 89.]

REGULATION 91—Note 1.

[1] Directors can delegate their power to remove or to appoint officers of the company to one of themselves by resolution. (Vol 20) 1933 All 344 (347) : 55 All 399 (DB).

[2] Director authorised by board of directors to attend to court proceedings can file petition in insolvency. (Vol 27) 1940 Mad 953 (959) (DB).

[3] Where rules regarding the administration of policy holders' trust Fund in an Insurance Company authorise the directors to purchase house property if there is unanimity of opinion among them, such unanimity must exist not only as regards the amount to be spent but also as regards the property to be purchased the duty of deciding which property is to be purchased cannot be delegated to a committee. (Vol 21) 1934 Mad 411 (414) (DB).

REGULATION 94—Note 1.

[1] A director who ceased to be a director entered into an agreement on behalf of the company. The shareholders agreed to ratify the agreement. Held that the irregularity, if any, was cured by Art. 94 and the company was estopped from challenging the validity of the agreement on the ground that the director was not duly appointed. (Vol 22) 1935 Rang 76 (80).

[2] See also Notes on S. 86.

REGULATION 95—Note 1.

[1] When a company declares a dividend on its shares a debt immediately becomes payable to each shareholder in respect of his dividend for which he can sue, and the statute of limitations immediately begins to run. (1895) 1 Ch 559 (564, 565).

96. The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 90]

97. No dividends shall be paid otherwise than out of profits ^a[of the year or any other undistributed profits.]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 91]

[a] *Inserted by the Indian Companies (Amendment) Act, 1936 (22 [XII] of 1936), S. 122. [15-1-1937]*

98. Subject to the rights of persons (if any) entitled to shares with special rights as to dividends, ^a[all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid upon any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest. ^b[be treated for the purposes of this article as paid on the share.

See S. 49 (3) (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 92]

[a] *See Reg. 3.*

[b] *See Reg 17*

99. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit.

[See S. 131 A. (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 93]

100. If several persons are registered as joint-holders of any share, any one of them may give effectual receipts for any dividend payable on the share.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 94]

101. Notice of any dividend that may have been declared shall be given in manner, herein, after mentioned to the persons entitled to share therein.

102. No dividend shall bear interest against the company.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 96]

Accounts.

^a[103. The directors shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipts and expenditure take place :

REGULATION 96—Note 1.

[1] The opinion of directors regarding declaration of dividend cannot altogether be disregarded; the courts may overrule directors who proposed to pay dividends but generally the Court will not compel them to pay when they have expressed their opinion that the state of accounts did not admit of any such payment. (1902) 1 Ch 353 (363).

REGULATION 98—Note 1.

[1] A company is bound to pay dividend to its members whose name was registered in the books of the company and the company could not take notice of any private arrangement entered into between the vendor and the vendee of certain shares regarding apportionment of dividends. (Vol 32) 1945 All 47 (48). F L R (1945) All 15.

[2] A company was not to hold its dividends as a trustee for the shareholders. (Vol 11) 1924 Mad 721 (722).

[3] Arrears of dividends and interest thereon are not debt different in character from obligation to pay current dividend. (Vol 27) 1940 Bom 97 (99); I L R (1940) Bom 165 (FB).

[4] Where the dividends on the second preference shares are declared "subject to income-tax" it does not amount that declaration can be only after deduction of tax. The words only mean that the dividend is subject to tax properly deductible and where no tax is so deductible they have no effect on the amount declared. (Vol 27) 1940 Bom 97 (99); I L R (1940) Bom 115 (FB).

REGULATION 99—Note 1.

[1] In general a company is entitled to place profits to a depreciation or to a reserve fund and dissentient shareholders, in the absence of a declaration of dividend or bonus or a winding-up, cannot challenge the decision of the majority. (Vol 14) 1927 Bom 371 (373); 51 Bom 372 (DB).

(b) all sales and purchases of goods by the company :

(c) the assets and liabilities of the company.

[See S. 130. (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 97]

[a] *Substituted* for the original regulation by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122 [15-1-1937]

^a[104. The books of account shall be kept at the registered office of the company or at such other place as the directors shall think fit and shall be open to inspection by the directors during business hours.]

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 98]

[a] *Substituted* for the original regulation by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122. [15-1-1937]

105. The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 99]

a[106. The directors shall as required by sections 131 and 131A of the Indian Companies Act, 1913, cause to be prepared and to be laid before the company in general meeting such profit and loss accounts [income and expenditure accounts] balance-sheets, and reports as are referred to in those sections.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 100]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122, for the original regulation.

[b] *Inserted, ibid.*, 1938 (2 [II] of 1938), S. 19.

[26-2-1938]

107. The profit and loss account shall a[in addition to the matters referred to in sub-section (3) of section 132 of the Indian Companies Act,] 1913, show, arranged under the most convenient heads, the amount of gross income b[(diminished in the case of a banking company by the amount of any provision made to the satisfaction of the auditors for bad and doubtful debts)] distinguishing the several sources from which it has been derived, and the amount of gross expenditure distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

[See Ss. 17 (2) second proviso and 132]

[a] *Inserted* by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 122 [15-1-1937]

[b] *Inserted, ibid.*, 1943 (30 [XXX] of 1943), S. 4.

[27-11-1943]

These words shall be deemed always to have been inserted.

REGULATION 105—Note 1.

[1] A member has no right to inspection by proxy even though she be a woman. Nor can a shareholder

beforehand seek to obtain information which can be supplied at the general meeting and ask the Court to stop the meeting till the information is supplied. (Vol 13) 1926 Sind 295 (296).

Objects and Reasons.

Amendment made in 1948.—For the reason for the amendment made in this regulation by Act 80 of 1948, see the Objects and Reasons given under section 151.

108. A balance-sheet shall be made out in every year and laid before the company in general meeting made up to a date not more than six months before such meeting. The balance-sheet shall be accompanied by a report of the directors as to the state of the company's affairs, and the amount which they recommended to be paid by way of dividend, and the amount (if any) which they propose to carry to a reserve fund.

109. A copy of the balance-sheet and report shall, a[fourteen] days previously to the meeting, be sent to the persons entitled to receive notices of general meetings in the manner in which notices are to be given hereunder.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 101]

[a] *Substituted* by the Indian Companies (Amendment) Act, 1938 (2 [II] of 1938), S. 19, for "seven"
[26-2-1938]

110. The directors shall in all respects comply with the provisions of sections 130 to 135 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

Audit.

111. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 102]

Notices.

112. (1) A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in British India) to the address, if any, within British India supplied by him to the company for the giving of notices to him.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

[See S. 79. (1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 103]

113. If a member has no registered address in British India, and has not supplied to the company an address within British India for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him on the day on which the advertisement appears.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 104]

114. A notice may be given by the company to the joint-holders of a share by giving the notice to the joint-holder named first in the register in respect of the share.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 105]

115. A notice may be given by the company to the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignee of the insolvent or by any like description, at the address (if any) in British India supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or insolvency had not occurred.

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 106]

116. Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member of the company (including bearers of share-warrants) except those members who (having no registered address within British India) have not supplied to the company an address within British India for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or insolvency of a member, who but for his death or insolvency would be entitled to receive notice of the meeting.

a[* * * * *].

[(1929) 19 and 20 Geo. V, C. 23—Sc. I, Table A, Reg. 107]

[a] The words "No other persons shall be entitled to receive notices of general meetings" were omitted by the Indian Companies (Amendment) Act, 1938 (2 [II] of 1938), S. 19. [26-2-1938]

TABLE B.

(See sections 249 and 262)

TABLE OF FEES TO BE PAID TO THE REGISTRAR.

I.—By a company having a share capital.

	Rs. A. P.
1. For registration of a company whose nominal share capital does not exceed Rs. 20,000, a fee of	40 0 0
2. For registration of a company whose nominal share capital exceeds Rs. 20,000 the above fee of forty rupees, with the following additional fees regulated according to the amount of nominal capital (that is to say)—	
For every 10,000 rupees* of nominal share capital, or part of 10,000 rupees, after the first 20,000 rupees up to 50,000 rupees	20 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 50,000 rupees up to 1,00,00,000 rupees	5 0 0
For every 10,000 rupees of nominal share capital, or part of 10,000 rupees, after the first 1,00,00,000 rupees	1 0 0
3. For registration of any increase of share capital made after the first registration of the company, the same fees per 10,000 rupees or part of 10,000 rupees, as would have been payable if such increased share Capital had formed part of the original share capital at the time of registration :	

Provided that no company shall be liable to pay in respect of nominal share capital on registration, or afterwards, any greater amount of fees than 1,000 taking into account, in the case of fees payable on an increase of share capital after registration, the fees paid on registration.

Rs. A. P.

4. For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.
5. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed, with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up 5 0 0
6. For making a record of any fact by this Act authorized or required to be recorded by the registrar, a fee of 5 0 0

II.—By a company not having a share capital.

1. For registration of a company whose number of members, as stated in the articles of association, does not exceed 20 40 0 0
2. For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100 100 0 0
3. For registration of a company whose number of members, as stated in the articles of association, exceeds 100 but is not stated to be unlimited, the above fee of Rs. 100 with an additional Rs. 5 for every 50 members, or less number than 50 members, after the first 100.
4. For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of 400 0 0
5. For registration of any increase on the number of members made after the registration of the company, the same fees as would have been payable a[ⁿ in respect of such increase] if such increase had been stated in the articles of association at the time of registration. b[*]

Provided that no one company shall be liable to pay on the whole a greater fee than Rs. 400 in respect of its number of members, taking into account the fee paid on the first registration of the Company.

6. For registration of any existing company except such companies as are by this Act exempted from payment of fees in respect of registration under this Act the same fee as is charged for registering a new company.
7. For filing any document by this Act required or authorised to be filed, other than the memorandum or the abstract required to be filed with the registrar by a receiver or the statement required to be filed with the registrar by the liquidator in a winding up 5 0 0
8. For making a record of any fact by this Act authorised or required to be recorded by the registrar a fee of 5 0 0

[a] *Inserted by Notification No. I.D., dated 3rd November 1917, see Gazette of India, 1917, Pt. I, p. 1787.*

[b] The figure "5" was omitted, *ibid.*

THE SECOND SCHEDULE.

(See sections 98 and 154.)

FORM I.

THE INDIAN COMPANIES ACT, 1913.

STATEMENT IN LIEU OF PROSPECTUS

filed by

.....LIMITED,

pursuant to section 98 of the Indian Companies Act, 1913.

[a] *Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 123, for the original Sc. II. [15-1-1937]*

Presented for filing by

The nominal share capital of the company ,	Rs.
Divided into	Shares of Rs. each. „ Rs. each. „ Rs. each.
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs. each.
The date on or before which these share are, or are liable, to be redeemed.	
Names, descriptions and addresses of directors or proposed directors and managers or proposed managers, and any provision in the articles, or in any contract, as to appointment of and remuneration payable to directors or managers.	
If the share capital of the company is divided into different classes of shares, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash.	1. —shares of Rs. fully paid. 2. —shares upon which Rs. per share credited as paid. 3. Debenture Rs. 4. Consideration.
Names and addresses of vendors of property purchased or acquired, or proposed to be purchased or acquired by the company.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs. Cash . . . Rs. Shares . . . Rs. Debentures . . . Rs. Goodwill . . . Rs.
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company ; or	Amount paid. Amount payable.
Rate of the commission	Rate per cent.

The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Estimated amount of preliminary expenses	Rs.
Amount paid or intended to be paid to any promoter.	Name of promoter Amount Rs.
Consideration for the payment.	Consideration :—
Dates of, and parties to every material contract (except contracts entered into in the ordinary course of the business intended to be carried on by the company or contracts, other than contracts appointing or fixing the remuneration of a managing director or managing agent, entered into more than two years before the delivery of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash of shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	
If it is proposed to acquire any business the amount as certified by the persons by whom the a[accounts:] of, the business, have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.	

(Signatures of the persons above-named as directors or proposed directors or of their agents authorised in writing.) _____

FORM II.
THE INDIAN COMPANIES ACT, 1913.
STATEMENT IN LIEU OF PROSPECTUS
filed by

.....LIMITED,
pursuant to sub-section (1) of section 154 of the Indian Companies Act, 1913.
Presented for filing by

The nominal share capital of the Company.	Rs.....
Divided into	Shares of Rs.....each. Shares of Rs.....each. Shares of Rs.....each.
Amount (if any) of above capital which consists of redeemable preference shares.	Shares of Rs.....each.
The date on or before which these shares are, or are liable, to be redeemed.	
Names, descriptions and addresses of Directors or proposed Directors and Managers or proposed Managers, and any provision in the Articles, or in any contract, as to appointment of and remuneration payable to Directors or Managers.	
If the share capital of the Company is divided into different classes of shares, the right of voting at meetings of the Company conferred by and the rights in respect of capital and dividends attached to, the several classes of shares respectively.	
Number and amount of shares and debentures issued within the two years preceding the date of this statement as fully or partly paid up otherwise than for cash or agreed to be so issued at the date of this statement.	1. Shares of Rs.....fully paid. 2. Shares upon which Rs.....per share credited as paid. 3. Debenture Rs. 4. Consideration.
Names and addresses of vendors of property (1) purchased or acquired by the Company within the two years preceding the date of this Statement or (2) agreed or proposed to be purchased or acquired by the Company.	
Amount (in cash, shares or debentures) payable to each separate vendor.	
Amount (if any) paid or payable (in cash or shares or debentures) for any such property specifying amount (if any) paid or payable for goodwill.	Total purchase price Rs..... Cash . . . Rs..... Shares . . . Rs..... Debentures . . Rs..... Goodwill . . Rs.....
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the Company; or Rate of the Commission.	Amount paid. Amount payable. Rate per cent.
The number of shares, if any, which persons have agreed for a commission to subscribe absolutely.	
Unless more than two years have elapsed since the date on which the Company was entitled to commence business :— Estimated amount of preliminary expenses. Amount paid or intended to be paid to any promoter.	Rs..... Name of promoter. Amount Rs..... Consideration.
Consideration for the payment	

Dates of, and parties to every material contract (Except contracts entered into in the ordinary course of the business intended to be carried on by the Company or contracts, other than contracts appointing or fixing the remuneration of a Managing director or Managing Agent, entered into more than two years before the delivery of this statement.)

Times and place at which the contracts or copies thereof may be inspected.

Names and addresses of the Auditors of the Company.

Full particulars of the nature and extent of the interest of every Director in the promotion of or in the property purchased or acquired by the Company within the two years preceding the date of this statement or proposed to be acquired by the Company or where the interest of such a Director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a Director, or otherwise for services rendered by him or by the firm in connection with the promotion or the formation of the Company.

If it is proposed to acquire any business, the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirements shall have effect as if references to two years or one year, as the case may be, were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on.

(Signatures of the persons above named as Directors or proposed Directors or of their agents authorised in writing.)

Dated the _____ day of _____.]

THE THIRD SCHEDULE.

FORM A.

(See sections 6 and 151.)

MEMORANDUM OF ASSOCIATION OF A COMPANY LIMITED BY SHARES.

1st.—The name of the company is "The Eastern Steam Packet Company, Limited".

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the conveyance of passengers, and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object".

4th.—The liability of the members is limited.

5th.—The share capital of the company is two hundred thousand rupees, divided into one thousand shares of two hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, addresses and descriptions of subscribers.		Number of shares taken by each subscriber.
1. A. B. of	, merchant	200
2. C. D. "	, "	25
3. E. F. "	, "	30
4. G. H. "	, "	40
5. I. J. "	, "	15
6. K. L. "	, "	5
7. M. N. "	, "	10
TOTAL SHARES TAKEN .		325

Dated the _____ day of _____ 19 .

Witness to the above signatures.

X. Y., of .

FORM B.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND NOT HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Mutual Calcutta Marine Association, Limited".

2nd.—The registered office of the company will be situate in Calcutta.

3rd.—The objects for which the company is established are "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above object".

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges and expenses of winding up and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding one hundred rupees.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, Addresses and Descriptions of Subscribers.

- " 1. A. B. of
- " 2. C. D. of
- " 3. E. F. of
- " 4. G. H. of
- " 5. I. J. of
- " 6. K. L. of
- " 7. M. N. of

Dated the day of

Witness to the above signatures.

X. Y., of

ARTICLES OF ASSOCIATION TO ACCOMPANY PRECEDING MEMORANDUM OF ASSOCIATION.

Number of Members.

1. The company for the purpose of registration is declared to consist of five hundred members.
2. The directors hereinafter mentioned may, whenever the business or the association requires it, register an increase of members.

Definition of Members.

3. Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

4. The first general meeting shall be held at such time not being less than one month nor more than three months after the incorporation of the company, and at such place, as the directors may determine.

5. A general meeting shall be held once in every year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the month following that in which the anniversary of the company's incorporation occurs, and at such place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be called by any two members in the same manner as nearly as possible as that in which meetings are to be called by the directors.

6. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

7. The directors may, whenever they think fit, and shall, on a requisition made in writing by any five or more members, call an extraordinary general meeting.

8. Any requisition made by the members must state the object of the meeting proposed to be called, and must be signed by the requisitionists and deposited at the registered office of the Company.

9. On receipt of the requisition the directors shall forthwith proceed to call a general meeting: if they do not proceed to cause a meeting to be held within twenty-one days from the date of the requisition being so deposited, the requisitionists or any other five members may themselves call a meeting.

Proceedings at General Meetings.

10. Fourteen days' notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of the business, shall be given to the members in manner hereinafter mentioned, or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such a notice by any member shall not invalidate the proceedings at any general meeting.

11. All business shall be deemed special that is transacted at an extra-ordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance-sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of remuneration of the auditors.

12. No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of the business. The quorum shall be ascertained as follows (that is to say)—if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members with this limitation, that no quorum shall in any case exceed ten.

13. If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting, if called on the requisition of the members, shall be dissolved; in any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned *sine die*.

14. The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

15. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of that meeting.

16. The chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

17. At any general meeting, unless a poll is demanded by at least three members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

18. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

Votes of Members.

19. Every member shall have one vote and no more.

20. If any member is a lunatic or idiot, he may vote by his committee or other legal guardian.

21. No member shall be entitled to vote at any meeting unless all moneys due from him to the company have been paid.

22. On a poll votes may be given either personally or by proxy: Provided that no company shall vote by proxy as long as a resolution of its directors in accordance with the provisions of section 80 of the Indian Companies Act, 1913, is in force. A proxy shall be appointed in writing under the hand of the appointor, or, if such appointor is a corporation, under its common seal.

23. (1) No person shall act as a proxy unless he is a member, or unless he is appointed to act at the meeting as proxy for a corporation.

(2) The instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

24. Any instrument appointing a proxy shall be in the following form:—

Company, Limited.

I, _____, of _____, being a Member of the Company Limited, hereby appoint _____ of _____ as my proxy to vote for me and on my behalf at the [ordinary or extraordinary, as the case may be] general meeting of the company to be held on the day of _____ and at any adjournment thereof.

Signed this _____ day of _____.

Directors.

25. The number of the directors and the names of the first directors shall be determined by the subscribers of the memorandum of association.

26. Until directors are appointed, the subscribers of the memorandum of association shall, for all the purposes of the Indian Companies Act, 1913, be deemed to be directors.

Powers of Directors.

27. The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by the Indian Companies Act, 1913, or by any statutory modification thereof for the time being in force, or by these articles, required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Elections of Directors.

28. The directors shall be elected annually by the company in general meeting.

Business of Company.

(Here insert rules as to mode in which business of insurance is to be conducted.)

Audit.

29. Auditors shall be appointed and their duties regulated in accordance with sections 144 and 145 of the Indian Companies Act, 1913, or any statutory modification thereof for the time being in force, and for this purpose the said sections shall have effect as if the word "members" were substituted for "shareholders," and as if "first general meeting" were substituted for "statutory meeting".

Notices.

30. A notice may be given by the company to any member either personally or by sending it by post to him to his registered address.

31. Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Names, Addresses and Descriptions of Subscribers.

"1. A. B. of
"2. C. D. of
"3. E. F. of
"4. G. H. of
"5. I. J. of
"6. K. L. of
"7. M. N. of

Dated the _____ day of _____ 19 .
Witness to the above signatures.
X. Y., of _____

FORM C.

(See sections 7 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF A COMPANY LIMITED BY GUARANTEE, AND HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Snowy Range Hotel Company, Limited".

2nd.—The registered office of the company will be situate in the province of Bengal.

3rd.—The objects for which the company is established are "the facilitating travelling in the Snowy Range, by providing hotels and conveyances by sea and by land for the accommodation of travellers and the doing all such other things as are incidental or conducive to the attainment of the above object".

4th.—The liability of the members is limited.

5th.—Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company, contracted before he ceases to be a member, and the costs, charges and expenses of winding up the same and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding fifty rupees.

6th.—The share capital of the company shall consist of five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers.										Number of shares taken by each Subscriber.
"1. A. B. of	.	.	.	.	.	.	.	.	.	200
"2. C. D. of	.	.	.	.	.	.	.	.	.	25
"3. E. F. of	.	.	.	.	.	.	.	.	.	30
"4. G. H. of	.	.	.	.	.	.	.	.	.	40
"5. I. J. of	.	.	.	.	.	.	.	.	.	15
"6. K. L. of	.	.	.	.	.	.	.	.	.	5
"7. M. N. of	.	.	.	.	.	.	.	.	.	10
TOTAL SHARES TAKEN										325

Dated the _____ day of _____ 19 .
Witness to the above signatures.
X. Y., of _____

Articles of Association to accompany preceding Memorandum of Association.

1. The share capital of the company is five hundred thousand rupees, divided into five thousand shares of one hundred rupees each.

2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares in the company.

3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.

4. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

"1. A. B. of _____, merchant.
"2. C. D. of _____
"3. E. F. of _____
"4. G. H. of _____
"5. I. J. of _____
"6. K. L. of _____
"7. M. N. of _____

Dated the _____ day of _____ 19 .
Witness to the above signatures.
X. Y., of _____

FORM D.

(See sections 8 and 151.)

MEMORANDUM AND ARTICLES OF ASSOCIATION OF AN UNLIMITED COMPANY
HAVING A SHARE CAPITAL.

Memorandum of Association.

1st.—The name of the company is "The Patent Stereotype Company".

2nd.—The registered office of the company will be situate in the province of Bombay.

3rd.—The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates of which method P. Q., of Bombay, is the sole patentee".

We, the several persons whose names are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers.										Number of shares taken by each Subscriber.
"1. A. B. of	.	.	.	.	.	.	.	.	.	3
"2. C. D. of	.	.	.	.	.	.	.	.	.	2
"3. E. F. of	.	.	.	.	.	.	.	.	.	1
"4. G. H. of	.	.	.	.	.	.	.	.	.	2
"5. I. J. of	.	.	.	.	.	.	.	.	.	2
"6. K. L. of	.	.	.	.	.	.	.	.	.	1
"7. M. N. of	.	.	.	.	.	.	.	.	.	1
TOTAL SHARES TAKEN										12

Dated the day of 19 .

Witness to the above signatures.

X. Y., of .

Articles of Association to accompany the preceding Memorandum of Association.

1. The share capital of the company is twenty thousand rupees, divided into twenty shares of one thousand rupees each.

2. All the articles of Table A of the Indian Companies Act, 1913, shall be deemed to be incorporated with these articles and to apply to the company.

Names, Addresses and Descriptions of Subscribers.

"1. A. B. of , merchant.
 "2. C. D. of .
 "3. E. F. of .
 "4. G. H. of .
 "5. I. J. of .
 "6. K. L. of .
 "7. M. N. of .

Dated the day of 19 .

Witness to the above signatures.

X. Y., of .

FORM E.

AS REQUIRED BY PART II OF THE ACT.

(See section 32.)

Summary of Share Capital and Shares of the		Company, Limited, made up to the		day of
19	(being the day of the first ordinary general meeting in 19 .)			
Nominal share capital Rs.	divided into*	{ shares of Rs.	each.	
Total number of shares taken up* to the	day of 19	{ shares of Rs.	each.	
must agree with the total shown in the list as held by existing members				
Number of shares issued subject to payment wholly in cash				
Number of shares issued as fully paid up otherwise than in cash				
Number of shares issued as partly paid up to the extent of per share otherwise than in cash				
† There has been called up on each—of shares				Rs.
There has been called up on each—of shares				Rs.
There has been called up on each—of shares				Rs.
‡ Total amount of calls received, including payments on application and allotment				Rs.

* When there are shares of different kinds or amounts (e. g., Preference and Ordinary of Rs. 200 or Rs. 100) state the numbers and nominal values separately.

† Where various amounts have been called or there are shares of different kinds, state them separately.

‡ Include what has been received on forfeited as well as on existing shares.

Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash	Rs.
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of _____ per share	Rs.
Total amount of calls unpaid	Rs.
Total amount (if any) of sums paid by way of commission in respect of shares or debentures or allowed by way of discount since date of last summary	Rs.
Total amount (if any) paid on _____ shares forfeited	Rs.
Total amount of shares and stock for which share-warrants are outstanding	Rs.
Total amount of share-warrant- issued and surrendered respectively since date of last summary	Rs.
Number of shares or amount of stock comprised in each share-warrant	Rs.
Total amount of debt due from the company in respect of all mortgages and charges which are required to be registered with the registrar under this Act	Rs.

List of Persons holding shares in the _____ Company, limited, on the _____ day of _____ 19____, and of persons who have held shares therein at any time since the date of the last return, showing their names and addresses and an account of the shares so held.

[illegible]

* State the aggregate number of shares forfeited.

**** State the aggregate number of shares forfeited (if any).**

† The aggregate number of shares held and not the distinctive numbers, must be stated and the column must be added up throughout so as to make one total to agree with that stated in the summary to have been taken up.

† When the shares are of different classes, these columns may be sub-divided so that the number of each class held or transferred may be shown separately.

§ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee, but the name of the transferee may be inserted in the remarks column immediately opposite the particulars of each transfer.

FORM I.

See sec. 124.

.....LIMITED

Balance-Sheet as at19 .

CAPITAL AND LIABILITIES.	PROPERTY AND ASSETS.
CAPITAL—	FIXED CAPITAL EXPENDITURE—
Authorised Capital.....shares of Rs.... .....each	(Distinguishing as far as possible between expenditure upon goodwill, land, buildings, lease-holds, railway sidings, plant, machinery, furniture, development of property, patents, trade-marks and designs, interest paid out of Capital during construction, etc., and stating in every case the original cost and the additions thereto and deductions therefrom during the year, and the total Depreciation written off under each head. Where sums have been written off on a reduction of capital or a revaluation of assets every balance-sheet after the first balance-sheet subsequent to the reduction or revaluation shall show the reduced figures, with the date of and the amount of the reduction made.)
(Distinguishing between the various classes of Capital)	
Issued Capital.....shares of Rs..... each	
(i) Shares issued as fully paid up pursuant to any contract without payments being received in cash.....shares of Rs.....each.	
(ii) Shares issued for payments in cash.....shares of Rs.....each.	
Subscribed Capital.....shares of Rs... .....each	
Amount called up at Rs.....per share.	
Less—Calls unpaid—	PRELIMINARY EXPENSES .
(i) due from Managing Agents .	
(ii) due from others .	COMMISSION OR BROKERAGE .
Add—Forfeited shares (amount paid up).	(Commission or Brokerage paid for underwriting or placing or subscribing shares or debentures until written off.)
Note. — Where circumstances permit issued and subscribed capital and amount called up may be shown as one item, <i>e. g.</i> ,	
Issued and Subscribed Capital..... shares of Rs.....each, Rs... paid up.	DISCOUNT ALLOWED on the issue of shares or so much as has not been written off at the date of the balance-sheet.
RESERVES	STORES AND SPARE PARTS .
DEBENTURES stating the nature of security	LOOSE TOOLS
ANY SINKING FUND	LIVE STOCK AND VEHICLES .
ANY OTHER FUND CREATED OUT OF NET PROFITS, including any development fund	STOCK IN TRADE
ANY PENSION OR INSURANCE FUND.	(Stating mode of valuation, <i>e. g.</i> , cost or market value.)
b[PROVISION FOR BAD AND DOUBTFUL DEBTS (in the case of Companies other than Banking Companies)]	BILLS OF EXCHANGE
	c[BOOK DEBTS (Other than Bad and Doubtful Debts of a Banking Company for which Provision has been made to the satisfaction of the auditors)].

[a] Substituted by the Indian Companies (Amendment) Act, 1936 (22 [XXII] of 1936), S. 124, for the original form [15-1-1937]. [b] Substituted, *ibid*, 1943 (30 [XXX] of 1943), S. 5, for "Provision for Bad and Doubtful debts." [27-11-1943.] [c] Substituted, *ibid*, for "Book Debts."

CAPITAL AND LIABILITIES.	PROPERTY AND ASSETS.
LOANS—	(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered good and debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated.)
(a) Secured—	
(i) loans on mortgages or fixed assets	
(ii) loans on debentures	
(iii) loans from banks, stating the nature of security	
(iv) liabilities to subsidiary companies	
(v) other secured loans, stating the nature of security	
(vi) interest accrued on mortgages, debentures or other secured loans	
(b) Unsecured—	
(i) loans from banks	
(ii) fixed deposits	
(iii) short term loans	
(iv) advances by directors or managers and managing agents	
(v) interest accruing but not due and interest accrued and due.	
(vi) liabilities to subsidiary companies	
UNCLAIMED DIVIDENDS	
LIABILITIES—	
For Goods supplied	
For Expenses	
For Acceptances	
For Other Finance	
ADVANCE PAYMENTS AND UNEXPIRED DISCOUNTS	
(For the portion for which value has still to be given, <i>e. g.</i> , in the case of the following classes of companies—	
Newspaper, Fire Insurance, Theatre, Club, Banking, Steamship Companies, etc.),	
PROFIT AND LOSS	
CONTINGENT LIABILITIES—	
Claims against the company not acknowledged as debts	
Money for which the company is contingently liable	
(Showing separately the amount of any guarantees given by the company on behalf of directors or officers of the company.)	
Arrears of Cumulative Preference Dividend	
	ADVANCES
	(Recoverable in cash or in kind or for value to be received, <i>e. g.</i> , Rates, Taxes, Insurance, etc., showing separately—
	(i) loans given to subsidiary companies
	(ii) loans including temporary advances made at any time during the year to directors or managers of the company)
	INVESTMENTS
	(Showing nature of investments and mode of valuation, <i>e. g.</i> , Cost or Market value and distinguishing—
	(i) investments in Government or trust securities
	(ii) investments in shares, debentures or bonds (showing separately shares fully paid up and partly paid up)
	(iii) investments in shares, debentures or bonds of subsidiary companies.
	(iv) immovable properties)
	INTEREST ACCRUED ON INVESTMENTS
	CASH AND OTHER BALANCES
	Amount in hand
	Balances with Agents and Bankers (in detail showing whether on deposit or current account, etc.)
	PROFIT AND LOSS

[The information required to be given under any of the items or sub-items in this Form if not included in the Balance-Sheet itself shall be furnished in a separate Schedule or Schedules to be attached to and to form part of the Balance-Sheet.]

FORM G.

(See section 136.)

FORM OF STATEMENT TO BE PUBLISHED BY BANKING AND INSURANCE COMPANIES AND DEPOSIT,
PROVIDENT, OR BENEFIT SOCIETIES.

* The share capital of the company is Rs. _____ divided into _____ shares of Rs. _____ each.
The number of shares issued is _____ Cal's to the amount of Rs. _____
per share have been made, under which the sum of Rs. _____ has been received.

The liabilities of the company on the thirty-first day of December (or thirtieth of June) were—

Debts owing to sundry persons by the company :

Under decree. R₂.

On mortgages or bonds, Rs.

On notes, bills or hundis, Rs.

On other contracts: Rs.

On estimated liabilities, Rs.

The assets of the company on that day were :

Government securities [stating them], Rs.

Bill of exchange, hundis and promissory notes. Rs.

Cash at the Bankers, Rs.

Other securities, Rs.

*If the company has no capital divided into shares, the portion of the statement relating to capital and share must be omitted.

3FORM H.

(See section 217.)

INFORMATION TO BE SUPPLIED IN OR IN ADDITION TO THE INFORMATION CONTAINED IN THE
BALANCE-SHEET OF A COMPANY REFERRED TO IN PART X.

Liabilities.

1. Summary of authorised Share Capital and Issued Share Capital.
2. Redeemable Preference Shares, stating date on or before which the shares are or are liable to be redeemed.
3. Debentures stating the nature of the Security.
4. Redeemed debentures which the Company has power to re-issue.
5. Loans (a) secured, stating the nature of the security ;
(b) unsecured.
6. Loans from Banks :—
(a) Secured, stating the nature of the security ;
(b) Unsecured.
7. Profit and Loss Account, showing (unless disclosed in a separate account) :—
Balance as per previous Balance-Sheet.
Appropriation thereof.
Profit since last Balance-Sheet.
8. Contingent Liabilities.
9. Arrears of Cumulative Preference Dividend.

Assets.

1. Fixed Assets, with sufficient particulars to disclose their general nature and stating how their values are arrived at.
 2. Preliminary expenses, so far as not written off.
 3. Any expenses incurred in connection with any issue of Share Capital or Debentures, so far as not written off.
 4. If it is shown as a separate item in or is otherwise ascertainable from the books of the Company, or from any contract for the sale or purchase of any property to be acquired by the Company, or from any documents in the possession of the Company relating to the stamp duty payable in respect of any such contract or the conveyance of any such property the amount of the goodwill and of any patents and trade marks as so shown or ascertained.
 5. Interest paid on Capital, so far as not written off, showing the Share Capital on which and the rate at which interest has been paid out of Capital during the period to which the accounts relate.
 6. Discount allowed on Shares issued, so far as not written off.
 7. Commission paid or allowed in respect of any shares or debentures, so far as not written off.
 8. Loans outstanding to enable employees or trustees on their behalf to purchase shares in the Company.
9. Particulars showing : —
- (a) the amount of any loans which during the period to which the accounts relate have been made either by the Company or by any other person under a guarantee from or on a security provided by the Company to any director or officer of the Company, including any such loans which were repaid during the said period :

and

(b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof ;
and

(c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the Company or by or from any subsidiary Company.

NOTE (1)—There shall not be required to be shown : —

(a) in the case of a Company the ordinary business of which includes the lending of money, loans made by the Company in the ordinary course of its business; or

(b) loans made by the Company to any employee of the Company if the loan does not exceed twenty thousand rupees and is certified by the directors of the Company to have been made in accordance with any practice adopted or about to be adopted by the Company with respect to loans to its employees.

NOTE (2)—The foregoing shall not apply in relation to a Managing Director of the Company, and in the case of any other director who holds any salaried employment or office in the Company there shall not be required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees.

(Where a company is a holding company then the Balance-Sheet shall disclose the particulars required by section 132A.)]

THE FOURTH SCHEDULE.

(See section 290.)

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal.
1882 . .	VI	The Indian Companies Act, 1882.	So much as has not been repealed.
1887 . .	VI	The Indian Companies Act, (1882) Amendment Act, 1887.	The whole.
1891 . .	XII	The Amending Act, 1891.	So much of the Second Schedule as relates to the Indian Companies Act, 1882.
1895 . .	XII	The Indian Companies (Memorandum of Association) Act, 1895.	The whole.
1899 . .	IX	The Indian Arbitration Act, 1899.	The second proviso to section 3 relating to the Indian Companies Act, 1882.
1900 . .	IV	The Indian Companies (Branch Registers) Act, 1900.	The whole.
1910 . .	IV	The Indian Companies (Amendment) Act, 1910.	The whole.

APPENDIX I.

(Table B in Schedule to Act XIX of 1857.)*

REGULATIONS FOR MANAGEMENT OF THE COMPANY.

Shares.

1. No person shall be deemed to have accepted any share in the company unless he has testified his acceptance thereof by writing under his hand in such form as the Company from time to time directs.

2. The Company may from time to time make such calls upon the share holders, in respect of all moneys unpaid on their shares, as they think fit, provided that twenty-one days' notice at least is given of each call ; and each shareholder shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the Company.

3. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

4. If, before or on the day appointed for payment, any shareholder does not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate of 5 per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

5 The Company may, if they think fit, receive, from any of the shareholders willing to advance the same, all or any part of the moneys due upon their respective shares beyond the sums actually called for, and upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the shareholder paying such sum in advance and the Company agree upon.

[a.] See S. 290 (1) (b) of the Indian Companies Act, 1913 (7 [VII] of 1913). The Table is reproduced here as an Appendix for convenience of reference.

6. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

7. The Company may decline to register any transfer of shares made by a shareholder who is indebted to them.

8. Every shareholder shall, on payment of such sum not exceeding eight annas as the Company may prescribe, be entitled to a certificate, under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.

9. If such certificate is worn out or lost, it may be renewed on payment of such sum, not exceeding eight annas, as the Company may prescribe.

10. The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

11. The executors or administrators or representatives of a deceased shareholder shall be the only persons recognized by the Company as having any title to his share.

12. Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder or in any way other than by transfer, may be registered as a shareholder upon such evidence being produced as may from time to time be required by the Company.

13. Any person who has become entitled to a share in any way other than by transfer may, instead of being registered himself, elect to have some person to be named by him registered as a holder of such share.

14. The person so becoming entitled shall testify such election by executing to his nominee a transfer of such share.

15. The instrument of transfer shall be presented to the Company accompanied with such evidence as they may require to prove the title of the transferor, and thereupon the Company shall register the transferee as a shareholder.

Forfeiture of Shares.

16. If any shareholder fails to pay any call due on the appointed day, the Company may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with any interest that may have accrued by reason of such non-payment.

17. The notice shall name a further date, and a place or places, being a place or places, at which calls of the Company are usually made payable, on and at which such call is to be paid; it shall also state that, in the event of non-payment at the time and place appointed, the shares in respect of which such call was made will be liable to be forfeited.

18. If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect.

19. Any shares so forfeited shall be deemed to be the property of the Company, and may be disposed of in such manner as the Company thinks fit.

20. Any shareholder whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

Increase in Capital.

21. The Company may, with the sanction of the Company previously given in general meeting, increase its capital.

22. Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital.

General Meetings.

23. The first general meeting shall be held at such time, not being more than twelve months after the incorporation of the Company, and at such place as the directors may determine.

24. Subsequent general meetings shall be held at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the ^a[first Monday in February] in every year, at such place as may be determined by the directors.

[a.] The bracketted portion read originally as follows: " day of ".

25. The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

26. The directors may, whenever they think fit and they shall, upon a requisition made in writing by any number of shareholders holding in the aggregate not less than one-fifth part of the shares of the Company, convene an extraordinary general meeting.

27. Any requisition so made by the shareholders shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

28. Upon the receipt of such requisition, the directors shall forthwith proceed to convene a general meeting; if they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other shareholders holding the required number of shares, may themselves convene a meeting.

29. Seven days' notice at the least, specifying the place, the time, the hour of meeting, and the purpose for which any general meeting is to be held, shall be given by advertisement, or in such other manner (if any) as may be prescribed by the Company.

30. Any shareholder may, on giving not less than three days' previous notice, submit any resolution to a meeting beyond the matters contained in the notice given of such meeting.

31. The notice required of a shareholder shall be given by leaving a copy of the resolution at the registered office of the Company.

32. No business shall be transacted at any meeting, except the declaration of a dividend, unless a quorum of shareholders is present at the commencement of such business; and such quorum shall be ascertained as follows (that is to say); if the shareholders belonging to the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional shareholders up to fifty, and one for every ten additional shareholders after fifty, with this limitation, that it shall not be necessary for any quorum in any case to exceed forty.

33. If within one hour from the time appointed for the meeting the required number of shareholders is not present, the meeting, if convened upon the requisition of the shareholders, shall be dissolved; in any other case it shall stand adjourned to the following day at the same time and place; and if at such adjourned meeting the required number of shareholders is not present, it shall be adjourned *sine die*.

34. The chairman (if any) of the Board of Directors shall preside as chairman at every meeting of the Company.

35. If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the shareholders present shall choose some one of their number to be chairman of such meeting.

36. The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

37. At any general meeting, unless a poll is demanded by at least five shareholders, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

38. If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs; and the result of such poll shall be deemed to be the resolution of the Company in general meeting.

Votes of Shareholders.

39. Every shareholder shall have one vote for every share up to ten; he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares.

40. If any shareholder is a lunatic or idiot, he may vote by his committee; and if any shareholder is a minor, he may vote by his guardian, or any one of his guardians if more than one.

41. If more persons than one are jointly entitled to a share or shares, the person whose name stands first in the register of shareholders as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

42. No shareholder shall be entitled to vote at any meeting unless all calls due from him have been paid, nor until he shall have been possessed of his shares three calendar months, unless such shares shall have been acquired or shall have come by bequest, or by marriage, or by succession to an intestate's estate, or by any deed of settlement after the death of any person who shall have been entitled for life to the dividends of such shares.

43. Votes may be given either personally or by proxies; a proxy shall be appointed in writing under the hand of the appointer, or, if such appointer is a corporation, under their common seal.

44. No person shall be appointed a proxy who is not a shareholder, and the instrument appointing him shall be deposited at the registered office of the Company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of one month from the date of its execution.

Directors.

45. The number of the directors, and the names of the first directors shall be determined by the subscribers of the memorandum of association.

46. Until directors are appointed, the subscribers of the memorandum of association shall for all the purposes of this Act be deemed to be directors.

Powers of Directors.

47. The business of the Company shall be managed by the directors, who may exercise all such powers of the Company as are not by this Act or by the articles of association (if any) declared to be exercisable by the Company in general meeting, subject nevertheless to any regulations of the articles of association, to the provisions of this Act, and to such regulations, not being inconsistent with the aforesaid regulations or provisions, as may be prescribed by the Company in general meeting, but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Disqualification of Directors.

48. The office of director shall be vacated—
if he holds any other office or place of profit under the Company;
if he becomes bankrupt or insolvent;
if he is concerned in or participates in the profits of any contract with the Company;
if he participates in the profits of any work done for the Company.

But the above rules shall be subject to the following exceptions :—that no director shall vacate his office by reason of his being a shareholder in any incorporated Company which has entered into contracts with or done any work for the Company of which he is director; nevertheless he shall not vote in respect of such contract or work; and, if he does so vote, his vote shall not be counted, and he shall incur a penalty, not exceeding five hundred rupees.

Rotation of Directors.

49. At the first ordinary meeting after the incorporation of the Company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year, one-third of the directors for the time being, or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

50. The one-third or other nearest number to retire during the first and second years ensuing the incorporation of the Company shall, unless the directors agree among themselves, be determined by ballot; in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

51. A retiring director shall be re-eligible.

52. The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

53. If at any meeting at which an election of directors ought to take place no such election is made, the meeting shall stand adjourned till the next day, at the same time and place, and, if at such adjourned meeting no election takes place, the former directors shall continue to act until new directors are appointed at the first ordinary meeting of the following year.

54. The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

55. Any casual vacancy occurring in the Board of Directors may be filled up by the directors; but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

Proceedings of Directors.

56. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit, and determine the quorum necessary for the transaction of business; questions arising at any meeting shall be decided by a majority of votes; in case of an equality of votes, the chairman, in addition to his original vote, shall have a casting vote; a director may at any time summon a meeting of the directors.

57. The directors may elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

58. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit: any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

59. A committee may elect a chairman of their meetings: if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

60. A committee may meet and adjourn as they think proper: questions at any meeting shall be determined by a majority of votes of the members present; and in case of an equal division of votes, the chairman shall have a casting vote.

61. All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

62. The director shall cause minutes to be made in books provided for the purpose—

- (1) of all appointments of officers made by the directors;
- (2) of the names of the directors present at each meeting of directors and committees of directors;
- (3) of all orders made by the directors and committees of directors; and
- (4) of all resolutions and proceedings of meetings of the Company, and of the directors and committees of directors.

And any such minute as aforesaid if signed by any person purporting to be the chairman of any meeting of directors, or committee of directors, shall be receivable in evidence without any further proof.

63. The Company, in general meeting, may, by a special resolution, remove any director before the expiration of his period of office, and appoint another qualified person in his stead; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Dividends.

64. The directors may, with the sanction of the Company in general meeting declare a dividend to be paid to the shareholders in proportion to their shares.

65. The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the Company, or any part thereof ; and the directors may invest the sum so set apart as a reserved fund upon such securities as they, with the sanction of the Company, may select.

66. The directors may deduct from the dividends payable to any shareholder all such sums of money as may be due from him to the Company on account of calls or otherwise.

67. Notice of any dividend that may have been declared shall be given to each shareholder or sent by post or otherwise to his registered place of abode ; and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the Company.

68. No dividend shall bear interest as against the Company.

Accounts.

69. Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year made up to a date not more than three months before such meeting.

70. The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters ; every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting ; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

71. A balance-sheet shall be made out in every year, and laid before the general meeting of the Company ; and such balance-sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

72. A printed copy of such balance-sheet shall, seven days previously to such meeting, be delivered at or sent by post to the registered address of every shareholder.

Audit.

73. The accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors to be elected by the Company in general meeting.

74. If not more than one auditor is appointed, all the provisions herein contained relating to auditors shall apply to him.

75. The auditors need not be shareholders in the Company : no person is eligible as an auditor who is interested otherwise than as a shareholder in any transaction of the Company ; and no director or other officer of the Company is eligible during his continuance in office.

76. The election of auditors shall be made by the Company at their ordinary meeting, or, if there are more than one, at their first ordinary meeting in each year.

77. The remuneration of the auditors shall be fixed by the Company at the time of their election.

78. Any auditor shall be re-eligible on his quitting office.

79. If any casual vacancy occurs in the office of auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

80. If no election of auditors is made in manner aforesaid, the Local Government may, on the application of one-fifth in number of the shareholders of the Company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the Company for his services.

81. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

82. Every auditor shall have a list delivered to him of all books kept by the Company, and he shall at all reasonable times have access to the books and accounts of the Company ; he may, at the expense of the Company, employ accountants or other persons to assist him in investigating such accounts and he may in relation to such accounts examine the directors or any other officer of the Company.

83. The auditors shall make a report to the shareholders upon the balance sheet and accounts ; and in every such report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs ; and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory ; and such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

84. Notices requiring to be served by the Company upon the shareholders may be served either personally, or by leaving the same, or sending them through the post in a letter addressed to the shareholders, at their registered places of abode.

85. All notices directed to be given to the shareholders shall, with respect to any share to which persons are jointly entitled, be given to whichever of the said persons is named first in the register of shareholders ; and notice so given, shall be sufficient notice to all the proprietors of such share.

FORM OF BALANCE-SHEET REFERRED TO IN TABLE B.		18 .		Cr.	
Balance Sheet* of the		Company made up to		PROPERTY AND ASSETS.	
Dr.					
CAPITAL AND LIABILITIES.					
I.—CAPITAL . . .	1	SHOWING— The total amount received from the shareholders; showing also— (a) The number of shares . . . (b) The amount paid per share . . . (c) If any arrears of calls, the nature of the arrear, and the names of the defaulters . . . (Any arrears due from any director or officer of the Company to be separately stated.) (d) The particulars of any forfeited shares . . .	Rs. a. p.	SHOWING— Immovable property, distinguishing— (a) Land (describing tenure) . . . (b) Buildings . . . Moveable property, distinguishing— (c) Stock-in-trade . . . (d) Plant . . . (The cost to be stated with deduction for deterioration in value as charged to the Reserve Fund or Profit and Loss.)	Rs. a. p.
II.—DEBTS AND LIABILITIES OF THE COMPANY.	2	SHOWING— The amount of loans on mortgage or debenture bonds . . . The amount of debts owing by the Company, distinguishing— (a) Debts for which acceptances have been given . . . (b) Debts to tradesmen for supplies of stock-in-trade or other articles . . . (c) Debts of law expenses . . . (d) Debts for interest on debentures or other loans . . . (e) Unclaimed dividends . . . (f) Debts not enumerated above . . .	Rs. a. p.	SHOWING— Debts considered good for which the Company hold bills or other securities . . . Debts considered good for which the Company hold not security . . . Debts considered doubtful and bad . . . (Any debt due from a director or other officer of the Company to be separately stated.)	Rs. a. p.
VI.—RESERVE FUND	3	SHOWING— The amount set aside from profits to meet contingencies . . . The disposable balance for payment of dividend, etc. . .	Rs. a. p.	SHOWING— The nature of investment and rate of interest . . . The amount of cash, where lodged, and if bearing interest . . .	Rs. a. p.
VII.—PROFIT AND LOSS.	4	SHOWING— Claims against the Company not acknowledged as debts. Moneys for which the Company is contingently liable . . .	Rs. a. p.		Rs. a. p.
VIII.—CONTINGENT LIABILITIES.	5				
IV.—DEBTS OWING TO THE COMPANY.					
V.—CASH AND INVESTMENT.					

*See clauses 71 and 72 of the foregoing Table B.

APPENDIX II.

(Table A in the First Schedule to Act VI of 1882.)^a

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES.

Shares.

(1) If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

(2) Every member shall, on payment of eight annas or such less sum as the Company in general meeting may prescribe, be entitled to a certificate under the common seal of the Company, specifying the share or shares held by him, and the amount paid up thereon.

(3) If such certificate is worn out or lost, it may be renewed on payment of eight annas or such less sum as the Company in general meeting may prescribe.

Calls on Shares.

(4) The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call; and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors.

(5) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.

(6) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

(7) The directors may, if they think fit, receive, from any member willing to advance the same, all or any part of the moneys due upon the shares held by him beyond the sums actually called for; and, upon the moneys so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the Company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

Transfers of Shares.

(8) The instrument of transfer of any share in the Company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof.

(9) Shares in the Company shall be transferred in the following form :

I, A B of _____, in consideration of the sum of rupees _____ paid to me by C D of _____, do hereby transfer to the said C D the share (or shares) numbered _____ standing in my name in the books of the _____ Company to hold unto the said C D, his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of the execution thereof; and I, the said C D, do hereby agree to take the said share (or shares) subject to the same conditions. As witness our hands the _____ day of _____.

(10) The Company may decline to register any transfer of shares made by a member who is indebted to them.

(11) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

Transmission of Shares.

(12) The executors or administrators of a deceased member shall be the only persons recognised by the Company as having any title to his share.

(13) Any person becoming entitled to a share in consequence of the death, bankruptcy or insolvency of any member, or in consequence of the marriage of any female member, may be registered as a member upon such evidence being produced as may, from time to time, be required by the Company.

(14) Any person who has become entitled to a share in consequence of the death, bankruptcy or insolvency of any member or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

(15) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

(16) The instrument of transfer shall be presented to the Company, together with such evidence as the directors may require to prove the title of the transferee, and thereupon the Company shall register the transferee as a member.

Forfeiture of Shares.

(17) If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay such call together with interest and any expenses that may have accrued by reason of such non-payment.

(18) The notice shall name a further day on or before which such call and all interest and expenses that have accrued by reason of such non-payment are to be paid. It shall also name the place where payment is to be made, the place so named being either the registered office of the Company or some other place at which calls of the Company are usually made payable. The notice shall also state that, in the event of non-payment at or before the time and at the place appointed, the shares in respect of which such call was made will be liable to be forfeited.

(19) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may at any time thereafter, before payment of all calls, interest and expenses due in respect thereof has been made, be forfeited by a resolution of the directors to that effect.

(20) Any share so forfeited shall be deemed to be the property of the Company and may be disposed of in such manner as the Company in general meeting thinks fit.

[a] See section 290 (1) (c) of the Indian Companies Act, 1913 (7 [VII] of 1913).
The Table is reproduced here as an appendix for convenience of reference.

(21) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the Company all calls owing upon such shares at the time of the forfeiture.

(22) A solemn declaration in writing, made before a Magistrate, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated as against all persons entitled to such share and such declaration and the receipt of the Company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to the purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase, and he shall not be bound to see to the application of the purchase-money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Conversion of Shares into Stock.

(23) The directors may, with the sanction of the Company previously given in general meeting, convert any paid up shares into stock.

(24) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interest, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the Company may be transferred, or as near thereto as circumstances admit.

(25) The several holders of stock shall be entitled to participate in the dividends and profits of the Company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof, respectively, the same privileges and advantages for the purpose of voting at meetings of the Company and for other purposes as would have been conferred by shares of equal amount in the capital of the Company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the Company, shall be conferred by any such aliquot part of the consolidated stock as would not, if existing in shares have conferred such privileges or advantages.

Increase in Capital.

(26) The directors may, with the sanction of a special resolution of the Company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the Company in general meeting directs, or, if no direction is given, as the directors think expedient.

(27) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the Company.

(28) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions, with reference to the payment of calls, and the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital.

General Meetings.

(29) The first general meeting shall be held at such time, not being more than six months after the registration of the Company, and at such place as the directors may determine.

(30) Subsequent general meetings shall be held, once at the least in every year, at such time and place as may be prescribed by the Company in general meeting; and if no other time or place is prescribed a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

(31) The above mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(32) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by not less than one-fifth in number of the members of the Company, convene an extraordinary general meeting.

(33) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the Company.

(34) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

Proceedings at General Meeting.

(35) Seven days' notice at the least, specifying the place, the day and the hour of meeting, and, in case of special business, the general nature of such business, shall be given to the members in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the Company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(36) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, and the consideration of the accounts, balance-sheets and the ordinary report of the directors.

(37) No business shall be transacted at any general meeting except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business. Such quorum shall be ascertained as follows, that is to say:—If the persons who have taken shares in the Company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten, there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation that no quorum shall in any case exceed twenty.

(38) If, within one hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved. In any other case, it shall stand adjourned to the same day in the next week, at the same time and place; and if, at such adjourned meeting, a quorum is not present, it shall be adjourned *sine die*.

(39) The chairman (if any) of the board of directors shall preside as chairman at every general meeting of the Company.

(40) If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.

(41) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(42) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the Company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(43) If a poll is demanded by five or more members, it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the Company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

Votes of Members.

(44) Every member shall have one vote for every share up to ten. He shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares.

(45) If any member is a lunatic or idiot, he may vote by his committee or other legal curator; and if any member is a minor, he may vote by his guardian or any one of his guardians if more than one.

(46) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

(47) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the Company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

(48) Votes may be given either personally or by proxy.

(49) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or, if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the Company.

(50) The instrument appointing a proxy shall be deposited at the registered office of the Company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote; but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

(51) Any instrument appointing a proxy shall be in the following form:—

Company, Ltd.

I, _____, of _____, being a member of the
 Company, Limited, and entitled to _____ vote or _____ votes, hereby appoint
 _____, of _____, as my proxy to vote for me and on my behalf at the
 [ordinary or extraordinary as the case may be] general meeting of the Company to be held on the
 day of _____, and at any adjournment thereof (or at any meeting of the Company
 that may be held in the year _____).

As witness my hand, this _____ day of _____, Signed by the said
 in the presence of _____

Directors.

(52) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(53) Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors.

(54) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the Company in general meeting.

Powers of Directors.

(55) The business of the Company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the Company and may exercise all such powers of the Company as are not by the foregoing Act, or by these articles, required to be exercised by the Company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act and to such regulations, being not inconsistent with the aforesaid regulations, or provisions, as may be prescribed by the Company in general meeting; but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

(56) The continuing directors may act notwithstanding any vacancy in their body.

Disqualification of Directors.

(57) The office of director shall be vacated —

if he, or any partner of his, or the firm of which he is a member, holds any other office or place of profit under the Company;

if he becomes bankrupt or insolvent;

if he is punished under any of the penal provisions of the foregoing Act;

if he is concerned in or participates in the profits of any contract with the Company.

But the above rules shall be subject to the following exceptions :—that no director shall vacate his office by reason of his being a member of any Company which has entered into contracts with, or done any work for, the Company of which he is director; nevertheless, he shall not vote in respect of such contract or work, and, if he does so vote, his vote shall not be counted.

Rotation of Directors.

(58) At the first ordinary meeting after the registration of the Company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or, if their number is not a multiple of three, then the number nearest to one-third, shall retire from office.

(59) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the Company shall, unless the directors agree among themselves, be determined by ballot. In every subsequent year, the one-third or other nearest number who have been longest in office shall retire.

(60) A retiring director shall be re-eligible.

(61) The Company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(62) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

(63) The Company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

(64) Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

(65) The Company in general meeting may by a special resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Proceedings of Directors.

(66) The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes, the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors.

(67) The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but, if no such chairman is elected or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

(68) The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the directors.

(69) A committee may elect a chairman of its meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

(70) A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present; and, in case of an equality of votes, the chairman shall have a second or casting vote.

(71) All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends.

(72) The directors may, with the sanction of the Company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

(73) No dividend shall be payable except out of the profits arising from the business of the Company.

(74) The directors may, before recommending any dividend, set aside out of the profits of the Company such sum as they think proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the Company or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.

(75) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the Company on account of calls or otherwise.

(76) Notice of any dividend that may have been declared shall be given to each member in manner herein-after mentioned ; and all dividends unclaimed for three years after having been declared may be forfeited by the directors for the benefit of the Company.

(77) No dividend shall bear interest as against the Company.

Accounts.

(78) The directors shall cause true accounts to be kept—

- of the stock in trade of the Company ;
- of the sums of money received and expended by the Company, and the matters in respect of which such receipt and expenditure take place ; and
- of the credits and liabilities of the Company.

The books of account shall be kept at the registered office of the Company, and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the Company in general meetings, shall be open to the inspection of the members during the hours of business.

(79) Once at the least in every year the directors shall lay before the Company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

(80) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting, and, in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

(81) A balance-sheet shall be made out in every year and laid before the Company in general meeting, and such balance sheet shall contain a summary of the property and liabilities of the Company arranged under the heads appearing in the form annexed to this table, or as near thereto as circumstances admit.

(82) A printed copy of such balance-sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served.

Audit.

(83) Once at the least in every year the accounts of the Company shall be examined, and the correctness of the balance-sheet ascertained by one or more auditor or auditors.

(84) The first auditors shall be appointed by the directors ; subsequent auditors shall be appointed by the Company in general meeting.

(85) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

(86) The auditors may be members of the Company, but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the Company, and no director or other officer of the Company is eligible during his continuance in office.

(87) The election of auditors shall be made by the Company at their ordinary meeting in each year.

(88) The remuneration of the first auditors shall be fixed by the directors ; that of subsequent auditors shall be fixed by the Company in general meeting.

(89) Any auditor shall be re-eligible on his quitting office.

(90) If any casual vacancy occurs in the office of any auditor appointed by the Company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

(91) If no election of auditors is made in manner aforesaid the Local Government may, on the application of not less than five members of the Company, appoint an auditor for the current year and fix the remuneration to be paid to him by the Company for his services.

(92) Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto.

(93) Every auditor shall have a list delivered to him of all books kept by the Company, and shall at all reasonable times have access to the books and accounts of the Company. He may, at the expense of the Company employ accountants or other persons to assist him in investigating such accounts, and he may, in relation to such accounts, examine the directors or any other officer of the Company.

(94) The auditors shall make a report to the members upon the balance-sheet and accounts, and in such report they shall state whether, in their opinion, the balance-sheet is a full and fair balance-sheet, containing the particulars required by these regulations and properly drawn up so as to exhibit a true and correct view of the state of the Company's affairs, and, in case they have called for explanations or information from the directors, whether such explanations or information have or has been given by the directors, and whether they or it have or has been satisfactory. Such report shall be read, together with the report of the directors, at the ordinary meeting.

Notices.

(95) A notice may be served by the Company upon any member either personally or by sending it through the post in a letter addressed to such member at his registered place of abode.

(96) All notices directed to be given to the members shall, with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members ; and notice so given shall be sufficient notice to all the holders of such share.

(97) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post ; and, in proving such service, it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

[4th April 1930.]

An Act further to amend the Indian Companies Act, 1913, for certain purposes.

WHEREAS it is expedient further to amend the Indian Companies Act 1913, for the purposes hereinafter appearing; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1930, Pt. V, p. 63; for Report of Select Committee, see *ibid*, p. 89.

Short title and commencement. 1. (1) This Act may be called the INDIAN COMPANIES (AMENDMENT) ACT, 1930.

(2) It shall come into force on such date^a as the ^b[Central Government] may, by notification in the ^c[Official Gazette], appoint.

[a] This Act came into force on the 1st April, 1932; see Gazette of India, 1932, Pt. I, p. 299. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Gazette of India".

2. [*Amendment of S. 144, Act VII of 1913.*] Repealed by the Repealing Act, 1938 (1 [1] of 1938), s. 2 and Schedule.

3. (1) All certificates granted by ^a[Provincial Governments] before the commencement of this Act entitling the holders, and all declarations made before the commencement of this Act by the ^b[Central Government] entitling the members of any specified institution or association, to be appointed and to act as auditors of companies throughout British India shall be deemed to be cancelled on the expiry of one year from the commencement of this Act:

Provided that the ^b[Central Government] may direct that any such certificate or declaration shall remain in force for a further period not exceeding one year:—

Provided further that any person who—

(a) was entitled immediately before the commencement of this Act by reason of any such certificate or declaration to be appointed and to act as an auditor of companies throughout British India, and

(b) has at any time, after he became so entitled and before the commencement of this Act, resided in India,

shall, if he possesses such qualifications as to good character and on payment of such fee as may be prescribed under clause (b) of sub-s. (2A) of section 144 of the Indian Companies Act, 1913, be entitled to be enrolled on the Register of Accountants referred to in that sub-section.

(2) Persons holding restricted certificates granted by ^a[Provincial Governments] before the commencement of this Act entitling them to act as auditors within a Province may continue so to act, on such conditions as may be prescribed by the ^c[appropriate Government] in rules^d made by notification in the ^e[Official Gazette] and after previous publication.

^f[In this section "the appropriate Government" means, in relation to companies falling within item 83 of List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government, and in relation to other companies, the Provincial Government]

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for "Governor-General in Council". [d] For the Auditors Restricted Certificate Rules made by the Governor-General in Council under this section, see Gazette of India, 1932, Pt. I, p. 299. [e] *Substituted* by A. O. for "Gazette of India". [f] *Inserted* by A. O.

THE INDIAN COMPANIES (FOREIGN INTERESTS) ACT, 1918.

(ACT XX of 1918).

STATEMENT OF OBJECTS AND REASONS.

"It is considered desirable that companies which, during the war, have been re-constituted in India on lines approved by the Government of India and that new companies, whose business is of importance to the security of India and of the British Empire as a whole, should be restrained from altering their articles of association in such a way as to bring them under the control of foreign interests. It is, therefore, proposed that the provisions in the articles of association of such companies, which are designed to restrict the shares or interests to be held or the powers to be exercised by persons other than British subjects, should not be

altered without the consent of the Governor-General in Council. Similarly, legislation in the United Kingdom has resulted in the Companies (Foreign Interests) Act, 1917 (7 and 8 Geo. V, Ch. 18), which prohibits the alteration of restrictive articles of this nature without the permission of the Board of Trade. Clauses 3 and 4 (1) of the Bill are designed to give effect to this proposal, and the remaining sub-clauses of cl. 4 have been inserted to prevent evasion of this provision by voluntary liquidation on the part of the Companies concerned."

— Gazette of India, 1918, Part V, page 74.

(ACT XX OF 1918).^a

[26th September 1918.]

An Act to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain Companies, and to provide for other purposes connected therewith.

WHEREAS it is expedient to take power to prohibit the alteration, except with the sanction of the Governor-General in Council, of articles of association which restrict foreign interests in certain companies, and to provide for other purposes connected therewith; It is hereby enacted as follows :—

[a] For Proceedings in Council, see Gazette of India, 1918, Pt. VI, pp. 955 and 1140.

Short title.

1. This Act may be called the INDIAN COMPANIES (FOREIGN INTERESTS) ACT, 1918.

Definitions.

2. (1) In this Act—

(a) the expression "British subject" has the same meaning as in s. 27 of the British Nationality and status of Aliens Act, 1914,^a but shall include any person who holds a certificate of naturalization as a British subject granted under any Act of ^b[the Central Legislature] for the time being in force and any association incorporated in any part of His Majesty's dominions: Provided that the said expression shall, for the purposes of this Act, be deemed to apply to any subject of a State in India;

(b) the expression "restrictive provision" means any provision in the articles of association of a company which, in the opinion of the ^b[Central Government], is designed to restrict or limit or has the effect of restricting or limiting the share or shares or interest which may be held, or the rights, powers or authority which may be conferred upon or exercised by or on behalf of persons other than British subjects in the Company, or in respect of the control, management or direction of the affairs thereof.

(2) All words and expressions used in this Act and defined in the Indian Companies Act, 1918, shall be deemed to have the meanings respectively attributed to them by that Act.

[a] 4 & 5 Geo V, Ch. 17. First paragraph of S. 27 is as follows: "The expression 'British subject' means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted". [b] Substituted by A. O. for "Governor-General in Council".

3 This Act shall apply to such companies as the ^a[Central Government] may, by notification in the ^b[Official Gazette], declare to be companies with restrictive provisions, and any such notification shall specify the restrictive provisions.

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India"

Alterations in restrictive provisions and winding up.

4. So long as a notification issued under section 3 is in force in respect of any company, notwithstanding anything to the contrary in any other Act—

(1) no alteration of the articles of association of the company affecting either directly or indirectly any restrictive provision shall be of any effect until it has received the consent in writing of the ^a[Central Government];

(2) a resolution for the voluntary winding up of the company shall be of no effect unless the ^a[Central Government] authorises or ratifies it by a written consent;

(3) any Court which has jurisdiction to wind up the company may in its discretion refuse to make a winding up order. In the exercise of its discretion, the Court shall be guided by the consideration whether the winding up is *bona fide* with a view to the discontinuance of the undertaking or is with a view to continuing the undertaking freed either wholly or in part from any restrictive provision;

(4) the ^a[Central Government] in giving consent, or the Court in making a winding up order, as the case may be, may impose such terms or conditions for giving effect to the purposes of this Act as ^b[it] thinks fit.

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "he or it".

(ACT XII OF 1926.)

STATEMENT OF OBJECTS AND REASONS.

"The several High Courts of Judicature established by Letters Patent are superior Courts of record, and as such they have power to attach and commit for acts amounting to contempt of their own proceedings as contempt of Court without reference to whether the acts alleged constitute an offence under the Indian Penal Code. Different views have, however, been held by the various High Courts in regard to their power to punish for such contempts committed in regard to proceedings in Courts which are subordinate to them. The Madras High Court in case of *In re Venkata Rao* (21 Mad. L. Jour 832) and the Bombay High Court in case of *King-Emperor v. B. G. Kulkarni* (24 Bom. L. R. 16) have held that they possess this power to protect their subordinate Courts against such contempts. The Calcutta High Court, on the other hand, in case of *Legal Remembrancer v. Motilal Ghose* (1 L. R. 41 Cal. 173) has taken a contrary view. In case in which it is held that the power to attach and commit exists the powers of the Court are as unrestricted as are the powers of superior Courts of record in England. It has not been decided whether the Courts of Judicial Commissioners of Central Provinces, Oudh and Sind, have these general powers either in regard to contempt of their own proceedings or of the proceedings of Courts subordinate to them. In England, in addition to the powers of the Superior Courts of record to attach and commit for contempt of Court, contempts of Courts are also indictable misdemeanours at Common Law. In India on the other hand, though the Indian Penal Code makes certain acts which would be punishable as contempts of Court in

England specific offences, it does not provide generally for the punishment of contempts of the authority of judicial officers not committed in their presence.

The condition of the law in India as summarised above has long been regarded as unsatisfactory, and in 1914 a Bill was introduced in the Indian Legislative Council which would have increased the classes of cases of contempts of Court punishable as offences under the Indian Penal Code, but it was not proceeded with owing to the war. The present Bill proposes to declare and amend the law on the other lines. Instead of increasing the classes of cases punishable as contempts of Court after trial by Magistrates, the Bill restricts the power to protect subordinate Courts against contempts which are not already provided for in the Indian Penal Code to High Courts themselves. The Bill resolves any doubts as to the powers of the High Courts of judicature in regard to the protection of their subordinate Courts from such contempts. It will show clearly that the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind, will have the same powers of punishing for contempts committed in regard to their own proceedings or of the proceedings of Courts subordinate to them. In lieu of the existing unrestricted powers of the High Courts of judicature it will define the nature of the offence of contempt of Court and the extent of the punishment which may be awarded. Finally, it bars the inherent powers of the High Courts to deal with such offences."

— Gazette of India, 1925, Pt. V, page 42.

SELECT COMMITTEE REPORT.

"The following Report of the Select Committee on the Bill to define and limit the powers of certain Courts in punishing contempts of Courts was presented to the Legislative Assembly on the 16th September 1925 :—

1. We, the undersigned, Members of the Select Committee to which the Bill to define and limit the powers of certain Courts in punishing contempts of Courts was referred, have considered the Bill and the papers noted in the margin, and have now the honour to submit this our Report, with the Bill as amended by us annexed thereto.

2. We have re-drafted the Bill omitting or restricting the provisions of the Bill as introduced as indicated below :—

(a) The definition of "contempt of Court" has been omitted. We are of opinion that the case-law on the subject will form an adequate guide.

(b) The provisions regulating the taking cognizance of offences under the Act and the procedure and powers of Courts in respect thereto have been omitted; the procedure at present followed by High Courts in respect of such offences is adequate, and we have provided that

High Courts, in respect of offences committed against subordinate Courts and Chief Courts, should follow the same procedure.

(c) Courts of Judicial Commissioners have been excluded as we are not of opinion that such Courts should have power to punish contempt.

(d) The provisions empowering Chief Courts to punish contempt have been limited to contempts of themselves.

(e) Simple imprisonment has been prescribed.

(f) The amount of fine has been limited to two thousand rupees.

The decisions referred to in clauses (c) (d) and (f) *supra* were not unanimous decisions.

3. We have further provided that a High Court will have no jurisdiction in respect of a contempt committed against a subordinate Court when such contempt is an offence punishable under the ordinary law; and in the proviso added to clause (3) we have, in accordance with the opinion of the majority, recognised the existing practice in such cases of accepting apologies. . . ."

[NOTE :—Minutes of Dissent are omitted.]

—Gazette of India, 1925, Pt. V, page 249.

COGNATE ACTS AND PROVISIONS.

1. CRIMINAL PROCEDURE CODE, 1898, SS 476-482.
2. PENAL CODE, 1860, SS. 172 TO 190, 228.
3. PRESIDENCY SMALL CAUSE COURTS ACT, XV OF 1882, SS. 87, 88.
4. PRESIDENCY-TOWNS INSOLVENCY ACT, III OF 1909, SS. 6 (3), 90 (8).

[THE] CONTEMPT OF COURTS ACT, 1926.

(ACT XII OF 1926.)

[8th March 1926.]

An Act to define and limit the powers of certain Courts in punishing contempts of Courts.

WHEREAS doubts have arisen as to the powers of a High Court of Judicature to punish contempts of [*] Courts;

And whereas it is expedient to resolve these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of court; It is hereby enacted as follows :

[a] The word "subordinate" was *repealed* by the Contempt of Courts (Amendment) Act, 1937 (12 [XII] of 1937), S. 2.

Short title, extent and commencement.

1. (1) This Act may be called the CONTEMPT OF COURTS ACT, 1926.

(2) It shall extend to the whole of British India.

(3) It shall come into force on such date^a as the ^b[Central Government] may, by notification in the ^c[Official Gazette], appoint.

[a] 1st May 1926; see Gazette of India, 1926, Pt. I, p. 442. [b] *Substituted* by A. O. for "Governor-General in Council". [c] *Substituted* by A. O. for 'Gazette of India'.

SECTION 1 — Synopsis.

1. Scope and object of Act.

2. Jurisdiction of Courts.

3. Contempt of Court, what amounts to.

1. Scope and object of Act. — [1] The new Contempt of Courts Act has been enacted in order to remove doubts which had arisen as to the powers of a High Court but does not imply that the Legislature recognised that no such power did in fact exist. (Vol 13) 1926 All 623 (632) : 48 All 711 (SB).

[2] The Act creates no new powers but merely recognises them to exist and seeks to define and limit them. (Vol 26) 1939 Oudh 131 (136, 139) : 14 Luck 492 : 40 Cri L Jour 421 (FB). (Oudh Chief Court has inherent power to protect Subordinate Courts and to prevent interference with course of justice.)

[3] High Courts being Courts of Record can proceed summarily to punish their own contempts. (Vol 22) 1935 Cal 419 (423, 424, 425) : 63 Cal 217 : 36 Cri L Jour 1053 (FB). (Right to punish by summary procedure contempts of itself by scandalization of the Court still exists) (Vol 29) 1942 Lah 105 (107, 108) : I L R (1942) Lah 411 : 43 Cri L Jour 599 (FB) (37) I L R (1937) 1 Cal 845 (354).

[4] Object of proceedings in contempt is to ensure that every litigant in Court of justice has a fair and unprejudiced hearing.—Object is not so much to vindicate the dignity of Court or person of judge. (Vol 24) 1937 Bom 305 (307) : 38 Cri L Jour 942 (Vol 27) 1940 Rang 70 (71) : 41 Cri L Jour 445 (DB) (Vol 22) 1935 All 1 (6) (DB). (Object is to protect administration of justice.)

[5] Notice of motion for contempt of Court is a proceeding of a Criminal nature. (Vol 21) 1934 Bom 452 (454) : 54 Bom 10 (37) (Vol 31) 1944 Lah 196 (202) : 46 Cri L Jour 174 (SB). (Person charged with contempt is entitled to benefit of doubt.) (37) I L R (1937) 1 Cal 845 (356) (Jurisdiction is quasi criminal and is not affected by Criminal P. C.) (Vol 16) 1929 Cal 115 (116) (DB).

2. Jurisdiction of Courts. — [1] Per *MacLeod J.* It is not that every contempt of an inferior Court is necessarily a contempt of High Court. It is a question which must be decided on facts. (Vol 9) 1922 Bom 52 (62) : 46 Bom 592 : 23 Cri L Jour 177 (DB).

[2] Madras High Court has jurisdiction in matters of contempt of High Court arising anywhere in Presidency.—Jurisdiction is determined by place where contempt is committed and not where contemner resides. (Vol 21) 1934 Mad 423 (424) : 57 Mad 831 : 35 Cri L Jour 962 (DB).

[3] Party restrained by judicial order of High Court from taking certain action.—Breach committed in other High Court's jurisdiction.—Former High Court can commit such person for contempt. (Vol 24) 1937 Cal 601 (602, 603) : 39 Cri L Jour 654.

[4] Writ of arrest upon committal can be executed anywhere in Bengal or through Court within whose

jurisdiction such person happens to be. (37) I L R (1937) 1 Cal 845 (354, 356, 357) (Vol 32) 1945 All 1 (4) : 46 Cri L Jour 272 : 11LR(1944) All 665 (DB). (Contempt of Court is offence within S. 5 (2), Criminal P. C.)

[But see (Vol 31) 1944 Bom 127 (128, 129) : I L R (1944) Bom 333 : 45 Cri L Jour 647 (DB). (High Court can deal with that person if he were within its jurisdiction—But it cannot arrest a man outside its jurisdiction nor can it arrest person for contempt of another High Court—B may High Court cannot take action in respect of contempt of Allahabad High Court if committed by publication out of Court by person within jurisdiction of Bombay High Court and a fortiori the Chief Presidency Magistrate of Bombay cannot do so—Nor can the Commissioner of Police, Bombay, deal with the matter—Such publication does not fall under either I. P. C. or Cr. P. C. or under any other law within meaning of S. 5 (2), Cr. P. C.)]

[5] Once a person is brought before the High Court the question whether his arrest at place outside jurisdiction was legal or illegal becomes irrelevant. (Vol 32) 1945 Oudh 266 (268) : 20 Luck 442 : 47 Cri L Jour 294 (DB).

[6] High Court at Allahabad being a Court of record is the sole and exclusive judge of what amounts to contempt of Court. (Vol 32) 1945 Oudh 266 (267) : 20 Luck 442 : 47 Cri L Jour 294 (DB).

[7] Subordinate Court has no power to entertain contempt proceedings if the contempt is not committed in its presence. (Vol 30) 1943 Nag 334 (334) : 45 Cri L Jour 407

3. Contempt of Court, what amounts to. —

[1] Contempts of Court are of three kinds: those which (1) scandalize the Court or (2) abuse the parties concerned in causes there or (3) prejudice mankind against persons before the cause is heard. (Vol 25) 1938 Mad 248 (249) : I L R (1938) Mad 545 : 39 Cri L Jour 328 (DB) (Vol 32) 1945 Lah 206 (207) : 47 Cri L Jour 115 (DB) (Vol 30) 1943 Lah 329 (335, 337) : I L R (1944) Lah 111 : 45 Cri L Jour 445 (FB). (Essence of each kind indicated and duty of Court before taking notice of publication pointed out.)

[See also (Vol 22) 1935 Cal 419 (429, 430) : 63 Cal 217 : 36 Cri L Jour 1053 (FB). (Per *Mukerji J.* 'Contempt of Court' involves two ideas: contempt of their power and contempt of their authority—"Court" means judges who constitute it; "Authority" does not mean the coercive power of the judges but deference and respect which is paid to them and their acts.)]

[2] Anything tending to curtail or impair the freedom of limbs of judicial proceedings constitutes contempt of Court. (Vol 27) 1940 Nag 110 (112, 113) : I L R (1940) Nag 69 : 41 Cri L Jour 709.

[3] An act calculated to affect dignity of Court is contempt — To describe Court proceedings as 'tamasha' is contempt. (Vol 32) 1945 Cal 107 (121, 122, 125) : I L R (1944) 1 Cal 489 (SB).

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[4] Conduct calculated and having tendency to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on is contempt of Court even though it is not likely that the mind of Magistrates or judges charged with case would thereby be prejudiced. (Vol 19) 1932 Mad 26 (27) : 55 Mad 262 : 33 Cri L Jour 270 (DB).

[5] Untruth amounting to contempt — Repetition of untruths is contempt, however, mitigated. (42) 1942 Oudh W N 6 (20) (DB) * (Vol 30) 1943 Lah 329 (337) : I L R (1944) Lah 111 : 45 Cri L Jour 445 (FB). (That the publication objected to is quotation from other source is no defence, if the article amounts to contempt.) * (Vol 28) 1941 Pat 185 192 : 20 Pat 306 : 42 Cri L Jour 225 (DB).

[6] Intention of writer is immaterial. (Vol 24) 1937 Bom 305 (306, 307) : 38 Cri L Jour 942 * (Vol 29) 1942 Bom 86 (89) : I L R (1942) Bom 151 : 43 Cri L Jour 583. (Not motive but effect of publication is to be considered.) * (42) (1942) Oudh W N 6 (20) (DB). (Notice may be a proper criterion in awarding punishment.) * (Vol 28) 1941 Pat 185 (188, 189, 194) : 20 Pat 306 : 42 Cri L Jour 225 (DB) * (Vol 26) 1939 Mad 257 (259) : I L R (1939) Mad 466 : 40 Cri L Jour 533 (SB).

[7] Publication of writing calculated to interfere with due course of justice — Intention or notice of writer is immaterial. (Vol 32) 1945 Lah 206 (207, 208, 209) : 47 Cri L Jour 115 (DB). (Principles on which Court will act, indicated.)

[8] Innocence of act is relevant only for punishment. (Vol 32) 1945 Nag 33 (47) : I L R (1945) Nag 74 (DB).

[9] Printer and Publisher are liable for offending article written by another even if they have dissociated from it or disapproved it. (Vol 27) 1940 Sind 239 (247) : I L R (1941) Kar 3 : 42 Cri L Jour 1 (FB).

[10] In order to see whether certain passage constitutes contempt of Court, it is for High Court to construe words and phrases which have no technical significance and to decide the meaning and effect they are calculated to produce. (Vol 16) 1929 Pat 72 (77) : 30 Cri L Jour 741 : 8 Pat 828 (FB).

[10a] Summary power of punishing for contempt should be used very sparingly and only in serious cases. To use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. (Vol 32) 1945 P C 134 (136) : 72 Ind App 189 : ILR (1945) Kar P C 294 : ILR (1945) Bom 950 (PC).

Comment on pending proceedings and judgments.

[11] Publication of comments prejudicing administration of justice amounts to contempt of Court. (Vol 15) 1928 Rang 115 (116) : 6 Rang 39 : 29 Cri L Jour 595 * (Vol 32) 1945 Nag 33 (48) : I L R (1945) Nag 74 (DB). (Tendency to interfere is enough.) * (Vol 28) 1941 Nag 241 (241, 242, 243) : 43 Cri L Jour 98 : ILR (1942) Nag 506. (When no harm is caused or intended Court should not be too sensitive.) * (Vol 28) 1941 Oudh 14 (15, 16) : 41 Cri L Jour 584 : 16 Luck 61 (DB). (Speech leading to influence result of pending trial.) * (Vol 27) 1940 Oudh 137 (137) : 15 Luck 268 : 41 Cri L Jour 169 (DB). (Newspaper has no special privilege.) * (Vol 17) 1930 Rang 124 (126) : 7 Rang 844 : 31 Cri L Jour 397 (DB). (Contempt to be punishable must interfere substantially with due administration of justice.) * (Vol 18) 1931 Cal 257 (258) : 58 Cal 884 : 32 Cri L Jour 675 (DB). (Creation of prejudicial atmosphere against person under trial.) * (Vol 16) 1929 All 81 (82) : 30 Cri L Jour 217 (SB). (Article influencing mind of prosecution witnesses and general public and written with object of prejudicing public against merits of prosecution.)

[12] Pamphlet published during pendency of proceeding amounts to contempt of Court when (1) it as-

sumes truth of certain facts connected with matters awaiting decision, (2) it contains reflection on persons connected with proceeding and (3) it purports to predict that certain party is likely to be successful and comments in effect that if he is successful, law and justice will be defeated. (Vol 26) 1939 Cal 672 (673) : I L R (1939) 1 Cal 399 : 41 Cri L Jour 148 (SB).

[13] Discussion in newspaper of rights and wrongs of pending case is improper and constitutes contempt of Court — To suggest Court to take certain course in matters before it or about to come before it amounts to contempt irrespective of notice — Criterion is whether act complained of is likely to prejudice course of justice. (Vol 26) 1939 Mad 257 (259) : 40 Cri L Jour 533 : I L R (1939) Mad 466 (SB).

[14] References by newspapers to pending cases should exclude everything leading to prejudice or prepossess mind of judicial officer concerned — Facts of pending cases should be expressed in form of statements of facts by newspaper itself (Vol 33) 1946 All 298 (299, 300) : 47 Cri L Jour 333 (FB).

[15] Press comment on pending cases affecting dignity of Court is contempt so also headlines in paper if it prejudices leader. (Vol 20) 1933 Cal 118 (121, 122) : 60 Cal 603 : 34 Cri L Jour 662 (DB) * (Vol 25) 1938 Mad 248 (249) : I L R (1938) Mad 545 : 39 Cri L Jour 328 (DB). (Fact that trial Judge is not affected by article has no bearing.) * (Vol 22) 1935 All 1 (3) (DB). (There need be no record that similar publications have been held in the past to constitute contempt.)

[16] In the absence of good faith and where there are misstatements and misrepresentation, criticism of Court is not protected. (Vol 27) 1940 Sind 289 (246) : I L R (1941) Kar 3 : 42 Cri L Jour 1 (FB).

[17] Contempt can be committed apart from any case in Court. (Vol 22) 1935 Cal 419 (424) : 36 Cri L Jour 1053 (FB) * (Vol 20) 1933 Cal 118 (122) : 60 Cal 603 : 34 Cri L Jour 662 (DB).

[18] It is enough that writer either knows a proceeding or cause to be imminent or should have known that it was imminent. In criminal cases it is not necessary that accused should have been brought before Magistrate provided he has been arrested and is in custody. (Vol 32) 1945 Lah 206 (209) : 47 Cri L Jour 115 (DB).

[19] Reasonable argument or expostulation offered against judicial acts as contrary to law or public good is not contempt of Court — To say that human element enters when sentences are awarded by Judges does not amount to contempt. (Vol 23) 1936 P C 141 (145, 146) (PC).

[20] Article in newspaper commenting upon findings of Magistrate in inquest held under S 176, Criminal P. C into the death of certain person, amounts to contempt of Court if the comments impute deliberate perversity, incapability and partiality to the public on the part of the Magistrate. (Vol 27) 1940 Rang 70 (71) : 41 Cri L Jour 445 (DB).

[21] Comment in newspaper reflecting on impartiality of Magistrate before whom the complaint is pending is contempt of Magistrate's Court. (Vol 9) 1922 Bom 52 (53) : 46 Bom 592 : 23 Cri L Jour 177 (DB).

[22] Article in newspaper suggesting that evidence used in prosecution which is proceeding or contemplated is obtained by improper means or is unreliable amounts to contempt of Court. (Vol 25) 1938 Bom 193 (199) : I L R (1938) Bom 176 : 39 Cri L Jour 424.

[23] Headline not itself misleading but amounting to criticism of prosecution case under guise of summary of day's proceedings — Contempt is committed — Absence of danger of actual prejudice is not only consideration for jurisdiction. (Vol 20) 1933 Cal 118 (121) : 60 Cal 603 : 34 Cri L Jour 662 (DB).

[24] Article demanding that counsel should not undertake defence of accused amounts to contempt of

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Court. (Vol 28) 1941 Pat 185 (190) : 20 Pat 306 : 42 Cri L Jour 225 (DB).

[25] Writer stating what he regards to be true facts of case while it is pending—This amounts to contempt of Court. (Vol 28) 1941 Pat 185 (189, 190) : 20 Pat 306 : 42 Cri L Jour 225 (DB).

[26] Editor of newspaper publishing complaint, filed by person charging certain persons of abduction, with scare headlines and comments — Publication held contempt of Court. (Vol 25) 1938 Lah 815 (816) : 40 Cri L Jour 156 (DB).

[27] During pendency of title suit for declaration that certain land claimed by defendant was public pathway, plaintiff publishing notice calling upon public to attend meeting to determine course of action to be followed—Notice, resolution at meeting and article in newspaper all asserting that disputed land was public pathway and that defendant was attempting to close it — This held amounted to contempt of Court. (Vol 25) 1938 Cal 772 (774) : I L R (1938) 2 Cal 447 (DB).

[28] *Per Harries C. J. and Teja Singh J. ; Munir J. contra.*—Article in newspaper headed "Arrest made on flimsy grounds" held in circumstances of case did not amount to contempt.

Per Full Bench—Article headed "Lawyer insulted" held was not comment on pending case and did not constitute contempt. (Vol 30) 1943 Lah 329 (338, 339) : I L R (1944) Lah 111 : 45 Cri L Jour 445 (FB).

Report of Judicial proceedings. — [29] Editors and proprietors of newspaper, in publishing copies or resumes of pleadings in pending cases, run the risk of being guilty of contempt of Court. (Vol 21) 1934 Cal 606 (608).

[30] Publication of plaint which reflects severely on defendant's conduct is contempt of scandalous and serious nature. (Vol 23) 1936 Lah 917 (918) : 38 Cri L Jour 73.

[31] Will disputed in a pending suit — Newspaper publishing it so as to prejudice party contesting it—Such publication amounts to contempt of Court. (Vol 18) 1931 All 420 (421) : 53 All 712 : 33 Cri L Jour 259.

[32] Defamation case pending — Publication with tendency to prejudice public or Court for or against any party before cause is finally heard amounts to contempt of Court. (Vol 28) 1941 Oudh 399 (401) : 16 Luck 758 : 42 Cri L Jour 524 (DB).

[33] Proceeding relating to appointment of guardian *ad litem* is proceeding relating to a ward of the Court and is within exceptions recognized in 1913 App Cas 417 — Publication of proceedings in a newspaper amounts to contempt of Court. (Vol 29) 1942 Bom 86 (88) : I L R (1942) Bom 151 : 43 Cri L Jour 583.

[34] It is contempt of Court to publish reports of chamber proceedings without permission of Judge concerned. (Vol 29) 1942 Bom 86 (87) : I L R (1942) Bom 151 : 43 Cri L Jour 583.

[35] Report of proceedings under S. 491, Cr. P. C., pending before High Court and publication of paras from petition under S. 491, Cr. P. C., held did not amount to contempt. (Vol 30) 1943 Lah 329 (338) : I L R (1944) Lah 111 : 45 Cri L Jour 445 (FB).

[36] Cases of contempt in nature of scandalizing Court require to be treated with much discretion. Proceeding for contempt of this nature should be instituted sparingly and always with reference to administration of justice—Tests is whether words complained of are calculated to obstruct or interfere with course of justice and due administration of law—Judicial personages cannot afford to be too sensitive. If a Judge is defamed in such a way as not to affect administration of justice he has ordinary remedy for defamation — Proceedings for contempt of Court would be misconceived where the re-

port does not involve any criticism of the Chief Justice in his administrative capacity but contains a mere allegation that he has committed an ill-advised act in writing to Subordinate Judges asking them to collect subscriptions for war fund. Such a remark does not amount to scandalizing the Court. (Vol 30) 1943 P C 202 (204, 205) : 70 Ind App 216 : I L R (1944) All 32 : I L R (1944) Kar (PC) 7 (PC).

[37] Election manifesto slandering whole judiciary to secure votes at Bar Council election—Truth of allegation is no justification of contempt. (Vol 22) 1935 All 38 (39, 40) : 36 Cri L Jour 620 (DB).

[38] Allegation by a legal practitioner in a notice under S 80, Civil P. C., that Judge has acted with prejudice, that he decided case not according to his own convictions, that he abused his powers and acted dishonestly amounts to contempt of Court of grossest kind. (Vol 28) 1941 Bom 228 (232) : I L R (1941) Bom 518 : 42 Cri L Jour 723 (DB).

[39] As persons to amount to contempt of Court need not be against particular Judge. An article was headed "Scandalous situation — Bar Council Election." The passage objected to was as follows : "In this connection it is amusing to note that when a comparatively undeserving lawyer is raised to the Bench, which is a fairly frequent occurrence in our judicial history, it is generally claimed . . ."

Held that these remarks constituted a contempt of Court of which High Court was bound to take notice. (Vol 22) 1935 All 1 (6) (DB).

[40] Speech expressing contempt for all Courts of justice in general and not making any attack on any Judge in particular or commenting on particular case, does not amount to such contempt of Court as to be dealt with by process for contempt. (Vol 25) 1938 Bom 197 (198) : I L R (1938) Bom 179 : 39 Cri L Jour 440.

[41] It is as much contempt to say that judiciary has lost its independence by reason of something it is alleged to have done out of Court, as to say that as result of a case it has decided, it is clear that it has no independence or has lost what it had. (Vol 22) 1935 Cal 419 (426) : 63 Cal 217 : 36 Cri L Jour 1053 (FB).

[42] Counsel's statement before Full Bench that his client does not wish matter to be argued before the Bench as constituted amounts to contempt. (Vol 19) 1932 Lah 485 (485) (FB).

[43] An article suggesting abuse by Chief Court of its powers, desire on its part to enter into conflict with executive government and containing invitation to Magistrates to disregard its authority, amounts to contempt of Court. (Vol 27) 1940 Sind 239 (249) : 42 Cri L Jour 1 : I L R (1941) Kar 3 (FB).

[44] Act or writing leading to undermine authority of Court or to influence result of pending case is serious offence. Article in question stated that "judgment after judgment was being given by the High Court arbitrarily, that neither law nor facts were discussed." It was further added that it was necessary "to restore confidence of the public that law is discussed and facts are digested before cases are disposed of." It also alleged that summary justice was being administered : *Held* that the article constituted a gross contempt of Court. (Vol 22) 1935 Lah 212 (212) : 16 Lah 266 : 36 Cri L Jour 837 (SB).

[45] Publication by a newspaper of a comment and an editorial insinuating that the Chief Justice acting under influence of the executive head issued some circular, amounts to contempt of Court. (42) 1942 Oudh W. N. 6 (20) (DB).

[46] Suggestion that High Court Judge was influenced by remarks of Secretary of State amounts to contempt of Court. (Vol 32) 1945 All 1 (5) : I L R

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(1944) All 865 : 46 Cri L Jour 272 (DB).

[47] Advocate expressing at meeting of Bar Association that "the man in the street has lost confidence in the administration of justice in the province," commits contempt of Court. (Vol 20) 1933 Oudh 118 (119) : 34 Cri L Jour 726 (DB).

[48] Article in newspaper suggesting that on account of youth of Judge he is unlikely to differ from decision of lower Court—It is attack on his competency as Judge and amounts to contempt. (Vol 17) 1930 Rang 124 (127) : 7 Rang 844 : 81 Cri L Jour 397 (DB).

[49] There cannot be contempt more gross than allegation that once Magistrate knew that Government had instituted prosecution there was bound to be conviction. (Vol 29) 1942 Mad 711 (711) : I L R (1943) Mad 26 : 44 Cri L Jour 162 (SB).

[50] *Per Mitter J.*—Statement by Police officer that arrest of detenu released under S. 491, Criminal P. C., was made in Court precincts with the permission of the Hon'ble Chief Justice, constitutes contempt. The implication of the statement suggests "hobnobbing with the executive." (Vol 32) 1945 Cal 107 (121) : I L R (1944) 1 Cal 489 (SB).

[51] Allegation by Solicitor engaged in case that Judge has prejudged issue of fact before evidence has been called on either side amounts to contempt of Court known as scandalizing Court. (Vol 29) 1942 Bom 331 (331 332) : 44 Cri L Jour 93.

[52-53] Criticism of executive officer is not contempt of Court. But if it contains matter calculated to interfere with due course of justice, it would amount to contempt — Proprietors and publishers of newspapers criticising public administration regarding matters which are sub judice do so at their peril. (Vol 32) 1945 Lah 206 (209) : 47 Cri L Jour 115 (DB) & (Vol 30) 1943 Lah 329 (337) : I L R (1944) Lah 111 : 45 Cri L Jour 445 (FB). (It is one thing to say during pendency of proceedings that an executive officer should not have taken certain course and it is quite different thing to say that the course he took was wholly illegal.)

Remarks against parties and witnesses.—[54] Publication leading to prejudice party to proceedings amounts to contempt—Reasons for rule explained. (Vol 30) 1943 Lah 329 (346) : I L R (1944) Lah 111 : 45 Cri L Jour 445 (FB).

[55] Criminal proceedings launched by a zamindar against his ryots — Person, while the proceedings were pending, issuing pamphlet accusing complainant zamindar of having deliberately launched false cases against his ryots is guilty of contempt of Court of grave nature. (Vol 25) 1938 Mad 975 (976) : 40 Cri L Jour 169 (DB).

[56] Abuse of parties amounting to ridicule or contempt is prohibited — Test is whether articles have tendency to interfere with due and proper administration of justice — Intention of writer is immaterial. (Vol 24) 1937 Bom 805 (806, 807) : 38 Cri L Jour 942.

[57] Complaint under S. 500, Penal Code, against editor of a newspaper pending—Editor publishing article suggesting that complainant is king of liars and conveying threat of future proceedings against complainant and his witness—Editor committed contempt of Court. (Vol 28) 1941 Oudh 67 (69) : 42 Cri L Jour 221 : 16 Luck 506 (DB).

[58] An article published in partisan spirit does not fall within functions of honest journalism. (Vol 29) 1942 Bom 86 (90) : I L R (1942) Bom 151 : 43 Cri L Jour 583.

[59] Publication which is defamatory of parties does not call for interference of Court unless it is likely to interfere with trial of suit — Publication not fair and honest has such effect. (Vol 29) 1942 Bom 86 (89) : I L R (1942) Bom 151 : 43 Cri L Jour 583.

Communication with parties or Court—[60] An Advocate addressed a letter to Court before whom the execution was pending. The letter was as follows: "...in case further action in execution is taken after this information as to the revision application and my client after success files a suit for damages, you shall not be in a position to put in your plea of good faith and *bona fide*": Held that the intention may be to influence the Court by the threat held out and to prevent him from passing orders in execution proceedings and exercising his independent judgment. Such contempt could not be purged by subsequent apology, however full and ample. (Vol 21) 1934 All 317 (318) : 35 Cri L Jour 433 (DB).

[61] Party sending to Judge, seised of case, letter containing threat and imputations about Judge's impartiality is guilty of contempt of serious nature. (Vol 27) 1940 Nag 407 (408) : I L R (1941) Nag 804 : 42 Cri L Jour 237.

[62] M. L. A. issuing instructions to District Magistrate in respect of pending trial is guilty of contempt of Court. (Vol 26) 1939 All 247 (248) (DB).

[63] Letter by M. L. A. asking Magistrate to drop certain pending proceedings amounts to contempt of Court. (Vol 27) 1940 Oudh 178 (178, 179) : 41 Cri L Jour 233 (DB).

[64] Proceedings under S. 107, Criminal P. C., against villagers — Letter by pleader for villagers to Magistrate requesting him to take immediate steps against opposite party and not to proceed with cases against villagers, amounts to contempt of Court. (Vol 26) 1939 Oudh 180 (180) : 14 Luck 653 (DB).

[65] When there is no judicial proceeding pending, a letter written to a Magistrate requesting him to take steps in his executive capacity for ensuring peaceful celebration of certain ceremonies likely to be obstructed by certain persons not containing any prayer to bound down such persons, does not amount to contempt of Court. (Vol 26) 1939 Oudh 182 (183, 184) : 14 Luck 649 : 40 Cri L Jour 566 (DB).

[66] Undertaking given by two adjoining estate owners not to interfere with embankment — Breach in embankment—One party repairing it but increasing the length of embankment — Complaint by other estate owners to District Magistrate who was also Collector—Complaint rejected—Letter by manager of complaining estate to Collector stating that rejection had emboldened people of other estate to make breach—Letter held did not amount to contempt. (Vol 24) 1937 Pat 124 (125, 127) : 38 Cri L Jour 412 (DB).

[67] Sending threatening notice to defendant in pending suit to withdraw plea taken by him in written statement is contempt—Pleader who sends it himself on behalf of his client is also guilty of contempt. (Vol 22) 1935 All 117 (118, 119) : 57 All 573 (DB) & (Vol 27) 1940 Nag 110 (112, 113) : I L R (1940) Nag 69 : 41 Cri L Jour 709. (A party addressing threatening notice to counsel of opposite party to withdraw certain allegations of fact in written statement of his client—There is clear invasion of counsel's right to represent his client's case.)

[See (Vol 28) 1941 Nag 241 (241, 242, 243) : I L R (1942) Nag 506 : 43 Cri L Jour 98. (Non party to proceeding sending notice to one of parties demanding damages and apology for reference made about him in written statement held did not commit contempt of Court, there being no interference with course of justice.) & (Vol 27) 1940 All 114 (115, 116) : 41 Cri L Jour 390 (DB). (Suit by A against B — B in written statement describing A's son with defamatory epithet — Application by A to Court for striking out those statements and notice by A's son calling upon B to pay damages for defamation or to face suit for defamation did not amount to contempt of Court.)]

Section 1 (contd.)

Institution of proceedings, pending case. — [68] Essence of offence of contempt of Court lies in prejudicing fair trial of pending case—*A* instituting insolvency proceedings against *B* and making statements defamatory of *B*—*B* to vindicate his character and integrity filing complaint under S. 500, Penal Code, against *A*—*B* was not guilty of contempt of Court—Threat by *B* prior to *A*'s starting insolvency proceedings that *B* would file complaint under S. 500, Penal Code, if *A* instituted insolvency proceedings against him amounted only to warning and not contempt of Court. (Vol 28) 1941 All 95 (97, 99) : 42 Cri L Jour 370 (DB) * (Vol 31) 1944 Oudh 14 (15, 16) : 19 Luck 303 : 45 Cri L Jour 108 (DB). (Complaint by party under S. 500, Penal Code and application for proceedings under S. 182, Penal Code, and notice demanding damages for allegation by opposite party in proceedings under S. 100, Criminal P. C., after termination of proceedings under S. 100, Criminal P. C.) * (Vol 27) 1940 All 497 (499, 500) : I L R (1940) All 710 : 42 Cri L Jour 211 (DB). (Application during pendency of guardianship proceedings by applicant under S. 476, Criminal P. C., alleging objector's allegation to be false and also complaint under S. 500, Penal Code) * (Vol 26) 1939 Oudh 225 (226, 227) : 40 Cri L Jour 569 (DB). (Defamatory statements by witness—Complaint for defamation after examination of all prosecution witnesses—Complainant is not bound to wait till termination of case.)

[69] Arrest of counsel proceeding to file or appear in case by police amounts to contempt when there is something in nature of *mala fides*, and the arrest is intended to interfere with due course of justice or calculated so to interfere. Mistaken and honest arrest does not amount to contempt. (Vol 31) 1944 Lah 196 (199, 200) : 46 Cri L Jour 174 (SB).

[70] Arrest under Regulation 3 of 1818 in courtroom when Court is not sitting or in precincts does not amount to contempt. (Vol 32) 1945 Cal 107 (119) : I L R (1944) 1 Cal 489 (SB).

[71] *Per Mitter J.*—Person released under S. 491, Criminal P. C., re-arrested under Regulation 3 of 1818—No warrant issued at the time—Arrest amounts to contempt. [Majority however held that warrants were issued and hence re-arrest did not amount to contempt.] (Vol 32) 1945 Cal 107 (121) : I L R (1944) 1 Cal 489 (SB).

Disobedience or interference with orders of Court. — [72] Lady ordered to deliver custody of boy to his father guardian—Intentional disobedience of Court's order—*Held*, that lady was guilty of contempt. (Vol 25) 1938 Cal 38 (42) : 39 Cri L Jour 466.

[73] Accused evading warrant of arrest and misrepresenting in revision application that he was in jail is guilty of contempt of Court. (Vol 27) 1940 All 386 (387) : I L R (1940) All 507 : 41 Cri L Jour 741 (DB).

[74] Injunction against Government not to interfere with possession of *A*—*B* not party to injunction proceedings and claiming interest through Government interfered with *A*'s possession—*Held*, that neither *B* nor Government was guilty of contempt. (Vol 25) 1938 P C 295 (299, 300) : 17 Pat 770 : I L R (1939) Kar P C 42 (P C) (Reversing) (Vol 24) 1937 Pat 65 : 16 Pat 159 (SB).

[75] That another person is surety for payment of moneys payable by the receiver, does not relieve receiver from obligation to obey Court's order to pay. (Vol 19) 1932 Bom 638 (642).

[76] Receiver in partition suit—Defendant brother taking certain sums from family funds disregarding protests of receiver and plaintiff and warnings of Court, is guilty of contempt. (Vol 27) 1940 Cal 487 (488) (DB).

[77] Person wilfully disobeying order of Court prohibiting him from performing marriage of minor in his

custody, is guilty of criminal contempt. (Vol 27) 1940 Nag 203 (206, 207) : I L R (1942) Nag 45 : 41 Cri L Jour 808.

[78] Party restrained by judicial order from proceeding with certain action—Disobedience is contempt, even if party is advised that order is wrong. (Vol 24) 1937 Cal 601 (602) : 39 Cri L Jour 654.

[79] Tampering with applications addressed to High Court is contempt—Altering date of application from 22nd to 23rd is contempt. (Vol 32) 1945 Nag 33 (38) : I L R (1945) Nag 74 (DB).

[80] Withholding of application to High Court under S. 491, Criminal P. C., constitutes technical contempt—Such withholding amounts to punishable contempt—When withholding lends substantially to interfere with course of justice—Fact that it might possibly interfere is not enough—There must be tendency substantially so to interfere. (Vol 31) 1944 Lah 196 (203, 204, 205) : 46 Cri L Jour 174 (SB).

[See also (Vol 32) 1945 Nag 33 (35, 38, 49) : I L R (1945) Nag 74 (DB). (Deliberately withholding application addressed to High Court by Head of Government Department and not filing it on earliest opportunity and filing partial copies is inexcusable, and constitutes contempt.)]

[81] Disobedience to an order by Chief Judge of Presidency Small Cause Court under S. 6A, Mussalman Wakf Act, directing to furnish accounts within 30 days, on the plea that the property in respect of which it is made is not wakf property, amounts to contempt of Court. (Vol 29) 1942 Bom 154 (154) : 43 Cri L Jour 667 (DB). (Affirmed in (Vol 32) 1945 P C 147 : 72 Ind App 226 : 47 Cri L Jour 61 : I L R 1945 Kar P C 355 : I L R (1945) Bom 959 (P C).)

[82] There is distinction without difference between direction and order of Court—Both must be obeyed—But the words "opinion, advice or direction" in S. 34, Trusts Act, mean nothing more than guidance—Disobedience to these does not involve committal for contempt. (Vol 32) 1945 Sind 81 (89, 92, 93) : I L R (1945) Kar 384 : 47 Cr LJ 283 (FB).

Breach of undertaking.—[83] Counsel for accused assuring counsel for complainant that accused would not leave jurisdiction of Court—Accused leaving one day before judgment—Case is not fit for proceeding in contempt. (Vol 19) 1932 Cal 229 (230) : 33 Cri L Jour 322 (DB).

[84] Undertaking given by party made part of decree—Breach of undertaking before satisfaction of decree—It is contempt of Court. (1938) 42 Cal W N 203 (205).

[85] Marriage of ward of Court without consent of Court in spite of undertaking not to do so—Only personal guardian is liable for contempt. (Vol 16) 1929 Bom 417 (417).

Contempt in relation to officers of Court.—[86] Interference with the possession of receiver appointed by Court is contempt. (Vol 21) 1934 Bom 452 (455) : 59 Bom 10 * (Vol 32) 1945 Sind 75 (80) : 47 Cri L Jour 408 : I L R (1944) Kar 396. (Interference by levying execution.) * (Vol 19) 1932 Cal 705 (707) : 33 Cri L Jour 945 (DB). (Attempts to interfere with Receiver's possession and intercept rent—Personal service of order appointing receiver is not necessary.)

[87] Where the Court comes to a decision that it will appoint a receiver but does not name any person as receiver, it is not contempt of Court, for a person who knows of that decision to collect and disburse moneys which are intended to fall within the powers of the Receiver. (41) 1941 Bang L R 747 (752).

Abuse of process of Court.—[88] Complainant genuinely on information given to him obtaining warrant against certain person—Finding him to be wrong

2. (1) Subject to the provisions of sub-section (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to them as they have and exercise in respect of contempts of themselves.

(2) Subject to the provisions of sub-section (3), a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-section (1).

(3) No High Court shall take cognisance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

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person complainant attempting but unsuccessfully to use that warrant to influence that person—Complainant then obtaining warrant against right person—This held did not amount to contempt of Court in the absence of evidence showing that complainant misused process of Court by obtaining warrant against person against whom he had no intention of proceeding merely to use it as a lever for blackmailing him. (Vol 26) 1939 Lah 143 (144) : 40 Cr L Jour 571 (DB).

SECTION 2. — Synopsis.

1. Sub-section (1) (General).
2. Practice and procedure.
3. "Courts subordinate to them."
4. Appeals.
5. Sub-section (2).
6. Sub-section (3).

1. Sub-section (1) (General).—[1] Judicial Commissioner's Court not being Court of Record has no powers either by Statute or otherwise to punish contempts of Courts subordinate to it. (Vol 22) 1935 Nag 46 (48) : 31 Nag L R 154.

[2] High Court can punish contempt of subordinate Courts in same way as if contempt had been of the High Court itself subject to limitation as to the extent of the punishment. (Vol 20) 1933 Pat 142 (143) : 12 Pat 1 : 34 Cr L Jour 770 (DB) * (Vol 22) 1935 All 117 (118) : 57 All 573 (DB).

[3] Power to commit for contempt should be used only when contempt is deliberate. (Vol 26) 1939 Mad 257 (260) : 1 L R (1939) Mad 466 : 40 Cr L Jour 533 (SB).

[4] Order for contempt should not be passed unless there is ample material to justify it — Court acting on receiver's or other officer's report — Finding should be based on evidence either oral or by means of affidavits. (Vol 16) 1929 Cal 115 (116) (DB).

[5] Commitment for contempt is matter of discretion — Unless discretion is used in serious disregard of principles of natural justice, Privy Council will be slow to interfere — Fact that another remedy is open should be considered while exercising discretion. (Vol 32) 1945 P C 147 (150) : 72 Ind App 226 : 47 Cr L Jour 61 : 1 L R (1945) Kar P C 355 : 1 L R (1945) Bom 959 (PC).

[6] *Per Harries C. J. and Teja Singh J.*—Proceedings are summary and arbitrary and so should be sparingly instituted and person should be convicted only when it is essential in interests of justice — There must be substantial contempt. (Vol 30) 1943 Lah 329 (337) : 1 L R (1944) Lah 111 : 45 Cr L Jour 445 (FB).

2. Practice and procedure. — [1] Ordinarily, if the contempt is not committed in the presence of the Court the proceeding for contempt is started by means of an application supported by an affidavit. (Vol 16) 1929 Cal 115 (116) (DB).

[2] In Bihar, the Legal Remembrancer is the Chief Law Officer empowered to make a petition for contempt

of Court on behalf of Government and to instruct the Advocate-General to carry on proceedings in the High Court. (Vol 28) 1941 Pat 185 (187, 188) : 20 Pat 306 : 42 Cr L Jour 225 (DB).

[3] Under Cl. 28, Letters Patent (Patna), the Divisional Bench has power to issue a rule to show cause on its own motion against committal for contempt. High Court can take notice and issue rule of its own motion. (Vol 28) 1941 Pat 185 (187, 188) : 20 Pat 306 : 42 Cr L Jour 225 (DB).

[4] When parties aggrieved refuse to apply for contempt, Court may take action of its own accord. (Vol 19) 1932 Cal 254 (255) : 33 Cr L Jour 444 (DB).

[5] In Bengal, Division Bench cannot entertain applications for contempt unless the Bench has been appointed by the Chief Justice to deal with such cases. (Vol 19) 1932 Cal 254 (255) : 33 Cr L Jour 444 (DB).

[6] Contempt in relation to officer of Court — Interference with Receiver appointed in suit — Plaintiff in suit, rather than Receiver, should apply for initiating proceedings for contempt. (Vol 22) 1935 Cal 684 (686) : 37 Cr L Jour 65 (DB).

[7] Contempt in relation to officer of Court (Receiver) — Application for proceedings for contempt should be made direct to the High Court by party aggrieved. (Vol 19) 1932 Cal 254 (255) : 33 Cr L Jour 444 (DB).

[8] High Court may treat petition for contempt proceedings made to lower Court as a petition to itself. (Vol 19) 1932 Cal 254 (255) : 33 Cr L Jour 444 (DB).

[9] Petition for issue of process for contempt made by Governor-in-Council with affidavit signed by Secretary is proper and within authority until contrary is shown. (Vol 20) 1933 Cal 118 (120) : 60 Cal 603 : 34 Cr L Jour 662 (DB).

[10] Belated application for exercise of summary procedure for contempt cannot be answered by saying that proceedings are terminated. (Vol 20) 1933 Cal 118 (122) : 60 Cal 603 : 34 Cr L Jour 662 (DB).

[11] Rule issued by Calcutta High Court to show cause against committal for contempt of itself and a subordinate Court. Party need not appear through Advocate instructed by attorney. (Vol 17) 1930 Cal 759 (760) : 58 Cal 458 : 32 Cr L Jour 352 (DB).

[12] Complaint not signed as required by rules and practice of the Calcutta High Court—Evidence showing *prima facie* that contempt has been committed — Absence of proper signature is not fatal irregularity. (Vol 20) 1933 Cal 118 (120) : 60 Cal 603 : 34 Cr L Jour 662 (DB).

[13] Disobedience of Court's order—Notice of motion must set out precise breach of the order. (Vol 19) 1932 Bom 638 (640).

[14] Party charged cannot be called upon to answer anything not specifically set out in grounds upon which the rule is issued. (Vol 19) 1932 Cal 255 (257) : 33 Cr L Jour 369 (DB).

[15] Order of Court disobeyed — Personal service of order must be proved—Service on attorney is insufficient

3. Save as otherwise expressly provided by any law for the time being in force, a contempt

Limit of punishment of court may be punished with simple imprisonment for a term which may for contempt of court. extend to six months, or with fine, which may extend to two thousand rupees, or with both :

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to support notice of motion for contempt of Court. (Vol 19) 1932 Bom 688 (639).

[16] When the contempt is committed in the face of a Court, it is that Court which is the proper tribunal to decide whether the contempt has been committed. (Vol 19) 1932 Lah 502 (503) : 33 Cri L Jour 675 (FB).

[17] Rule that party in contempt cannot be heard is inapplicable when order for the breach of which contempt is alleged is challenged on ground of want of jurisdiction. (Vol 18) 1931 Bom 402 (402) : 55 Bom 803 (DB).

[18] It is the duty of Magistrates to bring to notice of Chief Court attempt made to bring improper influence on them in connection with magisterial work. (Vol 26) 1939 Oudh 180 (181) : 14 Luck. 653 (DB).

[19] Where doubtful questions of fact are involved the High Court may refuse to issue notice to the person charged with contempt, before being satisfied by affidavit that there was reasonable ground for thinking that contempt had been committed. (Vol 32) 1945 All 67 (68) : 1 L R (1945) All 7 : 46 Cri L Jour 458 (D B).

[20] Though proceedings are of nature of criminal proceedings the position of alleged contemner is not that of an accused person who cannot file affidavit or make statement on oath. (Vol 30) 1943 Lah 329 (346) : 1 L R (1944) Lah 111 : 45 Cri L Jour 445 (F D).

[21] Proceedings for contempt are of summary nature — Hotly contested question of fact cannot be decided. (Vol 31) 1944 Lah 196 (201) : 46 Cri L Jour 174 (SB).

3. "Courts subordinate to them." — [1] Words "subordinate Court" were used in a wide sense as including any Court over which the High Court has superintendence for the purposes of S. 85, Government of Burma Act, 1935. (Vol 27) 1940 Rang 68 (70) : 1940 Rang L R 188 : 41 Cri L Jour 470 (D B).

[2] The Sub-Divisional Magistrate holding an inquiry under S. 176, Criminal P. C., is a Court subordinate to the High Court. (Vol 27) 1940 Rang 68 (70) : 1940 Rang L R 188 : 41 Cri L Jour 470 (D B).

[3] A Court of Commissioners appointed under Bengal Criminal Law Amendment Act is subordinate to High Court within the meaning of S. 2 (1). (Vol 20) 1933 Cal 118 (120) : 60 Cal 603 : 34 Cri L Jour 662 (D B).

4. Appeals.—[1] No application lies either under Cl. 41, Letters Patent (Cal) or under any other prior issue of law for leave to appeal to Privy Council, in summary proceedings taken by Calcutta High Court for contempt of itself by scandalization, even if such proceedings are taken (which is doubtful) in exercise of its ordinary original criminal jurisdiction. (1935) 39 Cal W N 823 (828) (D B).

[2] No leave to appeal to Privy Council under S. 109, Civil P. C., can be granted against refusal of High Court to punish party for contempt of Court. (Vol 28) 1941 All 211 (212) : 1 L R (1941) All 364 (D B).

[3] Leave to appeal to Privy Council ought not to be granted unless there is something in order of committal rendering it improper and therefore subject of appeal. (Vol 22) 1935 Cal 419 (453) : 63 Cal 217 : 36 Cri L Jour 1053 (F B).

[4] Appeal lies against High Court's order of committal for contempt. (1883) 7 Bom 5 (12) (D B).

5. Sub-section (2).—[1] Chief Court has inherent power to protect subordinate Courts and to prevent interference with course of justice. The Act creates no

new powers but merely recognizes them to exist and seeks to define and limit them. (Vol 26) 1939 Oudh 131 (136, 139) : 14 Luck 492 : 40 Cri L Jour 421 (F B).

[2] The Chief Court of Sind has a right to punish in summary way contempt of itself. (Vol 27) 1940 Sind 239 (241) : 1 L R (1941) Kar 3 : 42 Cri L Jour 1 (F B) * (Vol 32) 1945 Sind 75 (78) : 1 L R (1944) Kar 396 : 47 Cri L Jour 408.

6. Sub-section (3). — [1] High Court Judge can entertain proceedings for contempt only when no offence under the Penal Code is committed—Before relinquishing jurisdiction it must be determined whether act amounts to offence. (Vol 30) 1943 Nag 334 (335) : 45 Cr L J 407.

[2] *Quare*.—Whether S. 2 (3), Contempt of Courts Act prohibited the High Court from dealing with offences punishable under the Penal Code as contempt. (Vol 32) 1945 P C 147 (151) : 72 Ind App 226 : 47 Cri L Jour 61 : ILR (1945) Kar (PC) 355 : ILR (1945) Bom 959 (P C).

[3] Prohibition contained in S. 2 (3) refers only to offences punishable as contempt of Court by the Penal Code, and not to offences punishable there otherwise than as contempt. (Vol 27) 1940 Nag 407 (410) : 1 L R (1941) Nag 304 : 42 Cri L Jour 237 * (Vol 25) 1938 All 358 (361) : 1 L R (1938) All 548 : 39 Cri L Jour 677 (D B) (Defamation.) * (Vol 23) 1936 Lah 917 (918) : 1 L R (1937) Lah 34 : 38 Cri L Jour 73 * (Vol 20) 1933 Pat 204 (206) : 12 Pat 172 (D B) * (Vol 20) 1933 Pat 142 (144) : 12 Pat 1 : 34 Cri L Jour 770 (D B).

[But see (Vol 30) 1943 Nag 334 (335) : 45 Cri L Jour 407.]

[4] Where proceedings in the Magistrate's Court would be quite sufficient to meet the requirements of the case, it is not desirable to invoke the jurisdiction of the High Court. (Vol 13) 1926 Cal 701 (703) : 53 Cal 401 (DB).

[See also (1937) 41 Cal W N 1925 (1926).]

[5] Where *naib nasir* when directed by Judge to deliver possession to decree-holder goes to spot but is obstructed by person in possession : *Held*, that person was guilty of two offences one being obstruction to *naib nasir* and other contempt to Judge and High Court would take notice of second offence under this Act. (Vol 20) 1933 Pat 204 (206) : 12 Pat 172 (D B).

[6] Defamatory answers to interrogatories by presiding officer — Proper remedy is to proceed under S. 499, I. P. C., and not proceeding for contempt of Court. (Vol 22) 1935 All 896 (896) : 36 Cri L Jour 967.

[7] Failure to furnish information under S. 6A, Waqf Act is not offence under I. P. C. and High Court can deal with it under this Act. (Vol 32) 1945 P C 147 (150) : 72 Ind App 226 : 47 Cri L Jour 61 : ILR (1945) Kar (PC) 355 : ILR (1945) Bom 959 (P C) * (Vol 29) 1942 Bom 154 : 43 Cri L Jour 667 (D B) (Affirmed.)

SECTION 3 — Synopsis

1. Scope.

2. Apology.

1. Scope.—[1] Judicial independence of presiding officers of the Courts is to be maintained with a strong hand and the public must be made to feel that the Courts are not amenable to political or executive influence. (Vol 25) 1938 All 358 (360) : 1 L R (1938) All 548 : 39 Cri L Jour 677 (D B).

[2] Expression of intention not to repeat offence cannot affect question whether offence committed is serious one. (Vol 28) 1941 Pat 185 (194) : 20 Pat 306 : 42 Cri L Jour 225 (D B).

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court :

^a[Provided further that notwithstanding anything elsewhere contained in any law no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it.]

[a] *Inserted by the Contempt of Courts (Amendment) Act, 1937 (12 [XII] of 1937), S. 3.*

OBJECTS AND REASONS.

Amendment made in 1937.—It has been held by the Lahore High Court (see (Vol 24) 1937 Lah. 497 (SB)) that the power of punishment provided in section 3 related to the contempt of Courts subordinate to it, and that it had no application to the contempt of itself, to punish which it possessed inherent power to pass a sentence without regard to the limit of six months. As

the original intention of the enactment of section 3 was to restrict the powers of High Court in the punishment of any contempts whether of themselves or of Courts subordinate to them, this amendment made in 1937 makes the intention clear by deleting the word 'subordinate' from the preamble and adding a second proviso to section 3.

—See S. O. R., 1937.

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[3] Motive of contemner is immaterial though it may be a proper criterion in awarding punishment. ('42) 1942 Oudh W N 6 (20) (D B).

[4] Innocence of act is relevant for punishment. (Vol 32) 1945 Nag 33 (47) : I L R (1945) Nag 74 (D B).

[5] Excitable temper of the accused is a justification for mitigation of the maximum sentence for contempt of Court. (Vol 25) 1938 All 858 (362) : I L R (1938) All 548 : 39 Cri L Jour 677 (DB).

[6] Article not amounting to contempt of serious kind—Opposite party expressing no regret but insisting that no offence was committed—No apology offered—Case was fit for punishment. (Vol 28) 1941 Pat 185 (194) : 20 Pat 306 : 42 Cri L Jour 225 (D B).

[7] Other remedy available—Court has discretion to commit or not for contempt—Disobedience of order under S. 6A of Mussalman Waqf Act for two years—Court may consider that heavier fine than imposed under Waqf Act or even imprisonment is necessary and commit for contempt. (Vol 32) 1945 P C 147 (150) : 72 Ind App 226 : 47 Cri L Jour 61 : I L R (1945) Kar (PC) 355 : I L R (1945) Bom 959 (P O).

[8] High Courts can enforce their orders for contempt by attachment. (1883) 7 Bom 5 (13) (D B).

[9] Section 58, Civil P. C., does not apply to cases of imprisonment for contempt of Court. (1879) 4 Cal 655 (657) (DB).

[10] Because a particular type of contempt of Court is unusual or unprecedented, it does not follow that the Court has no power to punish such a contempt. (Vol 22) 1935 All 1 (3) (DB).

[11] High Court has jurisdiction to order the payment and recovery of fine from a person punished under the Act. (Vol 22) 1935 All 1013 (1014) : 58 All 374 : 36 Cri L Jour 1365 (DB).

[12] The High Court has jurisdiction to direct a person punished under the Contempt of Courts Act, to pay costs of the Crown. Such costs can be recovered on the lines of execution of decrees. (Vol 22) 1935 All 1013 (1014) : 58 All 374 : 36 Cri L Jour 1365 (DB).

[13] Where the Chief Justice and another Judge of the Court of which the appellant is alleged to be in contempt are of the opinion that no contempt is committed but the executive deems it necessary not only to appear but endeavours to uphold the order, the appellant should be given costs of the appeal. (Vol 32) 1945 P C 134 (136) : 72 Ind App 189 : I L R (1945) Kar (PC) 294 : I L R (1945) Bom 950 (PC).

[14] Person obstructing receiver in discharge of his duty may be made to pay costs of a hearing. (Vol 1) 1914 Cal 550 (554) : 15 Cri L Jour 85.

[15] Persons charged with contempt is entitled to benefit of doubt. (Vol 31) 1944 Lah 196 (202) : 46 Cri L Jour 174 (SB).

2. Apology. — [1] Except in scandalous and outrageous cases an unconditional apology is ordinarily considered to purge contempt. Contempt is aggravated. Where person persistently justifies his action. (Vol 32) 1945 Nag 33 (49, 50) : I L R (1945) Nag 74 (DB).

[2] An apology must be tendered at the earliest stage possible.

At the appellate stage it should be tendered unreservedly and unconditionally before the arguments begin, and must be the full, frank and manly confession of a wrong done, and should be intended to be evidence of real contriteness. (Vol 27) 1940 Nag 407 (408, 409) : I L R (1941) Nag 304 : 42 Cri L Jour 237.

[3] Where the accused takes such action as is likely to prejudice the trial and instead of apologising in the beginning contends that no contempt has been committed, his apology tendered at a late stage can only be regarded as an after-thought put forward in the hope of avoiding the wrath to come. (Vol 28) 1941 Oudh 67 (69, 70) : 16 Luck 506 : 42 Cri L Jour 221 (DB).

[4] Court can refuse to accept apology which it does not believe to be genuine. (Vol 27) 1940 Sind 239 (246) : I L R (1941) Kar 3 : 42 Cri L Jour 1 (FB).

[5] Advocate expressing at meeting of Bar Association "that the man in the street has lost confidence in the administration of justice in the province" commits contempt — Unconscious use of expression — Written apology is sufficient amends. (Vol 20) 1933 Oudh 118 (119) : 34 Cri L Jour 726 (DB).

[6] Where a person guilty of contempt of Court admits his error and states that he is "extremely sorry", it may amount to an expression of regret, but it is not an apology within the meaning of proviso to S. 3. ('42) 1942 Oudh W N 6 (20) (DB).

[7] In view of the fact that the contemner (who was a solicitor) committing contempt by scandalizing the Court had offered a very frank and unequal apology and had admitted that the letter written by him was improper and ought not to have been written, only a fine of Rs. 1000 was imposed. (Vol 29) 1942 Bom 331 (332) : 44 Cri L Jour 93.

[8] An Editor who had committed contempt of Court by publishing an article prejudicing the course of justice in pending case, was discharged on his tendering unequal apology. (Vol 27) 1940 Oudh 137 (137, 138) : 15 Luck 268 : 41 Cri L Jour 169 (DB).

[9] Publisher and editor of newspaper commenting upon findings of Magistrate in inquest held under S. 176, Criminal P. C., imputing deliberate perversity, incapability and partiality to police on part of the Magistrate cannot be allowed to go unpunished merely because they have tendered apology. (Vol 27) 1940 Rang 70 (72) : 41 Cri L Jour 445 (DB).

[THE INDIAN] CONTRACT ACT, 1872.
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[10] An advocate in writing a threatening letter to Court, commits contempt of Court and mere apology howsoever full and ample could not purge contempt

and the advocate is liable to conviction.

Punishment can, however, be remitted in view of unconditional apology, under the proviso to S. 3. (Vol 21) 1934 All 317 (318) : 35 Cri L Jour 433 (DB).

43. Any one of joint promisors may be compelled to perform.

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44. Effect of release of one joint promisor.

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- Amended by Acts 4 of 1886 ; 12 of 1891 ; 4 of 1930.
- Amended in C. P. by C. P. Act, 1 of 1915.
- Amended in C. P. and Berar by C. P. and Berar Act, 15 of 1938.
- Adapted by A. O.
- Repealed in part and amended by Acts 6 of 1899 ; 24 of 1917.
- Repealed in part by Acts 1 of 1877 ; 10 of 1914 ; 3 of 1930 ; 9 of 1932.

COGNATE ACTS AND PROVISIONS.

1. LIMITATION ACT, 1908, S. 29 (1).
2. PARTNERSHIP ACT, IX OF 1932.
3. PENAL CODE, 1860, S. 491.
4. SALE OF GOODS ACT, III OF 1930.
5. SPECIFIC RELIEF ACT, 1877.
6. TRANSFER OF PROPERTY ACT, 1882, S. 4.

[THE INDIAN] CONTRACT ACT, 1872.

(ACT IX OF 1872.)^a

[25th April 1872.]

Preamble. WHEREAS it is expedient to define and amend certain parts of the law relating to contracts ; It is hereby enacted as follows: —

[a] For the Statement of Objects and Reasons for the Bill, which was based on a Report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6, 1866, see *Gazette of India*, 1867, Extraordinary, p. 84; for the Report of the Select Committee, see *Ibid*, Extraordinary, dated 28th March 1872 ; for discussions in Council, see *ibid*, 1867, Supplement p. 1064; *ibid*, 1871, p. 313 and *ibid*, 1872, p. 527.

The chapters and sections of the Transfer of Property Act (4 [IV] of 1882) which relate to contracts are, in places in which that Act is in force, to be taken as part of Act 9 [IX] of 1872—See Act 4 [IV] of 1882, S. 4.

PREAMBLE — SYNOPSIS

1. Applicability and scope of the Act.
2. Illustrations to sections.
3. Interpretation of the Act.

1. Applicability and scope of the Act.—[1] The Contract Act, so far as it goes, is exhaustive and imperative. (03) 5 Bom L R 421 (427) (PC).

[2] Although the Indian Contract Act purports to deal only with certain parts of the law relating to contracts yet where it treats with a subject in a way at variance with the English law, it should be considered as exhaustive and binding on Courts in India. (Vol 3) 1916 Nag 104 (110) : 12 Nag L R 177 (DB).

[3] The Contract Act is not exhaustive. In cases where the law in terms is not applicable, the principles of English law should apply, as rules of justice, equity and good conscience. (Vol 33) 1946 Nag 114 (116) : I L R (1946) Nag 210 * ('35) 62 Cal 612 (617) (DB) * (Vol 19) 1932 Bom 168 (172, 173) : 56 Bom 101 (DB) * (Vol 26) 1939 Bom 23 (25) : ILR (1938) Bom 794 (DB). (The general principles of English law underlying the law of suretyship (and in particular the principle that the rights of a surety are not to be interfered with without his consent) may be applied even though the provisions of the Contract Act do not govern the case.) * (Vol 16) 1929 Bom n 260 (261) (DB) * (Vol 24) 1937 Rang 302 (307) (DB) * (Vol 25) 1938 Nag 254 (255). (The Act is not exhaustive and so far as the law relating to agency is concerned, it merely lays down general principles in wide and general terms.) * (Vol 29) 1942 Bom 302 (303) : I L R (1942) Bom 670. (The Contract Act is both an amending and a consolidating Act, and it is not exhaustive of the law of contract to be applied by the Courts in India.) * (Vol 4) 1917 Bom 268 (270) (Do.).

[4] English principles of equity can be applied, if not opposed to the provisions of the Contract Act. (Vol 24) 1937 Oudh 82 (86) : 13 Luck 65 (DB).

[5] Justice, equity and good conscience mean the rules of English Law so far as they are applicable to

Indian circumstances. (Vol 26) 1939 Sind 125 (126) : I L R (1939) Kar 422 (DB) * ('35) 62 Cal 612 (617) (DB).

[6] Trade usage can be pleaded in conflict with the provisions of the Contract Act. Its incidents and details ought to be indicated with clearness and precision. (Vol 18) 1931 All 583 (583, 584) (DB).

[7] The rights and liabilities arising out of a joint ownership created by Hindu law between the members of an undivided family cannot be determined exclusively by Indian Contract Act but must be considered with the general rules of Hindu law. (1880-81) 5 Bom 38 (39) (DB).

[8] The general provisions of the Contract Act as to the rights and liabilities of undisclosed principals were not intended to alter well established rules as to negotiable instrument. (07) 30 Mad 88 (92) (FB).

[9] The Contract Act, 9 [IX] of 1872, is not retrospective. (1874) 12 Beng L R 451 (458, 472) (SB).

[10] The general provisions of the Contract Act do not supersede the provisions of a special later enactment such as Bombay Hereditary Offices Act. (Vol 15) 1928 Bom 201 (203) (DB).

2. Illustrations to sections.—[1] An illustration to a section cannot control the plain meaning of the section itself especially when its effect would curtail a right purported to be conferred by the section. (Vol 4) 1917 Bom 268 (270).

[2] The illustrations are only intended to assist in construing the language of the Act. It is a mistake to be guided by the illustrations rather than considering the wording of the sections. (1874) 22 Suth W R 367 (368) (DB).

[3] Practice of looking more at illustrations in the Contract Act than at the words of the sections is not correct. (1874) 22 Suth W R 367 (368) (DB).

3. Interpretation of the Act.—[1] The Court must interpret an act where it applies and the natural meaning of the words should be followed uninfluenced by the previous state of the law. (Vol 19) 1932 Bom 168 (172, 173) : 56 Bom 101 (DB).

PRELIMINARY.

Short title.

1. This Act may be called the Indian Contract Act, 1872.

*Extent.*It extends to the whole of British India;^a and it shall come into force on*Commencement.*

the first day of September 1872.

b[* * * *]

Enactments repealed. Nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

[a] This Act has been declared in force in — the Santhal Parganas [see the Santhal Parganas Settlement Regulation 3 [III] of 1872], S. 3; British Baluchistan [see the British Baluchistan Laws Regulation 1913, (2 [II] of 1913), S. 3]; Panth Piploda [see the Panth Piploda Laws Regulation, 1929 (1 [I] of 1929), S. 2.] It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 [XIV] of 1874) to be in force in—the Tarai of the Province of Agra — see Gazette of India 1876, Pt. I, p. 505; the Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singbhum—see Gazette of India, 1881, Pt. I, p. 504. [The District of Lohardaga included at this time the present District of Palamanu, which was separated in 1894. The District of Lohardaga is now called the Ranchi District — see Calcutta Gazette, 1899, Pt. I, p. 44.] [b] The words “The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof, but” were repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914).

2. In this Act the following words and expressions are used in the following senses, unless *Interpretation-clause.* a contrary intention appears from the context :—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

Section 1 — Note 1

[1] The law of contract is the law of the place where the contract was made. Where the law of one province of British India is distinct from the law of the other province, the two provinces must be regarded, for the purposes of this rule, as foreign countries *inter se*. (Vol 27) 1940 Bom 362(363); ILR(1940) Bom 799 (DB).

[2] Words “not inconsistent with provisions of this Act” are not to be connected with words “usage or custom of trade”. Both grammatical construction of sentence and reason of the thing require that application of these words should be confined to subject which immediately precedes them. (1891) 18 Cal 620 (626) : 18 Ind App 121 (PC).

[But see (1875) 14 Beng L R 76 (85) (DB)].

[3] Where an agent by the trade usage sells goods, the question whether he is authorised to do so is not governed by the provisions of the Contract Act inasmuch as S. 1, Contract Act, provides that nothing therein contained shall affect any usage or custom of trade. (Vol 20) 1933 Lah 188 (184).

[4] It is for the parties to decide on what terms contracts should be entered into and if they choose to enter into contracts with full knowledge of the commercial usage governing them, they are bound by them even if the usage does involve some conflicts between the agent's duty and interest. (Vol 19) 1932 Lah 683 (685) (DB).

[5] It is open to a party to plead a trade usage in conflict with the provisions of this Act. But the incidents and details ought to be indicated with clearness and precision. (Vol 18) 1931 All 588 (588) (DB).

[6] By the mercantile usage prevailing in the Delhi iron market, among big merchants, no interest can be charged on the unpaid price for transactions before 1917. (Vol 20) 1933 Lah 127 (127) (DB).

[7] The rule that a person building on the land of another is ‘*prima facie*’ entitled to remove the buildings erected upon the land demised or to receive compensation, when applied to a contract of tenancy, is not inconsistent with anything in the Contract Act, and therefore, is unaffected by it. (1880) 5 Cal 688 (692).

[8] The existence of the usage of “*Palki Adat*” (a local usage) must be strictly proved. (Vol 22) 1935 Sind 38 (40) (DB).

[9] English principles of equity can be applied to contracts in suitable cases by Indian Courts if such principles are not opposed to the provisions of the Contract Act. (Vol 24) 1937 Oudh 82 (86) : 13 Luck 65 (DB).

[10] The Contract Act, including S. 73, applies in terms to all contracts including those in respect of lands. The Indian Courts cannot, therefore, even where the result might appear hard, apply to such contracts foreign rules of law or equity, modifying the express terms of the Statute. (Vol 14) 1927 Sind 120 (122) : 19 Sind L R 337.

[11] The liability of common carriers in India is not affected by the Indian Contract Act, 1872. The written law relating to that liability is untouched by the Act; the unwritten law is not within its scope. (1891) 18 Cal 620 (628) : 18 Ind App 121 (PC).

[12] The Contract Act applies to suits in the Calcutta Small Causes Court between the Hindoos. (1874) 22 Suth W R 370 (375) (DB).

[13] Chapters and sections of the Transfer of Property Act (IV of 1882), which relate to contracts, are, in places where the T. P. Act is in force, to be taken as part of this Act : see S. 4, T. P. Act.

[14] The provisions of this Act, except in so far as they are inconsistent with the provisions of the Partnership Act (IX of 1882), continue to apply to firms.

[15] Proof of usage or custom, see Evidence Act, 1872, S. 92 (5).

[16] The Barrister's profession cannot be called a trade and therefore the exception contained in this section has no application. (Vol 20) 1933 All 417 (420) : 55 All 570 (FB).

Section 2 (Gen.) — Note 1

[1] The definitions in this section have been applied to the Sale of Goods Act, 3 of 1930, S. 215; Partnership Act, 9 of 1882, S. 2 (e); Trusts Act, 2 of 1882, S. 3.

[2] Voidable contracts and void agreements, see Ss. 10 to 29.

Section 2 (a) — Note 1

[1] A proposal is merely an offer to be bound by a promise. (Vol 26) 1939 Rang 86 (87, 88) : 1938 Rang L R 667.

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:

Section 2 (a) — Note 1

[2] Where an instrument is so worded as to be binding only on the promisor, it is in point of law only an offer and until both parties are bound, neither party is bound. (Vol 19) 1922 Mad 16 (16) : 46 Mad 30 (D B).

[3] Where the agreement is executory on both sides with an option to one of the parties to do as he likes, there is nothing more than a standing offer. (Vol 9) 1922 Mad 16 (17) : 46 Mad 30 (D B).

[4] Telegraphing lowest price on request is not tantamount to an offer but a mere intimation for an offer. (Vol 1) 1914 Low Bur 236 (237) : 7 Low Bur Rul 343 (D B).

[5] A catalogue of the goods of a Company for sale is not a series of offers but only an invitation for offers. A person ordering a certain article is the offeror and the Company is the acceptor. ('09) 12 Oudh Cas 17 (20).

[6] When a merchant or commission agent sends his quotations or terms of business it is not an offer but merely an intimation on his part of his readiness to transact business on those terms. The addition of the words "let us have your transaction once" will not convert it into an offer. (Vol 25) 1938 Nag 186 (188) : I L R (1939) Nag 648 & (Vol 7) 1920 Mad 177 (179) (D B). (Giving of quotations indicating the value of articles to be supplied is not an offer) & (Vol 11) 1924 Sind 64 (66). (Quotation cards are mere invitations for offers and not offers themselves).

[7] A letter sent by a commission agent to other people stating the terms on which he was prepared to do business, whether written in the first instance or on enquiry from other people, is not an offer but only an intimation of the terms on which he is prepared to do business. A contract comes into being only when orders for business are given by the other people and accepted by the commission agent. (Vol 19) 1932 Bom 291 (298) : 56 Bom. 324 (D B).

[8] A person who bids at an auction thereby does not conclude a contract but states offer by which until it is accepted it is open to him to withdraw. (Vol 9) 1922 Mad 486 (491) : 45 Mad 799 (D B) & ('13) 18 Cal L Jour 53 (56) & (Vol 10) 1923 Mad 582 (582, 583) (D B).

[9] Where one person by a letter asks the consent of another to a certain transaction without stating the consideration, it does not become an offer. ('13) 1913 Pun L R No. 277, page 929 (930) (D B).

[10] A letter reciting a request for a loan and calling on the addressee to pay the amount to the bearer and containing "this sum I shall repay with interest . . . and get back this letter. I request you will not neglect to pay the amount on the strength of this letter" is a promote and not a mere proposal for a loan. (1893) 16 Mad 283 (283) (D B).

[11] A letter was in the following terms "..... Money is required for paying demands of Government Please Send Rs. 175 It will be repaid in August with interest." It was held that it was only a request to borrow on certain conditions and constituted a proposal. (1889) 13 Bom 609 (670) (D B).

[12] A letter requesting a loan and promising to repay with interest by a certain date is not a promissory note but a mere proposal. ('23) 71 Ind Cas 968 (969) (Pesh).

[13] An offer to sell and to keep the offer open till a certain time is *nudum pactum* and can, at any time before acceptance, be recalled. (Vol 3) 1916 Low Bur 18 (19).

[14] Letter communicating willingness to sell at a price in reply to an enquiry whether the property is for

sale, amounts to an offer and is not merely an invitation to an offer. (Vol 23) 1936 Cal 87 (89) (D B).

[15] Plaintiff instructing defendant, a commission agent, to purchase silver bars and to keep them with defendant—Defendant purchasing, and reporting that they were kept at plaintiff's risk — Bars kept by defendant at his *pedhi* unlocked and unattended—Three bars lost — Plaintiff's offer held was accepted by the defendant when he executed his instructions and he could not add or alter the contract by adding terms as to risk — That term was mere offer which was never accepted — Defendant held liable for damages for negligence. (Vol 26) 1939 Bom 101 (102, 103) (D B).

[16] Where an advertisement in a newspaper by Railway Company invited tenders for certain contract and was not addressed to any particular person it was held that the advertisement did not constitute a proposal. (Vol 26) 1939 Oudh 249 (252) : 14 Luck 710 (D B).

[17] On a request from a party the Bank sent some forms to be filled in by the party if he proposed to deposit money in the Bank. The party filled in the forms and sent them along with the money. The Bank accepted the deposit and sent back a receipt. It was held that the first letter of the Bank was a quotation and not an offer. The real offer was made by the party when he filled in the forms and sent the money and the acceptance was by the Bank by the issue of the deposit receipt. (Vol 29) 1942 P C 6 (7) : 69 Ind App 1 : I L R (1942) Bom 318 : I L R (1942) Kar (P C) 7 (P C).

[18] A consignor whose goods were not delivered to the consignee was informed by the Railway Company that the goods were lying in its lost property office and he could take delivery if he liked. The company in another letter offered to pay Rs. 20/- in satisfaction of the consignor's claim but this was refused by the consignor who sued to recover Rs. 50 as compensation. It was held that there was no definite promise to pay in the letter but only an offer to settle a claim at a certain amount which was not accepted. (Vol 7) 1920 All 157 (158) : 42 All 390.

[19] In a suit where plaintiffs based their claim on a contract alleged to arise out of an offer made by the manager of defendants who said in a suit that if the plaintiffs took into account a certain *havala* he would have to pay a certain amount to the plaintiffs, it was held that the statement only amounts to an expression of the consequences in law and not an offer. (1936) 162 Ind Cas 327 (328, 329) (P C).

[20] Informal discussions by interested persons and Court of Wards, culminating in Court of Wards passing a resolution that if possible compromise should be effected in terms arrived at the discussion does not amount to offer or an acceptance of an offer. The stage of making an offer and getting the acceptance would follow passing of the resolution. (Vol 28) 1941 Oudh 529 (539).

Section 2 (b) — Note 1

[1] The word 'promise' in the Contract Act is used in a narrow sense. A proposal is merely an offer to be bound by a promise and a promise in law is an accepted proposal. It is the promise or promises only which can give rise to an agreement, which, if enforceable by law, is contract, but if not, is a void agreement. (Vol 26) 1939 Rang 86 (87, 88) : 1939 Rang L R 667.

[2] Silence to letter, is not acceptance of its terms. (Vol 28) 1941 Rang 270 (272).

[3] Where a vendor of certain properties subject to pre-emption offered to sell them to his co-sharers by a notice and the co-sharers remained silent without ex-

- (c) The person making the proposal is called the "promisor," and the person accepting the proposal is called the "promisee":
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

Section 2 (b) (contd.)

pressing willingness to buy, it was held that the co-sharers' conduct amounted to a refusal to buy. (Vol 6) 1919 All 840 (842) (DB).

[4] Response to invitation of offer is not acceptance. (Vol 9) 1922 Lah 100 (101).

[5] To constitute a contract there must be an acceptance of the offer and there can be no acceptance unless there is a knowledge of the offer. ('13) 11 All L Jour 489 (492).

[6] Reward offered for the search of a missing boy for whose search a servant was already sent cannot be claimed by the servant though he found the boy out; the servant did not undertake the search with knowledge of the offer and finding out by him does not amount to acceptance by conduct. ('13) 11 All L Jour 489 (493).

[7] Where defendant desired that money should be lent to his friend, and the plaintiff money-lender lent on his acknowledging receipt of the money it was held that there was an implied promise by the defendant to repay as the plaintiff would not have lent if he had understood that the defendant did not intend to pay. (Vol 21) 1934 All 271 (272).

[8] Where after the demand by landlord for enhancement of rent, the tenant continues to occupy the premises without any express or implied protest, he must be deemed to have accepted by conduct the proposal for enhanced rent. (Vol 27) 1940 Oudh 287 (288).

[9] Before a party can be said to accept something other than the performance of the contract, he must have the option to refuse to accept such satisfaction and to insist on performance as stipulated. ('37) ILR (1937) 1 Cal 757 (763).

[10] Where there was an offer by a letter which was accepted by a minute of the Company which did not incorporate all the terms contained in the letter, it was held that the only binding contract was that contained in the minute. (Vol 1) 1914 P C 48 (48) : 10 Nag L R 108 (PC).

[11] Where a letter addressed to a member of a Company offered him new shares and in the event of his renouncing, to his nominee, and on the member's renouncing, the nominee accepted the shares, it was held that a contract with the nominee was concluded even though the offer was made in the letter to the member. (Vol 25) 1938 Cal. 423 (428) : 1 L R (1938) 2 Cal 190.

[12] An offer giving a sort of right of pre-emption to another, by giving him first opportunity to purchase in the event of sale, cannot create a contract unless there is anything to compel the offeree to buy the property and until the offer is perfected by acceptance, it is not binding. (Vol 13) 1926 Mad 120 (121).

[13] Where the plaintiff accepts the offer of the defendant to sell but seeks to add a further term, which the defendant refused to consider, at the same time repeating the offer previously made, and the plaintiff accepts the offer, the transaction of contract is complete and binding on the defendant. (Vol 25) 1938 Cal 343 (346).

[14] Where intention of offeror was to sell all the properties at a uniform rate of price offeree cannot accept a portion of it and claim specific performance of

that portion of contract. ('13) 1913 Pun L R No. 277 page 929 (932, 933) (DB).

[15] If the making of the contract be part of the cause of action, it follows that the act of concurrence of either party, which is essential to the contract, is itself a part of the cause of action, for without such act of concurrence the contract cannot come into existence. (Vol 18) 1931 Cal 659 (662) : 58 Cal 589 (DB).

[16] The defendant in a suit offered that if plaintiff's key witness ate food served by the plaintiff, the suit may be decreed. The offer was acted upon and the suit was decreed in plaintiff's favour: *Held*, that there was an offer and an acceptance thereof and the defendant could not resile from his promise and the suit was rightly decreed. Order 23, R. 3, Civil P. C., had no application. (Vol 12) 1925 All 271 (271, 272) : 47 All 456 (DB).

[17] The mere writing on bills of medical practitioners that interest at 1 per cent per mensem will be charged cannot amount to a contract. (Vol-28) 1941 Oudh 254 (256, 257) : 16 Luck 701 (DB).

Section 2 (c) — Note 1

[1] No man can in his own right be under any obligation to himself. Where *hatchuta* is executed by a person in favour of himself and some others, such person cannot in law become a promisee. Promisees must be taken in law to be the persons mentioned in the *hatchuta* other than such person. And the portion of the debt due to himself will stand discharged by the doctrine of merger. (Vol 28) 1941 Cal. 595 (597) (DB).

[2] The assignees of a mortgage cannot be promisees with regard to the original promise concerned. (Vol 26) 1939 Mad 818 (821) (DB).

[3] The promisee must include the representative of a deceased promisee as a person to whom the offer of performance can be made. ('08) 4 Mad L Tim 385 (386).

SECTION 2 (d) — SYNOPSIS.

1. "At the desire of the promisor."
2. Consideration need not be to the benefit of the promisor.
3. Consideration whether may proceed from third party.
4. Compromise as consideration.
5. Co-promisors — Whether consideration to one is consideration to all.
6. Essentials of consideration.
7. Evidence as to consideration.
8. Forbearance.
9. Future promises — Whether consideration.
10. Promise to pay subscription — Enforceability.
11. Past consideration.
12. Stranger to contract — Right to sue.
13. Valid consideration — Illustrations.

1. "At the desire of the promisor." — [1] The words "at the desire of the promisor" in S. 2 do not necessarily contemplate a promisor who, at time, possesses contractual liability. ('06) 16 Mad L Jour 422 (423) (DB).

[2] Promise to pay at some indefinite time is no promise made "at the desire of promisor." The words "at the desire of the promisors" imply a promise which has a real effect in conducing to the contract. (Vol 13) 1926 Bom 54 (54, 55) (DB).

Section 2 (d) (*contd.*)

[3] Where plaintiff company agreed to undertake management of mining concern of defendant and another and finance it on being admitted to share of profits: *Held*, that advances made were made not at personal request of defendant but on account of agreement and could not be treated as consideration for promote executed by defendant subsequently. (12) 1912 Mad W N 930 (931, 932) (DB).

[4] Plaintiff asked defendant to bring a Thakur on a certain day. On that day he had arranged Bhog and feeding of guests. Defendant who promised to bring the Thakur failed to do so and the guests went away without taking the food. In the suit for damages it was not proved that defendant promised to bring the Thakur in consideration of the plaintiff inviting guests. It was therefore held that there was no promise to do at the desire of the promisor and therefore there was no promise supported by consideration. (Vol 16) 1929 Cal 369 (370).

[5] By an agreement in writing the defendants promised to pay the plaintiff a commission on articles sold in a market Huma Ganj, in consideration of plaintiff having expended money in construction of the Ganj. Plaintiff constructed Ganj at the request of the Collector. In a suit filed by plaintiff to establish the agreement, it was held that the construction of Ganj was not 'at the desire' of defendants so as to constitute a consideration as defined in S. 2 (d) and agreement was therefore void for want of consideration. (1881) 3 All 221 (228) (DB).

2. Consideration need not be to the benefit of the promisor. — [1] It is not necessary that promisor should benefit by consideration. (Vol 13) 1926 Nag. 149 (151). (Forbearance to sue on bond is consideration for execution of fresh bond.) * (Vol 21) 1934 All 271 (272). (Where money was lent to a friend, for which the obligor signed a stamped receipt, it was held that there was consideration for it.)

[2] If the promisee does some act by which a third person is benefited which he would not have done but for the promise, the consideration is sufficient. (Vol 5) 1918 Cal 816 (816) : 45 Cal 774 (DB).

[3] Agreement to pay money to third person is valid consideration for contract. (09) 9 Cal L Jour 16 (17) (DB).

[4] Municipality applying to Government for contributing one third of the additional expenditure to be incurred on the scheme of free and compulsory primary education — Government offering to bear half costs — Municipality accepting the offer and putting the scheme into action *Held*, that the agreement was supported by "consideration." The consideration being an advantage to be gained by a section of Government's subjects. (Vol 21) 1934 Bom 277 (281, 282) : 58 Bom. 660.

[5] In cases of family arrangements, the consideration is not the sacrifice of any right, but the settlement of a dispute and the Court does not in such cases consider narrowly the quantum of consideration. (09) 9 Cal L Jour 19 (38) (DB).

3. Consideration whether may proceed from third party. — [1] The consideration for a promise need not necessarily move from the promisee but may move from a third party. (Vol 26) 1939 Pat 477 (485) (DB). * (Vol 27) 1940 Rang 91 (93) : 1940 Rang L R 237 * (Vol 23) 1936 Bom. 344 (351, 352) : 60 Bom 954 * (Vol 10) 1923 Mad 484 (485).

[2] An agreement to pay a debt due from a third person is good consideration. Suit on basis of acknowledgment by defendant of moneys due by his father is maintainable. (Vol. 24) 1937 Lah 484 (484).

[3] A and his elder brother, both Hindus, who lived together and cultivated their land jointly had dealings with B but the elder brother alone made the necessary

entries in the account books. After the elder brother's death, A struck a balance and continued the dealings in the same manner as before striking periodical balances. B then sued on the basis of the last balance and A's defence was that there was no consideration for striking the balance: *Held*, that the defendant must also have felt a moral obligation to pay the debt because he had enjoyed the benefit of it jointly with his deceased brother and there was, therefore, good consideration for acknowledgment made by A after his elder brother's death. (Vol 21) 1934 Lah 789 (796).

[4] In marine insurance broker's undertaking to pay premium is consideration though it moves from a third person. (Vol 13) 1926 Bom 82 (85).

4. Compromise as consideration. — [1] The compromise of doubtful rights is a sufficient basis of and forms a sufficient consideration for the agreement. (Vol 22) 1935 Cal 263 (266) (DB) * (Vol 24) 1937 Lah 708 (709). (A compromise of a doubtful claim is a valuable consideration for an agreement restricting the power of alienation of ancestral land.) * (Vol 21) 1934 Oudh 442 (444) * (Vol 20) 1933 Lah 121 (122). (Abandonment of doubtful claim is a valid consideration even if the claim is ultimately found to be without foundation.) * (Vol 20) 1933 Pat 306 (332) : 12 Pat 359 (DB) * (29) 116 Ind Cas 719 (720) (Lah) (DB) * (Vol 13) 1926 Oudh 22 (24). (Though claim turns out afterwards to have had no foundation.) * (Vol 12) 1925 Pat 68 (94) (FB) * (Vol 11) 1924 Pat 736 (744) (DB). (Even though it later on turns out that those supposed rights do not exist.) * (Vol 5) 1918 P C 287 (291) (PC). (Compromise of threatened suit is good consideration for promise irrespective of the possibility of the suit succeeding.) * (10) 1910 Pun W R No. 47, p. 114 (117).

[2] Compromise is agreement to put an end to dispute and to terminate or avoid litigation, and real consideration is not sacrifice of right but abandonment of claim. (Vol 3) 1916 Cal 843 (857) (FB).

[3] Family settlement entered into, as to avoid the possibility of a future dispute is supported by consideration. (Vol 6) 1919 Oudh 105 (109) : 22 Oudh Cas 300 (FB).

[4] Settlement of a doubtful claim for maintenance is not void for want of consideration. (Vol 18) 1931 Nag 197 (198) : 27 Nag L R 281.

[5] Composition followed by partial acceptance is consideration. (Vol 16) 1929 Sind 153 (154) : 23 Sind L R 294 (DB).

[6] Parties can arrange to avoid necessity for legal proceedings and such arrangement is supported by sufficient consideration. (08) 8 Cal L Jour 453 (465) (DB) * (Vol 21) 1934 Lah 163 (163). (Dispute as to amount due from defendant — Settlement of dispute without necessity of going to Court is a good consideration in law.) * (34) 60 Cal L Jour 477 (511) (DB) * (09) 11 Bom L R 1064 (1069, 1070) (DB).

5. Co-promisors — Whether consideration to one is consideration to all. — [1] Consideration paid to one of several joint promisors is sufficient consideration to support a promise to pay made by others. (Vol 1) 1914 Mad 41 (41) : 38 Mad 680 (DB) * (Vol 16) 1929 Lah 466 (467). (Where a bond to pay in instalments is executed by several promisors in lieu of a debt due to the lender from only one of them, the lender's abstinence from suing at the request of other promisors constitutes the consideration in respect of all.) * (Vol 15) 1928 Bom 316 (318) (DB) * (Vol 13) 1926 Nag 149 (152) * (Vol 9) 1922 Mad 23 (24) : 45 Mad 345 (DB). (A promote is enforceable against all the executants if there is consideration for the instrument as a whole. Separate consideration to each executant is not necessary.)

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6. Essentials of consideration. — [1] A consideration for a contract operates only once and when it has operated as consideration for one contract, it is spent. A single consideration cannot be made, by force of the definition in the Contract Act, to support an indefinite series of subsequent contracts. ('10) 1910 Mad W N 618 (622) * (Vol 15) 1928 All 440 (441) : 51 All 164 (FB). (Consideration received by a minor cannot be good consideration for fresh promise by him after attaining majority.).

[2] A valuable consideration may consist either in some right, interest or profit accruing to one party or some loss or responsibility suffered or undertaken by other. (Vol 5) 1918 Bom 183 (184) (DB).

[3] Consideration is what moves from the promisee whether it be an advantage to the promisor or detriment suffered by the promisee. (Vol 23) 1936 Mad 978 (980) (DB) * (Vol 5) 1918 Mad 311 (312) (DB).

[4] To constitute consideration, there must be an act, abstinence or promise on the part of promisee or some other person at the desire of promisor. (1875-77) 1 All 309 (310) (DB).

[5] Per *Sadasva Aiyar J.* — The mere doing of a thing which a person is already legally bound to do is no consideration for a new promise in his favour. (Vol 2) 1915 Mad 528 (529) (DB).

[6] Per *Sadasva Aiyar J.* — A consideration to be valid must be "good or valuable" in the sense in which these words appear in English Law though these words do not appear in the Contract Act which speaks only of unlawful and lawful considerations. (Vol 2) 1915 Mad 528 (529) (DB).

[7] Motive is distinct from and therefore cannot become the consideration for a contract. (Vol 23) 1936 Mad 978 (980) * (Vol 13) 1926 Cal 59 (63) : 53 Cal 51 (DB). (When a certain amount was paid so that the complainant may drop a criminal prosecution for embezzlement it was held that the amount paid was not consideration for dropping down the prosecution but only to provide a motive.)

7. Evidence as to consideration. — [1] Section 92 of Evidence Act does not prohibit the disproof of a recital in a contract as to the consideration by showing that the actual consideration was something different to that alleged. (1892) 5 Mad 6 (8) (DB).

[2] Onus of proving that there was no consideration rests on a person who denies it. (Vol 19) 1932 Lah 135 (136) (DB).

[3] When execution of a document and receipt of consideration has been admitted at registration the burden of proving non-receipt of consideration falls upon the party who makes such allegation. ('05) 27 All 71 (72) (DB) * (1896) 23 Cal 950 (955) : 23 Ind App 92 (PC). (The mere fact that the mortgagee had wrongly omitted to include the interest accruing on the mortgage in his income-tax returns will not help the mortgagor who denies the consideration after acknowledging it before the registering officer, to shift the burden of proof lying on him to show that no consideration actually passed.)

[4] When a defendant vendor admits the execution and registration of a sale-deed, but denies the receipt of the consideration, it is for the plaintiff purchaser who is kept out of possession to prove that the consideration money was paid. (1886) 8 All 641 (643) (DB).

[5] Recital in a contract that vendor has received consideration can be disproved by him, by proving a collateral agreement to the effect that money was to remain with the vendee for a specific purpose. (1900) 22 All 370 (375) : 27 Ind App 93 (PC).

[6] Where the price has been inflated to avoid pre-emption, and the price is clearly beyond the reasonable

market value, the vendee must show the actual payment of consideration and explain why an abnormal price was given. (Vol 6) 1919 All 340 (342) (DB).

[7] In an agreement to reconvey property the reciprocity between the parties is evidence of consideration. (Vol 18) 1931 All 113 (120) (DB).

[8] Document embodying only some terms—Suit on original consideration — Document should be produced. (Vol 24) 1937 Rang 61 (62).

8. Forbearance. — [1] Forbearance to sue can form valid consideration for a promise, provided some liability exists. (Vol 18) 1931 Lah 756 (757) (DB) * (Vol 28) 1941 Pat 282 (283, 284). (Wife forbearing to sue husband for maintenance allowance on his agreeing to pay her monthly allowances by way of maintenance.) * (Vol 25) 1938 Lah 781 (784) (DB). (The forbearance of a plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constitutes a good consideration for fresh agreement though the original contract had been in the nature of a wagering transaction.) * (Vol 17) 1930 Nag 298 (300) : 26 Nag L R 320. (Forbearance to sue debtor is a good consideration for the promise of the debtor to pay the amount found due.) * (Vol 16) 1929 Lah 689 (690) (DB) * (Vol 15) 1928 Bom 316 (318) (DB). (Money paid for making ornaments not returned — Goldsmith with 2 others passing pronote for forbearance from being sued — It is good consideration.) * (Vol 12) 1925 All 503 (506) : 47 All 637 (FB). (Abstinence from taking legal steps is consideration to support an agreement especially where there are mutual considerations and both parties are intending and agree to make an end of their dispute.) * (Vol 10) 1923 Oudh 176 (176) : 26 Oudh Cas 204. (Forbearance to sue on original instrument is good consideration for renewal of pronote.) * (Vol 9) 1922 All 260 (262) : 44 All 424 (DB). (Forbearance to sue is a good consideration to support a *Hundi*.) * (Vol 9) 1922 Lah 269 (270) (DB). (Plaintiff refraining from seeking legal remedy against defendant for having infringed his right by mortgaging the portion of the house sold to him, is sufficient consideration for agreement with the plaintiff whereby he undertook to discharge the mortgage himself.) * (Vol 6) 1919 Mad 528 (529) (DB). (Forbearance to sue debtor on his pro-note is good consideration for latter executing security bond for payment of debt.) * (Vol 4) 1917 Mad 341 (343) (DB). (Abstinence from taking legal proceedings against estate which the debtor may acquire at a future date is sufficient consideration for a promise to pay debt due to creditor.) * ('11) 11 Ind. Cas. 773 (773) (Burma). (Pronote was executed by five persons in consideration of old debts incurred by only three of them. On suit on pro-note other two signatories pleaded denial of receipt of any consideration. *Held*, that two contesting defendants being closely related to actual debtors, creditor's forbearance to sue latter was sufficient consideration.) * ('10) 5 Low Bur Rul 192 (194, 195). (Forbearance by mortgagee to sue on debt is sufficient consideration for promissory note executed by mortgagor.) * (1908) 2 K B 696 (727). (Forbearance to sue a book-maker and to declare him a defaulter thereby saving him from injury with his customers.) * (1893) 17 Bom 457 (463) (DB).

[2] Forbearance to sue will not constitute a valid consideration where the plaintiff does not *bona fide* believe in the validity of his claim. (Vol 16) 1929 Lah 689 (690) (DB).

[3] A promise to defer bringing a suit upon contract which is void does not amount to a consideration. (Vol 4) 1917 Cal 485 (486) (DB).

[4] Forbearance to continue an appeal against a person on that person's brother agreeing to pay the

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amount claimed is good consideration. ('12) 15 Oudh Cas 314 (315).

[5] Suit for ejectment and recovery of cess — Decree for latter relief only — Subsequent agreement to accept decree—Payment of decretal amount—*Held* each party impliedly agreed not to appeal from decree and therefore it was good consideration. (Vol 21) 1934 Pat 644 (645) (DB).

[6] An agreement not to appeal, consideration for which is the mutual consent of parties to refer the matter in dispute to Court as an arbitrator, is binding. (Vol 2) 1915 Mad 1074 (1074).

[7] Creditor forbearing to enforce execution and allowing time to pay at the request of the debtor is good consideration for a verbal promise by the debtor to pay the debt. The verbal promise constitutes a fresh contract. (Vol 8) 1921 Cal 67 (69) : 48 Cal 817.

[8] Decree-holder's forbearance to enforce decree if property under execution be leased to him is a good consideration. (Vol 12) 1925 Nag. 455 (456).

[9] The promise or undertaking on the part of a decree-holder not to execute his decree, or the acceptance by him of a bond, or mortgage or other similar contract as satisfaction of the decree is undoubtedly a consideration within the meaning of S. 2 of the Contract Act. (1885) 7 All. 124 (131) (DB).

[10] Relative of judgment-debtor offering money to decree-holder—The consideration consists in the decree-holder not insisting on attachment of the judgment-debtor's property. (Vol 28) 1941 Pesh. 6 (7) (DB).

[11] Where A and B executed a pro-note for the decretal amount against A alone, the abandonment by the promisee of his decree against A is a consideration for B's liability. (Vol 29) 1942 Mad. 134 (136) (DB).

[12] Positive evidence as to postponement of legal action is not essential in every case but may safely be assumed when the circumstances so permit. ('31) 32 Pun L R 632 (633) (DB). (Two persons executed a balance because by so doing and by thus assuming liability, they were aware that further time for payment of debt would be given by plaintiff to the principal debtor — *Held* that there was consideration for the balance struck.)

[13] Agreement for forbearance to sue need not be for any definite time and it is enough if implied request for forbearance be inferred. (Vol 6) 1919 Mad. 528 (529) (DB).

[14] Release of principal debtor is good consideration for undertaking liability by another. (Vol 3) 1916 Cal 740 (740) (DB).

[15] Acceptance by creditor of sole liability of one of two joint debtors is good consideration for agreement to discharge other debtor. (Vol 23) 1936 Rang 396 (398) (DB).

[16] Suit for recovery of amount due on *bahi* accounts against N brother of G. G opened accounts and died subsequently. His estate came into the possession of N. N had gone into account books, acknowledged their correctness and undertook to pay interest but subsequently pleaded want of consideration. *Held*, that undertaking to pay the amount due on the accounts by N discharges the estate of G from liability and that it was a sufficient consideration. (Vol 19) 1932 Lah 135 (136) (DB).

[17] Forbearance by vendee to enforce terms of prior sale without consideration is not a consideration for subsequent compromise. (Vol 6) 1919 Lah 215 (216) : 1919 Pun Re No. 137.

9. Future promises — Whether consideration.

—[1] A promise to do something in future is legal consideration. (Vol 25) 1938 Rang 202 (203) : 1938 Rang L R 385 (FB).

[2] Where one of terms of a *harar* for partition was that other co-parceners should pay certain sum for costs of marriage of daughter of one of them and in pursuance thereof pro-notes were executed, pro-note and agreement to pay are supported by consideration since it forms one of terms of contract. ('13) 36 Mad 151 (153, 154) (DB).

[3] Agreement by widow to adopt a particular person is good consideration for adoptee executing agreement in widow's favour. (Vol 13) 1926 All 194 (198) (DB).

10. Promise to pay subscription — Enforceability. — [1] A mere promise to subscribe a sum of money or the entry of such promised sum in a subscription list does not furnish any consideration and therefore the subscriber is not liable to pay it. (Vol 23) 1936 Mad 135 (135) ✕(Vol 1) 1914 All 22 (23) : 36 All 268 (DB) ✕('87) 14 Cal 64 (67) (DB).

[2] In order that a mere promise to pay subscription may be enforced there must be some request by the promisor to the promisee to do some thing in consideration of the promised subscription or an undertaking by the promisee to do something as part of the bargain. (Vol 23) 1936 Mad 135 (135) ✕('87) 14 Cal 64 (67) (DB). (But where persons were asked to subscribe knowing the purpose to which the money was to be applied and they knew that on the faith of their subscription an obligation was to be incurred to pay for the work undertaken, it was held that the promise to pay was supported by good consideration and the obligation was incurred at the desire of the promisor.)

11. Past consideration. — [1] Per *Sadasiva Aiyar J.*—Under the English law consideration must be present at the time of making the promise and there is no such thing as past consideration. A past request to the promisee to do an act even to the detriment of the promisee without simultaneous understanding that it is to be recompensed in future cannot make the act good consideration for a subsequent promise to pay. But the Indian Act does not require any such understanding. (Vol 2) 1915 Mad 528 (529) (DB).

[2] Per *Sadasiva Aiyar J.*—It is not every act on the part of the promisee, though done at the request of the promisor which could support a subsequent promise. The act done by the promisee must be "good or valuable" consideration in the sense in which the terms appear in English law. (Vol 2) 1915 Mad 528 (529) (DB).

[3] Past co-habitation between man and woman cannot be called a "consideration." Even assuming it is so, it would not be an immoral consideration rendering the contract void. ('81) 3 All 787 (788) (DB).

[4] Old debts form good consideration for mortgage or transfer of property. (Vol 6) 1919 All 348 (348) (DB) ✕(Vol 10) 1923 Oudh 3 (4) : 26 Oudh Cas 201.

[5] An account stated is an account which contains entries on both sides and in which the parties have agreed that the items on one side should be set off against the items on the other side and the balance should be paid. A stated account is a promise for good consideration to pay the balance even though some of the debts are barred by limitation. (Vol 28) 1941 Cal 595 (596) (DB).

[6] If the servants put forth extra work in consideration whereof a bonus is promised to them by the masters it is in law a promise for past services which is good under Indian law. (Vol 12) 1925 Mad 192 (194) (DB).

[7] Services previously rendered at the desire of a promisor are, by cl. (d) of S. 2 of the Contract Act (IX of 1872), placed on the same footing with services to be rendered in the future, and constitute a good consideration for a definite agreement. Consequently, services rendered at the desire of a minor expressed during his minority, and continued after his majority, form a good

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consideration for a subsequent express promise by him in favour of the person who rendered the services. ('96) 20 Bom. 755 (757) (DB).

[8] Money received during minority can form the consideration for a contract made by a person of full age and competent to contract. (Vol 11) 1924 All 730 (731) : 46 All 568 (DB).

[9] That which have voluntarily been performed in the past cannot be made consideration for a promise to do something in future. There must be another promise as consideration for that promise. (Vol 30) 1943 Oudh 89 (90) : 18 Luck 647.

[10] Though past services voluntarily rendered are not consideration to support promise and not capable of being enforced by the promisee yet they can be pleaded as valuable consideration in a suit to set aside alienation made on account of such past services. ('09) 19 Mad L Jour 62 (65) (DB).

[11] Condition precedent to agreement can be attached by consent of parties later on—Fresh consideration is unnecessary for later agreement. (Vol 8) 1921 P C 71 (75) (PC). (Agreement to grant lease—Condition precedent subsequently added that until certain debt on the lease property has been paid off he cannot grant lease—Agreement cannot be enforced until condition is fulfilled.)

12. Stranger to contract — Right to sue. — [1] Section 2, cl. (d) widens the definition of 'consideration' so as to enable a party to a contract to enforce the same. Not only, however, is there nothing in S. 2 to encourage the idea that contract can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'. (Vol 15) 1928 Cal 518 (522) : 55 Cal 1315 (DB).

[2] On equitable principles, only a person who is a party to a contract can sue on it. The law knows nothing of a *jus quæsitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. (Vol 20) 1933 P C 11 (14) (PC).

[3] The general rule is that although consideration for an agreement may proceed from a third party, a person not a party to an agreement cannot sue upon it. (Vol 30) 1943 Sind 190 (192) : I L R (1943) Kar 238 (DB) ; (Vol 29) 1942 Cal 251 (252) : I L R (1941) 2 Cal 576 (DB) ; (Vol 23) 1936 Bom 844 (846) : 60 Bom 954 ; (Vol 22) 1935 Lah 354 (357) : 16 Lah 118 (DB).

[4] A clause in a motor insurance policy empowering the insurance company to enforce the legal rights of the insured against a third party in the name of the insured and also providing that the insurance company shall indemnify the insured against his legal liability in respects of death of, or accident to passengers cannot give that third a right of suit against the insurance company for money due under the policy. A passenger being a mere stranger to the contract of insurance cannot sue for money payable under the policy. (Vol 25) 1938 Bom 217 (217).

[5] Where a person transfers property to another and stipulates for the payment of money by purchaser to a third person a suit to enforce that stipulation by the third party will not lie. (Vol 17) 1930 Mad 382 (389) : 53 Mad 270 (FB) ; (Vol 32) 1945 Nag 261 (263) : ILR (1945) Nag 581 (DB) ; ('37) 1937 Mad W N 408 (409). (Vendee undertaking to discharge pro-note executed by vendor in favour of a third party—Third party cannot sue vendor for amount due under pro-note as there is no privity of contract.) ; (Vol 20) 1933 Lah 695 (696) : 14 Lah 675 ; (Vol 17) 1930 Mad 567 (567). (A mortgagee not being party to agreement between the mort-

gagor and her vendee as regards payment of mortgage money cannot enforce agreement).

[See also (Vol 21) 1934 All 770 (772)].

[But see (Vol 20) 1933 Lah 178 (179)].

[6] A creditor, who is not a party to compromise effected between his debtors themselves, cannot institute a suit on that contract unless he stood in the capacity of a *cestui que trust*. (Vol 19) 1932 Mad 457 (457) : 55 Mad 436 (DB).

[7] S, a debtor of B, executed hypothecation bond in favour of C for a consideration including the amount of debt due to B which he agreed to pay off—B cannot recover the debt from C as he was not party to the hypothecation bond. (Vol 1) 1914 Mad 701 (704) : 38 Mad 753 (DB).

[8] A license for a liquor-shop was obtained by A and certain sum was at A's request deposited by B as security for the license. Subsequently A took C as partner in the shop. Government forfeited certain sum for arrears of license fee out of the amount deposited by B. B sued A and C for recovery of that amount. Held that A was liable but not C as there was no privity of contract between B and C. (Vol 27) 1940 All 98 (99) : I L R (1940) All 96 (DB). (Vol 25) 1938 All 206, Reversed.)

[9] A sold grain-pits to B by means of slips. Under their terms, A was bound to deliver grain-pits to the ultimate purchaser of slips. D was the ultimate purchaser of these slips from vendees from A. Held that the terms of the offer entered into the slip excluded the responsibility of each successive vendor to each successive purchaser and hence contractual liability existed only between A and D. (Vol 23) 1936 All 700 (701) (DB).

[10] An agreement between the sons of a deceased Muhammadan, that one of them should take the whole property of their father and also pay his debts, is not enforceable by the creditors. Such brother is not personally liable for the debts. (Vol 30) 1943 Sind 190 (192) : ILR (1943) Kar 238 (DB).

[11] Where a person who had agreed to mortgage his land in favour of another person on the understanding that the latter would pay the former's creditors, refuses to complete the mortgage, his creditors cannot claim payment from the inchoate mortgagee who has received no benefit thereunder. (Vol 17) 1930 Lah 549 (551) (DB).

[12] A stranger who renders services to arbitrator as his legal advisor and indirectly to parties to an award cannot sue for the benefit conferred upon him under the award, himself not being a party to the award itself, and there being no privity of contract between him and parties to the award. (Vol 26) 1939 Sind 125 (126) : I L R (1939) Kar 422 (DB).

[13] A servant cannot take advantage of an agreement between his master and another. (Vol 25) 1938 Rang 35 (38) : 1937 Rang L R 234.

[14] Defendant purchased the cotton of the plaintiff through B and the defendant promised to pay the amount of Rs. 550 to the plaintiff and gave a chitti. The terms of the chitti were as follows. "To L. Accept compliments of D (defendant). Further, at the instance of B, the man of G (plaintiff) will come. So you will please pay him Rs. five hundred and fifty." Held that the Chitti could not be construed as an agreement and there was no privity of contract between the plaintiff and the defendant and therefore could not sue him for recovery of the amount. (Vol 31) 1944 Nag 120 (121) : I L R (1944) Nag. 46.

[15] No stranger can challenge a transaction on the ground of want of consideration. (Vol 32) 1945 Nag 60 (63) : ILR (1944) Nag 796.

[16] Stranger having only an indirect interest in the performance of a contract cannot sue to enforce it. (Vol 25) 1938 Cal 578 (580, 581).

Section 2 (d) (contd.)

[17] The principle laid down in *Tweedle v. Atkinson* that a person who is not a party to a contract cannot take advantage of its provisions is inapplicable to India as certain exceptions to the general rule are recognised. (Vol 19) 1932 Lah 566 (568) (DB) & (Vol 9) 1922 Mad 397 (398).

[18] A person who is not a party to a contract cannot ordinarily sue for its specific performance, but where third person acquires some benefit under the contract, he is entitled to enforce such benefit by equitable relief. It is not the contract itself that is enforced but only the equities arising out of it. (Vol 18) 1931 Pat 114 (125) (DB) & (Vol 26) 1939 Nag 20 (21) & (Vol 23) 1936 Cal 67 (68) (DB) & ('35) 62 Cal L Jour 55 (64) (DB). (Even though the arrangement to his benefit was not communicated to him by the parties to that contract, and was brought to his notice by a mere accident.) & (Vol 21) 1934 Cal 682 (690) : 61 Cal 841 (DB) & (Vol 19) 1932 Lah 566 (570) (DB).

[See also (Vol 10) 1923 Cal 25 (27) (DB). (Tenant can invoke benefit of contract between Government and settlement holder.)]

[19] A stranger to a contract can sue in the following cases :

(a) Where one of the parties to the contract afterwards agrees with the stranger to pay him direct or is estopped from denying the liability to so pay. (Vol 20) 1933 Cal 407 (408) : 60 Cal 767 (DB) & (Vol 27) 1940 Rang 91 (94) : 1940 Rang L R 237 & (Vol 24) 1937 Oudh 99 (105) : 12 Luck 639 (DB) & (Vol 17) 1930 Mad 382 (389) : 53 Mad 270 (F B) & ('31) 131 Ind Cas 210 (211) (Lah).

(b) Where the contract on which he sues has created a trust in his favour. (Vol 29) 1942 Cal 251 (252) : I L R (1941) 2 Cal 576 (DB) & (Vol 30) 1943 Nag 266 (268) : I L R (1943) Nag 643 & (Vol 27) 1940 Rang 91 (94) : 1940 Rang L R 237 & (Vol 26) 1939 Bom 309 (311) & (Vol 24) 1937 Oudh 99 (105) : 12 Luck 639 (DB) & (Vol 23) 1936 Bom 344 (346) : 60 Bom 954 & (Vol 22) 1935 Lah 354 (357) : 16 Lah 118 (DB) & (Vol 20) 1933 Cal 407 (408) : 60 Cal 767 (DB) & (Vol 19) 1932 Oudh 82 (84) : 7 Luck 292 (DB). (A selling to D his rights under pro-note executed by B — B holding decree for sale by assignment — B assigning decree to C who undertook to satisfy the pro-note — D, purchaser of pro-note, is entitled to recover the amount due on it from C. The contract creates a trust in favour of A.) & (Vol 17) 1930 Mad 382 (389) : 53 Mad 270 (F B) & (Vol 12) 1925 Sind 272 (273) : 18 Sind L R 96 (DB). (A, a firm, contracting with B to pay a certain share of profits to B's minor son in consideration of B's services to firm — B's son becomes *cestui que trust* and can enforce the contract.)

(c) Where the money to be paid is made a charge on immovable properties. (Vol 17) 1930 Mad 382 (389) : 53 Mad 270 (F B) & (Vol 30) 1943 Nag 266 (268) : I L R (1943) Nag 643 & (Vol 24) 1937 Oudh 99 (105) : 12 Luck 639 (DB) & (Vol 20) 1933 Cal 407 (408) : 60 Cal 767 (DB).

(d) Where it is due to him under a marriage settlement, partition or other family settlement. (Vol 20) 1933 Cal 407 (408) : 60 Cal 767 (DB) & (Vol 26) 1939 Bom 309 (311) & (Vol 17) 1930 Mad 382 (389) : 53 Mad 270 (F B) & (Vol 11) 1924 Mad 861 (861). (Where all parties are before the Court, and it is in a position to do complete justice, it can order the enforcement of a contract by a person for whose benefit it was made, though he is not directly the promisee.) & (Vol 30) 1943 Nag 266 (268) : I L R (1943) Nag 643 & (Vol 24) 1937 Oudh 99 (105) : 12 Luck 639 (DB).

(e) Where the promisor, between whom and the stranger no privity exists, creates privity by his conduct

and by acknowledgment or otherwise constitutes himself an agent of the third party. (Vol 29) 1942 Cal 251 (252) : I L R (1941) 2 Cal 576 & (Vol 23) 1936 Bom 344 (346) : 60 Bom 954 & (Vol 22) 1935 Mad 904 (906) (DB). (B agreeing to collect outstandings due to A and pay all his creditors — B promising A's creditors by letter to pay the amount and they in return abstaining from enforcing remedies against A — B held liable to creditors of A.) & (Vol 27) 1940 Lah 471 (473). (Bank in liquidation — Official liquidator taking misfeasance proceedings against manager — Compromise between manager and Official liquidator — Manager thereby undertaking to satisfy claim of depositor of bank — Default by Manager — Suit by depositor to enforce terms of compromise held maintainable as Official liquidator was in a way acting as agent of depositors.)

[20] Transferee of portions of mortgaged property undertaking to pay sale consideration directly to mortgagees — Donee from mortgagor taking remaining property free from incumbrance — On failure of transferee to pay, mortgagees filing suit and obtaining decree and all property sold in execution — Donee is entitled to benefits of contract between mortgagor and transferee. (Vol 26) 1939 Pat 194 (196) : 17 Pat 751 (DB).

[21] A purchaser retaining part of the purchase-money to pay off previous mortgage, and informing mortgagee of the fact requesting him that he should not press the mortgagor for the same renders himself personally liable to pay the mortgagee. (Vol 22) 1935 Mad 115 (116) (DB).

[22] Third party getting benefit must pay money due under contract. (Vol 5) 1918 Mad 288 (292, 293) : 41 Mad 488 (DB).

[23] A person who takes an assignment of all properties of a deceased from his legal representative with an undertaking to pay his debts cannot be heard to say that he is not liable in a suit by a creditor on the plea that there is no privity of contract. (Vol 9) 1922 Mad 397 (398).

[24] A widow X was to receive maintenance from M in exchange of her interest in the land. X assigned the arrears to H for value. The land was purchased by F from M. H sued F for arrears. It was held that he was entitled to a decree. (Vol 23) 1936 Cal 260 (260, 261) (DB).

[25] Where certain persons obtained possession of properties relinquished by a female limited proprietor expressly agreeing to pay certain decretal debt due against her, it was held that the decree-holder though a stranger to that contract which is to his benefit is entitled to enforce the agreement to his benefit. (Vol 23) 1936 Cal 67 (68) (DB).

[26] A right to contribution is assignable. Where a person gets to himself a transfer of all assets and liabilities of another, a creditor to whom such transfer is communicated can proceed against the transferee, though there is no privity of contract. (Vol 9) 1922 Mad 397 (398).

[27] Debtor mortgaging property in favour of third person who agreed to pay the creditor — Mortgagee admitting liability — Suit by creditor against mortgagee to recover amount of his debt was held maintainable as privity of contract was admitted prior to suit. ('34) 36 Pun L R 244 (246, 247) (DB).

[28] Mutual benefit fund in order to secure pecuniary benefit to its members — R became a member naming S, his son, as his nominee to receive pecuniary benefit, S predeceased R and there was no further nomination. On R's death R's creditor attached call money payable to R's heir. Held that legal heirs of R can enforce contract against the fund as they are in the position of a *'cestui que trust'*, though they were not parties to the original contract. ('36) 70 Mad L Jour 581 (581).

Section 2 (d) (*contd.*)

[29] Where certain persons collected dues from cartmen coming to the bazar, for charitable purposes on behalf of a Dharam Sabha, such persons are trustees of the Sabha, and the Sabha can bring a suit for recovery of sums realised. (Vol 22) 1935 Oudh 496 (496) : 11 Luck 428 (DD).

[30] Where an ante-nuptial agreement was executed between parents of bride and bridegroom by which a promise was made to pay a monthly allowance to wife as pandan expenses in consideration of marriage, the wife can sue for arrears though not a party to agreement. (Vol 23) 1936 Oudh 385 (387) : 12 Luck 344 (DB) * (10) 32 All 410 (414) : 37 Ind App 152 (P O).

Interest created by Partition, Marriage Settlement or Family Settlement.—[31] Where in a partition of a joint family property by a compromise decree certain properties are given to certain branches to which are allotted certain debts and it is provided that until the debts are fully discharged the properties allotted to respective persons shall be liable in the first instance for the debts, the transaction amounts to a mere contract of indemnity between parties conferring no benefit or charge upon the creditors. A creditor who is not a party to the compromise, cannot sue on the contract unless he stands in the position of a 'cestui que trust.' (Vol 19) 1932 Mad 457 (457) : 55 Mad 436 (DB).

[32] Agreement by which member of Hindu family relinquished his share in property at partition in consideration of others maintaining their sister, constitutes good consideration for sister enforcing her right to maintenance against brothers. (12) 14 Ind Cas 517 (518) (Mad).

[33] Adopted boy though no party to settlement can sue the trustees for recovery of properties under settlement as he is a beneficiary. (Vol 22) 1935 Mad 141 (143).

[34] Award effecting partition between sons, stating father's debt to be charge on property taken by one son is not enforceable by a creditor who is stranger to award—No trust is created in favour of the creditor. (Vol 30) 1943 Sind 221 (222) : ILR (1943) Kar 338 (DB).

[35] Where a third party having knowledge of a breach of contract makes a contract with one of the contracting parties, with regard to the subject-matter of the first contract, privity of contract is established between him and the party complaining of breach of the first contract. (Vol 23) 1936 Sind 119 (120) : 30 Sind L R 157 (DB). (Agreement between A and B that latter should not exhibit a certain film in other Talkies—B contracting with C to rent the same film to him in breach of previous agreement with A—Suit by A for breach of contract against B and C—Held privity of contract between A and C who had knowledge of the breach was established and therefore suit was maintainable)

13. Valid consideration — Illustrations. —

[1] A settlement of accounts by all partners even if subsequent to three years from date of dissolution is valid—Mutual promises to abide by it is a good consideration to support the contract. (Vol 20) 1933 P C 120 (121) (PC).

[2] A agreed to pay B a sum of money in consideration of B supplying funds to A and also assisting him in a litigation. When B claimed the money A repudiated it on the ground that there was no consideration for the agreement : Held, that there was good consideration and that B could recover the money from A. (32) 138 Ind Cas 900 (902) (PC).

[3] Where plaintiff sells his shares in a Company to the defendant purchaser without undertaking to get the transfer recognised by the Company and the Company refuses to recognise the transfer, it was held that there

was no failure of consideration (Vol 1) 1911 All 118 (119) : 36 All 365 (DB).

[4] Where a creditor releases his debtor and accepts a new debtor in his place, the release of the original debtor furnishes a good consideration for the new contract. (Vol 21) 1934 Lah 789 (790).

[5] Mortgagee offering to release mortgaged property from his security if the proposed vendee paid him a certain amount—Purchase of property on faith of such offer and alteration of position of vendee is good consideration—Contract is binding on parties. (Vol 12) 1925 Cal 94 (97) (DB).

[6] Promise to pay for service undertaken at the request of the promisor is not a bare promise. Thus where a solicitor has agreed to serve and accept taxed cost in the event of success such agreement is a contract supported by consideration. (Vol 26) 1939 Bom 250 (251) : ILR (1939) Bom 307 (DB).

[7] Gift in consideration of donee performing certain religious services at temple is transfer for valuable consideration. (Vol 5) 1918 Bom 183 (184) (DB).

[8] Suit to enforce mortgage executed by Hindu father on behalf of himself and as guardian of his minor sons—Mortgagee undertaking to pay father's creditors and advancing cash alleged to have been received by father—Mortgagee's undertaking to pay creditors was held to be good consideration so far as father was concerned. (Vol 30) 1943 Mad 77 (78).

[9] Where a promise by A is consideration for a promise by B, the former, so long as it remains executory, will not amount to consideration in the eyes of law unless it involves a legal obligation which A may be compelled to perform. But even where the promise on the side of A does not involve a legal obligation its performance will constitute sufficient consideration, as an executed promise becomes consideration. (Vol 23) 1936 Mad 709 (712) (DB).

[10] If a person contracts marriage in consideration of a promise, then the marriage is for valuable consideration within the meaning of this definition. Such promise is binding and enforceable agreement. (Vol 6) 1919 Mad 500 (505) : 42 Mad 154 (DB).

[11] Defendant requested his step-mother to deliver him his share of his father's assets, but she stated that a certain debt was due by his father and defendant should pay part of the debt, as he was to receive part of the assets. He agreed to pay debt. The defendant thereupon executed a promissory note in favour of plaintiff and got his share of the assets. Held, there was consideration for the promissory note within the meaning of Cl. 2 (d). (1883) 6 Mad 351 (354) (DB).

[12] Mortgage executed to make good to mortgagee the loss sustained by him for having lost a property by pre-emption is valid and is supported by consideration. (Vol 12) 1925 Oudh 215 (216) (DB).

[13] A promise or undertaking on the part of a decree-holder not to execute his decree, or the acceptance by him of a bond or mortgage or other similar contract as satisfaction of the decree is consideration—Fact that such adjustment is not certified does not render it unlawful. (1885) 7 All 124 (131) (DB).

[14] Estate of two undivided brothers H and S was taken under the management of Court of Wards to pay off personal debts incurred by H. An agreement was entered into between the brothers by which H surrendered all his interest in the estate and S became the sole proprietor, subject to the payment to him by S of a personal allowance. The reasons given in the agreement for surrender were that S had to be recouped for the money appropriated to H's use. H had no sort of proprietary interest in the estate excepting the right to manage : Held, that the above agreement was not bad for want of consideration. (1895) 17 All 264 (271) (DB).

- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement:
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:
- (g) An agreement not enforceable by law is said to be void:
- (h) An agreement enforceable by law is a contract:

Section 2 (d) (contd.)

[15] A patti divided into sub-pattis at time of partition—Subsequent agreement by owner of one sub-patti that he would be responsible for realisation of rents from tenants on whole original patti is supported by consideration and is binding on parties. (Vol 31) 1944 Nag 307 (308) : I L R (1944) Nag 412.

[16] It is not necessary that there should be reciprocity of performance to make a promise to render services valid consideration. So long as there is a promise coming from each side and each side promises a thing which can be done and can legally be done there is consideration. Thus where P enters into an agreement with B that in P's suit to recover possession of a house B should do pairvi and if he succeeded P would transfer one-fourth of the house to B, and B succeeded, there is valid consideration. (Vol 30) 1943 Oudh 89 (90) : 18 Luck 647.

[17] A time-barred debt can be valid consideration for transfer of property. (Vol 12) 1925 Oudh 287 (268).

[18] L granted an estate to C and directed her to make an annual payment to L's brothers. C by agreement of even date made with L's brothers promised to carry out L's directions. Held, that the grant by L and the promise by C to L's brothers being one transaction, there was a sufficient consideration for the promise within S. 2 (d). (1882) 4 Mad 137 (140) (DB).

[19] If a mortgagor agrees to receive a less amount than that for which he agrees to execute the mortgage, the transaction is perfectly valid and the mortgagor is bound to pay the entire sum agreed. (Vol 11) 1924 Oudh 193 (195) : 27 Oudh Cas 4.

[See however (Vol 8) 1921 Cal 435 (440) (DB). (Partial failure of consideration does not affect validity of bond. The bond is operative to the extent of the sum actually advanced.)

[20] Dower to be paid under Muhammadan law to the daughter-in-law is a valid consideration for a transfer by the mother-in-law in lieu of it. (Vol 17) 1930 All 434 (435) (DB).

The following are illustrative examples of cases in which the contracts were held to be not supported by any consideration.

[21] An agreement by a tenant under a subsisting tenancy to pay a different rent when measurement would be made cannot be enforced as it is not supported by consideration. (Vol 20) 1933 Cal 725 (726).

[22] The threat of bringing a false suit is really a form of blackmail and cannot be regarded as good consideration for a contract. (Vol 25) 1936 Lah 6 (7).

[23] Where damages were claimed on the ground of breach of contract by the decree-holder in not having certified payment under O. 21, R. 2, Civil P. C., and in executing the decree : Held, that there was no contract at all as the repayment of money due under the decree was no consideration at all, and the fact that duty was cast upon the decree-holder to certify the payment cannot alter it. (Vol 20) 1933 All 511 (512).

[24] A person, under arrest, in execution of a decree by a Court having no jurisdiction to make it, gave the holder of such decree, a bond for the amount of the decree and a small amount for stamping and preparation of this bond, so that he might be released from arrest. It was held that such a bond was given without

consideration as the small amount paid for stamping and preparation of the bond was not "consideration" in legal sense. (1882) 4 All 352 (355) (DB).

[25] When a father transfers property to trustees in trust for his minor sons the limitations on the interest which the trustees have by virtue of the trust cannot be pleaded as consideration for the transfer. The trustees do not receive an absolute interest in consideration for which they agree to do certain things. (Vol 10) 1923 Oudh 80 (86) : 25 Oudh Cas 291 (DB).

Section 2 (e)—Note 1

[1] Term "agreement" refers both to "promise" and "a set of promises" forming consideration for each other. The words "forming consideration for each other" qualify only the words "set of promises" and not "every promise." Hence every "promise" is an agreement. (1904) 28 Bom 66 (72) (DB).

[2] Agreement includes a single promise or set of promises forming the consideration for each other. Consequently, there is no difficulty in treating promises made to minors for consideration received, as contracts, for they are made by persons competent to contract for consideration received. (1899) 23 Bom 146 (163, 164) (SB).

[3] Consideration is not always an essential element of an agreement. (1904) 28 Bom 66 (72) (DB).

Section 2 (g)—Note 1

[1] Not every unenforceable contract is declared to be void but only those which are unenforceable by substantive law—Inability to sue by reason of Limitation Act or Civil P. C., would not cause a contract to become void. (Vol 26) 1939 P C 110 (113) : 66 Ind App 198 : 1939 Rang L R 358 (P C).

[2] A contract void in its inception is no contract at all ; it has not passed from the stage of agreement to the stage of a contract. It is an agreement not enforceable at law. (Vol 24) 1937 Sind 211 (212) : 31 Sind L R 170 (D B).

[3] Agreement to pay interest, not awarded by a decree, together with the decretal amount, without the sanction of the Court, which passed the decree, is void. (1885) 9 Bom 176 (178) (D B).

[4] Statutory prohibitions are not subject to the common law exception of executed contract. Hence a contract, though executed, must be deemed to be void on the ground of failure to comply with statutory provisions relating to the manner in which it shall be made. (Vol 27) 1940 Sind 199 (202) : I L R (1940) Kar 347 (D B).

[5] As to voidable contracts, and void agreements, see Ss. 10 to 29, generally.

Section 2 (h) — Note 1

[1] The definition of 'contract' in S. 2 is built upon a succession of definitions of the elements, which go to make a contract, that is to say, proposal, acceptance, promise, promisor, promisee, consideration and agreement. The expression "reciprocal promises" is explained and finally a contract is defined as an agreement, enforceable by law. On the other hand, an agreement not enforceable by law is said to be void. It is not a contract at all. (Vol 23) 1936 Pat 153 (156, 157) (DB).

[2] The words "lawful agreement" in O. 23, R. 3, Civil P. C., mean exactly the same thing as words "an

- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate such proposal, acceptance, or revocation, or which has the effect of communicating it.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—
as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

Section 2 (h) (contd.)
agreement enforceable by law" in S. 2 (h). (Vol 33) 1946 Sind 81 (83) : I L R (1946) Kar 288.

[3] Obligations, included in Ch. V. are not contractual obligations and are not included in contracts, which only were subject-matter of Act. (Vol 33) 1946 Bom 216 (243) : 47 Cri L Jour 594.

[4] It is open to the parties to a transaction to contract themselves out of the provisions of a statute. But it must be clearly and satisfactorily established, not only that the parties intend that their liability should be different from that created by the statute, but also that they intended the variation, which is contrary to the provisions of the statute. (Vol 32) 1945 Pat 447 (449) : 24 Pat 438 (DB).

[5] Though the actual figure of the rent has not been determined, if there is no uncertainty regarding the way in which it should be fixed throughout the lease, the lease cannot be said to be unenforceable for uncertainty and would be a binding lease (Vol 31) 1944 Mad 518 (523) : I L R (1945) Mad 355 (DB).

[6] For contracts required to be in writing, see S. 10.

[7] For admission of oral and documentary evidence to prove terms of contract, see S. 10.

Section 2 (i) — Note 1

[1] The term voidable as used with reference to alienations by limited owners under Hindu law is not used in the sense in which it is used in the Contract Act. Under the Hindu law the transaction not supported by necessity is void and not merely voidable as regards other members, and where such necessity exists, it is valid. Fraud, undue influence, misrepresentation need not be proved to set it aside. (Vol 15) 1928 Mad 986 (989) (DB).

[2] A contract falling under S. 236 is a voidable contract. (Vol 20) 1933 Sind 207 (209) (DB).

[3] Where the contract was made by the Municipal Corporation of Bombay, through its President, and not through its Commissioner: Held that the contract was not binding on the municipality by virtue of S. 69 (a), City Municipal Act. It was not a voidable contract as defined in S. 2 (i) but a void contract. (Vol 21) 1934 Bom 277 (284, 285) : 58 Bom 660.

[4] When a voidable contract is acted upon by a party as valid, the party is estopped from denying its validity. (Vol 20) 1933 Sind 207 (210) (DB).

Section 2 (j) — Note 1

[1] The words "unenforceable by law" mean un-

enforceable by substantive law, and not by reason of some procedural regulation. (Vol 26) 1939 P C 110 (113) : 66 Ind App 193 : 1939 Rang L R 358 (PC).

Section 3 — Note 1

[1] Ticket by steamer issued to plaintiff printed in French—Ticket, on its face stating that it ought to be signed by passenger and that it was issued subject to conditions on the back — One of the conditions stating that company would not be responsible for loss or damage arising from accidents or risks of sea.—Ticket not signed by plaintiff who did not understand French — Plaintiff's luggage lost by wreck of a ship Plaintiff held was bound by the clauses and conditions on the back of the passage ticket, but the conditions did not relieve the company from its own negligence. (1881) 6 Cal 227 (234) (DB).

[2] (Per *Bhashyam Ayyangar J.*)—Where a policy of insurance is issued by a company, subject to the regulations and conditions comprised in the prospectus, it is unnecessary to prove that the company's prospectus had been read by or specially brought to the notice of the assured, apart from the reference made to it in the policy. (1902) 25 Mad 183 (205) (DB). ((1883) L R 10 Q B D 178 Followed.)

SECTION 4 — Synopsis.

1. Communication of proposal.

2. Communication of acceptance.

1. Communication of proposal. [1] Offer made by letter is effective only when it has been received by addressee. (Vol 32) 1945 Lah 260 (264) (DB).

[2] Offer by letter must be deemed to have reached the addressee, when the letter is delivered at the addressee's residence. Any delay in addressee actually receiving it in his hands, caused owing to his failure to make proper arrangements to receive the communication, will not be considered. (Vol 14) 1927 Lah 50 (50).

[3] Offer is made not, at the place from which it is sent, but, at the place where it reaches acceptor. (Vol 7) 1920 Mad 177 (180) (DB).

2. Communication of acceptance.—[1] Where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted. (1904) 27 Mad 355 (358, 359) (DB) (1909) 6 All L Jour 213 (214) (Vol 10) 1923 Lah 427 (427) (Vol 9) 1922 Lah 100 (101) (Vol 21) 1934 Mad 581 (582) (Vol 20) 1933 Mad 764 (765) (DB) (Vol 25) 1933 Nag 186 (188) :

The communication of a revocation is complete,—
as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;
as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete—

as against A when the letter is posted;

as against B when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

Revocation of proposals and acceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations.

A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Revocation how made.

6. A proposal is revoked —

(1) by the communication of notice of revocation by the proposer to the other party ;

Section 4 (*contd.*)

I L R (1939) Nag 648 * (Vol 8) 1921 Nag 42 (43) : 17 Nag L R 1 * (41) 1941 Nag L Jour 37 (38).

[2] The communication of acceptance does not make any change in the place where the contract is made, but only affect the time of its complete formation. ('96) 1896 Pun Re No. 76, p. 234 (238) (DB).

[3] The moment that the letter of acceptance is placed in the post box, the offer is accepted and the contract is concluded. (Vol 32) 1945 Lah 260 (264) (DB).

[4] A letter of acceptance to a proposer, not correctly addressed, could not, although posted, be said to have been 'put in a course of transmission' to him within S. 4. (1887) 9 All 366 (384) (DB).

[5] In absence of evidence of communication contained in letter having reached proposer, its press copy cannot be admitted as secondary evidence of its contents. (1887) 9 All 366 (384, 385) (DB).

[6] Where after a proposal form was signed and premium paid, the insurance company sent a cover note accepting the policy and saying that the policy would be sent within 30 days : Held the communication was complete, though the policy was not sent : (Vol 21) 1934 All 298 (300) : 56 All 726 (DB).

[7] Insurance company's head-office was at 'C'. Its agents had no authority to accept policies. The assured filled the form at 'E' and gave it to agent at E who sent it to C. Held as there was no offer till a proposal was received, both the offer and acceptance took place at 'C' itself. (Vol 24) 1937 Mad 571 (573) : I L R (1937) Mad 990 (DB).

[8] Proposal and acceptance of purchase of shares in joint stock company—In case of ordinary member of public contract is complete when notice of allotment of shares has been communicated to applicant—In case of director, director's application for shares completes the bargain. (Vol 16) 1929 Lah 656 (656).

[9] Passing of a resolution by the Court of Wards

regarding the acceptance of a compromise in a confidential proceeding does not amount to communication of it. (Vol 28) 1941 Oudh 529 (542).

Section 5 — Note 1

[1] A person bidding at an auction only states an offer. He does not conclude a contract. Until the bid is accepted by the falling of the hammer, it can be withdrawn. (Vol 9) 1922 Mad 486 (491) : 45 Mad 799 (DB) * (1913) 18 Cal L Jour 53 (56) (DB) * (1891) 14 Mad 235 (236) (DB) (Court sale.)

[2] *Revocation of contract* : Revocation or modification of contract requires concurrence of both parties. (Vol 12) 1925 P C 232 (232) (PC).

[3] *Revocation of offers* : — Where the plaintiffs offer that, if defendant stood on oath, with 'gangajali' in his hand, the suit might be disposed of in accordance with his evidence, and the offer was accepted, then and there, and the acceptance was communicated to the plaintiffs agent, the acceptance is complete against the plaintiffs and the plaintiffs cannot revoke it the next day even though the oath was not actually taken. (Vol 20) 1933 All 463 (464) : 55 All 298.

[4] *Standing offer* : — In the absence of consideration for the promise to keep the offer open for a time, the promise is a *nudum pactum*. Proposal by A to sell indigo to B allowing 8 days time for the acceptance of proposal—No consideration to keep the offer open — A may revoke proposal before expiry of 8 days. (1892) 2 Mad L Jour 67 (63, 64) (DB).

[5] Declaration or statement as to proposed amicable settlement between parties, is only an undertaking which, unless completed, can be broken off at any time by either side. (Vol 2) 1915 Bom 93 (95) : 39 Bom 528 (DB).

Section 6 — Note 1

[1] If the proposer revokes his offer before its acceptance, then S. 6 (1), Contract Act, applies. Even if he does not revoke, S. 6 (2) applies unless, of course, the

- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance ;
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

7. In order to convert a proposal into a promise, the acceptance must —

- (1) be absolute and unqualified ;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but, if he fails to do so, he accepts the acceptance.

Section 6 (contd.)

proposer's conduct amounts to a waiver of the revocation which would follow on the lapse of a reasonable time. (Vol 26) 1939 Nag 225 (226) : ILR (1941) Nag 567.

[2] Where application for shares of a company was made in March and July 1933 and December 1934, but there was no allotment of shares till August 1935, no notice of allotment being given to proposer till then, and there was nothing in the conduct of the applicant amounting to waiver of revocation, *held* that S. 6 (2) applied and the proposals must be deemed to have been revoked. (Vol 26) 1939 Nag 225 (226) : I L R (1941) Nag 567.

SECTION 7 — Synopsis

1. Acceptance must be unconditional.
2. Acceptance with variation.
3. Counter proposal.
4. Manner of acceptance (S. 7 (2)).

1. Acceptance must be unconditional. — [1] Section 7 lays down that in order to convert a proposal into a promise the acceptance must be absolute and unqualified. Until there is such an acceptance the stage of negotiations has not been passed and no legal obligation is imposed. (1900) 24 Bom 510 (523) (DB) & (1904) 28 Bom 420 (425) (DB) & (Vol 18) 1931 Lah 260 (263) (DB). (*Held* that the printed forms which plaintiffs sent to defendants could hardly be styled acceptance of offers so as to bind the parties.)

[2] The acceptance must be unconditional and unqualified. When once a proposal is practically refused it does not hold good and no acceptance after the refusal could convert the proposal to a promise so as to create a contract. (Vol. 9) 1922 Pat 24 (26, 27) (DB).

[3] The acceptance of a proposal must be absolute and unqualified and a person making the proposal cannot impose on the party to whom it is addressed the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal results that he must be deemed to have accepted it. (Vol 6) 1919 All 7 (8) : 42 All 187 & (1900) 24 Bom 510 (523) (DB).

[4] An acceptance which leaves one of the conditions essential to the implementing of the acceptance to the discretion of a third person is not an unqualified acceptance and fails as an acceptance. (Vol 28) 1941 Oudh 529 (543).

[5] When an order for goods is accepted "subject to confirmation by mail" the acceptance is conditional and the contract cannot be said to have been complete on the date of such acceptance. (Vol 17) 1930 Lah 325 (326) (DB) & (Vol 17) 1930 Lah 114 (115) (DB).

[6] Where the plaintiff accepts the offer of the defendant to sell, but seeks to add a further term, which the

defendant refused to consider, at the same time repeating the offer, which he had previously made, and the plaintiff accepts the offer, the transaction of contract of sale is complete and binding on the defendant. (Vol 25) 1938 Cal 343 (346).

[7] Where A, intending to insure his motor-car supplied the particulars to the Insurance Company in a printed form, and the company issued a policy containing a condition, that no insurance shall be held to be effected until premium thereon was paid in full, and accepted, and the defendant failed to pay the premium, it was held, in the suit by the company to recover the premium, that, there being no absolute and unqualified acceptance by the company of the proposal for insurance, there was no completed contract until actual payment of the premium. Therefore A was not liable to pay the premium. The handing over of the policy to A did not amount to waiver of the condition in the policy. (Vol 15) 1928 Bom 260 (262, 263, 264) : 52 Bom 532 (DB).

[8] The defendants ordered from plaintiffs Belgian cotton coatings by means of two indents. Plaintiffs replied on printed forms which read as follows :

"We beg to record as at foot on your Indent No. . . . confirmed by you on . . . has been duly placed which we communicate without engagement of any kind". It was held that the printed forms could hardly be styled acceptance of offers so as to bind the parties. (Vol 18) 1931 Lah 260 (263) (DB).

[9] On an order from a firm, following letter was sent: "We have the pleasure to accept your under-mentioned order subject to confirmation by mail. If you do not hear from us to the contrary within four weeks from to-day, the order should be considered as finally placed. Please note that if full particulars as to assortment, heading, stamping or ticketing, etc., are not given to us before 3rd September we shall hold you responsible for all consequences." *Held* that there was an absolute and unconditional acceptance. (Vol 17) 1930 Lah 374 (376) (DB).

[10] Insurance (Burglary) — Proposal and payment of premium—"Cover note" intimating risk insured and that policy would be issued in 30 days—Policy not issued—Occurrence of theft—Cover note implies acceptance—Acceptance is absolute and unequivocal — The fact that the policy did not arrive before the burglary actually took place cannot be relied upon by the company as the acceptance of the proposal was complete. (Vol 21) 1934 All 298 (300) : 56 All 726 (DB).

[11] An engineer was offered a job on Rs. 300 by a company. The engineer demanded Rs. 400. The company wired "Agree 400 without conveyance to act as engineer and manager. Please join duty immediately." The engineer accepted wiring back "shall arrive Madura, Friday 1st February awaiting detailed letter."

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance by performing conditions, or receiving consideration. acceptance of the proposal.

Section 7 (contd.)

Held that, the last telegram was a complete acceptance. Ordinarily a phrase like "awaiting detailed letter" might mean that acceptance was not intended to be final until the details were known; but correspondence of each case must be construed with reference to the surrounding circumstances. (Vol 17) 1930 Mad 654 (655, 656) (DB).

[12] Defendant advertised a horse for sale. Plaintiff answered the advertisement. Further in course of correspondence which took place before closing of bargain the defendant warranted soundness of the animal and the plaintiff agreed to purchase it if veterinary certificate was produced. Upon delivery the horse was found to be diseased: *Held* that S. 7 did not apply as the acceptance was complete as soon as the advertisement was answered. Further negotiations previous to the closing of bargain did not operate as waiver of warranty as to soundness of the animal. (1912) 9 All L Jour 285 (287) (DB).

2. Acceptance with variation.—[1] Where offer by the buyer to seller for purchase of certain shares was sent by telegram and in the course of transmission the word "profit" got added, it was held that so far as the seller was concerned it was an acceptance of the offer he actually received by telegram and he was not liable to the buyer. (1910) 10 Mad W N 513 (514).

See also Note 3.

3. Counter proposal. — [1] An acceptance with a variation is no acceptance. It is simply a counter proposal which must be accepted by the original promisor before a contract is made. (1900) 24 Bom 510 (523) (DB) & (Vol 1) 1914 Lah 436 (438): 1913 Pun Re No. 92 (DB) & (1908) 2 Sind L R 7 (8, 9) (DB) & (Vol 17) 1930 Lah 374 (375) (DB) & (Vol 4) 1917 Mad 13 (14) (DB).

[2] Defendant entered into contract with plaintiff for supply of cotton which would meet with plaintiff's approval. The contract was embodied in bought and sold notes. There was a slight variation in the notes. The bought notes contained the words "G. S. R.", representing a particular kind of cotton, which were not on the sold note. *Held* that the letters did not constitute such a variation so as to affect the validity of the contract. (1908) 2 Sind L R 7 (8, 9) (DB).

[3] A counter offer amounts to a rejection of the original offer. (Vol 17) 1930 Lah 374 (375) (DB) & (Vol 25) 1938 Lah 341 (344) (DB).

[4] The plaintiff while accepting the defendant's offer of a lease made a counter proposal for insertion of a clause in the real note providing for a renewal of lease for another five years. The defendant's estate manager replied "I am making necessary arrangements." It was held that the counter offer was not accepted. (Vol 8) 1921 Bom 200 (201): 45 Bom 8 (DB).

4. Manner of acceptance (S. 7 (2)). — [1] A correct interpretation of Ss. 7, 8 and 9 does not import into Indian law the English law as to acceptance by conduct. On a proper interpretation of the sections there are only three cases in which acceptance can be made otherwise than in words. One is when the promisor has specified a manner in which his proposal is to be accepted and that manner is not acceptance in words but acceptance otherwise than in words. A second is when acceptance is by performance of a condition of the proposal and the third is when acceptance of proposal is by the acceptance of any consideration offered for a reciprocal promise invited from the promisee. There is,

however, one further case in which there may be acceptance by conduct which is not covered by Ss. 7, 8 and 9. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly. (Vol 14) 1927 All 407 (409): 49 All 674 (DB).

[2] Manner prescribed cannot be mere silence. Assent must be by express words or positive conduct. No duty is cast by the law upon the person to whom an offer is made to reply to that offer. (Vol 14) 1927 All 407 (410): 49 All 674 (DB).

[3] Failure to reply to a counter proposal would not *per se* amount to an acceptance. (Vol 17) 1930 Lah 374 (375) (DB) & (Vol 26) 1939 Cal 500 (501) & (Vol 4) 1917 Mad 13 (14) (DB). (It was doubted whether the omission to reply to a counter proposal which conveyed an intimation that silence would be regarded as an acceptance of it, would amount to an acceptance.)

[4] The acceptance of counter proposal need not be in words or writing. Subsequent conduct may amount to acceptance. (Vol 1) 1914 Lah 436 (438): 1913 Pun Re No. 92 (DB).

[5] Acceptance of a proposal may be made without express communication, by conduct of the acceptor. A written offer to take goods accompanied by a sum of money representing price is acceptance, if the purchaser credits money received to his account. (Vol 6) 1919 All 7 (8): 42 All 187.

[6] Where a letter makes offer for sale of property, directing that purchaser should write about acceptance to a certain person and the intending purchaser instead of so writing communicates directly with the seller, there is no contravention of S. 7, as to tender contract not binding on seller. (Vol 23) 1936 Cal 87 (91) (DB).

[7] Equitable mortgage.—Creditor in Bombay asking debtor outside Bombay to send title deeds by post—Post office becomes authorized agent of creditor to receive title-deeds. Transaction is complete under S. 7, as soon as debtor posts title deeds. (Vol 24) 1937 Bom 39 (41): I L R (1937) Bom 768.

[8] As to the acceptance of a proposal for composition made under S. 38, Provincial Insolvency Act, 1920, see under S. 38 of the Provincial Insolvency Act.

SECTION 8 — Note 1

[1] Where an aunt promised to purchase and settle property on her niece if she resided with her and after the purchase also wrote a letter to that effect whereupon the niece resided with her, the letter coupled with the conduct of niece constituted a binding contract, which was specifically enforceable. (Vol 3) 1916 P C 9 (13): 43 Ind App 138: 39 Mad 509 (P C).

[2] A surety asked the creditor by letter to advance money to the debtor to certain amount and made himself responsible for the amount. The letter did not contemplate any communication of acceptance. It was held that the advancement of money amounts to acceptance of the proposal and the contract of guarantee was complete. (Vol 15) 1928 Lah 938 (939).

[3] The tenant of *nanja* land raised *vanapayar* crops only. It was held that the presumption was that the *nanja* rates were payable by the tenant and not merely *vanapayar* rates. However, where there is no evidence beyond the fact that only the *vanapayar* rates were paid the inference is that only *vanapayar* rates were payable under the agreement. (1912) 16 Ind Cas 609 (610) (Mad).

9. In so far as the proposal or acceptance of any promise is made in words, the promise is *Promises, express and implied.* said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

10. All agreements are contracts if they are made by the free consent of parties competent *What agreements are contracts.* to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing^a or in the presence of witnesses, or any law relating to the registration of documents.

[a] See *e. g.*, S. 25 *infra*; the Indian Copyright Act, 1914 (3 [III] of 1914), First Schedule, S. 5; the Apprentices Act, 1850 (19 [XIX] of 1850), S. 8; the Conveyance of Land Act, 1854 (31 [XXXI] of 1854), Ss. 14 and 18; the Carriers Act, 1865 (3 [III] of 1865), Ss. 6 and 7; the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), S. 24. (Collection of Statutes Relating to India, Vol II); the Imperial Bank of India Act, 1920, (47 [XLVII] of 1920), S. 21; the Indian Companies Act, 1913 (7 [VII] of 1913), Ss. 5, 19, 35 and 88.

SECTION 9 — Note 1

[1] Sections 7, 8, 9 lay down cases in which acceptance may be made otherwise than in words. In addition to that there may be acceptance by conduct which is not covered by these sections. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly. (Vol 14) 1927 All 407 (409) : 49 All 674 (DB).

[2] When the parties act, to the knowledge of the proposer upon a proposal, the objection that the contract was inchoate or incomplete is not maintainable. After such actings *locus penitentie* or the power to resile from the agreement is barred by *rei interventie* which raises a personal exception excluding the plea of *locus penitentie*. (Vol 3) 1916 P. C. 9 (13) : 43 Ind. App. 138 : 39 Mad 509 (P C).

[3] The principle of *quantum meruit* is applied by assuming implied contract when for some technical reason a contract is held to be invalid. The principle has no application to a case where by the terms of contract, a person agrees that he is not entitled to any remuneration unless the work has been checkmeasured. Consequently he cannot claim for any work that has not been checkmeasured. (Vol 28) 1941 Mad 887 (888).

[4] A covenant to repay must be implied in every transaction of loan. (Vol 21) 1934 Pat 433 (435).

[5] A contract may be of a mixed character, that is partly expressed in words and partly implied from acts of parties and circumstances. (Vol 29) 1942 Lah 47 (49) : 1 L R (1943) Lah 28 (DB).

[6] Contract whether implied or express gives an equal cause of action. (Vol 12) 1925 Lah 174 (174).

[7] Implied contracts are as much binding as express contracts on parties. (1912) 16 Ind Cas 609 (609) (DB) (Mad).

[8] Where defendant not only accepts liability without demur but sends goods to discharge the liability the defendant is personally liable for losses on constituent consignments. (Vol 23) 1935 P C 154 (157) (PC).

[9] An implied contract to pay compound interest may be implied from long course of dealings between parties. (Vol 7) 1920 P C 61 (62, 63) : 47 Ind App 17 : 44 Bom 474 (P C).

[10] Unless there is a mercantile usage, no interest can be imported into a contract containing no stipulation to that effect either under Hindu or English law. (1863) 9 Moo Ind App 256 (267) (PC).

[11] In cases where the relationship of principal and agent subsists agent's claim for extra remuneration on

implied contract is enforceable. (Vol 2) 1915 Mad 931 (933) (DB).

[12] Under an award made on reference to arbitration regarding disputes between A and B, C as surety of A paid the amount found due to B. On reference being discovered to be void C filed a suit against A for the recovery of amount. Held that there was an implied contract between C and A for reimbursement of the amount paid and therefore the suit was maintainable. (Vol 26) 1939 Lah 187 (188).

SECTION 10 — Synopsis

1. Construction of contracts

2. Contracts required to be in writing : See under Note 4.

3. Evidence to establish contract.

4. Formalities.

5. Consent.

1. Construction of contracts. — [1] While construing a written contract, the Court will be erring in approaching the question of what formed the subject-matter of the negotiations which preceded the written contract between the parties, without first settling to what extent the contract was so ambiguous as to justify resort to evidence as to negotiations. (Vol 33) 1946 P C 50 (50) (P C).

[2] Contracts should be interpreted by themselves, and it is improper to interpret one contract by reference to another because they may seem to differ very little, as it may result in identifying contracts which are wholly different. (Vol 3) 1916 Cal 548 (550) : 42 Cal 1050 (D B).

[3] Where in a contract there exists an apparent inconsistency according to the literal construction of the words used, and if by any other reasonably possible construction that inconsistency can be reconciled, that construction should be adopted. But the Court should not speculate as to reasons for the language used. (Vol 27) 1940 P C 151 (152) : 1 L R (1940) Kar (PC) 361 (PC).

[4] To find true meaning of contracts the surrounding circumstances must be considered. (Vol 23) 1936 Rang 319 (321) : 14 Rang 347 (D B).

[5] A preliminary written contract is entirely governed by the subsequent deed, where there is any difference between them. (Vol 25) 1938 Mad 81 (82).

[6] Option for renewal of the contract or the terms to be agreed upon, does not imply that the terms of the prior contract should be incorporated into the new one. There is no binding to renew on the old terms. (Vol 26) 1939 Rang 423 (424) (D B).

[7] Deed of transfer of land excepting therefrom "all coal and other minerals"—Held on construction that all other minerals including petroleum and natural

Section 10 (*contd.*)

gas, were excepted. ('88) 173 Ind Cas 88 (89) (P C).

[8] Contract to re-sell in a sale-deed—*Held* on construction, that there was not merely a standing offer to re-sell, but there was a completed contract to re-sell and purchase on the date of sale-deed. (Vol 20) 1933 Mad 322 (323) : 56 Mad 433 (F B).

[9] Contracts effected in different markets for different quantities with different delivery dates, evidenced by separate memoranda, are in law distinct one from the other, and the liabilities in respect of each are separate. (Vol 28) 1941 Bom 211 (219) : I L R (1941) Bom 441.

[10] Where each part of the contract is an inducement to every other part of it, there is an entire contract for a single consideration and there is no warrant to divide the contract into distinct parts. (Vol 25) 1938 Mad 982 (992) (D B).

[11] Where the printed terms of a contract are inconsistent with what has been written or typed in, the latter must prevail. (Vol 30) 1943 Bom-229 (236) * (Vol 4) 1917 Bom 246 (248).

Printed and written or typed provisions—Inconsistency between—If the type-written and printed portion of a contract can be read together, effect must be given to all the provisions but if the printed portion cannot be reconciled with the type written portion, the latter must prevail : (Vol 29) 1942 Mad 189 (141) : I L R (1942) Mad 33 (D B).

[12] Where there is inconsistency between the printed and the written provisions, print cannot be discarded but the real meaning is to be discovered from the printed as well as from written words. (1906) 30 Bom 1 (14) (D B).

[13] An illustration can in no event override an express provision in the contract. ('46) 1946 Nag L Jour 128 (136)

2. Contracts required to be in writing : See under Note 4.

3. Evidence to establish contract. — [1] As to the exclusion of oral by documentary evidence, see also Chapter VI of the Evidence Act, 1 [I] of 1872.

[2] Oral evidence is admissible to show that document executed by a person was never intended to operate as an agreement but was brought into existence solely for creating evidence of some other matter. (Vol 23) 1936 P O 70 (74) : 63 Ind App 126 : 59 Mad 446 (P C) (Ss. 91 and 92, Evidence Act, considered)

[3] Absence of oral evidence is not enough to defeat agreement to pay the amount due. The conduct of a party coupled with a chitti acknowledging the amount is sufficient to prove the agreement to pay the amount found due from him on that date. (Vol 31) 1944 Nag 124 (126) : I L R (1944) Nag 101 (D B).

[4] Oral agreements require clearest and most satisfactory evidence. ('41) 43 P L R 97 (103) (D B).

[5] In a suit to recover goods contracted to be sold a mercantile custom contradicting the written contract which will have the effect of entitling the vendor to require the purchaser to accept that which was not in accordance with the description stipulated for cannot be pleaded. But evidence of custom not inconsistent with the contract can be admitted. (Vol 3) 1916 Bom 4 (7) : 41 Bom 518 (D B).

[6] Entry by broker in noon of each contracting party embodying terms of contract signed by broker is intended to be written evidence of the fact that a contract has been made. (1912) 6 Sind L R 278 (283).

[7] The negotiation and correspondence must be looked at as a whole to see whether the parties have concluded a binding contract or not. Where only certain terms of the contract were settled and the others left open, there is no concluded contract. (Vol 26) 1939 Rang 428 (428) (D B).

[8] The true effect of an unambiguous contract cannot be changed by the course of conduct adopted by parties to it in its performance. Such conduct in certain events raises an inference that the parties have agreed to modify the original contract and may in special cases along with other evidence support a claim for rectification. (Vol 25) 1938 P C 26 (29) (P C).

[9] A by letter offered to purchase certain goods from B on condition of payment of advance. B replied 'I shall reduce all terms to writing and receive advance.' The same day A gave the advance to B who gave a receipt crediting it towards advance stipulated by A to be paid by A. *Held* there was completed contract and reduction to writing was merely incidental contract. (1911) 21 Mad L Jour 182 (184, 186) (DB).

[10] *Intention to have formal document, whether postpones contract.*—Where the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or form of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. (Vol 20) 1933 P C 29 (31) : 60 Cal 980 : 60 Ind App 297 (P C) * (Vol 33) 1946 Bom 149 (153) (DB) * (Vol 29) 1942 Pesh 33 (34, 35) (DB).

[11] Whether intention to have formal document drawn up, postpones formation of contract, depends on circumstances of each case (Vol 23) 1936 Mad 752 (755).

[12] Where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed the real completed contract is to be formed in the deed. The contract is merged in the deed. (1938) 173 Ind Cas 88 (90) (P C) * (Vol 32) 1945 Lah 35 (40) : ILR (1944) Lah 578 (DB).

4. Formalities. — [1] Formalities laid down by law must be gone through in order to create binding contract and to attach liability. (Vol 17) 1930 All 118 (120) (DB).

[2] Contract in writing does not require signature of both parties. (Vol 3) 1916 Cal 771 (773) (DB).

[3] A contract to pay does not require a writing. (Vol 31) 1944 Nag 124 (126) : ILR (1944) Nag 101 (DB).

[4] Where parties had entered upon their duties the execution of a formal document is not necessary. (Vol 29) 1942 Pesh 33 (34, 35) (DB).

[5] A party acting upon a contract required by law to be executed in a particular manner cannot sue for breach of such contract. (Vol 24) 1937 Rang 378 (380).

[6] A deed of assignment which is not registered being in contravention of the Punjab Land Alienation Act, can be used as a basis of a claim for the return of the money acknowledged to be due thereon. (Vol 19) 1932 Lah 400 (400).

[7] Where proposal to lease and its acceptance are in writing, they constitute a contract in writing. But if the acceptance were not in writing there is no entire agreement in writing and so, the contract to lease is not in writing (Vol 25) 1938 Cal 136 (138) : I L R (1938) 1 Cal 563 (DB).

Contracts by Government officers.—[8] In Government contracts the proper procedure should be, that after an agreement is reached, a memorandum should be contemporaneously prepared and signed by the parties to be followed later on by a formal document. (Vol 28) 1941 All 377 (384, 385) : ILR (1941) All 741 (DB).

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject,^a and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

[a] See the Indian Majority Act, 1875 [9 [IX] of 1875].

Section 10 (contd.)

[9] For contracts "required to be made in writing," see the following provisions :

Section 25 (4) and (3) and S. 28, Exception 2 of Contract Act.

Section 8 of the Apprentices Act, XIX of 1850;

Section 21 of the Imperial Bank of India Act, XLVII of 1920;

Sections 9, 10 and 88 of the Indian Companies Act;

Sections 14 and 18 of Conveyance of Land Act, XXXI of 1854;

Schedule 1, Section 5 (2) of the Indian Copyright Act, III of 1914;

Sections 6 and 7 of the Carriers Act, III of 1865;

Sections 54, 59 and 107 of the Transfer of Property Act, 1882;

Section 5 of the Indian Trust Act.

Acknowledgments to save limitation are also required to be in writing by S. 19 of the Limitation Act, 1908.

5. Consent.—[1] If a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. There is no real agreement between the parties. (Vol 23) 1936 P C 70 (74) : 63 Ind App 126 : 59 Mad 446 (PC) (1890) 17 Cal 291 (297) : 16 Ind App 233 (P C).

[2] Persons signing a printed form of contract without studying its terms is bound thereby. (1938) 40 P L R 701 (705).

[3] Persons having attained majority executing deed of sale—No evidence that they were wrongly induced so to act—Ample consideration existing—Contract is binding. (Vol 26) 1939 P C 219 (221) (PC).

[4] As to what is free consent, see S. 14.

SECTION 11—Synopsis

1. Scope.
2. Contract by minor.
3. Transfer in favour of minor.
4. Powers of guardian.
5. Estoppel.
6. "Law to which he is subject."
7. Burden of proof.
8. Personal disqualifications.
9. "Of sound mind."
10. Ratification.
11. Restitution.
12. Minor and adult.
13. "Person."

1. Scope.—[1] Section 37 of the Court of Wards Act, has to be read with Ss. 11 and 68 of the Contract Act. (Vol 30) 1943 Oudh 119 (121) : 18 Luck 318.

[2] Section 11 does not destroy force of S. 247 (now S. 30 of the Partnership Act). (1910) 34 Bom 72 (88) (DB).

[3] Bond executed by Mahomedan before Majority Act (IX of 1875) came into force—His capacity to contract in point of age under S. 11 should be determined under Mahomedan law and not under Bengal Minors Act (XL of 1858). (1885) 7 All 763 (765) (DB).

2. Contract by minor.—[1] A contract by a minor is void *ab initio* and not merely voidable and hence cannot be sued upon. (Vol 6) 1919 P C 129 (132) (PC). (30 Cal 539 : 30 Ind App 114 (PC) followed.) (Vol 28) 1941 Nag 105 (106) : I L R (1942) Nag 281 (DB) (Vol 23) 1936 Nag 15 (16) : 31 Nag L R (Sup) 62 (DB). (Question whether contract is void or voidable presupposes existence of contract—It cannot arise if

contracting party is disqualified by law.) (Vol 18) 1931 Lah 394 (395) (DB). (Sale.) (Vol 16) 1929 Lah 880 (881) : 11 Lah 167 (DB). (Mortgage.) (Vol 15) 1928 P C 152 (156) (PC) (Vol 11) 1924 Rang 288 (289). (Lease.) (Vol 3) 1916 Low Bur 29 (29) (Vol 2) 1915 All 107 (109). (Sale.) (Vol 2) 1915 Mad 412 (413) : 37 Mad 390 (DB) (1904) 26 All 342 (342) (DB). (Mortgage.)

[2] A consent decree against a minor stands on no higher footing than a contract and cannot be given effect to by a Court of law. (Vol 14) 1927 Pat 271 (279, 280) : 6 Pat. 388 (DB).

[3] A contract by a minor is void and has no existence in the eye of law. It entails no liability and cannot constitute a valid consideration for a subsequent contract. (Vol 14) 1927 Lah 24 (25, 26) (D B).

[4] A person whose estate is under Court of Wards is in no better position than a minor and any contract made by him is void. But when he contracts a debt, though he is not liable for it and it cannot be enforced against him still a debt comes into existence and if his son renders himself liable for repayment of the same by the execution of a bond, the bond can be enforced against him. (Vol 5) 1918 Lah 109 (110) (D B).

[5] A minor cannot become a partner in his own right as he is incapable of contracting under S. 11 and hence he cannot sue as a partner for dissolution of the partnership. (Vol 4) 1917 Mad 63 (64) (D B).

[6] A minor may bind himself by a contract of apprenticeship, if it be for his benefit but he cannot be sued for failing to serve as such. If such a remedy is desired a covenant from guardian must be obtained on which guardian himself can be made liable. (1910) 33 Mad 288 (290) : 11 Cri L Jour 180.

[7] Contract with minor does not create legal contractual relationship between the parties. Minor girl entering into a contract of service with a person can leave the service at any time without committing any actionable wrong. (Vol 26) 1939 Rang 266 (268, 270) : 1939 Rang L R 121.

3. Transfer in favour of minor.—[1] An agreement as defined in S. 2 (e) does not necessarily consist of a set of promises forming the consideration for each other. If the consideration for the promise of an adult be a reciprocal promise by the minor the agreement is void but if the consideration for it be something that is actually done, there is no reason why the result should not be a valid contract. (Vol 23) 1936 Pat 153 (157) (D B).

[2] A minor can enforce a contract made in his favour for a valuable consideration as while no liability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable. (Vol 14) 1927 Lah 24 (27) (D B).

[3] An executory contract cannot be entered into by a minor. But a minor is not disqualified as such from being the transferee of immovable property as purchaser or mortgagee under an executed contract. (Vol 12) 1925 Oudh 37 (38, 39) : 27 Oudh Cas 214 (Vol 32) 1945 All 156 (157) : I L R (1945) All 204 (DB). (Sale.) (Vol 23) 1936 Pat 153 (157) (D B). (Minor who has paid consideration of mortgage at time of execution of mortgage deed can sue on his mortgage.) (Vol 15) 1928 All 102 (103) (D B). (Mortgage.) (Vol 11) 1924 Lah 611 (612, 613) : 5 Lah 317 (D B). (Sale.) (Vol 9) 1922 Nag 239 (241). (Sale.) (Vol 6) 1919 Pat 561 (563) : 4 Pat L Jour 682 (D B). (Mortgage.) (Vol 5) 1918 Cal 1027 (1028) (D B). (Mortgage.) (Vol 4) 1917 Lah 109 (109) (Sale.)

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§ (Vol 4) 1917 Mad 630 (640) : 40 Mad 308 (F B) (Overruling 33 Mad 312.) § (Vol 3) 1916 Low Bur 91 (92, 93). (Sale.) § (Vol 2) 1915 Oudh 155 (157) : 18 Oudh Cas 115 (D B). (Sale.) § (1913) 18 Ind Cas 451 (451) (D B) (Cal) (Sale).

[4] Sale of his own property by certificated guardian to minors in satisfaction of money which he owed to them—Transaction bona fide and for benefit of minors—Transfer held valid and could be enforced. (1911) 33 All 657 (658).

[5] A money bond executed in favour of a minor is good in law and may be sued upon. (1889) 13 Bom 50 (51) (D B).

[6] A pronote executed in favour of a minor is valid and can be sued upon when the minor did not subject himself to any detriment by accepting it. (1913) 24 Mad L Jour 363 (364) § (Vol 11) 1924 Rang 136 (136) : 2 Rang 1.

[7] Where the defendants have received goods from the minor plaintiff there is no reason why they should not pay the price. (Vol 21) 1934 Lah 480 (480) : 16 Lah 1.

[8] A lease in a minor's favour imposing a liability on him is null and void. (Vol 5) 1918 Pat 626 (627) : 3 Pat L Jour 518 (D B).

4. Powers of guardian. —[1] Minors themselves are incapable of contracting but their guardians can contract on their behalf. (Vol 26) 1939 Nag 301 (301).

[2] Where contracting party is a minor represented by a guardian and the contract is clearly for benefit of minor and was made at the request of the guardian for benefit of minor, it binds minor. (Vol 10) 1923 All 17 (17).

[3] Contract by karta on behalf of Hindu joint family including minor—Minor can sue on it on attaining majority—Want of mutuality is no ground for dismissal—This is to be distinguished from minor's contract. (Vol 24) 1937 Mad 869 (870).

[4] A minor may not be answerable for the fraud of his guardian, but he cannot take advantage of it. (Vol 8) 1921 Low Bur 63 (66) : 11 Low Bur Rul 83 (D B).

[5] Where a manager of the Court of Wards confirms a lease during the minority of the ward, the confirmation is sufficient to make the lease valid during his minority. (1902) 6 Cal W N 905 (908) (D B).

[6] A certificated guardian sold some property belonging to himself to his minor wards in lieu of their money in his hands. After guardian's death, minors sued his heirs for possession of property. Held that transfer in favour of plaintiffs was valid. (1911) 33 All 657 (659, 660).

[7] A *de facto* guardian asserting a title hostile to the minor cannot bind the minor by a settlement arrived at by him which deprives the minor of half of his property. (Vol 22) 1935 Lah 382 (383) (D B).

[8] The mortgage of minor's property by an unauthorised person acting as his guardian is absolutely void, but the minor cannot recover it without making restitution of the advantage received by him or make due compensation. (1908) 11 Oudh Cas 1 (13) (DB).

[9] Where some of the parties to an agreement to refer to arbitration are minors represented by their mother and the other party to the agreement enters into it under a misconception as to the authority of the minor's mother to enter into the agreement he is entitled to withdraw from the agreement, when it is found that the mother has no authority to enter into such agreement. (Vol 8) 1921 Cal 818 (819) : 47 Cal 718 (DB).

[10] No contractual obligation is undertaken by a minor in a case, in which a contract is entered into

with his father and guardian. Any personal liability arising from the contract would have to be discharged by the guardian. (Vol 3) 1916 All 366 (369) : 38 All 154 (DB).

[11] In case of purchase by a guardian with a covenant to pay, the minor's property can be proceeded against for the debt due under the personal covenant. The minor cannot approbate the bargain by retaining the property and reprobate it by the plea that the guardian had no authority to acquire it by making a promise on his behalf to pay the cash consideration so as to bind him. (Vol 18) 1931 Mad 140 (143, 144) : 54 Mad 163 (DB).

[12] A trust may validly be created by purchasing property in the name of a minor. If a minor is not a contracting party but a beneficiary under a sale, the transaction will be upheld. When a contract by a minor is not a necessary condition for upholding the rights of the minor in the property his rights should be maintained but when it is a necessary condition preliminary to the transaction or contractual obligations flow from the transaction the transaction is void. (1913) 24 Mad. L Jour 352 (354) (DB) § (Vol 2) 1915 Mad 412 (414) : 37 Mad 390 (DB). (Purchase of property for benefit of minor by his maternal uncle is valid and if property is alienated by his father, minor can recover it.)

[13] Sale by guardian appointed under Guardians and Wards Act (1890) with permission of Court transfers a good title to the vendee. Unless Court's permission is obtained by fraud, such sale cannot be impeached on any ground. (Vol 6) 1919 Lah 391 (392) : 1919 Pun Re No. 73 (DB).

[14] Specific performance cannot be obtained of contract made on behalf of minor by his guardian, where such contract could not be enforced against the minor or his property. (Vol 4) 1917 Nag 213 (213) : 13 Nag L R 98 § (Vol 7) 1920 Mad 423 (423) (DB) § (Vol 5) 1918 Nag 110 (111) § (1912) 39 Cal 232 (237) : 39 Ind App 1 (PC).

[15] Guardian selling minor's land for Rs. 600—Rs. 400 utilised in paying off debt found binding on minor—Preponderance of purchase money being for binding purpose sale, held, binding as a whole. (Vol 20) 1933 Mad 352 (353).

[16] A purchaser of property of minor from guardian in good faith need not prove that the whole consideration was devoted to purposes of family necessity. It is sufficient if he shows that he acted in good faith and that the consideration was needed for purposes of family. The mere fact that the guardian got the favourable bargain is not sufficient to justify a sale of minor's property. (Vol 18) 1931 Bom 157 (160).

[17] Sale of minor's property by *de facto* guardian for minor's necessities is valid. (Vol 3) 1916 Low Bur 91 (93).

[18] Contract of lease entered into on behalf of minor—Minor after attaining majority can complete transaction of lease and sue to enforce it. (Vol 24) 1937 Sind 310 (311) : 31 Sind L R 502 (DB) § (Vol 23) 1936 Mad 564 (566) : 59 Mad 942 (DB).

[19] Where Hindu mother purchased certain immovable property in her name with funds belonging to her major and two minor sons. *Held*, sale was not void, it being in favour of minors. (Vol 1) 1914 Mad 666 (667) (DB). (30 Cal 539 and 4 Ind Cas 383, Disting.)

[20] A sale of minor's property by his brother, who is neither his legal nor natural guardian, under minor's personal law, is void *ab initio*, but can be upheld on ground of its being for necessities of the minor. ('04) 1904 Pun Re No. 33, page 114 (116).

[21] No doubt a compromise, in good faith, by the manager or father of a joint Hindu family, cannot be disturbed by the minor member of the family as he

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must be taken to have been properly represented by the manager or the father. But the compromise by minors, settling dispute as to inheritance between themselves, and their father's collaterals, is not binding on minors. It cannot be upheld even on ground of a family settlement because, a party cannot by describing a contract as a family settlement claim for it an exemption from the law governing the capacity of a person to make a valid contract. (Vol 25) 1938 P C 181 (182, 183) : 65 Ind App 213 : ILR (1938) Lah 313 : 32 Sind L R 760 (PC).

[22] Partition agreement between father and his minor children is not valid. (Vol 21) 1934 Rang 2 (4) (DB).

[23] Under the Mahomedan law the father, as guardian of his minor daughter, can grant a lease of the minor's property, if it be for minor's benefit. (Vol 28) 1936 Mad 564 (566) : 59 Mad 942 (DB)

[24] Minor can sue through guardian on a contract of insurance against fire entered into by his guardian in respect of his property. (Vol 22) 1935 Bom 353 (355) : 59 Bom 656.

[25] The sale of property by a father to his own son is invalid, if no one but the father himself acted for minor or settled the terms of contract on his behalf. But if father be presumed to have represented his minor son as his natural guardian and sale is without consideration, transaction is voidable under S. 53 of Transfer of Property Act. (1911) 10 Ind Cas 906 (906) (DB) (All).

[26] A contract by Hindu minor's mother to pay debts of minor's father, which the minor was under a pious obligation to pay, and for performance of funeral obsequies of the father, is binding on the minor. (Vol 20) 1933 Oudh 132 (133) (DB).

[27] Mother's agreement to compensate loss, on her minor daughter failing to fulfil contract of service, does not make daughter liable for loss. (Vol 25) 1938 Rang 359 (359) (DB).

[28] Where parties are Mahomedans, contracts of marriage made by minors, through guardians, are binding on the minors. (Vol 12) 1925 Cal 1255 (1256) (DB).

[29] Minor can maintain suit for damages for breach of contract of marriage entered into, on minor's behalf, by the minor's natural guardian. (Vol 12) 1925 Bom 97 (103) : 48 Bom 673 (DB) * (1909) 1909 Pun Re No. 3, p. 5 (5).

[But see (Vol 28) 1941 Rang 179 (180). (Contract of marriage between minor girl and major person with consent of minor's father — Minor cannot sue for damages for breach of promise—Father's consent does not make the contract any more valid)]

[30] A transaction, which is voidable at the instance of the minor, may be repudiated by an act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it. It is not necessary that he should bring a suit. (Vol 27) 1940 Cal 589 (591) * (Vol 25) 1938 Mad 822 (823) (DB) * (Vol 25) 1938 Pat 337 (349) : 17 Pat 460 (DB).

[31] A contract which is for the minor's benefit can be specifically enforced against him. When a valid agreement has been lawfully entered into, on behalf of a minor and for his benefit, it cannot be repudiated if the guardian subsequently finds he can make a better bargain elsewhere. (1912) 13 Ind Cas 673 (677) (DB).

5. Estoppel.—[1] Mere non-disclosure of minority is not misrepresentation or fraud. (Vol 24) 1937 Lah 598 (598).

[2] Where a minor enters into a contract by representing that he was of full age he is not estopped from pleading his minority in avoidance of the contract.

(Vol 15) 1928 P C 152 (156) (PC). (Deed executed by minor is nullity and incapable of founding a plea of estoppel) * (Vol 27) 1940 Nag 327 (328) : I L R (1940) Nag 632 * (Vol 20) 1933 Mad 94 (95) * (Vol 18) 1931 Bom 561 (569) : 55 Bom 741 (FB). (Overruling (Vol 10) 1923 Bom 169 : 46 Bom 137; 21 Bom 198 (DB) and (Vol 4) 1917 Bom 221 : 41 Bom 480 (DB).) * (Vol 17) 1930 Mad 945 (951, 954) : 54 Mad 112 (DB) * (Vol 16) 1929 Bom 201 (202) (DB).) * (Vol 15) 1928 Lah 609 (615) : 9 Lah 701 (FB). (Overruling (Vol 8) 1921 Lah 312 : 1 Lah 389 (DB) and 60 Ind Cas 267 (1) (Lah)) * (Vol 13) 1926 Nag 491 (492) * (Vol 7) 1920 Bom 269 (269) : 44 Bom 175 (DB) * (1911) 8 All L Jour 1058 (1058, 1059) (DB).

[3] Plaintiff suing on promote, executed by defendant representing himself to be major and contending that defendant was estopped from pleading minority—Held, that, before, any question of estoppel could arise, the plaintiff had to prove that, there was a valid contract and consequently the competency of the defendant to contract and as this could not be proved plaintiff's suit must fail. (1910) 4 Sind L R 250 (254, 255).

6. "Law to which he is subject."—[1] The capacity to contract will be determined by the law of domicile. The domicile of a widow is the same as that of her husband, unless she has changed it after his death. (1895) 19 Bom 697 (700) (DB).

[2] As to ordinary mercantile contracts, the capacity to contract is determined by the place of the contract and not by the law of domicile of the promisor. (Vol 20) 1933 Mad 756 (760, 761) : 57 Mad 398 (DB).

[3] The limitation of the Indian Majority Act, to persons domiciled in those parts of India, referred to in S. 1, excludes its application to European British subjects, not domiciled in British India. The contractual capacity of persons temporarily residing but not domiciled in British India, is left to be governed by the personal law of their personal domicile and such law in the case of European British Subjects is the common law of England which recognises 21 as the age of majority. (1885) 7 All 490 (500, 502) (FB).

[4] Under S. 3, Indian Majority Act, 1875, where a guardian is once appointed by Court, the minority continues till the minor's age is 21 years, and a contract entered into by the minor before he attained the age of 21 is void. (Vol 18) 1931 Lah 394 (395) (DB) * (Vol 7) 1920 Mad 661 (662).

[5] A Burman Buddhist, under the age of eighteen, is not competent to enter into a contract to marry in future. The Burmese Buddhist law has no application in such a case. Hence, breach of a promise to marry a Burmese Buddhist girl, under eighteen years, cannot be the basis of an action for damages. (Vol 26) 1939 Rang 86 (87, 88) : 1938 Rang L R 687 (DB).

7. Burden of proof.—[1] The burden of proving minority lies on the party, who alleges that he was a minor, at the date of the contract. (Vol 12) 1925 Oudh 487 (487) (DB). (Minority must be proved beyond reasonable doubt.) * (Vol 12) 1925 All 399 (399).

[2] Plaintiff suing to enforce a contract, entered into by minor, must establish, by *prima facie* evidence, that the contract is not invalid, and was entered into by a competent person. (1909) 6 All L Jour 693 (694) (DB).

[3] Ordinarily, the burden of proving that money was advanced to the minor for necessities, lies on the creditor. But, where a minor executes a promissory note, on attaining majority, for the debts contracted by his guardian for his necessities, the burden of proving that the debts were not contracted for his necessities is on him. (Vol 24) 1937 Nag 390 (391) : I L R (1937) Nag 453.

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8. Personal disqualifications. — [1] Judgment-debtor to whom Sch. II, Para 11, Civil P C, applies is person disqualified within the meaning of S. 11, and any transaction entered by him, in contravention thereof, is mere nullity. (Vol 4) 1917 Nag 215 (223, 224) : 13 Nag L R 130 (FB).

[2] English Barrister enrolled in Indian High Courts as an advocate, is under no disability to sue his client for professional services, done by acting and pleading for him. (Vol 20) 1933 All 417 (419) : 55 All 570 (FB). (25 All 509, overruled.)

[3] Ward of Court is not absolutely incapacitated from contracting, but the power of the ward is taken away, so far as regards all property, which comes under the control of the Court of Wards. (1882) 8 Cal 620 (629) (DB).

[4] Adult pardanashin women of sound mind are *sui juris* and must not be treated as though they were minors and were incapable through mental deficiency in conducting their own business. (Vol 33) 1946 All 127 (131) : 1 L R (1945) All 465 (DB).

9. "Of sound mind." — [1] Contract by lunatic is void. (1907) 17 Mad L Jour 78 (78) (DB).

[2] See also S 12.

10 Ratification. — [1] Minor's contract being void, *ab initio* cannot be ratified by the minor on attaining majority (Vol 14) 1927 All 242 (242) : 49 All 137 (DB) & (Vol 30) 1943 Bom 362 (364) & (41) 1941 Nag L Jour 363 (364) & (Vol 22) 1935 Lah 561 (565) : 16 Lah 546 (FB) & (Vol 18) 1931 Bom 178 (182) (DB) & (1930) 31 Pun L R 471 (472) & (Vol 6) 1919 Cal 875 (883) (DB).

[But see (Vol 21) 1934 Lah 218 (219). (Minor on attaining majority can ratify agreement entered into during minority.)]

[2] A person, after attaining majority, can elect to pay a debt, incurred by him, during minority. No question of ratification of a contract, entered into by a person, during minority, arises in such a case. If a person, on attaining majority, has paid the amount due on a mortgage, executed by him during minority he cannot subsequently sue for refund of that amount for the simple reason that, a contract entered into by a minor, though void, is not unlawful. (Vol 27) 1940 All 12 (14, 15) (DB). ((Vol 15) 1928 All 440 : 51 All 164 (FB), Distinguished.)

[3] Where a person executed a mortgage, after attaining majority, in consideration of the mortgagee paying off certain debts due to a third person, which the mortgagor had incurred during his minority the mortgage is not rendered invalid by any provisions of the Contract Act. Payment by the mortgagee, in such a case, is a perfectly good consideration within S. 2 (d). (Vol 20) 1933 All 659 (660) (DB). ((Vol 14) 1927 All 242 : 49 All 137 (DB) and (Vol 15) 1928 All 440 : 51 All 164 (FB), Distinguished.)

[4] Partnership with minor—Partnership continuing for ten years after majority—Firm dissolved by consent—Suit for accounts by co-partner for transactions after minor's majority, held, competent. (Vol 30) 1943 Bom 362 (365) ((Vol 18) 1931 Bom 178 (DB) and (Vol 15) 1928 All 440 : 51 All 164 (FB), Explained.)

[5] S an infant had a business in piece goods, in the course of which, he became indebted to K for a sum, the price of goods supplied to his business. After attaining majority, S executed a bond, by which he covenanted to pay, within one year, the above sum, as well as a further sum advanced to him, at the time of execution : Held, that there was new consideration for the promise, and S was liable for the whole amount. (1907) 11 Cal W N 135 (139).

[6] Where a minor, on attaining majority, approves of a mining lease of his land, granted by his guardians during his minority, and strikes his own bargain with the lessee by a patta, this patta and the *k-buhyat* executed by the parties, alone govern the rights of the parties and not the original agreement. (Vol 29) 1942 P C 1 (3) (PC).

[7] Agreement to sell, while under legal disability — Sale, after disability ceased, in pursuance of agreement — Agreement void, and subsequent sale cannot be enforced (Vol 15) 1928 All 112 (114) (DB).

11. Restitution. — [1] Where a minor, representing to be major, enters into a contract, the contract is void, and unenforceable against him. The minor cannot, in a suit against him on the contract be compelled under S. 65, or any equitable principle, to refund the money, received by him under the contract. (Vol 24) 1937 All 610 (618) : 1 L R (1937) All 860 (FB) & (Vol 28) 1941 Pesh 38 (40) (DB) & (Vol 11) 1924 Oudh 438 (441) : 28 Oudh Cas 34 (DB) & (Vol 21) 1934 Mad 560 (560) & (Vol 18) 1931 Cal 893 (896) : 58 Cal 224. (A mortgagee of the minor's property under a mortgage executed by the minor cannot recover the mortgage money from a purchaser of the property from the minor after he had attained majority as he could not have recovered the money from the minor himself.) & (1910) 32 All 25 (26) (DB).

[But see (Vol 15) 1928 Lah 609 (612) : 9 Lah 701 (FB). (Court may on equitable grounds order restitution of benefit received by quondam minor. & (Vol 23) 1936 Cal 567 (570) : 1 L R (1937) 1 Cal 283 (Do.) & (Vol 1) 1914 Mad 641 (642) : 38 Mad 1071 (DB). (Do.) & (Vol 16) 1929 Lah 880 (881) : 11 Lah 167 (DB). (Do.) & (Vol 21) 1934 Lah 304 (1) (304) (DB). (Vendee not using due diligence in ascertaining minor's age is not entitled to return of consideration in a suit by the vendee for declaration of his title to the property purchased.)]

[2] A contract by a minor is void. He cannot, in a suit to avoid such contract, be made to repay the moneys received under such contract, except, in the exercise of discretion under S. 41, Specific Relief Act. (1903) 30 Cal 539 (539, 540) : 30 Ind App 114 (PC).

[3] Where a minor enters into a transaction representing himself to be a minor, and then sues to set it aside he must restore the benefit received by him under the transaction before it can be set aside. (Vol 20) 1933 All 372 (373) (DB). (Suit to set aside sale — Affirming (Vol 20) 1933 All 371.) & (Vol 8) 1921 All 326 (327) (DB). (Suit for declaration that mortgage is void.) & (1909) 31 All 21 (21) (DB). (Suit to set aside sale.)

[4] Minor executing bond on obtaining cash consideration—No misrepresentation of age—Creditor bona fide believing him to be major—Minor can get bond cancelled only on returning money got as consideration. (Vol 9) 1922 Oudh 271 (273) : 25 Oudh Cas 287.

[5] Minor vendor representing himself to be major—Sale set aside—No compensation, held, could be awarded to purchaser as he made no proper enquiry as to minor's age, and was unscrupulous in his dealing. (Vol 11) 1924 All 156 (157) : 45 All 644 (DB).

[6] Sale by minor, without fraud or misrepresentation of his age — Vendee aware of vendor's minority—Sale set aside at instance of minor — Venise, held, not entitled to compensation. (Vol 24) 1937 Oudh 521 (523).

[7] Guardians and Wards Act (1890), S. 30—Mortgage of minor's property by guardian without Court's sanction—M nor, seeking to set aside mortgage, is liable to restore, what he has gained, as a consequence of it. (Vol 29) 1942 Nag 12 (14) : 1 L R (1942) Nag 161 (DB).

[8] Where an alienation by the guardian is not for necessity, the mere fact that the minor had benefited from subsequent events, following the alienation, does not impose an obligation on the minor to recoup the

12. A person is said to be of sound mind for the purpose of making a contract if, at the time *What is a sound mind for* when he makes it, he is capable of understanding it, and of forming a *the purposes of contracting.* rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk, that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

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benefit before getting the alienation set aside. (Vol 20) 1933 Lah 103 (104).

[9] See also S. 65, Contract Act, and S. 41, Specific Relief Act.

12. Minor and adult. — [1] A promissory note, executed by a minor, for himself and another person jointly, is void against both. (1909) 3 Ind Cas 403 (407) (All).

13. "Person." — [1] A subordinate Judge is a "person" and is capable of entering into a contract. Where a Court allows the application of the judgment-debtor for stay of execution, upon his furnishing security, the transaction cannot be regarded as a contract as it is not enforceable by law. (Vol 18) 1931 All 189 (191) : 52 All 844 (FB).

[But see (Vol 18) 1931 Oudh 99 (101, 102, 103) : 6 Luck 601 (SB). (Per *Wazir Hasan J.* — Order of Court directing respondent to be given possession of the property decreed in his favour on his furnishing security, amounts to a contract between him and the Court — *Shrivastava J.* dissenting.)]

SECTION 12—Synopsis

1. Unsoundness of mind.
2. Burden of proof and evidence.
3. Lucid intervals.

1. Unsoundness of mind. — [1] The test of unsoundness of mind is, whether the person is incapable of understanding the business concerned, and its implications, and mere weakness of mind is not sufficient. (Vol 31) 1944 Nag 232 (234) : ILR (1944) Nag 698* (Vol 19) 1932 PC 69 (72) (PC). (Mere loss of memory does not make a person unfit for the management of his own affair in his lifetime.) * (Vol 10) 1923 Pat 187 (192) (DB)* (Vol 14) 1927 Cal 889 (899) : 55 Cal 285 (DB).

[2] Idiocy is the most extreme form of mental unsoundness. (Vol 31) 1944 Nag 232 (233) : ILR (1944) Nag 698.

[3] A person of unsound mind, who has been so from birth, is in point of law an idiot. (1863) 1 Mad H C R 214 (215) (DB).

[4] If a party to a contract seeks to enforce a contract which is void under S. 12, it is not permissible to to give equitable relief. (1908) 10 Bom L R 1004 (1006, 1007).

2. Burden of proof and evidence. — [1] Normal presumption is in favour of sanity — Onus of proving insanity is on person who alleges it. (Vol 10) 1923 Pat 187 (192) (DB)* (Vol 28) 1941 Nag 251 (252) : I L R (1942) Nag 236 (DB)* (Vol 28) 1941 Oudh 529 (548).

[2] Old man suffering from senile dementia on certain date—Presumption is in favour of its continuance — Onus to uphold transactions subsequent to this date will be on persons who say that they were not vitiated on ground of his incapacity. (Vol 27) 1940 Mad 73 (74) (DB).

[3] Circumstances evincing insanity have to be considered together and not individually and their cumulative effect gauged. (Vol 28) 1941 Nag 251 (254) : ILR (1942) Nag 236 (DB).

[4] Plea of insanity—Pleadings and evidence must be scrutinized before deciding issue of mental condition. (Vol 25) 1938 Nag 204 (208).

[5] Question whether contract is invalidated by unsoundness of mind does not depend merely on belief or disbelief of the witnesses before Court but largely upon inference to be drawn from evidence. (Vol 14) 1927 Cal 889 (892) : 55 Cal 285 (DB).

[6] Where there is evidence that, shortly before his death, a person had reached a state of imbecility, a document bearing his signature and produced after his death is not, by itself conclusive. (Vol 26) 1939 P C (249, 250) : ILR (1940) Kar (PC) 1 (PC).

[7] Registered deed sought to be avoided on plea of insanity—Registrar's endorsement on deed cannot be discarded in deciding mental condition of executant. (Vol 25) 1938 Nag 204 (209).

[8] It is not legitimate for a Court to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence, is something quite different. (1905) 27 All 1 (10) : 7 Oudh Cas 287 : 81 Ind App 285 (P C).

3. Lucid Intervals.—[1] In order to avoid a contract on the ground of unsoundness of mind, the all important question to be decided is whether that person was of unsound mind when the contract was made. (Vol 14) 1927 Cal 889 (892) : 55 Cal 285 (D B).

[See (Vol 18) 1926 Oudh 470 (472):2 Luck 226 (DB). (Although executant might be a hard drunkard and frequently unsober, it must be decided whether he was unsober when deed was executed.)]

[2] Person proved to be of unsound mind—Burden of proving his sanity is on party alleging execution of document during lucid interval. (Vol 28) 1941 Nag 251 (252) : ILR (1942) Nag 236 (DB).

[See also (Vol 19) 1932 Rang 24 (25).]

[3] Suit on mortgage—Mortgagor pleading unsoundness of mind at execution — Mortgagor found to be of unsound mind, but having lucid intervals—No general rule could be laid down as to where burden of proof lay. (Vol 19) 1932 Rang 24 (25).

[4] Where a person is proved to have lucid intervals, the onus of proving that he was of unsound mind at the time of execution of a document lies on him who challenges the validity of the document. (Vol 20) 1933 Lah 453 (460).

[5] Order once made by an inquisition that a person is lunatic continues in force until it is set aside and such person cannot thereafter validly execute a deed disposing of his property even during a lucid interval. (1905) 1 Ch. 160 (178)* (Vol 20) 1933 Mad 824 (825) : 56 Mad 904.

13. Two or more persons are said to consent when they agree upon the same thing in the "Consent" defined. same sense.

"Free consent" defined. 14. Consent is said to be free when it is not caused by —

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

Section 12 (contd.)

[6] Where a person is not proved to be lunatic on inquisition, it is necessary to rebut the general presumption of insanity. (1908) 10 Bom L R 1004 (1012).

Section 13—Note 1

[1] Where a person is induced to execute a deed of one kind under the belief that he is signing an instrument of a wholly different kind the transaction is void and not only voidable. (Vol 8) 1921 Cal 786 (788) (D B) * (Vol 19) 1932 Bom 151 (155) : 56 Bom 180 (D B) * (1879) 3 Bom 242 (266, 267).

[2] When there is mutual misapprehension between both parties to a sale of a bill of exchange as to the particular kind of bill wanted by the purchaser their minds cannot be said to have met, or in the words of this section there would be no consent. (1882) 4 All 334 (336, 337) (D B). (The purchaser cannot recover the amount of the bill, where he is guilty of gross negligence in taking the bill and keeping it for a long period.)

[3] As to mistake of fact, see S. 20; and as to mistake of law, see S. 21.

SECTION 14 — Synopsis

1. Essentials of free consent.
2. Evidence of free consent.
3. Form of pleadings.

1. Essentials of free consent. — [1] In the case of a person who is *sui juris* and not under any disability, the mental act of intending the execution is, also, presumed, where there is admission of execution, or where the execution is proved. (Vol 20) 1933 Pat 306 (335) : 12 Pat 359 (D B).

[2] The law contains well-known principles for the protection of persons, who transfer their property to their disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. Independent legal advice in itself is not essential. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (P C) * (Vol 26) 1939 All 348 (361) (D B).

[3] The law upon the question of free consent is given in the statute itself, and therefore, the Court has to see whether the case comes within its provisions irrespective of the consideration whether the application of the provisions would or would not disfavour the abuse of moral influence or encourage moral cowardice. (Vol 32) 1945 Cal 218 (235) (D B).

[4] Per *Pal J.*—Consent is free, when the activity of man, by which it is effective, works without obstacles to impede its exercise. The obstacles are stated in S. 14. (Vol 32) 1945 Cal 218 (238) (D B).

[5] Consent obtained under duress is not free. Duress can be either physical or moral; the former makes a man submit like a machine and excludes all meeting of the minds because the license of him, who uses duress is

absolutely dominant; the latter can be exerted by depriving the victim of the use of his mind and free will, thus rendering him incapable of giving a valid consent. (Vol 32) 1945 Cal 218 (235) (D B).

[See also under S. 15]

[6] Per *Pal J.*—The fear caused by the duress must be real — "*non mehis vani hominus*" — and must be such as would induce a reasonable man to enter into a contract. (Vol 32) 1945 Cal 218 (235) (D B).

[7] Where one of the parties enters into a contract, as a result of the deception practised upon him by the other, the consent is not free. ('66) 1866 Pun Re No. 21, page 28 (29).

[8] A person, who is not illiterate, cannot escape from a document executed by him merely saying that he did not read it. (Vol 17) 1930 Pat 601 (602) (DB).

[9] Where an illiterate pardanashin lady was not told what she was signing, or she thought that she was signing a power-of-attorney, when she signed an agreement, such a consent is no consent at all and the agreement therefore is liable to be set aside. (Vol 26) 1939 Lah 439 (451) : 1 L R (1939) Lah 433 (DB).

[10] Inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given ; see S. 25, Explan. 2.

2. Evidence of free consent.—[1] Mere execution by a person, who is given protection, although unaccompanied by duress, protest, or obvious signs of misunderstanding or want of comprehension, in itself is no real proof of true understanding of mind in the executant. Evidence to establish such comprehension is found in proof that the deed was read over to the executant and where necessary explained. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (P C) * (Vol 26) 1939 All 348 (361) (DB).

[2] The extent of the explanation and character of a disposition must depend on its character in each case. Length, intricacy, the number and complexity of the dispositions or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount of efficiency of explanation. Thus, a matter not likely to attract the attention of the executant ought not to be relied on as binding unless the executant's mind has been directly drawn to it. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (P C) * (Vol 26) 1939 All 348 (361) (DB).

[3] Where a document executed by a person is in a language, which the executant does not understand, it must be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (P C) * (Vol 26) 1939 All 348 (361) (DB).

[4] *Burden of proof.*—The state of the settlor's mind must be proved by the persons who set up and rely on the deeds executed by persons who are given special protection by the law. (Vol 12) 1925 P C 204 (209) : 47

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian "Coercion" defined. Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation. — It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although S. 506 of the Indian Penal Code was not in force at the time when, or place where, the act was done.

Section 14 (contd.)

All 703 : 28 Oudh Cas 338 : 52 Ind App 342 (P C) * (Vol 26) 1939 All 348 (361) (DB).

3. Form of pleadings. — [1] General averment that consent was not freely obtained is not enough to set up the plea that there was one of the vitiating elements enumerated under S. 14 under the contract law of India as well as by ordinary principles. Coercion, undue influence, fraud and misrepresentations are all separate categories under law though they may overlap or may be combined. General allegations, however strong they may be, are insufficient to an averment of any one of the obstacles to the exercise of free consent. Therefore specific allegations with respect to each must be made in the pleadings (Vol 2) 1915 P C 7 (13); 39 Bom 441 : 42 Ind App 135 (PC).

[See also (1882) 6 Bom 309 (314, 323) (DB).]

SECTION 15 — Synopsis

1. "Act forbidden by the Penal Code."
2. Applicability and scope.
3. Detention of property.
4. Evidence as to coercion.
5. Illustrative cases.
6. "Prejudice."

1. "Act forbidden by the Penal Code." — [1] In dealing with a case of coercion the Court should decide, whether the alleged act of coercion amounts to an offence under the Indian Penal Code. (Vol 4) 1917 Mad 288 (290) (DB). (Affirmed in (Vol 5) 1918 Mad 414 : 41 Mad 33 (SB).)

[2] Per *Wallis C. J. and Seshagiri Aiyar J.*, (*Oldfield J. contra*):—A deed executed in consequence of a threat to commit suicide, held was obtained by coercion. (Vol 5) 1918 Mad 414 (416) : 41 Mad 33 (SB). (Threat to commit suicide must be deemed to be forbidden under the Penal Code) * (Vol 4) 1917 Mad 288 (DB). (Affixed.)

[3] Where a criminal prosecution is instituted against a person, and such person, fearing the result of the prosecution, entered into an agreement in favour of the complainant in consideration of his abandoning the prosecution. *Held*, that it cannot be held simply on these grounds that the consent of such person was caused by coercion. ('82) 1882 Pun Re No. 135, p. 398, (399, 400) (DB).

[4] A threat of bringing a false charge with the object of making another do a thing amounts to coercion. (Vol 23) 1936 Lah 6 (7).

2. Applicability and scope.—[1] Law of Duress of English Common Law is not applicable in India. It is different from English law lists. (1912) 15 Oudh Cas 192 (197) (DB).

[2] Duress — Imprisonment in a country with no settled system of law and with Judges having arbitrary power is duress.—Contract made during, and to get rid of the criminal charge, is void. (1876) 1 Cal 330 (334, 335) : 3 Ind App 61 (PC).

[3] Coercion as defined in S. 15 implies committing or threatening to commit some act, which is contrary to law. (1900) 22 All 224 (226) (DB).

[4] "Coercion" need not proceed from party to contract or be immediately directed against the party whom, it is intended to coerce, to enter into the contract. (Vol 4) 1917 Mad 288 (290) (DB).

[5] Coercion under the Contract Act can be pleaded only where the end arrived at was achieved by the use of something in the nature of unlawful force, or the threat of unlawful force, against the person or the mind of the contracting party. (Vol 32) 1945 Cal 218 (238) (DB).

[6] Agreement by a debtor cannot be avoided only on the ground of coercion, merely because he was in need of money. Coercion in the legal sense means something very much more than the mere need for raising loan. ('36) 1936 All W R 84 (84) (DB) * ('36) 1936 R D 52 (52) (DB).

[7] To establish coercion a person must prove (1) utterance of threat (2) of an act forbidden by Penal Code (3) with the intention of compelling the plaintiff to make the agreement complained of. (1912) 15 Oudh Case 192 (197, 198) (DB).

[8] *Obiter*.—In action brought in India to recover money paid under contract, entered into through coercion, the coercion proved must be such as comes within provisions of S. 15, Contract Act. (1888) 15 Cal 656 (656) (DB).

[9] Section 15 does not control S. 72 and coercion in S. 72 is not the same as defined in S. 15. (1913) 40 Cal 598 (612, 613) : 40 Ind App 56 (PC).

3 Detention of property.—[1] Unless the detention is authorised by law, even detention of property under some right is unlawful within S. 15. (Vol 7) 1920 Low Bur 38 (40) (DB).

[2] Dismissed agent withholding account books and obtaining release deed — Release is voidable, at the option of the principal. (Vol 14) 1927 Mad 852 (855) : 50 Mad 786 (DB).

[3] Where the Government in order to realise fine, due from the son, has attached the property belonging both to son and father and the father pays the fine in order to save property from being sold, payment made by the father is under coercion and he is entitled to recover (Vol 26) 1939 All 373 (374, 375).

[4] Wrongful attachment of property — Money paid under protest.—Suit for recovery is maintainable. (1913) 40 Cal 598 (612) : 40 Ind App 56 (PC).

[5] Wrongful attachment of property not belonging to the judgment-debtor.—Real owner paying decretal amount to decree holder under protest without regularly objecting to the attachment. *Held*, no coercion. ('11) 1911 Pun W R No 32, page 82 (92 & 93) (DB).

[6] Widow executed a bond, on detention of property, by the claimant. The claim was legal. Still it was held that the bond was executed under coercion.

*[16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other.

"Undue influence" defined.

(2) In particular, and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of S. 111 of the Indian Evidence Act, 1872]

[a] *Substituted* for the original by the Indian Contract Act, Amendment Act, 1899 (6 [VI] of 1899), S. 2.

Illustrations.

(a) A, having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money-market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Section 15 (contd.)

(Vol 7) 1920 Low Bur 38 (40) (DB).

4. Evidence as to coercion — [1] Suspicion or probability of the existence of coercion cannot take the place of proof. There must be actual proof to support the plea. (Vol 2) 1915 Bom 68 (70) : 39 Bom 149 (DB).

[2] Where coercion is alleged the allegation must by law be supported by particulars. It is only after due proof of those particulars that the Court can find that the alleged coercion is proved. (Vol 2) 1915 Bom 68 (69) : 39 Bom 149 (DB).

5 Illustrative cases. [1] *Where coercion was held to exist.* — A person under arrest in execution of a decree gave the decree-holder a bond for the amount of such decree in order that he might be released from such arrest—*Held* that bond was given under coercion and therefore invalid. (1882) 4 All 352 (353) (DB).

[2] *Where coercion was held not to exist.* — A person charged another with having misappropriated certain money and the charge was denied. The person, who accused, agreed to accept an oath from the other, that there was no misappropriation, but retracted from the undertaking, and threatened to launch prosecution unless a pro-note was passed : *Held*, that pro-note executed under these circumstances was not done under coercion. (27) 1927 Mad W N 761 (762) (DB).

[3] Mere threat of criminal charge does not amount to coercion as defined in the Contract Act. But the case is different when the threat is to bring a false charge. (1912) 15 Oudh Cas 192 (199) (DB).

[4] Criminal prosecution was instituted against a person—Later he entered into agreement to refer to arbitration — Prosecution was withdrawn—He attended the arbitrators' proceedings. After the award was given, he attacked it saying that the original agreement to refer to arbitration was entered into by him under coercion. *Held*, there was no coercion as the person visited the arbitration proceedings even after the criminal proceed-

ings were dropped instead of trying to get rid of them. (1901) 25 Bom 10 (12) (SB).

[5] Refusal to withdraw prosecution, already launched, unless a bond for the amount due is executed would not be covered by S. 15. (Vol 13) 1926 Cal 455 (456, 457) (DB).

6. "Prejudice." — [1] The word 'prejudice' in S. 15 does not mean mere sentimental prejudice. Some legal injury must flow before a person can be said to be 'prejudiced' under the section. (Vol 5) 1918 Mad 414 (416) : 41 Mad 38 (SB).

[2] A wife, who executes a document in consequence of the husband's threat, that he would commit suicide, is prejudicially affected by the threat. (Vol 5) 1918 Mad 414 (416) : 41 Mad 38 (SB).

SECTION 16 — Synopsis

1. Undue influence — General.
2. Who can plead.
3. Proof.
4. Inadequacy of consideration.
5. Previous indebtedness.
6. Presumption
7. Undue influence by third party.
8. "Relations."
9. "Position to dominate."
10. Unfair advantage.
11. Burden of proof.
12. High rate of interest.
13. Fiduciary relationship.
14. Mental incapacity.
15. Fear of punishment.
16. Pardanashin lady.
17. Unconscionable bargain.

1. Undue influence — General. [1] Undue influence means the domination of a weak mind by a stronger mind to an extent which causes the behaviour of the weaker person to assume an unnatural character. (Vol 24) 1937 Pat 362 (363) (DB). (Undue influence

Section 16 (*contd.*)

does not mean the exercise of advice by a close friend or relative.)

[2] According to the definition of undue influence in S. 16 there are three ingredients : (1) that the relation subsisting between the parties should be such that one of the parties is in a position to dominate the will of the other; (2) that the dominant party obtains an unfair advantage over the other; and (3) that the dominant party uses his dominant position to obtain that unfair advantage. (Vol 25) 1938 Nag 470 (472) : I L R (1938) Nag 535 (Vol 24) 1937 Oudh 254 (256) (DB) (Vol 17) 1930 Cal 547 (552) (DB).

[3] Four questions have to be considered in dealing with cases of undue influence. They are : (1) whether the transaction is righteous, (2) whether it was improvident, (3) whether it required legal advice and (4) whether intention to transfer originated with transfer. (1888) 15 Cal 684 (684, 685) (DB) (Vol 24) 1937 Cal 492 (494) (DB).

[4] The question whether a document was executed under undue influence is a question of fact. (Vol 14) 1927 Mad 255 (256).

[5] Questions as to undue influence must be decided under the Contract Act ; principles of English equity do not apply. (Vol 5) 1918 P C 249 (250) : 1918 Pun Re No. 124 (P C).

[6] Acts of undue influence must range themselves under either coercion or fraud. (Vol 21) 1934 P C 130 (131) : 61 Ind App 224 : 9 Luok 178 (PC) (Vol 16) 1929 Oudh 44 (53) (DB) (Vol 15) 1928 Pat 441 (444) : 7 Pat 426 (DB) (Vol 9) 1922 Oudh 59 (63, 65) (DB). (Coercion or fraud is generally the substratum of undue influence.)

[But see (Vol 19) 1932 Pat 105 (117) : 11 Pat 50 (DB). (A case of undue influence is not quite the same as that of fraud.)]

[7] Undue influence and incapacity to enter into a contract are totally different things. (Vol 14) 1927 Cal 889 (896) : 55 Cal 285 (DB).

[8] Bogus contract, and one brought about by undue influence, are totally different. (Vol 24) 1937 Lah 437 (439) (DB).

[9] It is incumbent on a party, be he plaintiff or defendant, who seeks to set aside a contract on the ground of undue influence to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to baldly assert that undue influence has vitiated the transaction. (1905) 8 Oudh Cas 210 (222) (DB).

[10] If facts, on record, justify the inference of undue influence, the Court can administer relief though pleadings are inartistic. (Vol 18) 1931 Nag 63 (64) : 27 Nag L R 19 (Vol 15) 1928 Nag 322 (324).

2. Who can plead.—[1] Plea of undue influence can be raised only by executant of dominant or his representative in estate, but not by a third party, claiming adversely to such executant. (Vol 18) 1931 Sind 78 (80) (DB).

[2] Donee from mortgagor's widow cannot plead undue influence. (Vol 10) 1923 Lah 634 (635) (DB).

[3] When contesting defendants are not the same as the one, whose consent was alleged to have been caused by undue influence, and the latter did not, at any time, seek to avoid the contract, then the former cannot avoid the same. (Vol 12) 1925 Cal 94 (96) (DB).

[4] Speculator, who purchases equity of redemption on the chance of getting redemption on easy terms, cannot be allowed to set up plea of undue influence. (1918) 1918 Pun L R No. 305, page 1027 (1031) (DB).

[5] Man of mature age and of some intelligence and actively managing his affairs previous to transaction, cannot resort to the plea of undue influence. (Vol 8)

1921 P C 43 (45) : 42 All 422 : 47 Ind App 116 : 23 Oudh Cas 54 (PC).

[6] Party claiming adversely to assignor and assignee cannot plead S. 16 to defeat assignment. (Vol 16) 1929 Lah 295 (304) : 10 Lah 613 (DB).

[7] A petition writer is not incapable of understanding the legal consequences of his acts on the true import of a transaction and is not a person upon whom undue influence can be exercised. (Vol 1) 1914 Oudh 299 (301) (DB).

[8] A defendant may raise plea of undue influence by way of defence and it is not necessary for him to take steps to set aside the agreement. (Vol 23) 1936 All 672 (673).

3. Proof. — [1] To establish a case of undue influence, it is not sufficient to raise an atmosphere of suspicion but there must be clear and definite evidence of the case propounded. (Vol 25) 1938 Lah 333 (334).

[2] A finding of undue influence cannot be based on mere conjecture, but must be supported by evidence. (Vol 19) 1932 P C 202 (207) (PC).

[3] Per *Oldfield J.* — The proof of undue influence may be either direct, or indirect with reference to the opportunities for and disposition to the exercise of influence on one side and the result of its exercise, as indicated by the merits of the transaction, the acceptance of false representations and the entertainment of false beliefs on the other. (Vol 5) 1918 Mad 194 (195) (DB).

[4] Not only should there be evidence of general undue influence but there should be specific evidence that undue influence was exercised. (Vol 14) 1927 Mad 255 (259).

[5] When there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational, proof of undue influence is complete. (Vol 27) 1940 Mad 285 (289) (D B).

[6] No admissions of plaintiff made while under undue influence, could be taken as proof that he had full knowledge of facts. (Vol 18) 1931 Oudh 34 (38) (DB).

[7] In a case of undue influence, the mere fact that on one or two matters, the Court does not accept a party's evidence will not disentitle him to relief. (Vol 22) 1935 Mad 726 (729) : 58 Mad 454 (DB).

[8] State of fear itself does not constitute undue influence. There must be further action of some kind of employment of pressure, or influence by or on behalf of other party to agreement. (1900) 22 All 224 (229) (DB).

[9] Threat or pressure must take the form of undue influence, before contract can be set aside under S. 16. If a person enters into contract, after it is explained to him that his honour requires it, or he would be saved from future worries, it would be pressure but not necessarily undue influence. (Vol 25) 1938 Bom 97 (104) (D B).

[10] Choice given to defendant of furnishing security or being at once put into Court—Held this did not amount to undue influence. (1901) 1901 Pun Re No. 36, page 107 (110) (DB).

[11] Defendant aged 25 practising as lawyer — Defendant given alternative, that he should marry particular girl and receive financial assistance or not marry and receive no assistance — Defendant marrying — Placing of alternative held did not amount to undue influence. (Vol 30) 1943 All 184 (185) : I L R (1943) All 295 (DB).

[12] Where a deed of mortgage was executed, while under arrest in execution of a money decree in satisfaction of that decree, held, that the deed was not void on ground of undue influence. (1908) 1908 Pun Re No. 51, page 259 (261).

[13] Execution of some confirmation deeds by adoptee in absence of natural father, under threats and undue

Section 16 (contd.)

pressure by widow and relatives, that his adoption would be set aside, that he would not be married, and that no money would be given to him for education etc., is vitiated by undue influence. (Vol 25) 1938 Bom 97 (108) (D B).

[14] Minor widow of deceased Hindu, corporeally, accepting boy in adoption — At the time of handing over boy to widow husband's corpse lying in house — Boy's relatives obstructing removal of corpse until widow had executed deed of adoption — Obstruction to removal of corpse, held was an act covered by S. 16. (1890) 13 Mad 214 (223, 224) (D B).

[15] Compromise—One party cripple and of weak intellect — His supporter himself interested in the terms — Terms of compromise very unfavourable to the party — Compromise held, was obtained by undue influence. (Vol 14) 1927 Lah 546 (549) (D B).

[16] The mere circumstance that, the man while giving away his property to strangers made no provision for his wife, is not alone sufficient to make the transaction voidable on account of undue influence. (Vol 14) 1927 Mad 255 (257).

[17] The fact that the defendant accepted compromise as he had no other option is not in itself sufficient to prove undue influence. (Vol 26) 1939 Pat 477 (482) (D B).

[18] Execution of deed of gift by old man who is hale and healthy—Gift to grandchildren in preference to daughter who is not on friendly terms with him — Witness to deed respectable and independent person — Held, gift valid and there was no undue influence. (Vol 22) 1935 Rang 174 (177) (D B).

[19] The fact that an unreasonable price is paid for an advantage necessarily required by donee is not sufficient to prove undue influence. A man may pay a fancy price for what he wants. (Vol 14) 1927 Mad 255 (257).

[20] Mortgagor simpleton and opium-eater — Mortgagee father of mortgagor's pleader — Undue influence is not proved. (Vol 15) 1928 Lah 601 (603) (D B).

[21] Reasonable *wakf* with provision for *mutwallis* — Undue influence is not proved. (Vol 12) 1925 P C 101 (102) : 27 Oudh Cas 346 (P O).

[22] Remonstrance by wife in loud voice does not prove undue influence — Fact that man loves his wife and gives her money or fixes allowance for her or provides her with residence does not prove undue influence by wife. (Vol 31) 1944 All 104 (110) : I L R (1944) All 141 (D B).

[23] Recitals in a deed of contract that the executant is incapable to manage his own affairs or that he was *non compos mentis* etc., are of no evidentiary value and cannot be taken advantage of to defeat his subsequent contracts with others on the ground of undue influence. (Vol 25) 1938 Mad 426 (428) (DB).

[24] Landlord holding decrees for ejectment putting decree into execution—Execution of fresh lease deed at enhanced rent to avoid ejectment—Existence of decree does not go to prove undue influence. (Vol 22) 1935 Lah 479 (480) (D B).

[25] A creditor can ask his debtor to execute documents in a particular form and where a creditor writes to his debtor's servant to get his master's signature to such a form, no inference that undue influence was used can arise. (Vol 6) 1919 All 1 (4) : 42 All 230 (DB).

4. Inadequacy of consideration. — [1] Inadequacy of consideration alone is not a ground to hold that a contract was influenced by undue influence, unless the inadequacy is so gross as to raise a presumption that the party either did not understand what he was doing, or was the victim of some imposition. (Vol 25) 1938 Mad 426 (428) (DB) * (Vol 24) 1937 P C 14 (17,

18) (PC) * (Vol 6) 1919 Cal 414 (416) (DB)*('82) 1882 Pun Re No. 148, page 449 (452) (DB).

[But see (Vol 13) 1926 Pat 539 (541) (DB).]

[2] Inadequacy of consideration in conjunction with circumstances of indebtedness and ignorance of plaintiff are facts from which Courts may infer undue influence (1901) 25 Bom 126 (128) (DB).

[3] An immature young man who had just attained majority and whose mind was clouded and affected by his addiction to hemp-smoking, was deprived of his property by his Guru, who had a complete control over the boy—Held, that the transaction being for an inadequate consideration, could be set aside on ground of undue influence. (Vol 23) 1936 All 672 (673).

5. Previous indebtedness. — [1] Prior indebtedness is not sufficient to prove undue influence. (Vol 11) 1924 Oudh 118 (119)*('10) 7 All L Jour 729 (730) (DB).

[2] Prior dealings of short duration, resulting in a small indebtedness, cannot by themselves raise any inference of undue influence. (Vol 17) 1930 Lah 65 (67) (DB).

[3] Existence of previous mortgage raise no presumption of undue influence. (Vol 14) 1927 All 315 (316) (DB).

[4] When a person, who is already indebted to a money-lender, contracts a fresh debt, on unconscionable terms, undue influence must be presumed. (Vol 14) 1927 Lah 536 (537) (DB)*('19) 1913 Pun L R No. 147, page 505 (507) (DB) *('11) 1911 Pun L R No. 213, page 818 (821, 822) (DB).

[5] Accounts between money-lender and agriculturist — Balances struck from time to time—Bonds taken for amount found due each time, thus charging compound interest — No undue influence held could be inferred. (Vol 1) 1914 Lah 63 (64) (DB).

6. Presumption. — [1] The Court will not presume undue influence where it is not pleaded by the parties. ('10) 7 All L Jour 391 (395) (DB).

[2] It must be shown that the lender was in a position to dominate the will of the borrower before any presumption can arise that contract was induced by undue influence. ('11) 10 Ind Cas 249 (250) (DB) (All).

[3] It is not necessary in order to establish presumption of undue influence that the parties should stand in some particular category of relationship to each other—The presumption can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client, or spiritual adviser and penitent, but it will arise in any case in which the facts show that the circumstances are such that influence can fairly be inferred. (Vol 32) 1945 P C 8 (9) : 71 Ind App 184 : I L R (1945) Bom 189 : I L R (1945) Kar (P O) 56 (PC).

[4] Money lent to profligate young man — Undue influence cannot be presumed. (Vol 12) 1925 Lah 430 (431) (DB).

[5] Where a money-lender has admittedly lent money to a dissolute young minor and supplied him with large quantities of jewellery in presence of his touts and dependants and obviously gave a false colour to the transaction, undue influence is clearly to be presumed. ('02) 1902 Pun Re No. 2, page 2 (4) (DB).

[6] The mere fact that a party to an agreement has very strong motive for executing it raises no presumption that he has been unduly influenced. (Vol 20) 1953 Lah 885 (888) (DB).

[7] Gift unreasonable or prejudicial to donor—Undue influence cannot be presumed. (Vol 5) 1918 Mad 194 (195) (DB).

[8] There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law during the donor's last

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illness. (Vol 1) 1914 Low Bur 278 (280) : 8 Low Bur 285.

[9] When a debt is incurred by a guardian on behalf of a minor and the minor ratifies it soon after coming of age, unless there is anything to show that the ratification was due to undue influence, no presumption of undue influence can be drawn. (Vol 24) 1937 Oudh 56 (57) (DB).

[10] Where an old feeble lady, dependant upon her nephew even for food and clothes, made a gift in his favour—*Held* that, the relation between parties is sufficient to raise presumption of undue influence. (Vol 16) 1929 P C 3 (5, 6) (PC).

[11] There is no presumption of undue influence in every case where a wife confers benefit on her husband without consideration. (Vol 32) 1945 P C 8 (9, 10) : 71 Ind App 184 : 1 L R (1945) Bom 189 : 1 L R (1945) Kar (PC) 56 (PC).

[12] Independent legal advice is not the only way in which the presumption of undue influence can be rebutted; nor does the fact that independent legal advice was given, rebut the presumption, unless it be shown that the advice was taken. (Vol 16) 1929 P C 3 (7) (PC).

7. Undue influence by third party. — [1] In the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. (Vol 7) 1920 P C 65 (66, 67) : 43 Mad 566 : 47 Ind App 1 (PC) & (Vol 1) 1914 Cal 223 (227) (DB). (Undue influence, which may affect a pardanashin lady's understanding of a document, may proceed from a third party.)

[But see (Vol 12) 1925 Lah 430 (431) (DB). (Undue influence of third person is no defence to claim.)]

8. "Relations." — [1] There are well-known relations such as those of guardian and ward, patient and medical adviser, solicitor and client, trustee and *cestui que trust* and the like which plainly fall under sub-s. (1) of this section. (1908) 32 Bom 37 (44) (DB).

[2] The word "relations" means not only the personal relations, but the circumstances in which the contract was entered into. (1911) 34 Mad 7 (10) (DB).

9. Position to dominate. — [1] In order to make out a case for undue influence there must be certain relations between the parties anterior to the transaction in question which placed one party in a position to dominate the will of the other. (1908) 11 Oudh Cas 295 (299).

[See also (1904) 28 Bom 639 (643) (DB).]

[2] The question whether a party was in a position to dominate the will of the other is largely a question of fact. (Vol 14) 1927 All 44 (45) : 48 All 666 (DB).

[3] Creditor is not necessarily in a dominating position over the debtor. (Vol 13) 1926 Cal 455 (457) (DB).

[4] Urgent need of money on the part of the borrower is not, in itself, sufficient to place the lender in a position to dominate the will of the borrower. (1907) 34 Cal 150 (156) : 34 Ind App 9 (PC) & (Vol 15) 1928 Oudh 330 (333) (DB) & (Vol 14) 1927 P C 84 (86) (PC) & (Vol 14) 1927 All 815 (816) (DB) & (Vol 13) 1926 Oudh 502 (504) & (Vol 12) 1925 Pat 326 (328) (DB) & (Vol 10) 1923 Lah 634 (635) (DB) & (Vol 9) 1922 Pat 491 (492) : 1 Pat 263 (DB) & (Vol 6) 1919 Cal 414 (416) (DB) & (Vol 2) 1915 Cal 796 (800) : 42 Cal 652 (DB) & (Vol 2) 1915 Mad 561 (563) : 38 Mad 850 (DB) & (1911) 34 Mad 7 (10) (DB) & (1910) 4 Sind L R 276 (277) (DB).

[5] Where there is no great pressure upon the mortgagors at the time of the execution of the mortgage deed, no inference can be drawn that the mortgagor is in a position to dominate the will of the mortgagors. (Vol 18) 1931 Nag 91 (92).

[6] The mere fact that a man is indebted to another's brother does not put the other in a position to dominate the will of the debtor. (Vol 12) 1925 Oudh 535 (536) (DB).

[7] A creditor who knows that his debtor's estate is under the Court of Wards is in a position to dominate the will of the debtor. (1906) 28 All 570 (576) : 33 Ind App 118 : 9 Oudh Cas 188 (PC).

[8] Bond obtained at 18% compound interest from a ward of the Court of Wards without the latter's knowledge—Creditor was held to be *prima facie* a person in a position to dominate the will of the ward. (1909) 31 All 386 (393) : 36 Ind App 96 : 12 Oudh Cas 300 (PC).

[9] Creditor lending money to expectant heir on the strength of that expectancy is in a position to dominate the debtor's will. (Vol 5) 1918 P C 249 (254) : 1918 Pun Re No. 124 (PC).

[10] Plaintiff lending money at an unusually high rate of interest to the defendant who was imbecile and spendthrift to the knowledge of the plaintiff was held to be in a position to dominate the will of the latter. (1910) 5 Ind Cas 486 (486) (Cal).

[See also (11) 1911 Pun L R No. 148, p. 559 (560).]

[11] Immoral young man mortgaging all property — Mortgagee in possession of all property not rendering accounts but buying part of it—Mortgagee is in dominating position. (Vol 7) 1920 P C 8 (11) : 16 Nag L R 94 (PC).

[12] Employer in embarrassing financial circumstances and fighting out big litigation — Employer's agent looking after litigation and also securing loans — Inference can be drawn that agent is in a position to dominate employer's will even if the employer is an astute person and a man of understanding. (Vol 33) 1946 Oudh 129 (138) : 21 Luck 194 (DB).

[13] Where the wife is very much younger than the husband, there is no legal presumption that she is in a position to dominate the will of her husband. (Vol 17) 1930 All 169 (171) : 52 All 368 (DB).

10. Unfair advantage. — [1] The expression "unfair advantage" is used as meaning an advantage obtained by unrighteous means. (1908) 32 Bom 37 (45) (DB).

[2] Under S. 16 one person being in a position to dominate another's will is not enough. Use of such position must be proved and bargain must be in favour of influencer. (Vol 7) 1920 P C 65 (66) : 43 Mad 546 : 47 Ind App 1 (PC) & (Vol 18) 1931 Nag 63 (65) : 27 Nag L R 19. (Deed executed in circumstances giving unfair advantage to dominating party — Deed cannot be upheld) & (Vol 13) 1926 Cal 171 (172). (Unless undue advantage is shown to have been taken the Court cannot interfere.) & (Vol 12) 1925 Nag 369 (370) & (Vol 10) 1923 Oudh 139 (140) (DB) & (Vol 1) 1914 Low Bur 22 (23). (Bargain fair and reasonable — Plea of undue influence collapses.)

[3] Suit by G on bond against N — Attachment before judgment obstructed by N, M and J — Application by G for prosecution of N, M and J — Suit decreed but on date of hearing of application two bonds executed in favour of G, one by N and other by M and J in lieu of decretal amount, G giving up one-third of his claim — Suit by G against M and J on bond — G held could not be said to have used his position to obtain unfair advantage from M and J, as applicant for prosecution, inasmuch as he gave up his one-third claim of decretal amount. (Vol 24) 1937 Oudh 254 (256) (DB).

[4] In the absence of a finding that promisee was in a position to dominate the will of promisor, a finding that promisee had obtained an unfair advantage over promisor is not sufficient to establish a case of undue influence. (Vol 22) 1935 P C 146 (148) (PC).

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11. Burden of proof. — [1] The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception to the general rule. (Vol 24) 1937 P C 50 (51) (PC) * (Vol 25) 1938 Cal 157 (159) (DB) * (Vol 14) 1927 Mad 255 (258) * (Vol 9) 1922 Nag 219 (220) * (Vol 18) 1931 Sind 78 (50) (DB) * (1910) 4 Sind L R 276 (277) (DB).

[2] In order to put the burden of proof on the creditor to establish that the debt was not borrowed under undue influence it is essential to show first that the lender was in a position to dominate the will of the borrower. (Vol 23) 1936 Pat 78 (78) (DB) * (Vol 25) 1938 Nag 470 (472) : I L R (1938) Nag 535 * (Vol 25) 1938 Nag 391 (392) : I L R (1940) Nag 149 * (Vol 14) 1927 All 44 (44, 45) : 48 All 666 (DB) * (Vol 12) 1925 Oudh 535 (536) (DB) * (Vol 11) 1924 Oudh 193 (196) : 27 Oudh Cas 4 * (1901) 1901 Pun Re No. 36, page 107 (110) (DB).

[3] The fact that the mortgagor was indebted in a small sum of Rs. 184 while the amount borrowed at the time of the mortgage was Rs. 2000 does not shift the burden of proving undue influence from mortgagor to the mortgagee. (Vol 11) 1924 Oudh 118 (119).

[4] Onus lies heavily on a person in a dominating position to prove affirmatively that no domination was practised and that the other party was separately advised in the independence of a free agent. (Vol 7) 1920 PC 65 (66) : 43 Mad 546 : 47 Ind App 1 (P C) * (Vol 21) 1934 All 507 (509) (DB) * (Vol 14) 1927 Mad 255 (257, 258, 259) * (Vol 10) 1923 Mad 96 (100) (DB) * (Vol 18) 1931 Oudh 34 (38) (DB) * (Vol 18) 1931 Nag 63 (65) : 27 Nag L R 19 * (Vol 12) 1925 Nag 211 (215). (Professional money-lenders must prove perfect good faith in their dealings with ignorant agriculturists.) * (1902) 1902 Pun Re No. 2, page 2 (4) (DB) * (1902) 5 Oudh Cas 307 (311, 312).

[5] The plaintiff setting up a plea of undue influence must prove that there was active confidence between the executant and the person under whose influence the document is said to have been executed. (Vol 7) 1920 Mad 982 (982) (DB).

[6] Where a person stands in the position of active confidence to another the onus is on him to prove the good faith of the transaction. (Vol 24) 1937 PC 50 (51, 52) (PC) * (Vol 17) 1930 PC 139 (139) (PC) * (Vol 14) 1927 PC 148 (150) (PC) * (Vol 15) 1928 Mad 6 (11) * (Vol 20) 1933 Rang 90 (91). (Transfer by elderly invalid person to one nursing him — Transferee must prove *bona fides* of transaction.)

[7] In the case of certain fiduciary relationships, such as that of a solicitor and client, the burden of proof is heavier on the solicitor accepting a gift from the client to establish that the gift was not the result of his influence. (Vol 14) 1927 PC 143 (150) (PC) * (Vol 17) 1930 Mad 317 (320, 321) (DB).

[8] Pleader not permanent pleader of client—He cannot be said to be in a position of active confidence — Pleader's father joint with him purchasing property from client — Burden is not on pleader to prove good faith (Vol 16) 1929 Oudh 67 (69) : 4 Luck 270.

[9] Plaintiff succeeding to brother's property resisted by wealthy relatives — Defendant collecting money for litigation which ended in plaintiff's favour — Plaintiff executing sale deed of half property for nominal consideration to defendant's brother—Other half of property endowed to temple in which defendant had interest — Held that defendant must prove that transaction was honest and *bona fide*. (1888) 10 All 535 (550) (DB).

[10] Person well advanced in age executing gift-deed in favour of his spiritual adviser for securing benefits to his soul — Having regard to the fiduciary relation

between parties held that the burden rested on spiritual guide to show that transaction was made in good faith and without undue influence. (1890) 12 All 523 (529, 530) (DB).

[11] Third person not in any way related to grantor or promisor is not required to prove soundness of transaction—But burden of proof is shifted on him if he is found to have had notice of undue influence. (Vol 22) 1935 Mad 726 (731) : 58 Mad 454 (DB) * (Vol 15) 1928 Mad 6 (11).

[12] Where fiduciary relation is established, it is settled law that the person in infiduciary position should affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. (Vol 25) 1938 Mad 919 (920) (DB) * (1906) 30 Bom 578 (581, 582, 589) (DB) * (1907) 30 Mad 169 (173, 174) (FB).

[13] In the case of the expectant heir or of persons under pressure without adequate protection the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. (Vol 24) 1937 PC 14 (17, 18) (PC).

12. High rate of interest.—[1] Mere excessive interest is not sufficient to show undue influence and Court cannot reduce interest solely on the ground that it is excessive. (Vol 12) 1925 Oudh 661 (662) (DB) * (Vol 23) 1936 All 712 (714) (DB) * (Vol 23) 1936 All 611 (612) (DB) * (Vol 15) 1928 Lah 949 (951) (DB) * (Vol 14) 1927 All 538 (538) (DB) * (Vol 12) 1925 Oudh 535 (535) (DB) * (Vol 6) 1919 Cal 1033 (1033) (DB) * (1912) 1912 Pun L R No. 130, page 401 (403) * (1908) 32 Bom 208 (211).

[But see (Vol 12) 1925 Nag 211 (215). (Excessive rate of interest can of itself be evidence of the fact that there was undue influence.)]

[2] Relief against high rate of interest cannot be granted unless S. 16 is applicable. Creditor must prove necessity for the loan as well as for the high rate of interest. (Vol 11) 1924 Pat 71 (74) : 2 Pat 488 (DB) * (Vol 12) 1925 Cal 722 (723) (DB) * (Vol 12) 1925 Pat 326 (328) (DB) * (Vol 8) 1921 Cal 199 (201) : 48 Cal 93 (DB) * (Vol 7) 1920 Cal 863 (863) (DB). (Contract rate of 25 per cent. per mensem must be allowed in the absence of fraud or undue influence.) * (Vol 7) 1920 Cal 529 (529) (DB) * (Vol 7) 1920 Cal 334 (335) (DB) * (Vol 6) 1919 Cal 994 (995) (DB) * (Vol 4) 1917 Pat 536 (537) : 2 Pat L Jour 212 (DB).

[3] Where a contract expressly provides for interest the Court can reduce interest only if exercise of undue influence is positively pleaded or proved or if circumstances raise the presumption of undue influence. (Vol 1) 1914 Lah 344 (345) (DB) * (Vol 14) 1927 Lah 536 (537) (DB). (Before any reduction can be allowed on the rate of interest under Punjab Chief Court Circulars, Vol. I, p. 99, undue influence must be proved to have been exercised.)

[4] Where there is ample security, the exaction of excessive and usurious interest does not raise a presumption of undue influence unless it is shown that the lender was in a position to dominate the borrower's will. (Vol 11) 1924 P C 60 (65) : 51 Ind App 101 : 3 Pat 279 (P C). (Vol 2) 1915 Cal 383 : 42 Cal 690 (DB), Overruled.) * (Vol 23) 1936 All 611 (613) (DB) * (Vol 18) 1931 Nag 91 (92) * (Vol 15) 1928 Oudh 330 (333) (DB) * (Vol 14) 1927 All 315 (316) (DB) * (Vol 10) 1923 Oudh 139 (140) (DB) * (1901) 1901 Pun Re No. 96, page 324 (326).

[5] The fact that the mortgage with ample security carries exorbitant rate of interest does not place the lender in a position to dominate the will within S. 16. (Vol 15) 1928 Oudh 330 (333) (DB).

[6] Creditor lending money at first at moderate rate of interest to debtor in helpless position to enable him

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to file suit—Creditor exacting harsher terms subsequently for further loans—He is in position to dominate the will of the borrower and contractual rate of interest can be reduced by Court. (Vol 21) 1934 All 938 (939) (DB).

[7] Excessive interest in itself may not be ground for relief, but it may be evidence of the very helpless condition of the borrower and of the unfair advantage obtained over him if the circumstances show that the debtor would not otherwise have accepted those terms. (Vol 1) 1914 Mad 131 (135) : 36 Mad 533 (DB).

[8] Debtor consenting freely and willingly to pay high rate of interest—There can be no question of undue influence. (Vol 13) 1926 Bom 65 (66) : 50 Bom 107 (DB) * (Vol 13) 1926 Oudh 273 (275) : 1 Luck 160 (DB).

13. Fiduciary relationship.—[1] The principles followed by Courts of Equity in dealing with transactions resulting through fiduciary relationship are equally applicable in India. (Vol 22) 1935 Mad 726 (731) : 58 Mad 454 (DB).

[2] The principle of English law that a special relationship of confidence exists between parent and child notwithstanding that the child is actually of age at the time the transaction is made is equally applicable to cases under S. 16. (Vol 26) 1939 Rang 278 (283) : 1940 Rang L R 35 (DB) * (Vol 15) 1928 Mad 6 (13).

[3] It is not special relations arising from certain relations only such as parent or child, or guardian or ward, that are jealously watched by the Court ; on the other hand, the principle on which equity gives relief is extended and applied to all the variety of relations in which dominion may be exercised by one person over the other. (Vol 15) 1928 Mad 6 (13) * (Vol 25) 1938 Bom 304 (306, 307) (DB).

[See also (Vol 8) 1921 Mad 394 (397) (DB)]

[4] A paramour can be said to be in a fiduciary relationship with his mistress if he is in a position to dominate her will. (Vol 25) 1938 Bom 304 (306) (DB).

[5] Weak-minded person executing gift-deed in favour of his elder brother—Latter held stood in fiduciary relationship to former. (Vol 18) 1931 Oudh 34 (36, 38, 39) (DB).

[6] Niece residing with uncle transferring to latter, her moiety of property, other moiety of which was already acquired by him—Consideration for transfer by niece being covenant by the uncle, to pay half the rents of the property to the niece and to devise half the property by will to her heirs—Transaction was probably voidable in a Court of Equity, in view of relationship between parties. (Vol 2) 1915 P C 168 (169) (PC).

[7] Husband heavily in debt mortgaging wife's property—Wife illiterate and submissive—Wife not knowing nature of transaction but merely signing document at husband's request without receiving any money—Wife held acted under influence of her husband and creditor who had notice of facts was in no better position. (Vol 32) 1945 P C 8 (9, 10) : 71 Ind App 184 : I L R (1945) Bom 189 : I L R (1945) Kar (P C) 56 (PC).

[8] Where a Buddhist lady made a gift of some land to her nephew who was also acting as her agent, it was held that although there was, what may be called, a fiduciary relationship between the parties, it was not such as to lead the Court to infer undue influence. (Vol 5) 1918 Low Bur 67 (68) (DB).

[9] Where it does not appear that unsound advice was given to the donor by or on behalf of the donee, or that confidence was reposed by the donor in the donee, the gift cannot be set aside for undue influence. (1896) 23 Cal 15 (25, 26) : 22 Ind App 153 (PC). (Only donor's statement that he had confidence is not a sufficient proof of undue influence.)

[10] The mere relation of daughter to mother, in itself suggests nothing in the way of special influence or control. (06) 33 Cal 773 (784) : 33 Ind App 86 (PC).

[11] An ordinary servant cannot usually be expected to exercise undue influence on his master. (Vol 8) 1921 Mad 394 (397) (DB) * (Vol 5) 1918 Oudh 313 (314) (DB).

[12] The mere fact that the mortgagor was a servant of the mortgagee is not sufficient, in the absence of other evidence to show that undue influence was used in getting the mortgage executed. (Vol 12) 1925 Nag 369 (370).

[13] It is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that one naturally relied upon the other for advice. It must be shown that the influence was undue. (Vol 25) 1938 Mad 426 (428) (DB).

[But see (Vol 26) 1939 Rang 278 (283) : 1940 Rang L R 35 (DB). (Undue influence is to be inferred from the special relationship between parties, apart from proof of actual fraud or unfair advantage.)]

[14] Where a transaction was finished through an attorney and the borrower had also another advice, held that undue influence was not proved. (Vol 17) 1930 Cal 547 (552) (DB).

[15] Where one party standing in a fiduciary relation to another exercises undue influence over the latter, a third person deriving benefit of such exercise with knowledge of such relation cannot retain benefit so received. (Vol 27) 1940 Mad 285 (289, 290) (DB) * (Vol 25) 1938 Bom 97 (106) (DB).

14. Mental incapacity.—[1] One of the ways of establishing that one party was in a position to dominate the will of the other is by showing that the mental capacity of the person dominated was affected by illness, or mental or bodily disease. (Vol 25) 1938 Nag 391 (392) : I L R (1940) Nag 149 (DB).

[2] The law stated in S. 16 (2) (b) is based on the principle of equity that where a purchase is made from a poor and ignorant man at a considerable under-value, the vendor having no independent advice, a Court of Equity would relieve against the transaction. (1935) 18 Nag L Jour 67 (71).

[3] Old donor able to exercise independent and intelligent mind and showing strength of mind in dealing with his properties and business—Plea of undue influence negatived. (Vol 10) 1923 Pat 137 (194) (DB).

[4] An old man who was hale and healthy and able to understand what he was doing, gifted away his property to his grand children in preference to his daughter with whom he was not on friendly terms. The deed was executed in the presence of a respectable and independent witness—Held that the gift was valid and was not brought about by undue influence. (Vol 22) 1935 Rang 174 (177) (DB).

[5] Alienation by aged though literate lady in favour of persons in close communion—Court will protect her interest. (Vol 17) 1930 Oudh 131 (140) (DB).

[6] The case of gift to agent—Agent can show that it was out of free will though principal was old man. (Vol 10) 1923 Oudh 254 (263) (DB).

[7] A sale by an illiterate lady a few days previous to her death, when she was suffering from illness and had no professional or other independent advice, should be set aside. (1880) 5 Bom 450 (458).

[8] Where a party to a contract is weak but has ample protection and independent advice, and the other party is not shown to have taken any undue advantage of his weakness the Court will not extend its protection in favour of such weak party. (Vol 14) 1927 Cal 839 (892) : 55 Cal 285 (DB).

[9] Mere physical infirmity does not necessarily carry with it mental incapacity. (Vol 25) 1938 Nag 391 (392, 393) : I L R (1940) Nag 149 (DB).

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[10] The mere fact that the vendee was in a distressed state of mind and was anxious to dispose of a portion of his property, raises no inference of the exercise of any undue influence. (Vol 11) 1924 Lah 337 (339) (DB).

[11] Mere mental distress on the part of the borrower is not sufficient to raise a presumption of undue influence. It must be shown that the opportunity was used by the creditor to gain an unfair advantage. (1909) 4 Ind Cas 359 (360, 361) (DB) (Sind). (Per Pratt A. J. C.)

[12] If the contents of a written contract are not fully explained to or understood by a party who is illiterate, it is not binding on him. (Vol 5) 1918 Cal 546 (547) (DB).

[13] Person of weak intelligence unable to understand exact nature and effect of transaction, executing deed of gift in favour of his elder brother — Deed held to be obtained by undue influence. (Vol 18) 1931 Oudh 34 (38, 39) (DB).

[14] The fact that the person is disqualified from managing his estate, as when his estate is under the management of Court of Wards, is not in itself sufficient to bring him within the category of those classes of persons whose supposed weakness of intellect or impaired capacity for contractual purposes *prima facie* suggests the inference that they have been imposed upon. (1905) 8 Oudh Cas 210 (216) (DB).

15. Fear of punishment.—[1] A state of fear by itself alone does not constitute undue influence. Assuming a state of fear amounts to mental distress which enfeebles the mind, still, there must be further action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement. (1900) 22 All 224 (229) (DB). (Person agreeing to submission to arbitration through fear of criminal proceedings—In absence of any allegation or proof as to other party taking advantage of his state of mind submission held not voidable.) * (Vol 27) 1940 Pat 573 (576) : 19 Pat 424 (DB) * (Vol 5) 1918 Nag 181 (184).

[2] The fact that the prosecutor was ready to compound offence and withdraw charge if a *kabuliyat* was executed and the accused executed the *kabuliyat* on condition of the withdrawal of the charge would not lead to the inference that the prosecution was in a position to dominate the will of the executant and used that position to obtain unfair advantage. (Vol 2) 1915 All 174 (175).

[3] When a criminal prosecution is instituted against a person and such person fearing the result of the prosecution enters into an agreement in favour of the complainant in consideration of his abandoning the prosecution it cannot be held that the consent of such person to the agreement was caused by "undue influence". ('82) 1882 Pun Re No 135, p. 398 (400) (DB).

[But see (Vol 3) 1916 Cal 74 (74) : 42 Cal 286 (DB). (Money paid on agreement not to prosecute is paid under undue influence)]

[4] Two persons in fiduciary relation with plaintiff inducing latter to enter into agreement of divesting estate in favour of one and granting enhanced monthly allowances to other by falsely putting him in fear of criminal prosecution by third person—*Held*, that there was undue influence and fraud practised upon plaintiff within S. 16. (Vol 16) 1929 Oudh 44 (53) (DB).

16. Pardanashin lady —[1] A *pardanashin* lady, in the true sense of that term is a lady living in seclusion that is, the "zanana," and having no communication with any male strangers except from behind a screen. (Vol 17) 1930 Lah 985 (987) : 12 Lah 239 (DB).

[2] A lady with a certain amount of education, who subscribes newspaper, manages her affairs and even

appears in Court, is not a *pardanashin* lady. (Vol 17) 1930 Lah 985 (987) : 12 Lah 239 (DB) * (Vol 20) 1933 All 955 (956) * (Vol 12) 1925 Lah 196 (198) : 5 Lah 465 (DB) * (1879) 4 Bom L R 146 (149) (DB).

[3] In cases of transactions by a *pardanashin* lady, the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act of the person who makes it. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 52 Ind App 342 : 28 Oudh Cas 338 (PC) * (Vol 6) 1919 P C 24 (26) : 47 Cal 175 : 46 Ind App 272 (PC) * (Vol 22) 1935 Cal 671 (678) (DB) * (Vol 22) 1935 Cal 495 (497).

[4] In the case of deeds and powers executed by *pardanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those who executed them. (1902) 29 Cal 749 (758) : 29 Ind App 127 (PC) * (Vol 53) 1946 All 178 (180) (DB) * (Vol 28) 1941 Oudh 172 (177) (DB) * (Vol 25) 1938 P C 276 (277) : 32 Sind L R 947 (P C) * (Vol 25) 1933 P C 38 (40) : 32 Sind L R 285 (PC) * (Vol 23) 1936 Cal 721 (722) (DB). (Rule applies with greater force where the lady is illiterate, young and inexperienced and is liable to be influenced or imposed on by near relations) * (Vol 22) 1935 All 235 (291) (DB) * (Vol 19) 1932 P C 134 (135) (PC). (General power of attorney executed by *pardanashin* lady—Onus of proving its binding nature on her is upon person who pleads so — Power executed by father on her behalf, she herself affixing her thumb impression before Registrar—Powers granted not unusual — There is *prima facie* evidence that instrument was consented to by her.) * (Vol 18) 1931 P C 100 (104) (PC) * (Vol 15) 1928 Oudh 449 (457, 459) (DB) * (Vol 12) 1925 P C 204 (209) : 47 All 703 : 52 Ind App 342 : 28 Oudh Cas 338 (PC) * (Vol 8) 1916 Oudh 10 (14, 18) (DB). (*Pardanashin* lady admitting her signature on gift deed in favour of her brother—Brother managing her affairs—Document not explained to her even by Registrar—Donor held did not appreciate full significance of deed which must therefore be set aside.) * (Vol 1) 1914 Cal 223 (227, 228) * (1912) 39 Cal 933 (937) (1912) 34 All 455 (462) : 39 Ind App 156 : 15 Oudh Cas 271 (PC) * (1909) 9 Cal L Jour 19 (42) (DB) * (1907) 31 Bom 165 (180) (DB) * (1901) 28 Cal 546 (556) : 28 Ind App 71 (PC) * (1881) 7 Cal 245 (250) : 8 Ind App 39 (PC) * (1877) 3 Cal 324 (327) (PC).

[5] In the case of *pardanashins* it is not sufficient to show that the document was read out to her. She must be proved to have understood its nature and effect. (Vol 21) 1934 P C 208 (209) (PC) * (Vol 24) 1937 Lah 353 (358) (DB) * (Vol 22) 1935 Lah 184 (187) (DB) * (Vol 4) 1917 Oudh 106 (110) (DB).

[6] The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 52 Ind App 342 : 28 Oudh Cas 338 (P C).

[7] Disposition by *pardanashin* lady — Requirement is that disposition must be substantially understood — She is not required to understand every technical detail of bargain. (Vol 27) 1940 P C 134 (136) : 11 LR (1940) 2 Cal 436 : 11 LR (1940) Kar (PC) 271 : 67 Ind App 309 (PC).

[8] The mere execution by a *pardanashin* lady, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension is in itself no proof of a true understanding mind in the executant. (Vol 12) 1925 P C 204 (209) : 47 All 703 : 52 Ind App 342 : 28 Oudh Cas 338 (PC) * (Vol 22) 1935 Cal 671 (678) (DB).

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[9] In the case of a pardanashin lady execution of any instrument to give it validity must be "intelligent execution" as opposed to mechanical execution. (Vol 23) 1936 All 858 (859) (DB) * (Vol 26) 1939 Nag 159 (161) : I L R (1941) Nag 418 (DB) * (Vol 23) 1936 Oudh 196 (199) (DB) * (Vol 15) 1928 Oudh 449 (457) (DB).

[See also (Vol 18) 1931 Mad 335 (337) (DB). (Execution should be clearly proved.)]

[10] If, for want of explanation a pardanashin lady did not understand an important feature of the transaction it cannot be held that her mind and free consent went with her act in executing the deed. (Vol 27) 1940 P C 134 (136) : I L R (1940) 2 Cal 436 : I L R (1940) Kar (PC) 271 : 67 Ind App 309 (PC).

[11] It is only when the document executed by a pardanashin lady is *prima facie* valid proof having been given of intelligent execution that the question of undue influence arises. (Vol 28) 1941 Oudh 172 (177) (DB).

[12] In the case of a document executed by a pardanashin lady, the question is not whether the lady knew what she was doing, had done, or proposed to do, but how her intention to act was produced, whether all that care and providence was placed round her as against those who advised her which from their situation and relation to her, they were bound to exert on her behalf. (Vol 8) 1916 P C 172 (179) (PC) * (Vol 18) 1931 Oudh 146 (155) : 6 Luck 619 (DB).

[13] A pardanashin lady executing a document must be a free agent, and duly informed of what she was about. (1869-70) 18 Moo Ind App 419 (419) (PC) * (Vol 21) 1934 All 179 (182) (DB).

[14] Where a deed is executed by a pardanashin lady, it must be reasonably established that the deed was the free and intelligent act of the executant. (Vol 12) 1925 P C 204 (210) : 47 All 703 : 52 Ind App 342 : 28 Oudh Cas 338 (P C) * (Vol 30) 1943 Mad 677 (680) : I L R (1944) Mad 181 (D B). (Pardnashin lady — Transfer by act free and independent — Transfer will stand.) * (Vol 26) 1939 All 348 (361, 362) (D B) * (Vol 26) 1939 Cal 569 (577) (D B) * (1938) 32 Sind L R 262 (264) (P C) * (Vol 18) 1931 Oudh 146 (155) : 6 Luck 619 (D B) * (Vol 12) 1925 Lah 196 (199) : 5 Lah 465. (Pardnashin lady, suffering from paralysis, gifting her property to her brother's son out of natural love—On facts, transaction held free and voluntary.) * (Vol 12) 1925 P C 204 (209) : 47 All 703 : 52 Ind App 342 : 28 Oudh Cas 338 (P C) * (Vol 24) 1937 Pat 362 (363) (D B) * (Vol 23) 1936 P C 207 (210, 211) : 11 Luck 346 : 63 Ind App 326 (P C) * (Vol 21) 1934 All 179 (182) (D B) * (1932) 138 Ind Cas 616 (617) (D B) (All) * (Vol 18) 1931 P C 100 (104) (P C) * (1911) 34 Mad 7 (10) (D B). (The fact that a pardanashin lady has acted under advice of her vakil does not preclude her from asking for relief on the ground that the contract was induced by undue influence.)

[15] The possessing of independent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to a decision whether the grantor, a pardnashin lady, comprehended and deliberately and out of free will carried out the transaction—But where upon the nature of the thing done, and the training and habit of the mind of the grantor as well as the proximate circumstances, affecting the execution, the conclusion is reached that the independent advice could not have altered the results then the absence of it does not detract from the valid nature of the consent. (Vol 30) 1943 Mad 677 (680) : I L R (1944) Mad 118 (D B).

[16] Gift deed by pardanashin lady in favour of person standing in position of confidence to her—Donee must prove not only that donor knew what she was

about, but also that she had independent advice. (Vol 33) 1946 All 121 (124, 125).

[17] Where a pardanashin lady is intelligent to understand the nature and effect of transaction and has got intelligent relations to assist her it cannot be said that she had no independent advice. (Vol 22) 1935 Cal 234 (237).

[18] Independent advice must be given before transaction—Advice given after event is of no value. (Vol 21) 1934 P C 210 (212) (P C).

[19] Bargain with pardanashin cannot be divided into parts or otherwise reformed by Courts so as to uphold certain portions while rejecting others. (Vol 27) 1940 P C 134 (136) : I L R (1940) 2 Cal 436 : I L R (1940) Kar (P C) 271 : 67 Ind App 309 (P C). (Pardnashin lady executing mortgage—That she was incurring personal liability not understood by her—Mortgage does not bind her at all.) * (Vol 26) 1939 Nag 159 (160) : I L R (1940) Nag 418 (D B) * (Vol 18) 1931 P C 303 (307) : 53 Ind App 450 : 11 Pat 227 (P C).

[20] The ground on which protection is given to a pardanashin lady is that she can be easily influenced and is very likely to be over-reached in her dealings. (Vol 26) 1939 Lah 439 (450) : I L R (1939) Lah 433 (D B).

[21] The protection given by law to "pardnashin" ladies is analogous to that always given by Courts to persons who are weak, ignorant and infirm and hence, incapable of protecting themselves. Generally the person seeking protection has to prove weakness or infirmity. In case of "pardnashin" ladies law presumes them to be incapable of protecting themselves. (Vol 20) 1933 Pat 306 (331) : 12 Pat 359 (D B).

[22] Wife is not "protected person"—No presumption of undue influence arises. (Vol 21) 1934 P C 210 (212) (P C).

[23] The protection offered to pardnashin ladies in respect of their transactions can be claimed only by them or persons claiming through their title to any property affected by the transaction and not by third parties. (Vol 26) 1939 Pat 477 (487) (D B).

[24] The rule giving protection to pardnashin lady is not strictly applicable to cases where the pardnashin lady is not a contracting party and the case is one of fraud and not of undue influence. (Vol 19) 1932 Pat 105 (117) : 11 Pat 50 (D B).

[25] Court should not extend unduly the rule for protection of pardnashin ladies — Adult pardnashin ladies of sound mind are *sui juris* and they must not be treated as though they were minors and incapable through mental deficiency of conducting their own business. (Vol 33) 1946 All 127 (130) : I L R (1945) All 465 (D B).

[26] The mere fact that the woman lives in seclusion or sits behind a pardah does not necessarily show that she is weak-minded, ignorant or incapable of understanding her affairs. (Vol 21) 1934 P C 208 (209) (P C) * (Vol 22) 1935 Lah 184 (187) (D B) * (1914) 36 All 81 (92) : 41 Ind App 23 (P C).

[27] A woman who is not a pardnashin lady is not subject to the same law as the pardnashin lady—Where the lady is not actually a pardnashin lady in the strict sense she is entitled to equitable relief afforded to that class when she had been sued on contracts which she had entered into. (1901) 23 All 137 (140) : 27 Ind App 168 (P C).

[28] Though a woman is not pardnashin it is for those who deal with her to establish that she had the capacity of understanding, that she entered into transaction voluntarily and with full knowledge and import of what the transaction meant. (Vol 17) 1930 Cal 591 (592) (D B).

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[29] The principles of law applicable to a pardanashin lady will not be extended to a man on the ground that he is old and not in robust health. (Vol 10) 1923 Oudh 254 (263) (D B).

[30] Where relationship of the transferee with the transferor who is a pardanashin lady is not such as would enable to dominate the will of transferor it cannot be said that the relation between the parties at the time of the transaction is such as would suggest that they are not on equal terms. (Vol 22) 1935 Cal 234 (237).

[31] Contract by pardanashin lady without competent advice and under pressure of illegal guardian proceedings is bad as being induced by undue influence. (10) 1910 Pun L R No. 177, p. 505 (507) (DB).

[32] Extracting harsher terms than first agreed to from a pardanashin lady just before impending sale of her property is covered by S. 16. (Vol 11) 1924 Oudh 423 (424) : 27 Oudh Cas 374 (DB).

[33] In cases of gifts undue influence will be presumed in transactions with pardanashin ladies. (Vol 3) 1916 Oudh 10 (17) (DB).

[34] Burden of proof—Gift by pardanashin lady — Burden of proving bona fides of the transaction lies on the party affirming it. (Vol 3) 1916 Oudh 10 (13) (DB).

[35] Lease by pardanashin lady — Agent's influence with deceased husband of lady — This fact does not put him in a position of confidence with regard to her or in a position to exercise undue influence. (1932) 15 Nag L Jour 101 (103).

17. Unconscionable bargain.—[1] In considering whether an unconscionable bargain should be relieved against only the terms of S. 16 must be considered. English equitable doctrine cannot be applied. (1906) 28 All 570 (573) : 33 Ind App 118 : 9 Oudh Cas 219 (P C) (Vol 7) 1920 Cal 334 (335) (DB) (1911) 10 Ind Cas 249 (250) (DB) (All).

[2] By sub-s. (3) of S. 16 three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, viz., the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. Error is almost sure to arise if the order of these propositions be changed. (Vol 11) 1924 P C 60 (63) : 51 Ind App 101 : 3 Pat 279 (P C) (Vol 25) 1938 Mad 426 (428) (DB) (Vol 15) 1928 Lah 224 (229) : 9 Lah 470 (DB) (Vol 15) 1928 Oudh 330 (333) (DB) (Vol 12) 1925 Oudh 661 (662) (DB). ((Vol 2) 1915 Cal 383 : 42 Cal 690 (DB), Disting.; 20 Oudh Cas 319, Foll.) (Vol 7) 1920 P C 65 (66) : 43 Mad 546 : 47 Ind App 1 (P C).

[3] Even though a bargain is unconscionable a remedy under the Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. (Vol 11) 1924 P C 60 (63, 65) : 3 Pat 279 : 51 Ind App 101 (P C) (Vol 15) 1928 Lah 224 (229) : 9 Lah 470 (DB).

[4] In the absence of undue influence the Court has no power to give relief under S. 16 even if the bargain is hard and unconscionable. (Vol 5) 1918 P C 48 (49) : 1918 Pun Re No. 101 (P C) (Vol 17) 1930 Cal 547 (552) (DB) (Vol 14) 1927 Lah 748 (751) (DB) (Vol 13) 1926 Rang 208 (211) : 4 Rang 214 (DB) (Vol 8) 1921 Oudh 207 (208) : 24 Oudh Cas 313 (Vol 2) 1915 Cal 383 (384) : 42 Cal 690 (DB) (13) 1913 Pun L R No. 305, p. 1027 (1027) (DB) (12) 1912 Mad W N 416

(416) (DB) (1911) 34 Mad 7 (10) (DB) (1910) 32 All 589 (592) (DB).

[5] Something unconscionable either in original dealing or in subsequent transaction must be shown to establish undue influence. (Vol 6) 1919 Pat 566 (567) (DB).

[6] Where the lender is in a position to dominate the will of the borrower and the transaction on the face of it appears to be unconscionable, a presumption arises that the transaction was induced by undue influence. (1910) 32 All 589 (591, 592) (DB) (Vol 20) 1933 Lah 682 (684) (DB) (Vol 18) 1931 Nag 63 (65) : 27 Nag L R 19 (Vol 14) 1927 Oudh 92 (94) : 1 Luck 144 (DB). (Sale deed by ignorant and illiterate person to his supporters in getting inheritance—Bargain unfair—Undue influence is presumed.) (Vol 1) 1914 Lah 348 (350) (DB) (1913) 17 Cal L Jour 221 (223) (DB) (1910) 32 All 590ⁿ (590ⁿ, 591ⁿ) (1909) 36 Cal 493 (502) (1909) 4 Ind Cas 1143 (1145) (1909) 1909 Pun W R No. 123 (DB) (1902) 5 Oudh Cas 256 (263, 264).

[7] Where a harsh unconscionable agreement is entered into by a tenant the presumption is that undue influence was brought to bear upon him by the landlord as he is in a position to exercise it. (Vol 3) 1916 Pat 107 (108) : 1 Pat L Jour 604 (DB).

[But see (1908) 8 Cal L Jour 135 (139) (DB). (There is no presumption that landlord can so dominate the will of his tenants as to induce them to enter into unconscionable bargain in his favour.)]

[8] Transaction unconscionable — Burden of proving that transaction was not induced by undue influence lies upon the person who was in a position to dominate the will of the other. (Vol 11) 1924 P C 60 (63) : 51 Ind App 101 : 3 Pat 279 (P C) (Vol 24) 1937 Cal 492 (494) (DB) (Vol 17) 1930 Cal 547 (552) (DB) (Vol 17) 1930 Sind 25 (29) (DB) (Vol 15) 1928 Oudh 330 (333) (DB) (Vol 9) 1922 Oudh 283 (287) (DB) (Vol 9) 1922 Oudh 59 (71) (DB) (Vol 5) 1918 Pat 680 (682) : 2 Pat L Jour 663 (SE) (1909) 5 Mad L Tim 204 (205) (DB).

[9] Before onus can shift to the other party to prove want of undue influence, party pleading undue influence, has to prove not only that the other party was in a position to dominate his will, but also that the transaction was unconscionable. (Vol 18) 1931 Sind 78 (80) (DB) (Vol 19) 1932 P C 202 (206) (PC). (Plea of undue influence is of no avail to lessor, unless he discharges the burden of establishing that the lessee was in a position to dominate his will.) (Vol 12) 1925 Pat 326 (329) (DB).

[10] Where it is alleged that one party took advantage of the other party's position and drove an unconscionable bargain, the burden of proving that undue advantage was taken by the former, lies upon the party who so alleges. (1882) 1882 Pun Re No. 148, p. 449 (452) (DB).

[11] Party not in position to dominate will of another — Rule regarding burden of proof enacted in S. 16 (3) cannot apply. (Vol 25) 1938 Oudh 24 (26).

[12] Whether a transaction was unconscionable or not depends upon the facts of each case. (1909) 3 Ind Cas 318 (319) (DB) (Mad).

[13] To avoid a transaction as being unfair, specific plea to that effect ought to be made in the plaint. (Vol 22) 1935 Cal 284 (238).

[14] Whether transaction is unfair and unconscionable bargain for inadequate price is question entirely between assignor and the assignee. (1910) 14 Cal W N 191, (200, 201) (DB).

[15] A transaction may be unconscionable in many ways and Court should see in each case according to its

17. "Fraud" means and includes any of the following acts committed by a party to a "Fraud" defined. contract, or with his connivance, or by his agent, with intent to deceive another party thereto, or his agent, or to induce him to enter into the contract:—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

Section 16 (contd.)

sense of justice if it is really so. (1913) 17 Cal L Jour 221 (225) (DB).

[16] In order to see whether a bargain is unconscionable the state of affairs at the time when the bargain was struck should be considered and not the ultimate claim made. (Vol 7) 1920 Lah 238 (239) (DB) * (Vol 22) 1935 Cal 234 (238) * (Vol 7) 1920 Lah 123 (125) : 1 Lah 124 (DB) * (Vol 5) 1918 P C 249 (251) : 1918 Pun Re No. 124 (PC). (Mere fact that suit claim exceeds enormously the original loan is no ground for holding transaction unconscionable.) * (Vol 14) 1927 Lah 748 (751) (DB). (Mere accumulation of interest as a result of efflux of time coupled with default of payment of interest is not valid ground for rule.) * (Vol 1) 1914 Oudh 299 (301) (DB).

[17] Mere fact that the rate of interest is high is not sufficient to justify Court in holding that the bargain is unconscionable one, and relieving the parties who entered into it from the liability incurred. (1911) 8 All L Jour 407 (408, 409) (DB) * (Vol 16) 1929 Lah 242 (244) * (Vol 14) 1927 Mad 620 (620) : 50 Mad 614 (DB).

[See also (Vol 15) 1928 P C 80 (82) : 55 Ind App 107 : 7 Pat 305 (PC). (Rate of interest must vary with risk run. 21 per cent. simple interest was held allowable.)]

[But see (Vol 1) 1914 Mad 131 (133) : 36 Mad 533 (DB). (High rate of interest may be evidence of unconscionable nature of bargain and also the fact that the will of the borrower was dominated.)]

[18] Stipulation in mortgage deed that redemption shall not take place before expiry of 20 years—Mortgagor to pay interest at rate of 2 per cent. per month—Transaction held was unconscionable. ('11) 1911 Pun L R No. 128, page 474 (477, 478) (DB).

[19] Mortgage bond executed by old woman and her two sons who were coolies—Bond for larger sum than what was paid—Higher interest inserted to secure prompt execution of mortgage deed—Stipulation as to payment of higher interest held was unconscionable. (1909) 3 Ind Cas 818 (819) (DB) (Mad).

[20] Promissory notes carrying interest at 75 per cent. per annum and 60 per cent. per annum respectively—Lender in position to dominate debtor's will at time when pro-notes were passed—Transactions held unconscionable—Interest reduced to 24 per cent. per annum. (1907) 31 Bom 348 (352).

[21] Bond executed by a person of profligate habits and greatly in need of money—Bond securing sum of Rs. 500 with interest amounting to Rs. 37-8-0 per cent; per annum, with six monthly rests—Borrower not empowered to repay money within three years—Borrower obliged to pay three years' interest if he did pay within three years—Bargain held was unconscionable. (1907) 29 All 305 (305) (DB).

[22] Rate of interest hard and unconscionable—Creditor imposing his own terms and putting pressure on executant of deed of charge to impose clog on redemption—Court can allow lower rate. (Vol 1) 1914 Oudh 23 (25) : 18 Oudh Cas 267.

[23] The conditions and terms of lending must be looked at when the loan carries compound interest with frequent rests. Compound interest at a moderate rate may not necessarily be oppressive, and similarly compound interest with infrequent rests may not be oppressive. (Vol 15) 1928 P C 64 (67) : 55 Ind App 85 : 7 Pat 294 (PC). (There is no presumption that simple interest

is judicially preferable to compound interest—Considerations in England and India are different.)

[See also (Vol 7) 1920 Cal 314 (315) (DB). (Compound interest unless unconscionable or agreed to under undue influence will not be refused.) * (1911) 34 Mad 188 (196) (DB).]

[24] Stipulation for payment of high rate of compound interest—Transaction is unconscionable. (1906) 28 All 570 (573) : 33 Ind App 118 : 9 Oudh Cas 188 (P C) * (Vol 12) 1925 All 31 (32). (Mortgagors illiterate and ignorant—2 per cent. per month compound interest was held unconscionable.) * ('11) 1911 Pun L R No. 148, page 557 (560). (Compound interest at rate of Rs. 1-9-0 per mensem.) * (1911) 34 Mad 7 (11) (DB) * (1910) 7 All L Jour 591 (596) (DB).

[But see (Vol 13) 1926 Oudh 273 (275) : 1 Luck 16C (DB). (Rate of Rs. 1-8-0 compound interest not unconscionable.) * (1913) 1913 Pun L R No. 305, page 1027 (1027) (DB).]

[25] A transaction is not unconscionable merely because it is in lieu of earlier loans carrying very high rate of interest. (Vol 14) 1927 All 44 (45) : 48 All 666 (DB).

[26] Agreement to pay interest at stipulated rate does not become unconscionable merely because there is stipulation to pay compound interest at same rate in default of payment of simple interest. (Vol 7) 1920 Lah 238 (239) (DB).

[27] Person in difficulties executing promote—Consideration much smaller than mentioned in promote—Transaction held unconscionable. (1908) 1908 Pun Re No. 115, page 522 (526).

[28] Deed of perpetual lease in favour of agent—Deed executed in consideration of large sum alleged to have been advanced by lessee and services rendered by him—No likelihood of sum being advanced by lessee—Right of re-entry not reserved—Lessor practically parting with fourth share of his property and also undertaking to pay part of revenue—Deed held unconscionable. (Vol 33) 1946 Oudh 129 (139) : 21 Luck 194 (DB).

[29] Donor 100 years old—Donee intimate with him and lending money—Donor disinheriting his son—Deed of gift held unconscionable. (Vol 17) 1930 Sind 25 (29) (DB).

[30] Rent-free lands of defendant illegally auctioned by landlord—To retain possession defendant executing kabulyat giving up status of inamdar and agreeing to pay rent and this apparently for no consideration—Contract held was unconscionable. (1909) 5 Mad L Tim 204 (205) (DB).

[31] Insurance policy assigned to person originally engaged as servant but practically treated as mistress by assignor—Transaction is not of unconscionable nature. (Vol 25) 1938 Lah 333 (334).

SECTION 17 — SYNOPSIS

1. Applicability and scope.

2. Clause (1).

3. Clause (2).

4. Clause (3).

5. Clause (4).

6. Clause (5).

7. Explanation.

8. Proof of fraud.

1. Applicability and scope.—[1] Difference between fraud and misrepresentation—In one case the

- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation. — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,^b or unless his silence is, in itself, equivalent to speech.

[a] Compare S. 238. [b] See S. 143.

Illustrations.

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter, and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A, "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

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person making the suggestion does not believe it to be true and in the other he believes it to be true. (Vol 18) 1931 All 154 (156) : 33 All 374 (DB).

[2] It is not fraud to merely break promises or fail to perform obligations in future. Frauds ought to be restricted to misrepresentations, and dishonest misrepresentations of existing facts. (Vol 3) 1916 Bom 239 (244).

[3] The mere execution of a deed of relinquishment by an exproprietary tenant cannot amount to constructive fraud on behalf of the landlord. (Vol 10) 1923 All 113 (114).

[4] Court will not take 'Fraud' in the same sense in which it is desired in this section to set aside a decree on the ground of fraud. (Vol 1) 1914 Sind 28 (30) : 8 Sind L R 3 (DB).

[5] The illustrations to sections 17 and 19 indicate that the principle is meant to extend to contracts which include an element of transfer, such as sales or mortgages. (Vol 27) 1940 Lah 505 (508) (DB)* (Vol 12) 1925 Cal 555 (556).

2. Clause (1). — [1] Deliberately giving false replies by withholding material information, in answering questions of the insurance company during its enquiry into one's proposal amounts to fraud. (Vol 26) 1939 Sind 254 (255, 256) : I L R (1939) Kar 611 (DB)* (Vol 29) 1942 Cal 412 (414) : I L R (1942) 1 Cal 100 (DB)* (Vol 26) 1939 Cal 8 (12) (DB).

[2] Where a purchaser of a decree belonging to an insolvent from the official Assignee, represented to the Official Assignee that the decree was unsecured while as a matter of fact, it was secured and this fact was also known to the purchaser and he purchased the decree for 20 per cent. of its face value :

Held, that the sale was void for fraud and the Official Assignee was entitled to have it set aside, (Vol 18) 1931 Mad 603 (605) (DB).

3. Clause (2). — [1] The defendant after selling the property to a third person sold it to the plaintiff and it was agreed in the sale-deed that the seller should not be responsible to the buyer for loss caused to the latter if, by reason of the invalidity of the seller's title, the buyer was deprived of the property. It was found by the lower appellate Court that the buyer would never have bought if he had known that the seller had no title. *Held*, that the conduct of the seller must be held to amount to the active concealment of a fact by one having knowledge, and constituted fraud. (Vol 14) 1927 All 693 (698) (DB).

[2] If a vendor has been guilty of fraud by actively concealing the fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of any diligence might have ascertained the truth is no defence to a suit to recover purchase money. (1888) 11 Mad 419 (436) (DB).

[3] Non-disclosure of minority is no misrepresentation or fraud.—Creditor cannot recover money. (Vol 24) 1937 Lah 598 (598).

[4] Where a minor whose period of minority has been extended to 21 years states that he is of 20 years of age, his suppression of the fact that a guardian was appointed amounts to fraudulent representation as to his age. (Vol 16) 1929 Lah 880 (881) : 11 Lah 167 (DB).

[5] Lady illiterate and not a business woman.—Agreement to refer to arbitration—Lady not made aware of the nature of the transaction—Lady's agreement obtained by persons having conflicting interests and standing in fiduciary relationship by fraudulent concealment of particulars—Award not binding on the lady either as award or as family settlement. (Vol) 3 1916 P C 172 (179) (PC).

[6] Concealment of claim of mortgagee against property sold—Clause in sale deed binding vendor to remove any claim or dispute about property — *Held* on facts that no inference of fraud within S. 17, could be drawn. (1896) 20 Bom 522 (534) (DB).

[7] One of the conditions of the plaintiff's employment under the defendant firm was that plaintiff was not to engage in any business of his own or join any other firm so long as he remained in the services of the defendant firm. Without the knowledge of the defendant firm plaintiff joined another in business transactions and induced the defendant firm to enter into contracts with that third person without disclosing his association with him. *Held* that the contracts were voidable at the instance of the defendant firm they having been procured as a result of the fraud practised by plaintiff and by his concealment of the fact that he was entering into contracts in contravention of the terms of his agreement with the defendant firm. (1922) 66 Ind Cas 441 (449) (DB) (Lah).

[8] X sold Y a horse with cracked hoof but filling the crack with some substance in such a way as to defy detection. Shortly after purchase lameness of horse was discovered. In a suit by Y, it was held that he was entitled to avoid sale on the ground of fraud and to recover purchase money. (1904) 1904 Pun Re No. 48, page 149 (151).

"Misrepresentation"
defined.

18. "Misrepresentation" means and includes —

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;

Section 17 (contd.)

4. Clause (3).—[1] To bring case within S. 17 (3) promisee must be shown to have no intention of performing promise, at time of making it. (1911) 35 Bom 98 (96) (DB).

[2] Mere failure to fulfil promise is not fraud, unless, from outset, promisee did not intend to fulfil it. (Vol 5) 1918 Low Bur 142 (143).

[3] Where person orders and obtains possession of goods with intention of not paying for them, he commits fraud. He must then be considered as agent of vendor and his possession is that of vendor. If vendee tries to dispose of goods before payment by transfer of invoices to third party's name, third party gets no title to goods. (Vol 4) 1917 Lah 421 (423) (DB).

5. Clause (4).—[1] False personation amounts to a deception, so as to constitute a fraud within the meaning of this section. ('86) 1886 Pun Re No. 21, page 37 (38) (DB).

6. Clause (5).—[1] Omissions to make disclosures mentioned in S. 55, para. (1) (a) and para. (5) (a) of the Transfer of Property Act, by the seller and buyer respectively are declared to be fraudulent by last para of that section. (1896) 20 Bom 522 (534) (DB). (Concealment of a claim of an equitable mortgagee against property sold—Vendor bound to and could readily remove the defect—Claim bearing small proportion to purchase money—*Held* defect was not material within the meaning of S. 55, para. (1), cl. (a).)

[2] For a full discussion of what is a material defect, see A. I. R. Commentaries on the Transfer of Property Act, 2nd (1945) Edition, S. 55 N. 2.

7. Explanation.—[1] 'Duty' clearly means a legal duty. (Vol 24) 1937 Lah 598 (598).

[2] Purchaser occupies no fiduciary position and is under no obligation to disclose facts. There is in such case no duty to speak and silence does not amount to fraud. Intentional misleading communication would be fraudulent. Equal means of knowledge is immaterial where there is a misrepresentation or any thing lulling suspicion. (Vol 18) 1931 Mad 603 (605) (DB).

[3] Contract of marriage between father of bridegroom and a third person on behalf of the bride, both Mahomedans—Negotiations concluded by *pan rusam*—It was subsequently discovered that the girl was suffering from epilepsy—*Held* that the father of the bridegroom was entitled to rescind . . . The right arose out of contractual relationship, and there being a breach of duty to disclose, the opposite party was only liable on the ground of fraud under this section. (Vol 24) 1937 Nag 270 (271, 273) : I L R (1937) Nag 299.

[4] Where a party alleged that the other party who drew the acceptance memo took advantage of his illiteracy and lack of knowledge of English language and failed to direct him to the proper sense of the instrument when he misread the same and believed it to be something different, but on evidence it was found he had signed all documents and carried on the lengthy correspondence in English : *Held* that he was neither illiterate nor a person who did not understand the language and in these circumstances there was no duty cast upon the party the non-discharge of which amounted to fraud. (Vol 10) 1923 Sind 25 (27).

[5] Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid; see S. 143.

8. Proof of fraud.—[1] *Per* Kinoid J. C.—Pleas such as misrepresentation and fraud must be examined

with the utmost rigour. They are not pleas that an honest man would make, save in the most exceptional circumstances. They are pleas too, which, if allowed, would be capable of the most dangerous extension. (Vol 10) 1923 Sind 25 (28).

[2] Fraud is a matter of inference in all cases and direct evidence of this is seldom, if ever available. All that is necessary to show is that, circumstances exist, which show that, fraud must have been practised. (Vol 26) 1939 Lah 439 (451) : I L R (1939) Lah 439 (DB). (If fraud is practised and the decree obtained is the result of fraud, relief must be granted whether the woman was or was not a *pardanashin lady*.) * (Vol 18) 1931 Oudh 333 (338) : 7 Luck 131 (DB) * (Vol 13) 1926 Cal 73 (77) (DB).

[3] Circumstances of mere suspicion should not be taken as proof of fraud, but the evidence must be sufficient to overcome the natural presumption of honesty and fair dealing. Fraud is not to be presumed or inferred lightly. (Vol 13) 1926 Cal 73 (77) (DB).

[4] A charge of fraud, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. (Vol 28) 1941 P C 93 (95) (PC).

[5] The party, alleging fraud, must furnish specific details. (Vol 24) 1937 P C 146 (148) : 64 Ind App 143 : 31 Sind L R 306 : I L R (1937) All 566 (PC). * (Vol 20) 1933 Cal 366 (371) : 60 Cal 262. (Court will not allow allegation of fraud to be made lightly, or otherwise than with the utmost precision and particularity and above all promptly.)

[6] To prove fraud, it must be proved that representations made were false to the knowledge of party, making them, or were such, that the party could have no reasonable belief that they were true; that they were made for the purpose of being acted upon and believed, that they were believed and acted upon and caused the actual damage alleged. (Vol 11) 1924 All 17 (19) : 45 All 624 (D B).

[7] Evidence of unfairness of transaction may be taken to assist the Court to come to a conclusion whether there was fraud or not. But that evidence alone is not sufficient to find fraud, where the direct evidence on the question of fraud is unreliable. (Vol 28) 1941 Pat 83 (90) : 19 Pat 669 (D B).

[8] Party who relies upon fraud must plead and prove it, and must give particulars of alleged fraud; and can succeed, only upon proof of fraud as alleged. (1911) 10 Ind Cas 922 (923) (Low Bur) * (1841) 2 Moo Ind App 181 (244) (P C).

[9] Fraud accomplished — Plaintiff suing for possession suppressing fraud — Defendant in possession can plead and prove fraud to defeat plaintiff's claim. (Vol 28) 1941 Bom 274 (275) : I L R (1941) Bom 575 (FB) ((1907) 31 Bom 405 (DB) overruled.) * (1904) 28 Bom 639 (643) (D B).

SECTION 18—Synopsis

1. Sub-section (1).

2. Sub-section (2).

3. Sub-section (3).

1. Sub-section (1) — [1] The principal difference between fraud and misrepresentation is that, in the one case, the person, making the suggestion, does not believe it to be true, and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor. (Vol 18) 1931 All 154 (156) : 53 All 374 (D B).

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Section 18 (contd.)

[2] If a blind, or an illiterate man signs a document on the misrepresentation that it contains something, which it does not contain in reality, then he can plead that, there was no consent as contemplated by the Contract Act. If that plea fails, it is still open to him to plead misrepresentation and ask for relief. (Vol 12) 1925 Pat 140 (141).

[3] Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity, considered as having been obtained fraudulently. So, where the plaintiff represented his power as auction purchaser as greater than what it really was in law and obtained assent of the tenants to the ikrarnama, it was held that the statement of the effect of law was a misrepresentation and therefore the plaintiff could not sue upon the contract. (1890) 17 Cal 291 (297) : 16 Ind App 233 (P C).

[4] A chartered a ship which was wholly unknown to him on the representation made by B that it was of a particular tonnage and it turned out to be of larger tonnage upon which A refused to accept it in fulfilment of the charter party. B sued A for damages for breach of charter party. Held, that A was entitled to treat the contract as void by reason of misrepresentation by B with regard to the size of the ship. B's assertion with regard to the size of the ship was not warranted by any information he had at the time and was not true and it also caused A to make a mistake as to the size of the vessel which was the quality the parties had principally in view. (1890) 14 Bom 241 (248).

[5] Hindu father agreeing to sell family property without necessity, alleging that he was sole owner—He is guilty of misrepresentation. (Vol 14) 1927 Sind 219 (222) : 20 Sind L R 220 (D B).

[6] Vendor giving false information whether on inquiry or otherwise about income or rental of property to be sold—Held, that was misrepresentation. (Vol 19) 1932 Nag 148 (149) : 28 Nag L R 184.

[7] Where A is persuaded by B, her brother, to execute a deed accepting the partition made during her (A's) minority though B well knew that she was under the false impression that her father had created a wakf of that property which false impression had been deliberately induced by him, Held, B's action amounted to misrepresentation. (Vol 25) 1938 Rang 264 (267) (D B).

[8] An endorsement containing an acknowledgment of full satisfaction of the mortgage, when it is not so satisfied, amounts in law to misrepresentation. (Vol 21) 1934 Nag 29 (30, 31) : 30 Nag L R 196.

[9] A vendor wrote a letter to the proposed vendee stating that the mares which he wished to sell were thoroughly sound and had no vice whatsoever, but added that the vendee should buy them only after satisfying himself with regard to them, through a friend. Vendor's information did not warrant the assertion regarding soundness of the mares. The mares were found unsound on purchase. Held that, this amounted to misrepresentation under S. 18 (1) as to the soundness of the mares. (86) 1886 Fun Re No. 41, page 73 (79, 80) (D B).

[10] Seller professing to be owner, though merely lease-holder, is guilty of misrepresentation. (Vol 16) 1929 All 887 (839) (D B).

[11] Where B, an agent of a company, relying upon

information given to him by C, that a certain person would be a director of the company, induced certain persons to buy shares, Held, that, B was not warranted in making the positive assertion relying upon the second-hand information given to him and, therefore, there was misrepresentation within S. 18 (1). (1900) 4 Cal W N 369 (388) (D B).

[12] Misrepresentation made by a salesman of one of the contracting parties, is misrepresentation made by one contracting party to other. (Vol 27) 1940 Oudh 35 (41) : 15 Luck 191 (DB).

[13] Person, executing deed, neither blind nor illiterate—Plea of *non est factum* is not open to him, where there is no fraudulent misrepresentation—He is bound by deed even though he has not read it or understood it. (Vol 25) 1938 P C 103 (109) (PC).

2. Sub-section (2). — [1] The second clause of S. 18 is probably intended to meet all those cases which are called in the Courts of Equity, cases of 'constructive fraud,' in which there is no intention to deceive, but where the circumstances are such as to make the party, who derives a benefit from the transaction, equally answerable in effect as if he had been actuated by motives of fraud or deceit. (1879) 3 Bom 242 (267). (Deed of release signed on representation and belief that it was a deed of composition.)

[See also (Vol 8) 1921 Sind 121 (123) : 16 Sind L R 235. (No misrepresentation as to real nature of document—Its acceptance without protest is tacit acceptance of its terms.)]

[2] Where vendor of lease-hold property is informed by vendee of object of his purchase and knows that the lease contains covenants, which will defeat that object, and yet remains silent; such silence will in equity be equivalent to misrepresentation. (Vol 1) 1914 Cal 661 (662) : 42 Cal 28 (DB).

[3] Tenant proposing to take a house, on rent, situate in another town and containing not less than four bed-rooms — Landlord sending a plan of the house showing that it had four bed-rooms—Acting on that plan tenant entering into contract of lease—Subsequent discovery that house did not contain the required number fit to be used as bed-room — Held that, tenant was justified in repudiating the contract on ground of misrepresentation in plan. (Vol 4) 1917 Lah 173 (174).

[4] At the time of an auction of liquor shops in a district a statement was circulated among the proposed bidders showing the names of the places of the liquor shops and the average quantity sold therein. Plaintiff was a purchaser of one of such shops. Near the place of the plaintiff, there was another shop which prior to the auction was allowed to be brought still nearer but no mention was made of this change in the statement. In a suit by the plaintiff for a declaration that the Secretary of State had no right to make a demand on the plaintiffs for money until the loss which the plaintiff had suffered owing to the neglect of the defendant was made good. Held, there was an omission to state material fact and the plaintiff could proceed under S. 19, on the ground of misrepresentation. (Vol 15) 1928 Bom 17 (17) (DE).

3. Sub-section (3). — [1] Where the company, by their Directors, acting within their authority, and in perfect assurance, sold a bill to the bank on behalf of the company as a bill upon which the company was liable, which, however, turned out to be one, upon

19. When consent to an agreement is caused by coercion, "[* "] fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Voidability of agreements without free consent. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of S. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out, and the mortgage debt redeemed.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[a] The words, "undue influence," were repealed by the Indian Contract Act, Amendment Act, 1899 (6 [VI] of 1899), S. 3.

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which the company was not liable: *Held*, there was misrepresentation within the meaning of Cl. (3) of S. 18. (1881) 5 Bom 92 (97, 98).

[2] Where a party executes a document under a mistake as to the subject of the contract on an innocent misrepresentation by the other party that the document contained all the terms agreed upon, while in fact it did not contain all the terms, held that the mistake was sufficient to justify repudiation of the contract. (Vol 19) 1932 Bom 151 (153) : 56 Bom 180 (DB).

[3] A sale in execution cannot be set aside in a suit by the auction-purchaser on the ground of a mistake in the sale proclamation as to the extent of the judgment-debtor's share in the property, where it is not proved that any misrepresentation was intentionally made by or on behalf of the decree-holders. (Vol 8) 1921 All 223 (224) (DB).

[4] Guarantee obtained by misrepresentation is invalid; see S. 142.

SECTION 19 — Synopsis

1. Scope.
2. 'Consent caused by coercion, fraud or misrepresentation.'
3. Inadequacy of consideration.
4. Exception.
5. Explanation.
6. Who can avoid the contract.
7. Remedies under the section.
8. Rescission of contract—Effect : see S. 64.
9. Plea of fraud.

1. Scope.—[1] Section 17 read with S. 19 extends to contracts, which include an element of transfer, such as sales and mortgages. (Vol 27) 1940 Lah 505 (508) (DB).

[2] Section 17, read with S. 19, permits a contract to be avoided, when based on representations known to be false by the person making them. (Vol 27) 1940 Lah 505 (508) (DB).

[3] Where there was a misrepresentation as to the nature of the document and not merely as to its contents, there was no real execution and the document was void *ab initio* and not merely voidable. (Vol 27) 1940 Pat 201 (203). (*Obiter.*)

[4] Where there is no consent at all within the meaning of S. 19 the document is *ab initio* void and need not be set aside. But where there is consent, but such a consent is caused by one of the grounds mentioned in S. 19 making it voidable, the party objecting to the consent must prove it before the contract can be avoided. (Vol 9) 1922 Pat 514 (525) : 2 Pat 52 (DB).

[5] Person induced to execute deed under belief that he is signing deed of different nature by promisee's fraud—Contract is void *ab initio*. (Vol 8) 1921 Cal 786 (788) (DB).

[6] Section 19 of the Contract Act, cannot apply in the case, where the contract itself contains a defeasance clause. If the conditions of such clause are fulfilled, the party, who is given the right to annul the contract under it, is entitled to do so, unless the other party proved that the former has waived his rights. (Vol 29) 1942 Cal 412 (417) : ILR (1942) 1 Cal 100 (DB).

[7] A contract, which is neither illegal nor fraudulent as between the parties, cannot be refused enforcement, merely because a third person has a right to refuse to give effect to that contract, as regards himself. (18) 1913 Pun L R No. 48, page 182 (189) : 1913 Pun Ra No. 58 (DB).

[8] As to consequences of rescission of voidable contract, see S. 64. As to pledge by person in possession under voidable contract, see S. 178A. As to sale by

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person in possession under voidable contract, see S. 29, Sale of Goods Act, 1930.

2 'Consent caused by coercion, fraud or misrepresentation.'—[1] Fraud which brings about consent to a transaction does not make a transaction void, but only voidable at the instance of the person defrauded. (1904) 28 Bom 639 (642) (DB) & (1910) 37 Cal 81 (87, 83) (DB).

[2] Secrecy *prima facie* implies fraud. (1909) 32 Mad 242 (233) (SB).

[3] Fraud referred to in S. 19 is fraud as defined in S. 17 and does not include the infringement of a condition in a contract to transfer a tenancy, requiring previous consent of a third party to the transfer of tenancy. (13) 1913 Pun L R No. 48, page 182 (188) : 1913 Pun Re No. 58 (DB).

[4] Where a person, against whom a decree with costs for possession was made, and whose right of appeal was time barred, made an offer to decree-holder that he would not file an appeal from decree if costs were given up and the decree-holder accepted it, it was held that the agreement was void under S. 20, if the judgment-debtor had honestly believed that he had right to appeal when he made the representation as both the parties were under mistake of fact; but, if the judgment-debtor had acted dishonestly, the agreement was voidable under S. 19 as brought about by misrepresentation. (Vol 26) 1939 Lah 511 (512) : ILR (1940) Lah 392.

[5] Mistake, induced by innocent misrepresentation, is sufficient to justify repudiation of the contract. (Vol 19) 1932 Bom 151 (153) : 56 Bom 180 (DB). (Signing an agreement under the mistaken belief that it contained all the terms of contract, where, in fact, a material term was omitted—No fraud—Contract can be repudiated on ground of innocent misrepresentation.)

[6] Misrepresentation must have in fact materially induced contract, in order to give the right of avoidance, and such plea ought to be specifically taken in the plaint. (Vol 7) 1920 Cal 908 (909) (SB).

[7] Where one of the contracting parties says : "I am well known to the National Bank in your city," it is not a statement of fact, but only his own opinion as to the state of his credit, though it may be false; such statement is not one of fact, and even if false, does not avoid the contract under S. 19. (Vol 3) 1916 Mad 830 (831) (DB).

[8] Whether misrepresentation caused other party to consent to contract or not is a question of fact. (Vol 8) 1921 Mad 198 (198) (DB).

[9] Mother and guardian of minor executing bond in lieu of debt barred by time—Recitals, contained in the bond, showing that the mother executed it on misrepresentation that a debt was due from her late husband—*Held*, that neither the minor nor his mother guardian can be held liable on the bond. (Vol 22) 1935 Oudh 12 (18).

[10] Mortgage brought about by concealing, fraudulently from mortgagee the existence of prior mortgage is voidable at option of mortgagee. (Vol 2) 1915 Mad 1059 (1059) (DB).

[11] In entering into a contract or inducing another person to act, if one should misrepresent a fact, then the contract between him and the person so deceived shall be based in law upon the ground that the fact so misrepresented must be made good by the party misrepresenting it. (Vol 2) 1915 Bom 124 (128).

[12] Where both the plaintiff and the defendant are parties to the fraud, and the fraud has been successfully committed, the plaintiff is not entitled to any relief from the Court on the maxim "*in pari delicto potior est conditio possidentis*." (Vol 20) 1933 Oudh 124 (127) : 8 Luck 235 (DB).

[13] Misrepresentation inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality, no consent at all to the marriage. (Vol 20) 1933 All 122 (126, 127) : 55 All 185.

3. Inadequacy of consideration. — [1] Inadequate consideration may lead to an inference of fraud or undue influence. But the inadequacy must be apparent and not merely inferential (Vol 13) 1926 Pat 539 (542) (DB) & (Vol 27) 1940 Lah 505 (508) (DB). (*Held*, the mortgage could not be avoided merely for inadequacy of consideration.)

4. Exception.—[1] The exception to S 19, Contract Act, applies to all cases of misrepresentation as distinguished from fraud and should not be restricted to misrepresentation, which is "fraudulent within meaning of S. 17." (Vol 26) 1939 Cal 473 (475) : I L R (1939) 1 Cal 889 (DB). (Intending seller causing bogus letters written to him quoting high price — Purchasers induced to pay high price on showing of letters. This amounts to fraud. Exception does not apply.) & (1888) 11 Mad 419 (439) (DB).

[2] Where execution sale is sought to be set aside on ground of misrepresentation by the officer conducting sale, exception to S. 19 does not apply. (1909) 36 Cal 323 (333) : 36 Ind App 32 (PC).

[3] There can be no estoppel where the truth of the matter is known to both parties. (1903) 30 Cal 539 (546) : 30 Ind App 114 (PC). (A false representation made to a person, who knows it to be false, is not such a fraud as to take away the privilege of infancy).

[4] Failure to make such inquiries, as an ordinary prudent man would make, may be evidence that the person, to whom misrepresentation was made, was not actually deceived. (Vol 10) 1923 Sind 5 (14) : 16 Sind L R 112 (FB).

[5] There is no misrepresentation, if there are means of discovering truth with ordinary diligence. (Vol 3) 1916 Lah 151 (153).

[6] A person, who had the means of discovering the truth, with ordinary diligence, cannot avoid the contract on the ground that he was deceived by the misrepresentation. (Vol 19) 1932 Nag 148 (151) : 28 Nag L R 184 & (Vol 5) 1918 Lah 94 (95) : 1918 Pun Re No. 42 & (1900) 4 Cal W N 369 (382) (DB). (Application of exception not restricted to cases, where party had constructive notice of fraud) & ('86) 1886 Pun Re No 41, page 73 (77) (DB). (Whether he had such means is a question of fact to be determined on the facts of case.) & (1879) 4 Cal 801 (807) (DB).

[7] Exception to S. 19, applies when contracting party might, with due diligence, have discovered misrepresentation before he entered into contract. (Vol 4) 1917 Lah 173 (174).

[8] If the executants had not the means of discovering truth with ordinary diligence, the exception to S. 19 is not applicable. (1879) 4 Bom 242 (269).

[9] In the case of active misrepresentation, to get relief under S. 19, party defrauded, need not establish that he had no means of discovering truth with ordinary diligence. (Vol 26) 1939 Cal 473 (476) : I L R (1939) 1 Cal 889 (DB) & (Vol 18) 1931 All 154 (157) : 53 All 374 (DB).

[10] If a vendor is guilty of fraud, by actively concealing a fact, which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth will not come within the exception. (1888) 11 Mad 419 (436) (DB).

[11] Vendor of land failed to disclose that land had been leased to third party and represented to vendee

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that he could take immediate possession of land. Sale is voidable and does not fall within exception to S. 19. (Vol 27) 1940 Mad 560 (561) (DB).

[12] Where there is no reason to suspect the representation as untrue, but the statement turns out to be such, the party who makes the misrepresentation cannot be heard to plead that the right to relief is gone, because the other party had the means to discover the truth by due diligence. (1900) 4 Cal W N 369 (381) (DB).

[13] The phrase "fraudulent within the meaning of S. 17" applies to word "Silence" exclusively and not to the word "Misrepresentation." (Vol 26) 1939 Cal 473 (475) : 1 L R (1939) 1 Cal 389 (DB) & (Vol 18) 1931 All 154 (157) : 53 All 374 (DB).

5. Explanation.—[1] Explanation to the section must not be taken as meaning that any subsequent fraud will not affect the validity of the original contract as it deals with fraud only so far as it affects the free will of the parties at the time of entering into contract. (Vol 2) 1915 Mad 1152 (1154) (DB). (Material alteration after execution of deed—Explanation does not apply.) & (1913) 37 Bom 158 (169). (Fraud in the performance of a contract is no ground for rescission)

[2] Illustration (b) to S. 19 is not exhaustive of the class of cases which could come under that explanation. (Vol 8) 1921 Mad 198 (198) (DB).

[3] Where the fact of minority of one of the parties to a contract is known to the other, the misrepresentation by the minor as to his age is not such a fraud as would vitiate the contract, and the explanation would cover such a case, irrespective of the consideration whether the principles of estoppel as laid down in S. 115, Evidence Act, would apply to minors or not. (1903) 30 Cal 539 (546) : 30 Ind App 114 (PC).

[4] Whether a particular misrepresentation was of such a nature, that it did cause the consent of the person, to whom it was made, or whether it was of such a nature that his consent was, in no way, affected by the misrepresentation is a question of fact. (Vol 8) 1921 Mad 198 (198) (DB).

[5] See also Notes on Section 17.

6. Who can avoid the contract.—[1] If a transaction which is voidable is admitted by the person, who is entitled to avoid it, it cannot be questioned by a third party. (Vol 3) 1916 Cal 924 (925) (DB). (*Obiter*). & (1912) 36 Bom 37 (41) (DB).

[2] The right to avoid a transfer or conveyance is not a mere personal right, but can be exercised by heirs or legal representatives of person unduly influenced or defrauded, unless the person has indicated his election to stand by transaction. : (Vol 5) 1918 Bom 93 (94) : 43 Bom 173 (DB).

7. Remedies under the section. — [1] Where there is an omission to state material fact, on the part of one of the contracting parties, only two remedies are open to the other, (i) to avoid the contract before the expiry of the term of contract or (ii) to enforce it as represented. (Vol 15) 1928 Bom 17 (18) (DB) & (Vol 19) 1932 Nag 149 (150, 151) : 28 Nag L R 184. (When party cannot be put in represented position only remedy of avoiding remains—There is no right to sue for damages.) & (Vol 4) 1917 Lah 173 (175). (A party to contract can repudiate it when misrepresentation comes to his knowledge.) & (1881) 5 Bom 92 (98). (Can be set aside.) & (Vol 5) 1918 All 74 (76) : 40 All 619 (DB).

[See also (Vol 28) 1941 Nag 111 (113, 114) (DB)]

[2] Where a party to a contract treats it as voidable and exercises his option, he cannot go back to the agreement to enforce it. When he not only states that he treats the document incorporating the agreement in suit as void but proceeds on that footing to make his

demands on the other party, though the latter does not admit that the former could do so and the former party does not, at any time, give up the attitude taken by him, he cannot afterwards be permitted to enforce the agreement as a subsisting contract. (Vol 30) 1943 Sind 197 (212) : ILR (1943) Kar 49 (DB).

[3] Section 19 does not entitle a party to insist on the performance of different contract from the one entered into by him. (Vol 16) 1929 Nag 254 (257) : 25 Nag L R 187 (FB).

[4] Person induced to be partner by fraud — Court can rescind contract and reimburse him with amount paid. (Vol 8) 1921 Lah 180 (181) (DB).

[5] Relief cannot be granted when fraudulent or illegal object has been carried out and both parties are in *pari delicto*. (1911) 5 Cal W N 408 (409).

[6] Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently, if he seeks to take advantage of that error, and cannot be allowed to enforce it. (Vol 21) 1934 Cal 778 (779) : 61 Cal 548.

[7] After commencement of winding up proceedings of a company, a shareholder cannot have his contract to take shares set aside on the ground of fraud or misrepresentation unless he has not only repudiated his shares, but also taken proceedings to have his name removed or asserted his right to repudiate them in an action by company to enforce calls upon him before liquidation. Even if the contract was voidable on the ground of fraud or misrepresentation if the applicant had ratified it he was debarred from questioning it. (Vol 5) 1918 Lah 94 (95) : 1918 Pun Re No 42.

[8] Misrepresentation about subject-matter of contract made not in the contract but collaterally—Remedy is claim for damages for breach of the collateral contract if any. (Vol 2) 1915 P C 113 (114) (PC).

8. Rescission of contract—Effect : See S. 64.

9. Plea of fraud. — [1] In cases of accomplished fraud if only one party acts fraudulently, he cannot be allowed, as plaintiff or defendant, to plead his own fraud. (Vol 23) 1941 Bom 274 (278) : ILR (1941) Bom 575 (FB) & (Vol 28) 1941 Nag 357 (361) : 1 L R (1942) Nag 564 (DB). (No equitable relief, such as a declaration that the plaintiff is the owner of a certain property can be granted when the plaintiff has acted fraudulently.) (Vol 23) 1936 Mad 630 (631) & (Vol 13) 1926 Mad 631 (632). (Person's object being to cheat two persons, but, actually cheating only one — Court should refuse to help him.) & (1871) 15 Suth W R 278 (274) (DB). (Person deliberately conveying his property to defraud others cannot be allowed to set up his fraud against it — He is bound by the deed.)

[2] Where both parties are equally fraudulent, the Courts will refuse to enforce the fraudulent transaction, with the result that— (a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed; and (b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim. (Vol 28) 1941 Bom 274 (278) : 1 L R (1941) Bom 575 (FB) & (Vol 27) 1940 Pat 379 (380) (DB). (Person assigning his decree to another to avoid its attachment by his creditor cannot subsequently ask Court to declare that assignment was benami.) & (Vol 22) 1935 All 799 (801). (Fraud of both plaintiff and defendant to defraud pre-emptors—Plaintiff suing to enforce the transaction—Defendant will be allowed to prove want of consideration and also his fraud — Principle of '*pari delicto*' applies here to defeat plaintiff's suit.) & (Vol 13) 1926 Nag 259 (260). (Parties to fraud cannot seek Court's assistance.)

Power to set aside contract induced by undue influence.

^a[19A. When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 12 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.]

[a] Inserted by the Indian Contract Act, Amendment Act, 1899 (6 [VI] of 1899), S. 3.

PROVINCIAL AMENDMENTS.

Ss. 19B, 19C—C. P. & BERAR

"19B (a) 'Maintainer' means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognized by law as justifying his interference.

(b) 'Champertous agreement' means an agreement whereby the nominal plaintiff agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

Power to set aside champertous agreement. 19C. A champertous agreement may be set aside upon such terms and conditions as the Court may deem fit to impose."

—The Central Provinces and Berar Indian Contract (Amendment) Act, 1938 (15 [XV] of 1938), S. 2. [5-7-1938.]

Section 19 (contd.)

[3] A fraud cannot be pleaded successfully against an innocent person. It is only where the attempted fraud has been wholly or partially carried into effect that the Court will give effect to the fraudulent transaction as between transferor and transferee. (Vol 10) 1923 All 164 (164).

[4] A person whose consent has been brought about by fraud is entitled to resist the claim under the contract by pleading fraud even though he may not have himself sued to set aside the transaction, and is not precluded from urging the plea in defence by the lapse of time. (1904) 28 Bom 639 (642) (DB).

SECTION 19A—SYNOPSIS

1. Scope.
2. Who can avoid the contract.
3. Plea and proof of undue influence.
4. Limitation.

1. Scope.—'Undue influence', though separately treated in Contract Act, is only a branch of a fraud in equity and invites same relief as fraud. (Vol 3) 1916 Bom 275 (277) (DB).

[2] Court has power to interfere and relieve a defendant against unconscionable transactions under this section. (1907) 31 Bom 348 (352).

[3] Where a sale deed is executed under circumstances, giving an unfair advantage to the dominating party, that sale deed cannot be upheld in a Court of law. (Vol 18) 1931 Nag 63 (65) : 27 Nag L R 19.

[4] There is nothing in law to prevent a joint owner of the property, on reaching majority, accepting and agreeing to a partition of joint property, made during his minority. When such person is persuaded to execute a deed accepting such partition by misrepresentation and undue influence by the person standing in fiduciary relation by concealing material facts such deed is voidable at the instance of such person. (Vol 25) 1938 Rang 264 (266, 267) (DB).

[5] Acknowledgment of liability to pay certain sum is not binding, when the executant signed it under intimidation. (Vol 8) 1921 Lah 362 (363).

[6] No contract can be avoided merely on the ground that it embodies on unconscionable bargain unless

undue influence can be proved by the plaintiff. ('18) 1913 Pun L R No. 305, page 1027 (1031) (DB) & (1910) 4 Sind L R 276 (277) (DB). (High rate of interest—Undue influence not proved—No relief under this section.) & (1908) 32 All 589 (594). (Do.)

2. Who can avoid the contract. — [1] Relief under this section could be granted only to the person whose consent to the contract was induced by undue influence. (Vol 12) 1925 Cal 94 (96) (DB).

[2] Contract procured by undue influence is only a voidable one and only gives the person, under undue influence, a right of choice or election. Such right once exercised is exhausted. (Vol 30) 1943 Cal 162 (165).

[3] The fact that the party had acted under independent advice will not preclude him from seeking relief under S. 19A. (1911) 34 Mad 7 (10) (DB).

[4] The rights under Ss. 19 and 19A can be exercised by party's legal representatives, unless the party has at the date of death lost it by acquiescence or otherwise. (Vol 23) 1936 All 672 (674) & (Vol 14) 1927 Bom. 384 (387) : 51 Bom 133 (DB). (Per *Marten C. J.*) & (Vol 5) 1913 Bom 93 (94) : 43 Bom 173 (DB). (A and B, two sisters, brought up by their uncle—Sale-deed executed by them in his favour for inadequate consideration acting under his influence—B dies—A sues to avoid the sale both in her own right and as heiress to B—*Held*, suit was competent and sale declared void.)

[See also (Vol 21) 1934 Cal 762 (763) (DB). (Plea under S. 19A by way of defence is available to the representative of executant within three years after the contract)]

[5] Transferee of a bond is invested with all the rights of the transferor in respect of the bond, including the right to avoid it under S. 19A on the ground of undue influence. (Vol 23) 1936 Oudh 105 (106) (DB). (Suit must be brought without undue delay.)

[See however (1918) 1913 Pun L R No. 305, page 1027 (1031) (DB). (Speculator purchasing equity of redemption on chance of getting easy redemption, seeking avoidance of mortgage on ground of undue influence—*Held*, it was doubtful whether he could set up the plea though original mortgagor could have done so.)]

[6] Where the transferee has brought the land with

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation. — An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations.

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 19A (contd.)

open eye, the Court will not ordinarily interfere on his behalf. (Vol 23) 1936 Oudh 105 (106) (DB).

[7] Where a disqualified proprietor whose estate had been taken by Court of Wards under a transaction, and became willing to restore the money advanced to him with interest, the Court under S. 19A would set aside the transaction on those terms. (1902) 5 Oudh Cas 256 (258).

3. Plea and proof of undue influence. — [1] Where undue influence is pleaded, precision should be observed. Unless pleadings make out a case, Court will not investigate. (Vol 8) 1921 Pat 107 (109) : 6 Pat L Jour 253 (DB).

[2] If there are facts on record to justify inference of undue influence, the Court has power to administer relief notwithstanding inartistic pleading. All that Court is to see is that adversary of the party pleading undue influence is not taken by surprise. (Vol 13) 1931 Nag 63 (64) : 27 Nag L R 19.

[3] To avoid a contract under S. 16 of the Contract Act a party has to establish not only that the other party was in a position to dominate his will but he must also prove that the other party has used that position to obtain an unfair advantage over him. (Vol 7) 1920 PC 65 (66) : 43 Mad 546 : 47 Ind App 1 (PC) * (Vol 18) 1931 Nag 63 (65) : 27 Nag L R 19. (Transaction being unconscionable along with dominating position — Inference of undue influence may be drawn.)

[4] Unless one of the parties was in a dominant position, mere unconscionableness of bargain alone will not justify a Court to interfere with contract under S. 19A. (1911) 10 Ind Cas 249 (250) (DB) (All).

[5] When a transaction is unconscionable, the burden of proving that the contract was not induced by undue influence is on the person who is in dominant position. (Vol 7) 1920 PC 65 (66) : 43 Mad 546 : 47 Ind App 1 (PC).

[6] Although the plaintiff fails to substantiate his plea of misrepresentation, still that will not disentitle him from getting such relief as under the circumstances proved, he is entitled to. The suit need not be dismissed on account of such failure. (Vol 18) 1931 Nag 63 (65) : 27 Nag L R 19.

[7] A plea under the second clause of S. 19A may be allowed to be raised in second appeal and second appellate Court may impose such terms and conditions as may seem just to any order for the contract being set aside. (Vol 12) 1925 All 783 (784) : 47 All 932 (DB).

4. Limitation. — [1] Transfers made by undue influence are voidable under S. 19A and such suits are governed by Art. 91, Limitation Act. (Vol 21) 1934 All 507 (511) (DB).

[2] Where the suit is really one for avoiding a contract on the ground of undue influence, the plaintiff cannot evade for provisions of the law of limitation by framing the suit as one for possession alone. (Vol 21) 1934 All 507 (511) (DB).

SECTION 20 — Synopsis.

1. Applicability and scope.

2. Illustrative cases.

3. Restoration or compensation for advantage received under contract void for mutual mistake. — See S. 65.

1. Applicability and scope. — [1] In order to make agreement void both parties must be under mistake of fact. (Vol 10) 1923 Sind 25 (28).

[2] Where there is a mutual mistake as to a fact, which goes to the root of the contract, and frustrates the object of the agreement, S. 20 will apply and the agreement is void. (Vol 20) 1933 Rang 79 (81) : 11 Rang 201 (D B). (Fact, which makes bargain advantageous, within knowledge of only one party — Other party is bound by contract unless party, knowing the fact, is under obligation to disclose it to the other party.) * (Vol 22) 1935 Mad 287 (287) * (Vol 5) 1918 Sind 41 (44) : 12 Sind L R 41 (D B). (Agreement to refer to arbitration.)

[See (Vol 10) 1923 Mad 17 (17) (D B). (Contract in which there is no mistake as to its formation, but only as to its execution, is not void under S. 20.)]

[3] Where terms of contract are understood by parties in different sense, contract is void. (Vol 13) 1926 Nag 435 (439).

[See (1904) 28 Bom 421 (425) (D B). (Mistake in expression which may be either common or unilateral implies that the minds of the parties were not one on that which is expressed. But it does not follow that in every case in which there has, in fact, been such a mistake there is no contract.)]

[4] Parties being under mutual mistake and misapprehension as to their relatives and respective rights — Agreement is void. (Vol 24) 1937 Pat 65 (71) : 10 Pat 159 (S B) * (Vol 4) 1917 Cal 786 (789) (DB).

[5] Though S. 20 deals only with common mistake, as to a matter of fact essential to the agreement and does not cover cases of frustration yet the general principle of frustration may be imported into by construction so as to cover such cases also. (Vol 8) 1921 Cal 509 (514) (DB).

[6] Where parties agree to purchase or sell a specific article and it happens that at the time of the agreement the article is not in existence, there is a common mistake as to an essential fact and the agreement is void. (Vol 8) 1921 Bom 49 (51) : 45 Bom 1222 (DB).

[7] Execution of document on mistaken assumption which bears only on motive inducing execution, does not amount to "mistake as to rights" to justify its cancellation. (Vol 5) 1918 Mad 395 (395) (DB).

[8] Mistake as to the status of plaintiff in the mind of the defendant alone is not a mutual mistake nor a mistake in respect of a matter of fact essential to a compromise. (Vol 23) 1936 Oudh 97 (100) (DB).

[9] Plea of mutual mistake is available to a plaintiff, where he seeks the equitable remedy of ratification or

Section 20 (*contd.*)

cancellation, and to the defendant, as a defence, when an equitable remedy is sought against him. (Vol 18) 1931 Mad 785 (786) : 54 Mad 973 (DB).

[10] Mistake known at the time to one party to the contract may be proved, and performance in accordance with the terms of the error will not be compelled. (1904) 28 Bom 421 (426) (DB).

[11] Where the subject-matter of the contract is substantially obtained, S. 20 will not apply. Thus, where, in a sale, the subject-matter of the sale was substantially obtained by the vendee, it was held that the contract need not be set aside, and for the small portion that he did not obtain, compensation could be awarded. (Vol 14) 1927 Rang 90 (91).

[12] Section 20 applies only to contracts, but cannot be applied, by analogy, to decrees which have been obtained on account of mistake of parties. (Vol 24) 1937 All 731 (735) (DB).

[13] Mistake of fact should be pleaded in the written statement and in the absence of any plea the question cannot be allowed to be raised. (Vol 30) 1943 Pat 327 (337) : 22 Pat 220 (DB) (Vol 27) 1940 Pat 516 (533) : 19 Pat 433 (DB).

2. Illustrative cases. — [1] A contract which is based on a misunderstanding as to its terms is not enforceable. (Vol 20) 1933 Pat 579 (581).

[2] Parties to suit compromised in the belief that the suit was pending. But the suit had at the time ended in plaintiff's favour. *Held*, that the compromise was void. (Vol 6) 1919 Cal 330 (330) (DB).

[3] A Receiver, in a suit, sold by auction certain property under order of the Court. The plaintiff, the highest bidder, deposited in Court the necessary amount. A notice, under the Calcutta Improvement Act, affected the property. Both the parties were unaware of it at the time of sale. *Held*, that the agreement was void. (Vol 10) 1923 Cal 641 (643, 644) : 50 Cal 615 (DB).

[4] Plaintiff, purchaser, alleging that price, as stated in written agreement, was in excess of agreed amount, sued to recover difference. *Held*, suit would not lie, though plaintiff could sue to avoid the contract under S. 20 on the ground that parties to agreement were under mistake in matter of price. (Vol 17) 1930 Rang 12 (12).

[5] Suit by municipality for possession of property decreed — Agreement between parties that if plaintiff gave up claim for costs, defendant would deliver possession and would not file appeal — Defendant found to have no right of appeal while making agreement — *Held* agreement was void under S. 20 or voidable under S. 19. (Vol 26) 1939 Lah 511 (512).

[6] Both parties to settlement under Bombay Act VII of 1863 entering into it in belief that plaintiffs were superior holders of all land in village — Settlement, being an agreement is void on ground of common mistake of fact essential to agreement. (1892) 17 Bom 407 (412, 413) (DB).

[7] Defendant offering some stones in the belief that they were genuine emeralds — Plaintiff accepting offer in same belief — After purchase, stones turned out to be pieces of green coloured glass — Agreement held to be void on ground of common mistake regarding fact essential to agreement. (Vol 7) 1920 Oudh 31 (33).

[8] Where a person impersonating the real owner forged his signature to mortgage and also confirmed the sale by mortgagee by a similar forgery, it was held that the vendee and mortgagee were under a mistake as to the essential fact that the real owner had executed the mortgage. (Vol 3) 1916 Bom 209 (210) : 40 Bom 638 (DB).

[9] *Per Garth C. J.* — *Semble* — Even if it only appeared that compromise had been entered into and

sanctioned under mistake of parties and Court with regard to the subject-matter of the agreement, it ought to be set aside under S. 20. (1881) 6 Cal 687 (706) (DB).

[10] A lease was executed at a fixed annual rent. Assessment was subsequently enhanced by Government. Lessor sued for recovery of the enhanced rates. It was held that he could not recover the enhanced assessment, as the defendant's liability was fixed by the terms of the lease though both parties believed then that the assessment would not be increased. (1878-79) 3 Bom 154 (158) (DB).

[11] Mining lease of land measuring by reputation 100 bigas though actually less — In suit for rent, area held not essential for purpose of agreement — Contract held not void on ground of mistake. (Vol 16) 1929 Cal 547 548 (DB).

[12] When parties compromise *bona fide* believing the right of ownership of the plaintiff but subsequently it is found that no such right existed it will not amount to a mistake. Mere doubt as to the matter is not sufficient ground to set aside the compromise under S. 20. (Vol 21) 1934 Oudh 442 (444).

[13] Lessee from Government of a certain village with a condition that proprietary rights will be conferred on the fulfilment of certain terms, sold some lands without a covenant for title. Subsequently the alienation was disallowed by the Government as being in contravention of one of the terms of the lease. In a suit by dispossessed vendee for compensation it was held there was no material mistake of fact in the case. ('93) 1893 Pun Re No 62, p. 279 (283) (DB).

[14] Subsequent to the contract to supply certain articles but before delivery of goods, the tariff on the goods sold was raised and the vendor refused delivery unless vendee paid the enhanced duty. *Held*, that the vendor was bound to deliver the goods and the plea of mutual mistake did not exist. (Vol 20) 1933 Rang 79 (80) : 11 Rang 201 (DB).

[15] A separate warranty in a contract proves that the matter of the warranty is not an essential part of the contract, so as to render the contract void under S. 20 on the plea of mistake. (1907) 30 Mad 284 (290) (DB).

[16] A document, dated 3rd August 1896, recited that on the security of a ship belonging to the defendants, "now under sail to the Nicobars from Negapatam" a certain sum was lent. Defendants agreed to repay with interest as soon as the ship reached Negapatam, on the expiry of eight months from 23rd July 1896. The ship had left Negapatam on the 23rd and was lost at sea three days thereafter. Plaintiff sued to recover the sum advanced on the plea that the ship was lost even before the contract was concluded and therefore was void under S. 20. *Held*, that the risk started from the 23rd July as per terms of the agreement, and it was on that date alone that the ship commenced the voyage. Section 20 did not apply. (1902) 25 Mad 561 (566) (DB).

[17] A suit by the Secretary of State for possession was compromised whereby the defendant recognised the title of plaintiff and agreed to be in possession as a lessee. In a subsequent suit for rent the defendant contended that there was mutual mistake regarding the fact of plaintiff's title to the land *Held*, that the essence of the compromise was the recognition of plaintiff's title, and the question whether there was actually title or not did not matter and therefore a mistake regarding that was not a mistake as to an essential fact. (Vol 14) 1927 Oudh 198 (199) (DB).

[18] Misdescription of property in a mortgage deed does not invalidate the mortgage. (Vol 11) 1924 Pat 359 (361) (DB).

21. A contract is not voidable because it was caused by a mistake as to any law in force in *Effect of mistake as to law*. British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

^a[After the establishment of the Federation of India, this section applies in relation to Central Acts made for a Federated State as it applies to laws in force in British India.]

Illustration.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. The contract is not voidable.

b[* * * * *

[a] *Inserted by A. O.* [b] Second illustration was *repealed* by the Repealing and Amending Act, 1917 (24 [XXIV] of 1917), S. 3 and Sch. II.

Contract caused by mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Section 20 (*contd.*)

[19] Defendant entered into a contract by which he sold certain goods lying with his agent at the plaintiff's town and handed over a delivery note to the plaintiff and on the same day ordering the agent to deliver the goods. Meanwhile the agent had already despatched the goods to the plaintiff by rail which fact was not known to either of the parties to the contract. Plaintiff knowing this subsequently demanded the railway receipts and also offered to pay the purchase money. The defendant refused and sold the goods, as soon as they arrived, at a profit. In the suit by plaintiff for damages it was held that the parties cannot be said to have contracted under a mutual mistake to entitle the defendant to set aside the contract. (Vol 14) 1927 Bom 514 (515) (DB).

[20] A compromise decree can be set aside if the agreement embodied therein was brought about by the mistake of both parties and the Court as regards its subject-matter. (1881) 6 Cal 687 (705, 706) (DB).

[21] Mortgage suit was compromised on mortgagee agreeing to take 25 bighas of mortgaged land. A commissioner was appointed to make partition. By a mistake induced by the mortgagor the commissioner gave only 10 bighas to the mortgagee. A decree was passed on the basis of the commissioner's report. In a suit by the mortgagee to set aside the decree, it was held that as the decree as passed did not represent agreement of the parties as to the subject-matter thereof, the decree could be modified. (Vol 17) 1930 Pat 155 (157) : 8 Pat 726 (DB).

3. Restoration or compensation for advantage received under contract void for mutual mistakes—See S. 65.

SECTION 21—Note 1

[1] Section 21 deals with only those mistakes of law which give birth to a contract and not any other mistake of law. Therefore, if under a mistake of law, which is not the origin of a contract, a payment is made, then under S. 72 it is refundable. The English Common law rule that a payment under a mistake of law is not recoverable has no application in India. (Vol 33) 1946 Cal 245 (249).

[2] An innocent mistake of law also is governed by S. 21. (1907) 1907 All W N 197 (198) (DB).

[3] The construction of a contract is a matter of law—If a party acts under a mistaken view of his rights under a contract, he is not entitled to any relief. (Vol 30) 1943 Pat 327 (333, 341) : 22 Pat 220 (DB).

[4] Where mutual mistake is one of law as to the legal rights of any party, S. 21 would apply. (Vol 8) 1921 Bom 93 (102).

[5] Ignorance of particular rights, however excusable, is on the same footing as ignorance of general law—Money paid voluntarily with a full knowledge of all the facts, cannot be recovered. (186) 164 Ind Cas 732 (739) (DB) (Cal).

[6] In certain cases, English Courts of Equity relieve against agreements induced by an error of law, but the Indian Contract Act specifically lays down that error of law does not vitiate the contract—Much less will a conveyance, after the lapse of many years, be set aside on the ground that it was induced by error of law, unless there has been misrepresentation or fraud, etc. (1887) 11 Bom 174 (176, 177) (DB) (Vol 23) 1936 Sind 99 (105) : 29 Sind L R 445 (DB). (Compromise in ignorance of law.) (Vol 20) 1933 Lah 836 (838) (DB). (A mortgagee took a mortgage with notice of a previous but unregistered mortgage and got it registered, under the belief that the latter mortgage would get precedence over the first mortgage being registered first—Held that this was mistake as to law in force in British India; that S. 21, Contract Act, applied and that the contract was not voidable) (1909) 9 Cal L Jour 19 (40) (DB). (Compromise in probate proceedings, requiring the probate to be granted in an amended form, for which there was no provision in law—Mistake in law held not sufficient to set aside compromise)

[7] Mortgage for an indefinite period—Provision as to period contravening S. 8 (2), Punjab Alienation of Land Act—Whole mortgage held not void by reason of S. 21. (Vol 19) 1932 Lah 630 (632) : 13 Lah 508 (DB).

[8] Where a consumer of electricity pays the bill to the Electricity Supply Company under mistake that the Company had made rules, after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in British India and the consumer can recover the amount back. (Vol 26) 1939 Pesh 8 (9).

[9] Mistakes of parties about right of the defendant municipality to acquire land under S. 92, Bombay District Municipalities Act, is one of fact and not of law. (Vol 7) 1920 Sind 59 (60) : 14 Sind L R 22 (DB) (Vol 5) 1918 All 74 (76) : 40 All 619 (DB).

[10] Pure mistake of law, unless it is a mistake bearing upon private or special right of person, resulting in the payment by one person to another, is no ground for relief under S. 72. (Vol 16) 1929 Mad 177 (178) (DB).

SECTION 22—Note 1

[1] In the absence of fraud on the part of the defendant inducing the plaintiff to enter into a contract, the mere circumstance that the contract was caused by one of the parties to it (plaintiff) being under a mistake as to a matter of fact, will not make the contract voidable. (1885) 9 Bom 358 (361) (DB).

[2] Any proceeding or order cannot be reopened on the ground of mistake of fact of one of the parties to it. (Vol 16) 1929 Cal 670 (672) (DB).

[3] The mistake due to negligence of one of the parties is not sufficient to relieve that party of his own agreement. (Vol 16) 1929 Cal 670 (672) (DB).

[4] When a written contract has been signed by the parties, the party alleging that it has been erroneously

What considerations and objects are lawful, and what not.

23. The consideration or object of an agreement is lawful, unless—

it is forbidden by law,^a or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement, of which the object or consideration is unlawful, is void.

Illustrations.

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise; and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C, enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

[a] See Ss. 26, 27, 28, 30.

Section 22 (contd.)

recorded and that he signed it under a mistake, must establish that fact beyond all doubt. (Vol 21) 1934 Cal 778 (779) : 61 Cal 548.

[5] Contract cannot be avoided on the ground that it became more onerous than what the seller considered it to be, on account of an increase in duty. (Vol 12) 1925 Sind 80 (82) : 18 Sind L R 265 (DB).

[6] The plaintiffs required a steamer to sail from Jeddah 'fifteen days after the Haj' to convey pilgrims to Bombay. They chartered steamer from the defendants. The defendants contracted only with respect to English date. The plaintiffs were under the belief that the date corresponded with fifteenth day after the Haj. On finding the mistake, the plaintiff brought a suit to rectify an alleged mistake — *Held* that as the mistake was on the plaintiffs' part there could not be rectification. (192) 16 Bom 561 (566)

[7] A kabuliati, at an enhanced rate of rent was executed under a mistake of fact as to the title of the executant. It was acted upon and on the basis of it a claim for ejectment was resisted successfully — *Held*, if there was any mistake, it was an innocent mistake and as there was no fraud or misrepresentation the kabuliati was binding upon the heir of the executant. (11) 10 Ind Cas 343 (344) (All).

[8] Party signing a contract written in unknown

language cannot plead ignorance of its terms. (Vol 15) 1928 Sind 97 (98) : 22 Sind L R 286.

[9] Where one of the parties to an agreement knows a fact which makes his bargain an advantageous one and that fact is unknown to the other party, the latter remains bound by the contract unless there is an obligation on the former to disclose it. (Vol 20) 1933 Rang 79 (81) : 11 Rang 201 (DB).

SECTION 23 — SYNOPSIS

1. Scope and applicability.
2. Unlawful consideration or object.
3. "Forbidden by law."
4. Excise contracts.
5. Lease of Government tolls and ferry.
6. Agreements not forbidden by law.
7. "Defeat the provisions of any law."
8. Personal law.
9. Fraudulent agreements.
10. "Injury to the person or property of another."
11. Immoral agreements.
12. Public policy.
13. Agreement opposed to public policy.
14. Champerty and maintenance.
15. Stifling prosecution.
16. Marriage contracts.

Section 23 (*contd.*)

17. Past and future cohabitation.
18. Prostitution.
19. Adoption contracts.
20. Religious purposes.
21. Agreement to indemnify surety.
22. Office brokerage contracts.
23. Interference with course of justice.
24. Agreements creating interest against duty.
25. Agreement between client and his pleader.
26. Benami transactions.
27. Agreement against bidding.
28. Monopoly.
29. Restraint of trade.
30. Slavery bond.
31. Agreements not opposed to public policy.
32. Void contracts—If enforceable.
33. Contract of agency.
34. Partnership.

1. Scope and applicability. — [1] Section does not apply to claims founded on tort. (Vol 18) 1931 All 83 (85) : 53 All 316 (D B).

[2] A voidable transaction does not fall within S. 23. (Vol 23) 1936 Nag 268 (269) : I L R (1937) Nag 94.

[3] Anything which is not lawful within S. 23 is unlawful for the purposes of an agreement or compromise and a decree incorporating such an agreement or compromise is a nullity. (1909) 2 Ind Cas 865 (878, 874) (All).

[4] A contract which is *ultra vires* is not necessarily illegal. (Vol 17) 1930 Mad 512 (513) : 53 Mad 771 (D B). (Bank prohibited by memorandum of association to lend on mortgage, lending money on mortgage—Contract though *ultra vires* is not illegal.)

2. Unlawful consideration or object. — [1] To bring a case within the purview of S. 23, it is necessary to show that the object or consideration of the agreement is unlawful. (Vol 25) 1938 Cal 840 (850, 851) : I L R (1939) 1 Cal 241 (D B).

[2] A presumption of lawfulness exists in first instance in favour of every consideration and the law presumes against illegality to begin with. Therefore, the onus of establishing that a particular consideration is illegal as a matter of fact is on the person who asserts so. (Vol 12) 1925 Nag 111 (113) & (Vol 24) 1937 Mad 223 (226) (D B).

[3] The word "object" in S. 23 is distinct from "consideration" and means something aimed at. It means "purpose or design." (Vol 20) 1933 Bom 209 (212) (D B) & (1906) 33 Cal 702 (710).

[4] Section 23 is not concerned with motive. It confines the Court to the object of the transaction and not to the reasons or motives which prompted it. (Vol 27) 1940 Nag 305 (311, 312) : I L R (1940) Nag 573 and 618 (F B) & (Vol 17) 1930 All 357 (360, 362) : 52 All 406 (D B). (Fact that contract was entered into in expectation of some ulterior gain would not affect contract which is valid in every other way.)

[5] In determining validity of contract the object of the agreement and not action actually taken under the agreement should be considered. (Vol 28) 1941 Pat 349 (350).

[6] Where the object of a contract is illegal, the whole contract is illegal, and no right of action exists in respect of it—The test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party. (Vol 25) 1938 Oudh 24 (25).

[7] When plaintiff proves lawful object and con-

sideration to the promise, defendant cannot set up that he acted illegally by giving his promise in particular manner as Court shall not allow any one to be benefited by his own fraud. (1910) 4 Sind L R 44 (47) (D B).

[8] B, a Hindu, borrowing money from A and bribing certain officer therewith—To pay off A, B obtaining loan from C and executing mortgage in his favour—Purpose of mortgage loan held was not to effect illegal purpose. (Vol 27) 1940 Nag 305 (312) : I L R (1940) Nag 573 and 618 (F B).

[9] Preventing estate by legal means from being taken over by Court of Wards is not unlawful purpose. (Vol 28) 1941 Oudh 529 (555).

[10] Pronote executed by ward of Court though void is lawful consideration for bond executed by his son after his death and after estate had ceased to be under the Court of Wards. (Vol 10) 1923 All 590 (590) (D B).

[11] Where a cantonment board contracts to confer "old grant" tenure upon a person in the cantonment land, the consideration or object of the agreement, even if it is in excess of the powers of the board under the Cantonment Act and the rules thereunder, cannot be said to be unlawful. (Vol 30) 1943 Oudh 99 (104) (D B).

[12] Judgment-debtor executing bond in consideration of decree-holder refraining from executing decrees for arrears of rent before passing of U. P. Stay of Proceedings (Revenue Courts) Act of 1937 and U. P. Stayed Arrears of Rent (Remission) Act of 1939 : Held that neither consideration nor object of agreement was unlawful. (Vol 28) 1941 All 193 (194) : I L R (1941) All 367.

[13] A mortgage of lands granted Kabzadari without right of transfer is not transfer for unlawful object or consideration. (1911) 14 Oudh Cas 144 (146).

[14] Loan for gambling—Place of gambling not proved to be public—Play not conducted for purposes of profit by owner of house where it was conducted—Money lent held was recoverable, as not necessarily being for illegal purpose. (Vol 14) 1927 Nag 155 (155).

[15] Where the consideration for a contract to pay enhanced rent by tenant to his landlord is the settlement of disputes as to rate of rent and abandonment of still higher claims on the part of landlord, the contract is valid and enforceable. (1911) 11 Ind Cas 699 (700) (DB) (Mad).

[16] Suit for ejectment — Tenant's plea that he was occupancy tenant—Suit compromised—Tenant passing promissory note in consideration of withdrawal of suit—Consideration held not unlawful. (Vol 1) 1914 All 533 (533).

[17] Promise of pension for giving up practice as a lawyer and payments to various persons to use their influence with Government in connection with private or quasi-political concerns are not illegal or immoral considerations. (Vol 4) 1917 Pat 92 (98) (DB).

3. "Forbidden by law." — [1] The word "law" in Cl. (1) of S. 23 means judicial law, that is, the law enacted by any competent Legislature. (Vol 26) 1939 Rang. 305 (312) : 1939 Rang L R 311 (FB).

[2] The question whether a particular transaction is forbidden by an Act or tends to defeat its provisions is always one of construction of the Act, the rule for which is that it should be construed according to the intention of the persons passing it and such intention should be gathered from what they have said in the Act (1902) 5 Oudh Cas 256 (260) (DB).

[3] There is a clear distinction between an agreement which may be forbidden by law and which is merely declared to be void. In the former case the Legislature penalises it or prohibits it. In the latter case it merely refuses to give effect to it. (Vol 17) 1930 All 1 (3) : 52 All 338 (FB).

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[4] A contract which is void as being forbidden by law cannot become valid even if the parties act accordingly to the contract. (Vol 16) 1929 All 394 (395).

[5] Deed of contract alleged to be a transfer forbidden by law — Such transfer should not merely be presumed but must appear in the deed. (Vol 13) 1926 Mad 218 (221).

[6] Where a statute prescribes no penalties, an agreement in breach of a condition imposed under powers given by it does not fall under S. 23, and when a condition is imposed under statute purely for administrative purposes an agreement in violation thereof is not void. (Vol 30) 1943 Oudh 99 (104) (DB).

[7] A contract made in contravention of S. 75, C. P. Local Self-Government Act, is illegal and void and attracts the provisions of S. 23, Contract Act. (Vol 28) 1941 Nag 273 (276) : I L R (1942) Nag 294

[8] A promissory note or hundi payable to bearer on demand is against S. 25 of the Paper Currency Act, 1923 which is repealed now : (see S. 31, Reserve Bank of India Act, 1934) and is therefore void. (Vol 15) 1928 All 371 (376) : 50 All 839 (SB). (Promissory note) * (Vol 1) 1914 Upp Bur 3 (4) : 2 Upp Bur Rul 13. (Promissory note) * (1910) 5 Low Bur Rul 191 (191, 192). (Promissory note.) * (1910) 5 Low Bur Rul 182 (183) (DB). (Hundi.)

[9] Transfer of items declared untransferable by Transfer of Property Act, S. 6 is void. (Vol 12) 1925 Oudh 16 (18) (DB). (Mortgage of a mere chance of inheritance is void.) * (Vol 18) 1931 All 589 (591) (DB). (Transfer of *spes successionis*.) * (Vol 11) 1924 Oudh 234 (237) : 26 Oudh Cas 368. (Sale of expectancy by reversioner.) * (Vol 4) 1917 Lah 222 (223). (Transfer of right of reversion.) * (Vol 3) 1916 Mad 579 (579, 580) : 39 Mad 554 (DB). (Contract to sell *spes successionis*.)

[But see (Vol 14) 1927 Rang 157 (158) (DB). (A transfer inoperative under S. 6 (d) is not unlawful within S 23)]

[10] Transfer of actionable claims in contravention of S. 136, T. P. Act, is void under S. 23, Contract Act. (Vol 23) 1936 Oudh 275 (276, 277) : 12 Luck 150 (DB).

[11] Restriction of export under Export and Import Act, 1916—Export on permits issued to another is not opposed to provisions of that Act. (Vol 17) 1930 Sind 175 (176) (DB).

[12] A lease by Municipality of its right of farming out slaughtering fees is void as being opposed to law. (1913) 36 Mad 113 (114, 115) (DB).

[13] A contract involving the contravention of Rules made under the Motor Vehicles Act, is illegal. (Vol 13) 1926 Nag. 259 (259).

[14] Where in temporarily settled estates Government has prohibited sub-letting at rate higher than that fixed by temporary settlement under S. 172 of Bengal Tenancy Act, contract to sub-let at a higher rent cannot be enforced. (Vol 15) 1928 Cal 763 (765).

[15] Agreement to surrender cultivation of *sir* lands after partition is void as it is forbidden by law. (1886) 1886 All W N 88 (88) (DB).

[16] Transfer of land to Patwari in contravention of rules under Punjab Land Revenue Act is void. (Vol 14) 1927 Lah 18 (19) : 7 Lah 463 (DB).

[17] Agreement by Government tenant with his brother to share whatever might accrue to him with him is forbidden by S. 8, Punjab Government Tenants Act, 1893. (Vol 9) 1922 Lah 287 (289) : 3 Lah 92.

[18] Agreement that the tenant will not be able to make any improvements without the consent of the Zamindar, and that he will not be entitled to any compensation at the time of eviction is contrary to law, (S. 90 of the Tenancy Act) and is void. (1911) 10 Ind Cas 465 (466) (All).

[19] Mortgage by one who was disqualified under

S. 8 of the Jhansi Encumbered Estates Act, is void, being forbidden by law. (1908) 30 All 88 (89) (D B).

[20] Contract for possessory mortgage of occupancy holding being against Tenancy Law is void under S. 23 and covenant empowering mortgagee to recover money if possession was not delivered is also illegal. (Vol 18) 1931 All 461 (461) * (Vol 24) 1937 Oudh 150 (151) : 12 Luck 679 (D B) * (Vol 22) 1935 All 256 (257) * (Vol 19) 1931 Oudh 309 (310) : 6 Luck 689 (D B) * (Vol 11) 1924 All 668 (668) : 46 All 622. (Such mortgage will not be recognised even collaterally under S. 68, T. P. Act.) * (Vol 1) 1914 All 418 (419) * (1907) 29 All 327 (329) (D B).

[See also (Vol 3) 1916 All 346 (348) : 38 All 232 (D B).]

[21] Sub-lease in violation of S. 25, Agra Tenancy Act, is void as it is contrary to law. (Vol 10) 1923 All 453 (454).

[22] A contract to deliver grain in discharge of money advanced, was held to be a contract in contravention of Food Grains Control Order (1942) and was therefore unenforceable. (Vol 32) 1945 Mad 512 (512).

[23] Contract made in contravention of Yarn (Dealers) Control Order is illegal and cannot be enforced. (Vol 31) 1944 Mad 387 (387).

[24] When persons enter into a contract which is declared invalid by statute, no party can recover any compensation for breach of it. (1911) 33 All 695 (701) (D B).

4. Excise contracts.—[1] The provisions of the Abkari and Opium Acts are not intended merely to protect public revenue but the provisions contained in them are based on public policy. (1912) 35 Mad 582 (586) (D B) * (Vol 12) 1925 Sind 55 (56) : 18 Sind L R 16 (D B) * (Vol 8) 1921 Mad 455 (456).

[2] All contracts to evade the provisions of the Excise rules are altogether illegal and void. (1911) 12 Ori L Jour 11 (12) (D B) (Cal).

[3] Contract to supply liquor on credit held illegal. (Vol 30) 1943 Sind 219 (221) : I L R (1943) Kar 350 (D B).

[4] Agreement to make over excise shop in return for certain profit—Agreement is void being contrary to Rule 143 framed under S. 89 of Bihar & Orissa Excise Act (II of 1915). (Vol 30) 1943 Pat 374 (375) : 22 Pat 334 (D B).

[5] A contract for the sale of fermented liquor, by a person who has not obtained a license under Bengal Act VII of 1878, is illegal and therefore void. (1889) 16 Cal 436 (442) (D B).

[6] Section 12 of the Madras Abkari Act does not make a lease for tapping toddy to an unlicensed person illegal. (Vol 8) 1921 Mad 455 (456).

[7] A sub-lease of a license to manufacture and sell country liquor given in violation of condition of such license is forbidden by law. (1888) 10 All 577 (579) (D B).

[8] An agreement sub letting the right to vend *ganja* in contravention of license is illegal. (Vol 4) 1917 Mad 852 (853).

[9] Where without obtaining previous sanction of Collector, as was necessary under the rules of license to sell arrack, a license-holder agreed to sub-let and sell arrack to sub-lessee, it was held that such agreement was illegal and therefore unenforceable. (1903) 26 Mad 430 (433) (D B).

[10] Sub-lease of salt pans in contravention of conditions of lease is unenforceable at law. (Vol 9) 1922 Bom 78 (78) : 46 Bom 651 (D B) * (1909) 33 Bom 636 (641) (D B).

[11] Mere admission by an excise licensee of an unlicensed person to partnership is not necessarily unlawful. (1898) 11 C P L R 62 (63) * (Vol 22) 1935

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Mad 895 (898) * (Vol 16) 1929 All 210 (211) : 51 All 506 (D B) * (Vol 13) 1926 Mad 218 (221). (According to Mysore Law, partnership by Abkari licensee is not illegal.) * (Vol 8) 1916 Cal 657 (657) * (Vol 1) 1914 Oudh 399 (402) : 17 Oudh Cas 198 (D B) * (1909) 6 Mad L Tim 345 (345) (D B) * ('06) 1906 Pun Re No. 114, page 440 (442). (Agreement of partnership to be illegal must be shown to be directly infringing some positive rule of law.)

[See also (Vol 16) 1929 Mad 689 (690) (D B). (Forest contract—Contractor forming partnership with another is not illegal.) * (Vol 2) 1915 Bom 244 (245) : 40 Bom 64 (D B). (Agreement to share profits which would contravene the terms of license as between the Forest Officer and licensee is not forbidden by law.)]

[12] A licensee of salt manufacture admitting partners but manufacturing salt himself cannot be said to have contravened provision of Bombay Salt Act against alienating benefits of license. (Vol 8) 1921 P. C. 137 (187) (P O).

[13] Firm taking lease from Government for manufacture of salt — One partner taking sub-partner and agreeing with him to pay a share out of his share — Sub-partner merely entitled to share having no interest in conduct of business or inspection of accounts of firm — Agreement held was not illegal. (Vol 31) 1944 Mad 394 (395).

[14] Section 13 of Madras Abkari Act does not prohibit person who has no license from holding interest in manufacture or vend of liquor jointly with a licensed manufacturer or vendor, and such partnership is not illegal. (1910) 20 Mad L Jour 387 (388) (D B).

[15] If an excise licensee enters into partnership which has the effect of taking away a part of the control of the business out of his hands, such partnership is illegal. (1898) 11 C P L R 62 (63).

[16] Licensee entering into partnership in defiance of Abkari Act — Contract is void. (Vol 12) 1925 Sind 55 (56) : 13 Sind L R 16 (D B) * (Vol 31) 1944 Mad 295 (298) : I L R (1944) Mad 697 (D B) * (Vol 24) 1937 Nag 250 (251) : I L R (1937) Nag 376. (Agreement prohibited by Rule 6 made under S. 62, C. P. Excise Act.) * (Vol 7) 1920 Mad 270 (270) : 43 Mad 141 (D B).

[17] When there is no transfer of right within R. 27 under the Madras Abkari Act, 1866, a contract of partnership is not illegal. (Vol 22) 1935 Mad 895 (898).

[18] Where a partnership was entered into by a licensee, after the date of bid at auction but before the issue of license, with another by which the other person was to bear half of the expenses of business and to supervise the procuring of toddy, it was held that it amounted to a transfer and therefore was illegal and unenforceable. (Vol 28) 1941 Mad 64 (65) ((Vol 23) 1936 Mad 557-dissented from.)

[19] Farmers of opium revenue under Government obtaining license from Collector for sale of opium, subject to condition that they should not sell, transfer or sub-rent their privileges without Collector's permission — Third person admitted as partner without such permission under agreement with him — Contract held was forbidden by law. (1912) 35 Mad 532 (586, 587) (D B).

[But see (1913) 37 Bom 320 (325, 326) (D B).]

[20] Partnership in abkari business without previous permission of Collector — One partner successfully bidding — Other partner advancing money to partnership for carrying on business on promissory note — Held object of partnership was in contravention of cl. 27 of General Sale Notification, issued under Abkari Act, and suit on promissory note was not maintainable. (Vol 22) 1935 Mad 440 (442) : 58 Mad 727 (F B) * (Vol 3) 1916 Mad 272 (273).

5. Lease of Government tolls and ferry. — [1] Lease of tolls by Government — Assignment of lease without Collector's previous permission prohibited by terms — Agreement of assignment without permission offends against covenant and not against provisions of S. 23 (Vol 27) 1940 Bom 369 (372) : I L R (1941) Bom 71 (D B).

[2] Lease of Government tolls — Condition in lease disallowing lessee to sub-lease without prior permission of Collector — Breach of condition — Sub lease not held to be illegal or opposed to public policy — Penal consequences of breach were limited to specific penalty and did not make sub-lease contract void. (1900) 24 Bom 622 (625) (D B).

[3] Partnership entered into with another person, by a lessee of a Government ferry, who has covenanted not to underlet or assign the lease without the leave or license of the Magistrate who granted it, is not void or voidable as between the partners, by reason of the covenant not to underlet or assign the lease. (1878) 2 All 411 (414, 415) (F B).

6. Agreements not forbidden by law. — [1] It is not forbidden by law to make an agreement to substitute a mortgage for a judgment debt if it is done with the sanction of the Court. (1907) 31 Bom 552 (559) (D B).

[2] Subsequent mortgage of property against which there is a temporary injunction by a Civil Court is not void as it is not forbidden by law. (1887) 9 All 497 (500) (D B).

[See also (1908) 25 All 431 (434) (D B).]

[3] Assignment of his share in the profits to a stranger by a co-sharer in a mahal is not within the prohibition of this section. ('94) 1894 All W N 140 (140) (D B).

[See also ('94) 1894 All W N 17 (17) (D B).]

[4] Grant prohibiting transfer to person not holding certain certificate — Person not holding certificate is not "legally disqualified" within S. 6 (h) (3), T. P Act — S. 23, does not apply to transfer to such person. (Vol 15) 1928 Rang 136 (137) : 6 Rang 423 (D B).

[5] Validity of bequest contingent upon consent of heirs — Such bequest is not forbidden by law. (Vol 15) 1928 All 494 (496) = 50 All 748 (D B).

[6] Contract of pre-emption does not offend against rule against perpetuities — N transferring whole village except a small portion to N with condition that either transferring his portion to stranger the other could pre-empt — Contract is enforceable. (Vol 14) 1927 All 170 (172) : 49 All 527 (F B). ((Vol 10) 1923 All 511 : 45 All 492 (D B) and (Vol 10) 1923 All 514 : 45 All 478 (D B) overruled.)

[But see (Vol 9) 1922 Bom 84 (94) : 47 Bom 191 (D B).]

[7] A covenant in a sale deed that the vendor would not claim ex-proprietary rights is neither forbidden by any law nor does it defeat the provisions of S. 7A (5), Oudh Rent Act or any other law and is not, therefore, unlawful within the meaning of S. 23. (Vol 23) 1942 Oudh 1 (6) : 17 Luck 249 (D B).

[8] Bond executed by a disqualified proprietor is not void as it does not infringe Ss. 173 and 174 of Oudh Land Revenue Act, 1876. (1902) 5 Oudh Cas 256 (261) (D B).

[9] Agreement in Santhal Parganas to pay compound interest is not prohibited and hence is not unlawful. (Vol 17) 1930 Pat 442 (450) : 10 Pat 63 (D B) * (1899) 26 Cal 238 (240) (D B).

[10] The Cantonment Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. The Cantonment Magistrate is not prohibited from entering into agreement that house will be vacated for military officer

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with an intending purchaser or even an owner in possession. (Vol 11) 1924 Bom 258 (259).

[11] Transfers of occupancy and ordinary tenant rights are voidable in the manner and to the extent provided for by the C. P. Tenancy Act. Such transfers are not unlawful within the meaning of S. 23 and are not absolutely void. (Vol 12) 1925 Nag 375 (375) * (Vol 13) 1926 Nag 345 (346) : 22 Nag L R 86 * (Vol 4) 1917 Nag 125 (126).

[But see (Vol 5) 1918 Nag 178 (179) : 14 Nag L R 125.]

[12] Bye-law of Co-operative Society that the Society shall not sell goods on credit to a non-member cannot have force of law and it cannot be brought against the Society suing for recovery of balance standing against non-member. (Vol 13) 1926 Nag 463 (464).

[13] In the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, a mortgage by a legal practitioner is valid and enforceable. (Vol 15) 1928 Nag 273 (275).

[14] Baglas are herons which are birds which do not come within the exceptions mentioned in the Notification No. 5028 S. R., dated 19th September 1902, and a contract of partnership to trade in the feathers of Baglas is illegal and void being against public policy. (Vol 16) 1929 Lah 663 (663) : 11 Lah 8 (DB).

7. "Defeat the provisions of any law." — [1] The words "any law" refer to substantive law and not to an adjective law, such as the Civil Procedure Code. (1889) 16 Cal 504 (508) (DB).

[2] Parties cannot contract themselves out of statute. (Vol 22) 1935 All 619 (619). (Contract ignoring S. 73, Agra Tenancy Act — Contract is void.) * (Vol 29) 1942 Sind 47 (49) : 1 I L R (1941) Kar 401 (DB).

[3] No man can exclude himself from the protection of Courts by contract. (Vol 4) 1917 P C 116 (118) : 42 Bom 380 : 45 Ind App 61 (PO).

[See also (Vol 12) 1925 Pat 487 (488). (Agreement by servant not to sue for wrongful dismissal is invalid.)]

[4] Parties by contract can neither alter statutory period of limitation nor statutory starting point of limitation. Such a contract is void. (Vol 21) 1934 All 661 (675) : 57 All 108 (F B) * (Vol 4) 1917 Mad 892 (893, 894) : 40 Mad 701 (DB).

[But see (Vol 11) 1924 Cal 186 (187) (DB).]

[5] Oral agreement to postpone registration of deed of lease would defeat the provisions of the Registration Act. (Vol 10) 1923 Nag 76 (76).

[6] Agreement by vendor to relinquish ex-proprietary rights in *sir* land is void as being opposed to the policy of Agra Tenancy Act. (Vol 3) 1916 P C 59 (61) : 39 All 173 : 44 Ind App 54 (PO) * (Vol 9) 1922 All 430 (431) (DB) * (Vol 4) 1917 All 111 (112) : 39 All 645 (DB) * (1910) 7 All L Jour 778 (781) (DB).

[See also (1898) 20 All 219 (225) (F B). (Case under S. 7, N. W. P. Rent Act, 1881.)]

[7] An assignment, the object of which is to defeat the provisions of the Insolvency law, is void under S. 23. (1906) 33 Cal 702 (709).

[8] One creditor secretly agreeing with insolvent that he would give up his opposition and consent to scheme along with other creditors, if insolvent made third person execute pro-note in his favour — Pro-note executed in pursuance of this agreement is unlawful. (1897) 20 Mad 84 (86) (DB).

[9] *Hatchitta* in favour of insolvents by their debtors transferred to plaintiff with debtors' consent — Debtors also executing *hatchitta* in favour of plaintiff — Discharge of insolvency proceedings — Suit upon *hatchitta* executed by debtors in plaintiff's favour — Contract held was such as to defeat provisions of Insolvency Act. (1912) 16 Cal L Jour 162 (164, 165) (DB).

[10] Discharged insolvent executing pro-note for debts contracted prior to insolvency and not for any real or fresh consideration — Claim on pro-note can be enforced. (1936) 163 Ind Cas 858 859 (Cal).

[11] Creditors advancing money to Official Assignee on condition of their obtaining priority — Agreement is against S. 23. (Vol 16) 1929 Mad 385 (386).

[12] Insolvent getting discharge conditional upon his consenting to decree being passed for all proved debts — Subsequently, one of scheduled creditors agreeing to advance loan to insolvent and to waive all claims to his debt in insolvency — Insolvent and surety for him executing pro-note in favour of creditor for original debt with interest — Suit by creditor on pro-note : Held that consideration for pro-note neither defeated provisions of Presidency Towns Insolvency Act, nor was opposed to public policy, because the creditor did not seek to prejudice the rights of any of the scheduled creditors. (Vol 25) 1938 Rang 11 (13, 14) : 1938 Rang L R 19 (DB).

[13] Sale of Malguzari without reservation of occupancy without necessary sanction is void. (Vol 15) 1928 Nag 232 (236) (DB).

[14] An agreement which contravenes the provisions of S. 29 of the Bengal Tenancy Act to pay an enhanced rent of more than two annas is void under S. 23. (1897) 24 Cal 895 (896) (DB).

[15] An agreement by purchaser at patni sale to reconvey property to defaulter patnidar is void as its object is to defeat the provisions of S. 9 of the Patni Regulation of 1819. (1910) 14 Cal W N 1031 (1033) (DB).

[16] Execution by creditor under Sch. III, para. 7, Civil P. C. — Mortgage by judgment-debtor without leave of Collector — Mortgage held void. (Vol 20) 1933 All 468 (472) (DB).

[17] Object of lease such that, if permitted, it would defeat the provisions of Rent Act — Lease is void. (Vol 11) 1924 Cal 57 (60) : 50 Cal 491 (DB).

[18] Where in a partnership business, an insolvent enters into an agreement, but since he cannot carry out any business in his own name, appoints his junior son as a partner, the agreement being intended to defeat the provisions of insolvency law is absolutely void. (Vol 23) 1936 Lah 831 (832).

[19] A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced. (Vol 16) 1929 Lah 330 (331) (DB).

[20] An agreement preventing a party from making claim to which he is legally entitled is unlawful, as it would defeat the provisions of law if permitted. (Vol 5) 1918 Nag 178 (179) : 14 Nag L R 125.

[21] An agreement to pay a tax prohibited by an Act of Legislature is void as it would defeat the provisions of law if permitted. (1884) 8 Bom 393 (403) (DB).

[22] Tenant agreeing to pay to zamindar certain dues over and above his usual rent — Contract is unenforceable as its intention is to defeat provisions of Ss. 56 and 86, U. P. Land Revenue Act. (1913) 35 All 19 (22, 23) (DB).

[23] Person effecting insurance on his younger brother's life has no insurable interest and hence insurance contract is void under Ss. 23 and 30. (Vol 28) 1941 Lah 33 (34) (DB).

[24] Condition in Fire Insurance Policy that company will not be liable after expiration of certain period from date of loss — Held that clause did not defeat any provisions of law. (Vol 21) 1934 Rang 15 (16) : 11 Rang 475.

[25] Purchase by decree-holder without the permission of the Court is not void. (1909) 32 Mad 242 (253) (DB).

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[26] A clause in contract that suits arising out of contract should be filed in Court at particular place is legal. (Vol 31) 1944 Mad 47 (48).

[27] Contract to be bound by oath is valid, provided Court can administer it under S. 8, Oaths Act. (Vol 10) 1923 All 443 (444).

[28] Agreement, even apart from Indian Oaths Act, by parties to a suit to abide by statement of witness, who is also party to suit, is valid unless fraud, etc., can be proved. (Vol 20) 1933 All 861 (880) : 56 All 39 (SB).

[29] Pending grant of letters of administration the parties cited came to an agreement regarding certain arrangement with regard to the property. The Court adopted an irregular procedure in granting probate. *Held* that illegality of the probate proceedings and its consequences did not vitiate the contract. (1909) 9 Cal L Jour 19 (40) (DB).

[30] District Board taking out certificate under Bengal Public Demands Recovery Act—Execution of certificate by arrest of certificate-debtor—Defendant executing surety bond to certificate Officer agreeing to be liable for amount on default by debtor—Default occurring—Board applying in execution against surety—Application dismissed—Suit by Board against surety for recovery of amount of surety bond—Bond held was not hit by S. 23, there being lawful consideration. (Vol 24) 1937 Cal 625 (628) : I L R (1937) 2 Cal 698 (DB).

[31] The provision in a contract of lease that no waiver shall be effective unless it is in writing does not affect the rule of law that forfeiture that has accrued is waived by receipt of rent. (Vol 7) 1920 P C 190 (191) (PC).

[32] Purchase of tenancy from Collector—Secret agreement by purchaser with another that each should advance half purchase money and take possession of half land and half profits—Such possession continued for several years—Subsequent agreement that enjoyment of land should continue as such is not illegal. (Vol 20) 1933 Lah 291 (292) (DB).

[33] A compromise incorporated into a decree provided that the debtors-applicants will not apply for the recovery of property under S. 35, U. P. Encumbered Estates Act. But in spite of it the debtors did put in an application for restoration of possession under S. 35. *Held*, that the compromise did not defeat the provisions of any law as the provisions of S. 35, U. P. Encumbered Estates Act. were not obligatory. ('40) 1940 Oudh W N 1246 (1248) (DB).

[34] Amount on pro-note to be paid at Delhi—Defendant residing in U. P. and governed by U. P. Agriculturists' Relief Act—Suit brought at Delhi: *Held*, that the bringing of such a suit in Delhi contrary to the provisions of the U. P. Act was not illegal. (Vol 26) 1939 Lah 498 (498).

[35] Sanction under S. 172, Punjab Municipal Act, (1911) by Municipal Committee for construction of building involving encroachment on street—Applicant agreeing to pay rent for such encroachment—Case held to be governed by agreement which was neither illegal nor without consideration. (Vol 18) 1931 Lah 634 (635).

[36] An agreement by which a superior proprietor agreed to hold himself responsible for the Government revenue and the inferior one agreed to give the former 2/5ths of the produce is neither illegal nor against public policy. ('83) 1883 Pun Re No. 139, p. 421 (422) (DB).

[37] Unregistered agreement to sell land followed by mortgage-bond by purchaser for purchase-money—Mortgage-bond held was not for unlawful consideration and hence not invalid. (1910) 5 Ind Cas 581 (582) (DB) (Cal).

[38] Acquisition of share in village or mahal, in which the disputed property is situated, for obtaining preferential right of pre-emption is not against S. 23. (Vol 12) 1925 All 358 (860) : 47 All 424 (DB).

[39] Statute prescribing conditions of carrying on business—Agreements not observing such conditions for administrative purposes are valid. (Vol 14) 1927 Lah 333 (334) : 8 Lah 310

[40] Agreement not to divide share without vendor's consent is not illegal. (Vol 2) 1915 All 40 (41).

8. Personal law.—[1] The word 'law' in Cl. (2) of S. 23 means personal or customary law. (Vol 26) 1939 Rang 305 (312) : 1939 Rang L R 311 (FB).

Hindu Law—[2] Agreement taking away absolutely the right to partition of members of joint family is unenforceable. (Vol 15) 1928 Oudh 365 (368) (DB).

[3] An agreement between joint owners that on failure of 'aurosa' son in one line, the impartible property of family should go to the other line who got aurosa son, would not bind the successors, such agreement being contrary to law. ('86) 9 Mad 499 (499) : 13 Ind App 97 (P O).

[4] A stipulation as between a husband and wife to avoid the marriage on the breach of a condition embodied in an ante-nuptial agreement between them is contrary to the policy of law. (1900) 1900 Pun Re No. 15, p. 53 (55) * (Vol 24) 1937 Bom 358 (860) : I L R (1938) Bom 1 (DB).

[5] A post-nuptial agreement of separation between husband and wife providing for maintenance of wife is neither opposed to public policy nor to the spirit of Hindu law unless it is proved to have been obtained by fraud, undue influence or mistake. (Vol 24) 1937 Bom 358 (860) : I L R (1938) Bom 1 (DB) * (Vol 18) 1931 Nag 197 (198) : 27 Nag L R 281.

[But see ('11) 34 Mad 898 (401) (DB)]

[6] An agreement by a Hindu bridegroom not to marry a second wife during the continuance of his marriage with his first wife, is not immoral or opposed to public policy. ('08) 4 Nag L R 86 (90).

[7] Contract by Hindu to maintain as wife a woman, who is not his lawfully wedded wife, is contrary to public policy and consequently unlawful. ('12) 14 Bom L R 547 (557, 558) (DB).

[8] An agreement between husband and wife made on reconciliation, the object of which is to put an end to the present separation, is not opposed to public policy if it contemplates a future separation and promise for maintenance in that event. (Vol 32) 1945 Mad 36 (37).

[9] Contract by a wife to suspend the operation of her maintenance decree for some time to give opportunity to husband to prove his willingness to maintain her properly is not opposed to public policy. (Vol 31) 1944 Mad 17 (18).

[10] A contract to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives is void under S. 23 of the Contract Act, as this contract, if it were capable of being carried out and were recognized by the Court, would involve an injury to the person and property of the adopted son and would defeat the provisions of the Hindu law. ('11) 13 Beng L R (App) 42 (43, 44) * (Vol 9) 1922 Bom 382 (382) : 46 Bom 908 (DB).

[11] Agreement by adoptee as condition precedent to give some property to widow's brother is binding on adopted son. (Vol 13) 1926 All 7 (10, 14) (DB). (Per *Mukerji, J.*—*Lindsay, J.*, contra.)

[12] In absence of proof of absence of custom, contract to compensate husband for expenses of his marriage upon his consenting to divorce wife is not void. (Vol 12) 1925 Nag 111 (114).

Section 23 (*contd.*)

[13] Custom laying down particular mode of inheritance with regard to property held by ladies of zamindar's family and derived from the zamindar is not opposed to public policy. (Vol 3) 1916 Mad 102 (107) (DB).

Muhammadian law.

[14] In Mahomedan law marriage is a mere civil contract and an ante-nuptial agreement between the wife and her husband, that the husband would be liable to pay for her maintenance in case of dissension between them, is valid. (Vol 19) 1932 Lah 65 (86) & (Vol 28) 1939 Lah 165 (165, 166) & (Vol 8) 1921 All 152 (153) : 43 All 650 (DB).

[15] Mahomedan marrying two wives — Wives disagreeing — Agreement to give maintenance to one on living separately is valid. (Vol 15) 1928 Oudh 303 (303, 304) : 3 Luck 603 (DB).

[But see ('13) 37 Bom 280 (282, 283) (DB).]

[16] An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is not illegal nor invalid as immoral or opposed to public policy or in restraint of marriage. (Vol 7) 1920 Low Bur 59 (60) : 10 Low Bur 194.

[17] Post-nuptial contracts are not mere nullity at law. But where husband stipulates in post-nuptial contract to do nothing without permission of his wife on pain of immediate divorce and realization of *denmohur*, and also to pay over to her all money he may earn, such stipulations would be illegal as opposed to public policy. ('75) 15 Beng L R (App) 5 (7).

[18] Agreement for desertion on husband's second marriage is opposed to Muhammadan law. (Vol 22) 1935 Lah 902 (903).

[19] Muhammadan husband neglecting wife and living idle life—Agreement by husband that he will live respectable life and live in house approved by wife and her parents—Wife at liberty to divorce him on default of conditions — Agreement is valid and not opposed to public policy. (Vol 23) 1936 Lah 716 (717).

[20] Even if the parties be Mahomedans whose personal law allows wife to purchase a divorce an agreement to advance money to a married woman to enable her to procure a divorce in a Court of law and marry the plaintiff is void as the object and consideration of such an agreement is unlawful and opposed to public policy. ('87) 1887 Pun Re No. 46, p. 97 (99 & 100).

[21] There is nothing in the Mohamedan husband's promise to pay a certain sum of money for the personal expenses of his wife during his life time which can reasonably be regarded as opposed to public policy. (Vol 16) 1929 Lah 660 (661) : 11 Lah 85 (DB).

[22] Charge created by a Mohamedan on unknown shares of one of his heirs is invalid under S. 23, as it defeats the provisions of Mohamedan law. (Vol 20) 1933 All 934 (937) (DB).

[23] It is unlawful for a Hindu to make a dedication in favour of a mosque as it is unlawful for an unbeliever to make a 'Wakf' in favour of a mosque. ('12) 16 Cal W N 114 (116) (DB).

Buddhist law.

[24] According to Buddhist law, a *rahan* is forbidden by his law, that is the Vinaya, to engage in trade. Therefore purchasing or selling property by *rahan* is opposed to S. 23. (Vol 26) 1939 Rang 305 (312) : 1939 Rang L R 311 (FB).

[25] Neither the object nor consideration of sale to Buddhist monk is immoral within S. 23. (Vol 16) 1929 Rang 354 (363) : 7 Rang 677 (FB) & (Vol 15) 1928 Rang 3 : 5 Rang 626 overruled.)

Parsi law.

[26] An agreement between a Parsi husband and wife for their leaving separate is lawful and binding.

(Vol 8) 1921 Bom 399 (400) : 45 Bom 318 & (1899) 23 Bom 279 (280, 281).

[27] Decree for divorce—Wife consenting to give up claim to future maintenance — Consent, even if embodied in consent order is void being against public policy — Wife is not precluded thereby from claiming future alimony under S. 40, Parsi Marriage and Divorce Act. (Vol 32) 1945 Bom 537 (542).

Christian law.

[28] Promise by Christian to marry another when the person is already a married person is void. (Vol 13) 1926 PC 27 (27) (PC).

9. Fraudulent agreements. — [1] Omission to mention word "fraudulent" in pleading—Still it is open to the Court to examine contract as whole and see whether it falls within mischief of S. 23. (Vol 30) 1943 Nag 260 (262, 263) : ILR (1943) Nag 565 (DB).

[2] Agreement between two persons to commit fraud on third party is void. (Vol 17) 1930 All 732 (733) : 52 All 1001 (DB).

[3] Object of agreement to conceal actual *Sivai amdani* and so to reduce assessment of land revenue—Agreement is fraudulent. (Vol 10) 1923 Nag 76 (76).

[4] Creditor agreeing not to sue one co-debtor if latter helped in realization of the debt from others and to refund deposit if realization made—Agreement is unenforceable. (Vol 7) 1920 Cal 515 (516) (DB).

[5] Composition between debtor and creditors — Secret agreement to prefer some creditors to obtain their consent to composition—Agreement is void being fraudulent. (Vol 26) 1939 Sind 33 (33, 34) : ILR (1939) Kar 147 (DB).

[6] Where A, a stranger, advanced money to three widows to enable them to make false claim of inheritance against rightful heir B, got the entire control of suit and under threats of prosecuting the suit to his ruin, induced B to enter into compromise of suit by virtue of which the widows were to withdraw the suit on B executing a bond to A for large sum in discharge of debts alleged to be due from widows to A, it was held that the bond was invalid and fraudulent as against B. (1873-74) 1 Ind App 241 (267) (PC).

[7] Contract to prepare and supply copies of picture produced in England is not void as being fraudulent. (Vol 7) 1920 Bom 84 (85) : 44 Bom 720 (DB).

[8] A sale made by a person with the object of defeating a probable execution against him is not necessarily one made with a fraudulent and unlawful object. (1879-80) 4 Bom 70 (73) (DB).

[9] Interest not awarded by decree—Agreement providing that judgment-debtor should pay decretal amount with interest subsequent to date of decree—Agreement held was not fraudulent. (1877-78) 3 Cal 602 (609) : 5 Ind App 78 (PC).

[10] Where the fraudulent purpose has been effected the maxim "*in pari delicto potior est conditio possidentis*" will apply and the Court will help neither party. But where the purpose of fraud is not carried in execution the mere intention to defraud will not deprive the true owner of the property. (Vol 12) 1925 Oudh 120 (123) : 27 Oudh Cas 175 (DB) & (1909) 36 Cal 874 (881).

[11] Where a case put forward in the trial Court was that the agreement in question was void as being opposed to public policy : Held that on same facts it could be attacked as fraudulent in revision. (Vol 26) 1939 Sind 33 (34) : ILR (1939) Kar 147 (DB).

10. "Injury to the person or property of another." —[1] Where one of the objects of an agreement was to deal with the minor's interest in property, held that it involved and implied injury to the property of the minor and consequently the agreement was unlawful. (1935) 61 Cal L Jour 88 (89, 90).

Section 23 (contd.)

[2] Mortgagor only entitled to part of mortgaged property—Mortgage is not invalid. (1908) 12 Cal W N 94 (96) (DB).

11. Immoral agreements. — [1] Where a transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory. (1905) 28 Mad 418 (418) (DB).

[2] Where object of transfer is immoral, no interest in property passes. But the principle of equity prevents Court from giving aid to person guilty of immoral conduct. (Vol 20) 1933 Bom 209 (212) (DB) & (Vol 3) 1916 Cal 266 (269) : 43 Cal 115 (DB).

[3] Court has power to dismiss a claim which is tainted with immorality, though such a plea may not be taken by either party. (Vol 17) 1930 Mad 547 (549) & (Vol 20) 1933 Mad 187 (189).

[4] Where the consideration for a pro-note is immoral, the question whether the consideration failed or not would be immaterial, as the agreement would be void under S. 23. (1908) 13 Mad L Jour 7 (8).

[5] Agreement to pay *dastoori* or commission on purchases is unlawful being immoral and opposed to public policy. (10) 1910 Pun L R No. 189 page 538 (539) : 1910 Pun Re No. 91.

[6] Money borrowed for immoral purposes on promissory note — Note containing no recital as to purpose — No proof that creditor knew of the purpose — Lending cannot be said to be vitiated by immorality. (Vol 9) 1922 Mad 181 (182, 183) : 45 Mad 778 (DB).

[7] A contract to pay brokerage is neither immoral nor opposed to public policy. (1921) 60 Ind Cas 727 (728) (Lah).

12. Public policy. — [1] Public policy means restriction by law of freedom of contract or private dealings for the good of community — It is variable and fluctuates with circumstances of the time. (Vol 27) 1940 Bom 369 (372, 373) : 1 L R (1941) Bom 71 (DB).

[2] Public policy requires that men of full age, and competent understanding, shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be valid and that Court should not interfere with this freedom of contract. (Vol 12) 1925 Oudh 120 (124) : 27 Oudh Cas 175 (DB).

[3] Just as a contract may be invalid because it is contrary to public policy in its substance or in its purpose, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement. This is, perhaps, the true underlying principle and this general rule has been reduced so far as possible to specific rules. Where the instrument of coercion is the doing or threatening of wilfully illegal act of any description, it retains the name of coercion in Indian Statute. But even though the instrument of coercion is not, thus, in itself, illegal, as in the case of a threat of prosecution, it may amount to undue influence and the enforcement of a contract so procured may nevertheless be held, in appropriate cases, to be contrary to public policy. (Vol 32) 1945 Cal. 218 (239) (DB).

[4] The Courts ought to be very cautious in deciding a question of public policy, and though, with the development of public opinion and morality, the doctrine must be applied with necessary variation, each case has to be decided on its own facts. (Vol 18) 1931 Pat 22 (24) (DB).

[5] The question whether a contract is opposed to public policy or not is to be decided on general principles only, and not by any consideration of the terms of particular contract. (1909) 32 Mad 185 (190) (DB).

[6] The doctrine of public policy will not be extended beyond the class of cases already covered by it. The

Courts cannot invent new heads of public policy (Vol 21) 1934 Cal 328 (339) : 61 Cal 80 (DB). (Doctrine does not apply to case of appointment of servant for a term.) & (Vol 18) 1931 Pat 22 (24) (DB). (Payment of commission by debtor to agent of creditor, who facilitates transaction of heavy loan is legal.) & (Vol 10) 1923 Cal 154 (156) (DB). & (1911) 6 Low Bur Rul 1 (2) (DB).

[7] A person who asks a deed to be declared invalid as being opposed to public policy must prove the grounds which would bring it under S. 23. (Vol 28) 1941 Mad 727 (730).

[8] A transaction, to be void as being against public policy, must be found as a fact, in its inception, to amount to or involve an illegality or be of such nature that, if permitted, it will defeat the provisions of the law. (1902) 4 Bom L R 948 (950) (DB).

[9] The plea that a contract is void as being opposed to public policy and illegal, may be raised for the first time in arguments though not pleaded. (Vol 10) 1923 Mad 626 (627) (DB).

[10] The question of public policy is one of law and even when the facts have not been fully pleaded by the parties, the Court will deduce them from evidence and apply the doctrine of public policy. (1910) 6 Nag L R 148 (151).

[11] Plea, as to deed being invalid as opposed to public policy is one of mixed law and fact and cannot be raised for first time in second appeal. (Vol 28) 1941 Mad 727 (731).

[12] Contract opposed to public policy—Either party cannot enforce. (Vol 10) 1923 Mad 626 (628) (DB).

[13] If in contract part of consideration is void as being opposed to public policy, or one of its essential conditions could not be complied with, then it becomes unenforceable. (Vol 5) 1918 Bom 170 (170) : 42 Bom 339 (DB).

[14] Money paid under agreement opposed to public policy can be recovered. (Vol 5) 1918 Cal 409 (410) (DB).

[15] Sections 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all instances of agreements which are contrary to public policy. (Vol 11) 1924 Oudh 404 (405) : 27 Oudh Cas 100. (Person binding himself by agreement to associate for whole of his life only with certain body of his fellow-men is contrary to public policy.)

13. Agreements opposed to public policy.—[1] The following agreements have been held to be opposed to public policy :

(a) Contract for wholesale supply of rice in contravention of terms of license. (Vol 10) 1923 Mad 626 (628) (DB).

(b) Agreement that judgment debtor should pay Rs. 6 out of Rs. 41 of his salary to decree-holder. (Vol 28) 1941 Bom 889 (892) : 1 L R (1941) Bom 415.

(c) Contract to sell not less than certain quantity of intoxicating drugs every year. (1906) 3 All L Jour 802 (804).

(d) Agreement by father to give up entirely the custody and control of his child to mother. (Vol 15) 1928 Cal 600 (601) : 55 Cal 730 (DB).

(e) Transfer of decree with object to defraud other creditors. (Vol 11) 1924 Mad 189 (191) (DB).

(f) Alienation of *swastivachanam* service inam lands. (Vol 9) 1922 Mad 197 (198) : 45 Mad 620 (FB).

(g) Arrangement to secure one creditor advantage over others. (1906) 16 Mad L Jour 418 (419) (DB).

(h) Contract for carrying mail not transferable—Contractor D entering into partnership with P—Partnership dissolved — D to transfer lorries to P and also to get contract transferred to P — On failure to transfer contract, D to maintain continuance of contract for P—Contract held void being opposed to public policy.

Section 23 (contd.)

{Vol 30} 1943 Nag 260 (262, 263) : I L R (1943) Nag 565 (DB)

14. Champerty and maintenance.—[1] Champerty, under English law, is something against good policy and justice; something tending to promote unnecessary litigation; something immoral in law, and to constitute which a bad motive, in the same sense is necessary. (1863) 8 Moo Ind App 170 (187) (PC).

[2] The English law of champerty is not applicable in India. (1873-74) 1 Ind App 241 (265) (PC) (Vol 24) 1937 Mad 161 (162) : I L R (1937) Mad 584 (DB) (Vol 15) 1928 Mad 437 (438) (DB) (Vol 10) 1923 Nag 214 (218) (Vol 7) 1920 Lah 123 (129) : 1 Lah 124 (1893) 20 Cal 843 (847) : 20 Ind App 112 (PC) (1876-77) 2 Cal 233 (255) : 4 Ind App 23 (PC).

[3] There is no law in India which would make agreements, which would, under English law, be called champertous, void. (1908) 35 Cal 420 (426) : 35 Ind App 48 (PC) (Vol 32) 1945 Oudh 152 (153) : 20 Luck 194 (DB) (Vol 17) 1930 Lah 392 (393) (DB) (Vol 11) 1924 P C 162 (173) : 52 Ind App 1 : 48 Mad 230 (PC) (Vol 11) 1924 Mad 877 (879) (Vol 8) 1921 Oudh 207 (208) : 24 Oudh Cas 313 (Vol 7) 1920 Nag 69 (71).

[4] The ground, upon which agreements, which are champertous, or agreements for maintenance, have been held to be void, in this country, is that they are contrary to public policy, or are considered to be immoral and against public policy. (1874) 13 Beng L R 530 (548) (DB).

[See also (Vol 24) 1937 Mad 161 (162) : I L R (1937) Mad 584 (DB)]

[5] In deciding whether a particular transaction is vitiated under this section, the Courts are to consider whether the transaction is merely the acquisition of an interest in the subject of the litigation *bona fide* entered into or whether it is an unfair or illegitimate transaction, got up for the purpose merely of spoil or of litigation disturbing the face of families, and carried on from a corrupt and improper motive. (1880) 5 Cal 4 (6) (DB) (Vol 18) 1931 Cal 144 (149, 150) (DB). (Lessee carrying on litigation on lessor's behalf — Transaction, if got up from corrupt motive is against public policy.) (1911) 33 All 626 (628) (DB) (1873-74) 1 Ind App 241 (265) (PC). (Court will consider whether transaction is *bona fide* or illegitimate.)

[6] A contract is opposed to public policy being a champertous one, if it is unfair or illegitimate transaction, got up for the purpose, merely, of spoil or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive, or is a gambling in litigation. (Vol 23) 1936 Rang 491 (492) : 14 Rang 392 (DB) (Vol 25) 1938 Lah 23 (28) (Vol 20) 1933 Rang 418 (421) (DB) (Vol 11) 1924 Mad 877 (879) (Vol 8) 1921 Nag 135 (136) (1921) 61 Ind Cas 884 (885) (Nag) (1921) 59 Ind Cas 10 (12) (Bom) (Vol 5) 1918 All 371 (372) (1889) 11 All 57 (73) (DB). (A executed a bond for 25,000 rupees in consideration of B obliging to defray expenses of appeal — Held that the contract was void, as it amounted to gambling in litigation.) (1874) 13 Beng L R (Note) 516 (519) (DB).

[7] Agreements to finance litigation in consideration of having share of property, are not *per se* opposed to public policy. They may be so, if the object of the agreement is an improper one, such as abetting unrighteous suits or gambling in litigation. (Vol 18) 1931 P C 100 (104) (PC) (Vol 25) 1938 Lah 23 (27, 28) (Vol 21) 1934 Lah 1017 (1018) (Vol 21) 1934 Rang 346 (347) (Vol 15) 1928 Mad 437 (438) (DB) (Vol 13) 1926 Lah 43 (44, 45) (1926) 93 Ind Cas 959 (960) (DB) (Lah) (Vol 11) 1924 P C 162 (174) : 48 Mad 230 : 52 Ind App 1 (PC) (Vol 11) 1924 Oudh 234 (236) : 24 Oudh Cas 368 (Vol 10) 1923 Sind 50 (51) : 16 Sind

L R 278 (DB) (Vol 7) 1920 Lah 123 (124) : 1 Lah 124 (13) 1913 Pun L R No 98, page 359 (360, 361) (Vol 1908 Pun Re No. 26, p 96 (101) (DB) (1905) 27 All 271 (290) : 32 Ind App 113 : 8 Oudh Cas 155 (PC) (1893) 20 Cal 843 (847) : 20 Ind App 112 (PC) (1880) 5 Cal 4 (6) (DB) (1876) 2 Cal 233 (257) : 4 Ind App 23 (PC).

[See also (Vol 4) 1917 P C 58 (60) (PC). (Deciding against party because he was financed by somebody else is unsound)]

[8] In a suit to recover money, given to finance litigation, plaintiff must prove the agreement to be just and equitable. (Vol 21) 1934 All 1023 (1024).

[9] Where A agrees to pay B a certain sum of money, in consideration of B supplying funds to A, and otherwise assisting him in a litigation, but when B claimed the money. A contended that there was no consideration and that he was bound to pay only the actual expenses incurred by B; overruling A's contention, it was held, that B was entitled to recover the amount which A had agreed to pay. (1932) 138 Ind Cas 900 (902) (PC).

[10] Where an agreement to finance litigation upto the High Court is entered into, the mere fact that no appeal was lodged, as it became unnecessary to do so, does not enable the party to evade his obligations. (Vol 21) 1934 Lah 1017 (1018).

[11] Agreement by N, as agent of F, to give loan to K—K promising to grant lease of his zemindari to N—K getting loan from another person and granting him lease—N suing K for specific performance of agreement—After N's death his heir assigning N's interest under agreement to F—Assignment, held, was not void for champerty. (1861) 8 Moo Ind App 170 (188) (PC).

[12] Where a claimant to property, unable to fight out his own case, engages another person to act and represent him wherever necessary and promises certain sum to him on success of suit, such agreement is not champertous or void as against public policy. (Vol 23) 1936 Rang 491 (493) : 14 Rang 392 (DB).

[13] An agreement, taken by a pleader, that he shall be given part of the property, in dispute, in the suit, in which he is engaged, must, necessarily, be contrary to public policy, and therefore, unlawful. (Vol 12) 1925 Bom 470 (471) : 49 Bom 619 (DB).

[14] Where, suit is not a speculative one, any agreement about it is not champertous. (Vol 9) 1922 Upp Bur 12 (14) : 4 Upp Bur 104

[15] A speculative sale is not bad, on the ground of being against public policy. (1895) 18 Mad 374 (378) (DB).

[16] Transferee's claim to recover property, which he has brought by paying costs of suit, is a speculation in litigation, but, it is not of such a nature as to be rendered invalid in law. (Vol 12) 1925 Oudh 71 (72).

[17] Champertous agreements are, in their essence, speculative; and fairness or otherwise of a particular bargain is to be decided regard being had to the value of property and the commercial value of claim. The proportion to be retained by the claimant is an important matter to be considered while judging the fairness of a bargain made at a time when result of litigation is problematical. (Vol 27) 1940 P C 19 (23) : I L R (1940) Lah 1 : I L R (1940) Kar (P C) 63 : 67 Ind App 50 (P C).

[18] Where the reward stipulated was out of all proportion to the actual expenses incurred, held, that the agreement was unconscionable and therefore illegal as against public policy. (Vol 13) 1926 Lah 43 (45) (Vol 25) 1938 Lah 23 (25, 26) (Vol 11) 1924 Rang 43 (51) : 1 Rang 565 (DB). (Financier getting five times his moneys advanced — Agreement held to be unfair.) (1889) 11 All 128 (135) (DB). (1889) 11 All 118 (118, 119) (DB) (1874) 13 Beng L R 495 (502, 505) (DB).

Section 23 (contd.)

[See however (Vol 15) 1928 Mad 437 (439) (DB). (A bargain, in which the reward is largely in excess of the expenses incurred, is not, necessarily, an unconscionable bargain rendering it champertous.)]

[19] Money advanced for prosecuting appeal to Privy Council — Reward stipulated for unconscionable — Decree for money, actually advanced with interest, is a correct decree. (1893) 15 All 352 (353, 359) : 20 Ind App 127 (P C) * (1889) 11 All 128 (135) (DB) * (1889) 11 All 118 (119, 126) (DB).

[20] Agreement to finance litigation and receive half of decretal amount is *prima facie* inequitable and opposed to public policy. (Vol 21) 1934 All 1023 (1024).

[21] Agreement to finance defendant's partition suit by plaintiff in consideration of defendants giving half of his share—Agreement, held, an unconscionable and extortionate bargain and opposed to public policy. (Vol 27) 1940 Bom 143 (147) (DB).

[22] Agreement to finance litigation in consideration of the claimant's getting a share of property, if successful, but containing no provision for refund in case of failure, is champertous. (Vol 6) 1919 Mad 718 (724) (DB).

[23] Agreement under which Mahomedan Mooktear interfering in affairs of Hindu family advanced money to carry on suit by members of that family to set aside alienations, made by their father, on the understanding that he was to be entitled to the share of estate, recovered from purchasers in the event of success, savours of champerty and a suit by him for specific performance of such agreement could not be countenanced. (1911) 13 Beng L R 516 (517, 518) (DB).

[24] Where the form of a contract is so adopted as to evade the effect of the transaction being stamped with the character of champerty, it will be set aside. (1869) 12 Moo Ind App 275 (309) (P C).

15. Stifling prosecution.—[1] Stifling prosecution is well recognised as opposed to public policy. (Vol 29) 1942 Mad 173 (174) : 43 Cri L Jour 734.

[2] The essential element in stifling a prosecution is the tampering with the administration of justice by a private individual. (Vol 13) 1926 Cal 519 (521) (DB) * (Vol 25) 1938 Cal 840 (850) : I L R (1939) 1 Cal 241 (DB) * (Vol 13) 1926 Cal 455 (456) (DB).

[3] An agreement, the object of which is to stifle a prosecution, is against public policy. (1904) 28 Bom 326 (329) (DB) * (Vol 32) 1945 Cal 218 (234) (DB) * (Vol 20) 1933 Cal 196 (197) * (Vol 24) 1937 Lah 686 (687) (DB) (Mortgage.) * (Vol 2) 1915 Mad 635 (635) : 37 Mad 385 (Pro-note) * (Vol 18) 1926 Oudh 40 (40) Pro-note. * (Vol 11) 1924 Oudh 243 (243) : 26 Oudh Cas 378. (Pro-note) * (Vol 1) 1914 Oudh 278 (279) : 17 Oudh Cas 213 * (1910) 6 Nag L R 148 (151).

[4] In regard to agreements to stifle prosecutions, it is of the essence of the defence that the defendant should establish a contract, whereby the proposed or actual prosecutor agrees, as part of the consideration received or to be received by him, either not to bring or to discontinue criminal proceedings for some alleged offence. It is, of course, impossible for such a contract to be made unless both parties know of the proposed or actual proceedings. Proof that there has actually been crime committed is obviously unnecessary. But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange, for the promise of the other not to prosecute or continue proceeding. (Vol 28) 1941 P C 95 (96) : I L R (1941) Kar (P C) 141 : I L R (1942) 1 Cal 1 : 68 Ind App 144 (P C).

[See also (Vol 24) 1937 Mad 223 (224) (DB). (Mere possibility of talk of criminal proceedings at some stage

or another will not make transaction illegal.) * (Vol 23) 1936 Mad 658 (658) : I L R (1937) Mad 471.]

[5] If it be an implied term of a deed that criminal complaint would not be further proceeded with, then the consideration for the deed is unlawful, quite irrespective of the fact, whether any prosecution in law has been started or there is something for which it is to be dropped. It is also not necessary that the agreement to settle criminal prosecution should be expressly stated as part of the consideration. It is enough if the inference necessarily follows from the evidence that the consideration was such. (Vol 27) 1940 Pat 573 (575) : 19 Pat 424 (DB).

[6] The question whether there was, or was not, an agreement to stifle prosecution is one of fact (Vol 32) 1945 Cal 218 (245) (DB). (Such an agreement will seldom be set out in paper and perhaps, more often than not be only an implied one.)

[7] Transaction entered into with object of stifling criminal prosecution—Object achieved—Parties not in fiduciary relationship — Both parties in *pari delicto* — One of the parties cannot repudiate transaction. (Vol 25) 1938 Oudh 24 (26).

[8] An agreement to compound a non-compoundable offence is forbidden by law, and when such an agreement will constitute the consideration for or be the object of, an agreement the latter will fail to develop into a contract. (Vol 32) 1945 Cal 218 (234) (DB).

[9] Where an offence is non-compoundable, an agreement, the purpose of which is to compound that offence, is illegal as opposed to public policy (Vol 32) 1945 Bom 82 (84) : I L R (1945) Bom 208 * (Vol 29) 1942 Mad 173 (176) : 43 Cri L Jour 734 * (Vol 28) 1941 Pat 349 (350). (Agreement arrived at due to criminal case.) * (Vol 26) 1939 Lah 98 (99) (DB) * (Vol 17) 1930 Oudh 196 (199) : 4 Luck 669 * (Vol 13) 1926 All 270 (270, 271) * (Vol 10) 1923 Lah 689 (690). (Money paid for composition of non-compoundable offence is not recoverable) * (Vol 5) 1918 Bom 170 (170) : 42 Bom 339 (DB) * (Vol 3) 1916 Pat 284 (288) : 1 Pat L Jour 48 (DB) * (1913) 40 Cal 113 (118) (DB) * (1912) 8 Nag L R 97 (106) * (1909) 1909 Pun L R No. 93 p. 343 (344) * (1904) 28 Bom 326 (329) (DB).

[10] If, even a part of the consideration of an agreement is shown to be the stifling of a non-compoundable offence, the agreement must be held to be void. (Vol 30) 1943 Sind 197 (205) : I L R (1943) Kar 49 (DB) * (Vol 29) 1942 Mad 173 (174) : 43 Cri L Jour 724.

[11] In deciding the question as to whether the consideration for an agreement was the settlement of the pending criminal cases the Court cannot be confined to the terms of the agreement. The whole evidence must be examined. (Vol 27) 1940 Cal 337 (342) : I L R (1940) 1 Cal 372 (DB).

[12] Where the consideration for an agreement is a promise not to prosecute for an offence, which is non-compoundable the agreement is not enforceable (Vol 20) 1933 Bom 413 (414, 416) : 57 Bom 478 (DB) * (Vol 29) 1942 Mad 662 (662) : 44 Cri L Jour 29 : I L R (1943) Mad 183 (DB). ((Vol 29) 1942 Mad 173 : 43 Cri L Jour 734, Reversed) * (Vol 27) 1940 Pat 683 (689) : 19 Pat 715 (DB) * (Vol 9) 1922 Pat 502 (503) : 1 Pat 164 (DB).

[13] An agreement not to prosecute for a non-compoundable offence, is not enforceable only where the consideration for the agreement was clearly such an illegal promise (Vol 25) 1938 Bom 413 (414, 416) * (Vol 9) 1922 Pat 502 (503) : 1 Pat 164 (DB) * (Vol 4) 1917 Pat 454 (455) : 2 Pat L Jour 630 (DB).

[14] An agreement, the consideration for which is the abandonment of criminal prosecution of a non-compoundable offence, is void. (Vol 10) 1923 Cal 292 (292) (DB) * (Vol 27) 1940 Pat 573 (576) : 19 Pat 424 (DB) * (Vol 21) 1934 Pesh 105 (106) (DB) * (Vol 24) 1937 All

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370 (372) * (Vol 10) 1923 All 504 (505, 507) : 45 All 396 (DB). (Bond.) * (Vol 10) 1923 Lah 689 (890). (Complaint of theft — Composition during investigation is void.) * (1912) 8 Nag L R 97 (104) * (1905) 3 Low Bur Rul 42 (42, 43).

[15] Where the consideration for an agreement is withdrawal of a complaint for a non-compoundable offence, the bond is void. (1913) 40 Cal 113 (117, 118) (DB). (Bond.) * (Vol 25) 1938 Cal 840 (850) : ILR (1939) 1 Cal 241 (DB) * (Vol 23) 1936 Mad 656 (659) : I L R (1937) Mad 471. (Pro-note) * (Vol 21) 1934 All 1068 (1069). (Pro-note.) * (Vol 18) 1931 All 128 (128) : 53 All 130 * (Vol 11) 1924 Pat 305 (306) (DB). (Bond.) * (Vol 5) 1918 Nag 181 (183). (Withdrawal of application to sanction prosecution under S. 195, Cr. P. C.) * (82) 1882 Pun Re No. 135 p. 398 (400) (DB). (Deed of relinquishment.)

[16] It is not enough that the motive which impelled the party, who undertook the liability under the agreement, was that a pending criminal case should be withdrawn. The test to be applied is whether it was an express or implied term of the bargain between the parties that a non-compoundable criminal case should not be proceeded with. (Vol 32) 1945 Bom 82 (84) : I L R (1945) Bom 208 * (Vol 25) 1938 Cal 840 (850) : I L R (1939) 1 Cal 241 (DB) * (Vol 14) 1927 All 318 (318) : 49 All 540 (DB).

[17] The fact that the prosecution was actually withdrawn as a result of the execution of the bond does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. (Vol 25) 1938 Cal 840 (850) : ILR (1939) 1 Cal 241 (DB).

[18] Agreement between husband and wife, pending criminal case against husband by wife's brother relating to a non-compoundable offence, is valid, provided, it is made independently of the criminal case. (Vol 13) 1926 Lah 33 (34).

[19] Where security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case and as such, the security is not entertainable in law (Vol 25) 1938 Cal 840 (851) : ILR (1939) 1 Cal 241 (DB).

[20] Where the withdrawal of the complaint is due to the debtor having executed a pronote in favour of the creditor, but such withdrawal is not the consideration of the pronote, the pronote is not invalid. (Vol 14) 1927 Lah 530 (533).

[21] It is not necessarily unlawful to agree to withdraw a criminal complaint of a non compoundable offence; because, it may have been withdrawn because complainant had very little chance to succeed in establishing his case. (Vol 16) 1929 All 456 (457).

[22] Sale of property, for raising money, to be given to third party as bribe, to induce him to withdraw criminal charge against vendor — Vendee not party to unlawful agreement — Sale held valid. (1832) 8 Cal 24 (28) (DB).

[23] Contract for payment of money in respect of which a criminal prosecution is pending is not by itself opposed to public policy, where there is a civil liability. The consideration and object of such a contract is not illegal within the meaning of S. 23. The withdrawal of the prosecution in the case might be the motive but is not the object or consideration so as to render the agreement illegal. (Vol 18) 1931 Cal 421 (422) (DB) * (Vol 23) 1941 Oudh 593 (596) (DB) * (Vol 25) 1938 Cal 840 (851) : ILR (1939) 1 Cal 241 (DB) * (Vol 21) 1934 Pesh 105 (106) (DB) * (Vol 19) 1932 Lah 541 (543) : 13 Lah 356 (DB) * (Vol 18) 1931 Cal 416 (417) * (Vol 17) 1930 All 826 (826) (DB) * (Vol 16) 1929 Lah 564 (565) (DB) * (Vol 16) 1929 Mad 7 (7) * (1928) 107 Ind Cas 605 (606) (Lah) * (Vol 12) 1925 Lah 364 (365, 366).

[24] A man, to whom a debt is due may take security for that debt from his debtor, even though the debt arises out of a non-compoundable offence, and he threatens to prosecute for that offence, provided, he does not in consideration of such security agree not to prosecute and such an agreement will not be inferred from the creditor using strong language. (Vol 20) 1933 Bom 413 (416) : 57 Bom 678 (DB) * (Vol 32) 1945 Cal 218 (224) (DB) * (Vol 27) 1940 Cal 337 (341, 342) : ILR (1940) 1 Cal 372 (DB) * (Vol 23) 1936 Mad 656 (658, 659) : ILR (1937) Mad 471 * (Vol 14) 1927 Lah 231 (232) * (1926) 94 Ind Cas 465 (468) (DB) (All) * (Vol 13) 1926 Cal 455 (456) (DB) * (Vol 13) 1926 Cal 59 (64) : 53 Cal 51 (DB) * (Vol 1) 1914 Oudh 278 (279) : 17 Oudh Cas 213 * (06) 1906 Pun Re No. 9, p. 29 (37) * (1901) 1901 Pun Re No. 41, p. 119 (123, 124) (DB) * (1912) 8 Nag L R 97 (104).

[25] In cases of agreement to stifle prosecutions, the fact that there was a debt really due from the accused to the complainant, is irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. (Vol 28) 1941 P C 95 (96) : 68 Ind App 144 : ILR (1941) Kar (PC) 141 : ILR (1942) 1 Cal 1 (PC).

[26] A creditor must not, by stifling prosecution, obtain a guarantee for his debt. (Vol 20) 1933 Bom 413 (416) : 57 Bom 678 (DB) * (Vol 13) 1926 Cal 59 (64) : 53 Cal 51 (DB).

[27] If the agreement as to the civil liability changes the nature or the extent of the original civil liability; for example, if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security, this will be an indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. (Vol 27) 1940 Cal 337 (342, 343) : ILR (1940) 1 Cal 372 (DB).

[28] A reference is invalid and the award which followed would be inoperative when the reference is the result of an understanding between the parties to abandon the prosecution of a non-compoundable case. (Vol 31) 1944 Sind 80 (81) : ILR (1943) Kar 390 (DB) * (Vol 21) 1934 Sind 71 (72) (DB) * (Vol 26) 1939 Lah 187 (187) (Obiter.) * (Vol 26) 1939 Pat 291 (292) * (Vol 20) 1933 Cal 817 (818) (DB) * (Vol 6) 1919 Cal 1073 (1073) (DB) * (Vol 4) 1917 Mad 607 (608) : 40 Mad 285 (DB) * (1911) 5 Sind L R 267 (269, 270) (DB).

[29] If it is an implied term of the reference to arbitration of a civil dispute that the criminal complaint would not be further proceeded with, then the consideration of the reference is invalid, whether any prosecution had been started or not. (Vol 17) 1930 P C 100 (102) : 57 Ind App 117 : 57 Cal 1302 (PC). ((Vol 13) 1926 Cal 519, Reversed.)

[30] Where the partners agree to refer their whole dispute concerning the partnership to arbitration, the agreement does not become void under S. 23 simply because a criminal prosecution under S. 406, Penal Code, is pending against one of the partners at the instance of the other partners, and in pursuance of such an agreement the prosecution is dropped. (Vol 14) 1927 Lah 465 (466).

[31] In case of offence compoundable with or without Court's leave, agreement between complainant or prosecutor and accused, or person interested in his welfare, to withdraw prosecution, is not against public policy and is therefore valid. (Vol 28) 1941 Rang 231 (233) : 1941 Rang L R 316 * (Vol 33) 1946 Mad 80 (80) * (Vol 32) 1945 Bom 82 (84) : I L R (1945) Bom 208 * (Vol 29) 1942 Mad 173 (176) : 43 Ori L Jour 734 * (35) 1935 Oudh W N 553 (554) * (Vol 17) 1930 Oudh 196 (199) : 4 Luck 669 * (1921) 62 Ind Cas 70 (71) (Pat) (DB) * (1811) 8 All L Jour 498 (502, 503) * (1911) 10 Ind Cas 189 (190) (All).

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[32] Compounding, on behalf of wife, a compoundable offence, for consideration, by husband, is legal and the consideration is not illegal merely because of the absence of signature of wife. (Vol 15) 1928 Bom 805 (806) : 52 Bom 693.

[33] A promise to pay sum of money as compensation for the abduction of woman is not enforceable, abduction being a non-compoundable offence. ('04) 1904 Pun Re No. 82 p. 802 (804) (DB).

[34] Though criminal breach of trust is not compoundable in British India, pro-note executed in consideration of dropping prosecution of such offence committed in French territory, where it is a compoundable offence, for consideration, payable in British territory, is valid. (Vol 10) 1923 Mad 708 (709, 711).

[35] Offence compoundable with Court's permission—Compromise during pendency to refer dispute to arbitration and withdraw prosecution—Compromise is lawful. (Vol 26) 1939 Lah 98 (99, 100) (DB).

[36] Where the complaint is about a non-compoundable offence but the sworn statement disclosing an offence which is only compoundable, the parties are at liberty to compound and an agreement in respect of such compoundable offence is not invalid. (Vol 33) 1946 Mad 80 (80) * (Vol 3) 1916 Cal 917 (917, 918) (DB).

[37] The withdrawal of a false complaint intentionally lodged to coerce the opposite party to enter into an agreement is not good consideration for such agreement even though the offence alleged is a compoundable one. (Vol 19) 1932 Lah 446 (447) (DB).

16. Marriage contracts.—[1] It is a matter of public importance that parents and guardians, as a class, should duly perform their duty as sponsors in the marriages of infant children and agreements which intend to cause misfeasance in the performance of this duty may be properly held void as being opposed to public policy. ('89) 1889 Pun Re No. 128 p. 446 (450, 451) (FB).

[2] Contract of betrothal entered into by a Hindu parent is not void as being against public policy or Hindu Law. ('87) 1937 Mad W N 1274 (1277).

[3] An agreement to pay money to the parents or guardian of a bride or bridegroom in consideration of their consenting to the betrothal is not necessarily immoral or opposed to public policy. (Vol 13) 1926 Pat 582 (600) : 5 Pat 646 (DB).

[4] Consideration paid in consideration of betrothal agreement is not recoverable. (Vol 2) 1915 Lah 480 (481).

[5] Betrothal with unborn person is against public policy. (Vol 17) 1930 Lah 561 (564) : 11 Lah 598 (DB).

[6] A breach of betrothal agreement gives rise to a claim for damages. (Vol 2) 1915 Lah 480 (481).

[7] To constitute marriage brokerage contract, some third party must stipulate for a personal benefit to himself for bringing about marriage. ('37) 1937 Mad W N 1274 (1277).

[8] A contract to pay money to the father of a girl in consideration of his giving her in marriage is immoral and opposed to public policy. (1909) 32 Mad 185 (188) (FB) * (Vol 15) 1928 Nag 89 (90) : 24 Nag L R 66 * (Vol 18) 1926 Pat 582 (600) : 5 Pat 646 (DB) * (1912) 10 All L Jour 159 (161, 162) * (1911) 15 Cal W N 447 (452) * (1901) 23 All 495 (497) (DB) * (1889) 13 Bom 126 (130) * ('89) 1889 Pun Re No. 128 p. 446 (448) (FB) (Agreement with girl's brother.)

[But see (1890) 18 Mad 83 (88) (DB).]

[9] Contract by A to give his daughter in marriage to D's son and to pay damages in case of breach, is void since it creates pecuniary interest in marriage-taking place : (Vol 1) 1914 Mad 551 (552) : 37 Mad 893 (DB) * (Vol 22) 1935 Pesh 121 (122).

[10] An agreement providing money payment for the negotiation of a marriage by a third party is void being immoral and contrary to public policy : (1889) 13 Bom 181 (186).

[11] Where the object of an agreement is to procure by corrupt means, the guardian's consent to a desired marriage and is, therefore, a bargain and sale of the minor in marriage, as it were, such agreement is void, as opposed to public policy : ('92) 1892 Pun Re No. 112 page 385 (387) (DB).

[12] An agreement for the purchase of a bride for the son of a person who had given his daughter in exchange for finding a wife for that person is void being against public policy. (Vol 17) 1930 Lah 561 (566) : 11 Lah 598 (DB).

[13] Agreement to pay money to a person for persuading woman to marry a person, paying money, is opposed to public policy. (Vol 6) 1919 Upp Bur 2 (2) : 3 Upp Bur Rul 119.

[14] Receiving consideration, by those who arrange marriages, when the money received, is intended to benefit those persons and not for the expenses of the ceremony or for the benefit of bridegroom or bride, is against public policy and hence no suit would lie to enforce any agreement to that effect. (Vol 31) 1944 Nag 159 (160) : 1 L R (1944) Nag 535 (DB).

[15] Contract for payment of money by parent of, either boy or girl, after performance of marriage is not void *ab initio*, as being opposed to public policy. (Vol 6) 1919 All 248 (248) (DB).

[16] A promise to pay a particular sum of money or to settle some property on a bride or bridegroom in consideration of her or his marrying the son or daughter of the promisor is not illegal. (Vol 32) 1945 Mad 165 (166).

[17] Although a marriage when performed in the Asura form is valid, an agreement to pay money to the father, in consideration of such marriage, is not valid, and the money cannot be recovered by suit. If the money had been paid and the marriage solemnised, the money cannot be recovered back. (1909) 32 Mad 185 (190) (FB) * (Vol 18) 1926 Pat 582 (588) : 5 Pat 646 (DB). (Where the gift is actually made whether to the bride, the bridegroom or the father of the bridegroom by the bride's parents it cannot be recovered back when once the marriage is solemnised, though it may not be enforced in a suit.)

[18] A suit can lie to recover money already paid to the girl's father, in case the marriage falls through, there having been a breach of the marriage contract. (Vol 15) 1928 Nag 89 (90) : 24 Nag L R 66 * (Vol 20) 1933 Lah 849 (850) * (Vol 6) 1919 Lah 35 (35) : 1919 Pun Re No. 113

[But see (1912) 10 All Jour 159 (161, 162).]

[19] Money paid for arranging for marriage can be recovered if contract is not one of brokerage. (Vol 10) 1923 Nag 296 (296, 297).

17. Past and future cohabitation.—[1] Future cohabitation is immoral consideration. Agreement having such consideration is void. (Vol 20) 1933 Bom 209 (211) (DB) * (Vol 12) 1925 All 437 (438) : 47 All 619 (DB) * (Vol 11) 1924 Mad 159 (159) * (1903) 13 Mad L Jour 7 (12).

[2] Where a promise is given during the continuance of cohabitation there is no presumption that the consideration is future cohabitation and is therefore given for an immoral purpose. (1903) 13 Mad L Jour 7 (9)

[3] Although future cohabitation cannot support a promise as being immoral, yet there is nothing wrong in a promise made in consideration of past cohabitation. (Vol 30) 1943 Mad 253 (253) * (Vol 27) 1940 All 385 (385) : 1 L R (1940) All 871 (DB) * (Vol 17) 1930 Mad 956 (960) (DB) * (Vol 12) 1925 Oudh 536 (536) * (Vol 11)

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1924 Bom 135 (137) (DB) & (1903) 13 Mad L Jour 7 (13) & (1880) 2 All 433 (435, 436) (DB). (A gift made by a person to his kept mistress, who lived with him as his wife "on condition of her continuing to be his wife and remaining obedient to him, her husband"—which is followed by possession enjoyed for a number of years, cannot, even assuming that consideration for it was illegal or immoral, be set aside, in the absence of fraud in enforcement of a debt created subsequent to gift. Such a gift cannot be held to be immoral solely on strength of words used in deed of gift, where donor had children by his mistress and his object in making it appears to have been her continuing to remain with him and discharge her duties to such children rather than continuance of their illicit intercourse.) & (1875-77) 1 All 478 (479, 480) (DB).

[But see (Vol 25) 1938 Pat. 502 (503, 504) : 17 Pat 308 (DB) & (Vol 20) 1933 Bom 209 (211) (DB) & (Vol 17) 1930 Mad 239 (239, 240) & (Vol 7) 1920 Bom 142 (143) : 44 Bom 542 (DB)]

[4] Where a bond executed for payment of loan is taken by creditor in name of his concubine's mother, debtor is not entitled to plead unenforceability due to immoral consideration. (Vol 7) 1920 Mad 198 (201) (DB).

[5] Where adultery was not without consent or connivance of the husband, a contract, for which such adultery forms the consideration, is not illegal. (Vol 15) 1928 Pat 375 (386).

18. Prostitution.—[1] Knowingly letting a house to a prostitute with the object of her carrying on there-in prostitution is immoral and contrary to public policy; and a landlord who, knowingly, so lets quarters to a prostitute cannot recover the rent in a Court of law. (1909) 31 All 58 (58) (DB) & (Vol 8) 1921 Cal 486 (487) (DB) & ('04) 1904 Pun Re No 65, p. 185 (185).

[See ('98) 1898 Pun Re No. 2 p. 2 (3) (DB).]

[2] Money lent for the purpose of assisting the borrower to visit brothels and bring in prostitutes cannot be recovered in a Court of law. (Vol 5) 1918 Cal 399 (399, 400) (DB).

[3] A custom among the prostitutes that if one of them contracts a marriage, she forfeits all rights in her original family, in other words that she becomes practically an outcaste, is opposed to public policy and is immoral and consequently unenforceable in the British Indian Courts. (Vol 15) 1928 Lah 516 (520) : 9 Lah 428 (DB).

[4] No suit would lie by an adopted daughter of a dancing girl for accounts or a share in the profits of an immoral and illegal partnership. (Vol 26) 1939 Mad 139 (142) : ILR (1938) Mad 789.

19 Adoption contracts. — [1] Agreement by widow, whereby she undertakes not to exercise her power to make adoption, is void as being opposed to public policy. (Vol 6) 1919 Mad 447 (452) (DB).

[2] Agreement to pay bride to procure adoption of a boy is one against public policy and therefore void. (Vol 2) 1915 Mad 130 (131) (DB).

[3] Contract offering inducement to one party to adopt a certain person on pain of losing a part of his property is not opposed to public policy, if the parties intend thereby to end family trouble (Vol 12) 1925 Mad 321 (322, 323) & (Vol 13) 1926 Mad 1093 (1093, 1094) (DB)

20. Religious purposes. — [1] Mahomedan agreeing to pay Hindu certain sum of money for praying to God for his success in suit—Agreement is not

opposed to public policy. (Vol 16) 1929 Mad 812 (812) : 53 Mad 29 (DB).

[But see (Vol 14) 1927 All 406 (407) : 49 All 705 (DB).]

[2] Agreement to perform religious rites to secure, by propitiation of deity, confirmation in post — Agreement is not opposed to public policy. (Vol 22) 1935 Nag 119 (120) : 31 Nag. L R 229.

[3] Agreement for consideration by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya is neither opposed to public policy nor uncertain and so is not void. (Vol 3) 1916 Pat 218 (219) : 1 Pat L Jour 539 (DB).

[4] Agreement by Pandas of temple to share offerings to deities is not necessarily against public policy. (Vol 10) 1923 All 56 (57) : 45 All 79.

[5] Agreement among Maha Brahmans regulating method in which offerings shall be collected or divided which does not control or restrict discretion of those, by whom offering or gifts are made, is valid. (Vol 5) 1918 Oudh 462 (463) : 20 Oudh Cas 265.

[6] Sale of a share is the right to receive the offerings of a share is not opposed to public policy, if it is made in favour of one, who is a participant in the offerings, and not to a stranger. (Vol 20) 1933 Lah 223 (224).

21. Agreement to indemnify surety. — [1] An agreement by the accused with the surety who gives bail to him, that he will indemnify the surety if the bail is forfeited on account of the accused's non-appearance is void, being opposed to public policy. (Vol 12) 1925 Nag 59 (60) : 20 Nag. L R 166 & (Vol 17) 1930 Cal 596 (597) : 57 Cal 1093. & (Vol 7) 1920 Cal 498 (498) & ('99) 1899 Pun Re No. 1, p. 1 (4) (DB).

[2] Bail bond forfeited due to accused's failure to appear — Third person agreeing to indemnify surety in case of forfeiture — Agreement to indemnify is illegal. (Vol 2) 1915 Cal 695 (695) (DB).

[3] Person standing surety for another on receipt of cash consideration—Latter cannot recover consideration. (1922) 65 Ind Cas 137 (138) (DB) (Lah).

[4] No agreement between surety and accused that latter would reimburse former for amount of security on forfeiture — Amount forfeited — Accused, three years later voluntarily executing mortgage in favour of surety, consideration being amount forfeited—S. 23, held, did not apply. (Vol 25) 1938 Lah 732 (734) (DB).

22. Office brocage agreements. — [1] A promise to pay money in order to procure resignation of public servant with a view to promisor's securing that appointment is void as being an office-brocage agreement. (1907) 30 Mad 530 (531).

[2] It is contrary to public policy to induce public officers for money or other valuable consideration, to use their position and influence to procure a benefit. (Vol 8) 1921 Cal 185 (187) : 43 Cal 427 (DB) & (Vol 3) 1916 Cal 266 (267) : 43 Cal 115 (DB).

[3] Agreement to withdraw candidature for a public office in consideration for certain sum to be annually paid, amounts to bargain or traffic relating to public office and is opposed to public policy. (Vol 18) 1931 All 428 (429) : 53 All 609.

[4] Where plaintiff and defendant agreed that both should eventually bear costs of *lambardars* suit, brought by both of them and that successful party should pay to other half the *pachotra* of the office, held, agreement was void *ab initio*. ('93) 1893 Pun Re No. 86 page 346 (347).

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[5] Transfer of a right to conduct charity by one trustee to another co-trustee for consideration, is against public policy, and confers no right on transferee. (Vol 25) 1938 Mad 982 (987) (DB).

[6] Agreement to pay money in consideration of recommendation to appointing authority is against public policy, and, therefore, void. (Vol 20) 1933 Mad 768 (768).

[7] Sale of palanquin bearing service Inam is not opposed to public policy. (1911) 2 Mad W N 588 (588) (DB).

[8] Agreement to give share of commission, allowed by Government as salary for services, is not opposed to public policy. (12) 1912 Pun L R No. 201, page 645 (646).

23. Interference with course of justice. —

[1] Agreement between parties to assist the other in litigation with object of delaying execution of decree is opposed to public policy within the meaning of S. 23. (Vol 20) 1933 All 303 (305) (DB).

[2] An agreement to make a disposition of property in the hands of the Court Receiver is against public policy, as an interference with the Receiver's work, and is unlawful. (1912) 16 Cal W N 114 (116) (DB).

[3] Contract to transfer property to a person, in consideration of his giving false evidence, is void as being against public policy. (Vol 27) 1940 Rang 73 (75).

[4] A promissory note executed in consideration of giving evidence is unenforceable whether the statement which a person may have promised to give be either true or false. If, however, the object and consideration are found to be legal and valuable, the transaction cannot be avoided simply because the promisee happens to know the reason for which the promisor had executed the promissory note in his favour. (Vol 25) 1938 Mad 911 (913, 914).

[5] Agreement to bring suit in one only out of two Courts, having jurisdiction, is not opposed to public policy. (Vol 33) 1946 Lah 57 (61) : I L R (1945) Lah 281 (FB) ✕ (Vol 24) 1937 Nag 334 (335) : I L R (1939) Nag 641.

[But see (Vol 22) 1935 Nag 48 (49).]

[6] The mere fact that a part of the consideration for a sale of property is dependent on the result of a suit relating to that property, does not make the transaction bad as opposed to public policy. (Vol 19) 1932 Pat 80 (83) : 10 Pat 670 (DB).

[7] Agreement by judgment-debtor, not to appeal against the decree, in consideration of certain arrangements with the decree-holder, is binding upon the parties under S. 23. (Vol 18) 1931 Nag 126 (127).

24. Agreements creating interest against duty.

[1] If a person enters into a contract with a public servant, which he knows casts upon the public servant duties, conflicting with his duties as a public servant, the contract is void. (1909) 13 Cal W N 59 (62).

[2] Commissioner appointed by Court, though at instance of party taking bond from latter—Bond is not enforceable. (Vol 10) 1923 Cal 436 (437) (DB).

[3] Person entrusted with sale of land, and occupying fiduciary position, using that position for interest of prospective purchaser for which purchaser agrees to pay him commission—Contract is unenforceable. (Vol 23) 1936 Mad 541 (543).

[4] Loan by a regimental *bania* to a *sower* is not opposed to public policy. (1902) 1902 Pun Re No. 96 page 432 (437) (DB).

[5] Payment of money to procure exercise of private influence with Government is not immoral or contrary to public policy. (Vol 4) 1917 Pat 92 (98) (DB).

25. Agreement between client and his pleader.

[1] Agreements between legal practitioners and their clients whereby the payment of the former is contingent on the success of the litigation, are improper and opposed to public policy. (1907) 1907 Pun Re No 61, page 280 (288) (FB) ✕ (74) 1874 Pun Re No. 26, page 130 (132) (DB).

[But see (78) 1878 Pun Re No 5, page 33 (42) (DB).]

[2] Agreement to pay vakil's clerk for special attention to his case is void, as against public policy. (Vol 5) 1918 Mad 504 (504) : 41 Mad 471 (FB).

[3] Loan transaction between a pleader and person, who is not his client, is not opposed to public policy and is enforceable. (Vol 4) 1917 Oudh 34 (36) : 20 Oudh Cas 67 (DB).

26. Benami transactions.—[1] Where a public servant buys property in the name of another without the permission of the Government, his conduct is reprehensible but cannot be deemed to be against public policy. (Vol 10) 1923 Cal 154 (156) (DB) ✕ (Vol 13) 1931 Bom 269 (270, 271) (DB).

[See also (Vol 2) 1915 Bom 280 (282) : 40 Bom 126 (DB). (Contract, violating Government Servants' Conduct Rules not being statute, is not void as against law.)]

[But see (Vol 5) 1919 Oudh 457 (459) ✕ (1911) 11 Ind Cas 2 (2, 3) (All.) (Overseer obtaining, contrary to conditions of service and without permission, lease in names of his relatives).]

[2] Assignment of mortgage in the name of a *patwari*'s mother is not against public policy. (Vol 4) 1917 All 462 (463) : 39 All 51 (FB).

[See also (Vol 31) 1944 Nag 325 (326) : I L R (1944) Nag 645. (Pro-note—Loan by wife of *patwari*—Renewal not in name of husband (*patwari*) is not void, and is enforceable at *patwari*'s instance)]

[3] Transfer of property to *kanungo*'s wife, but really in favour of *kanungo*, is not against public policy. (Vol 4) 1917 All 447 (447) : 39 All 53 (DB).

[4] Benami purchase by police-officer, while in service, is not void as being opposed to public policy. (Vol 6) 1919 Nag 50 (52) : 16 Nag L R 25.

[5] Police-officer making benami purchase in contravention of S. 33, Bombay District Police Act — Contract is void. (Vol 20) 1933 Bom 262 (265) (DB).

[6] Plaintiff entering into agreement with defendant 1, Inspector of Land Records, to buy land in his circle — All transactions to be carried out in name of defendant 2 — Defendant 1 buying land in name of defendant 2—Contract held, was not opposed to public policy. (1911) 6 Low Bur Rul 1 (3) (DB).

[7] Money-lending by pleader in the name of his wife. Question in such cases is really one of professional etiquette rather than of public policy, and contract is not invalid. (Vol 10) 1923 Oudh 3 (4) : 26 Oudh Cas 201.

27. Agreement against bidding. — [1] There is nothing unlawful in two or more persons agreeing not to bid against one another at an auction sale. (1894) 18 Bom 342 (346) (DB) ✕ (Vol 27) 1940 Bom 369 (373) : I L R (1941) Bom 71 (DB). (Public sale held for farming out public revenues.) ✕ (Vol 20) 1933 Oudh 124 (127) : 8 Luck 233 (DB) ✕ (Vol 5) 1918 Low Bur 77 (81) ✕ (Vol 4) 1917 Nag 62 (63) (Excise auction) ✕ (1911) 10 Mad L Tim 338 (340) (DB) ✕ (1907) 6 Cal L Jour 111 (116) (DB) ✕ (1905) 1 Cal L Jour 85 (91) (DB) ✕ (1899) 16 Cal 194 (199) (DB).

[2] An agreement not to bid against each other, with the object of defrauding a third person, is void. (Vol 20) 1933 Oudh 124 (127) : 8 Luck 233 (DB).

[3] An agreement by intending bidders at an auction

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*forming a ring to share the profits resulting from the 'knock out' is against public policy. (Vol 30) 1943 Lah 100 (100, 101) : LLR (1943) Lah 837 * (1907) 6 Cal L Jour 111 (116) (DB).

[4] Agreement among intending bidders at public auction, by the Government, for purpose of keeping down bids and dividing profits, as among themselves is opposed to public policy and unenforceable. (Vol 1) 1914 Sind 165 (169, 170) : 8 Sind L R 247 (DB).

[5] An agreement between several persons to purchase land jointly at an auction-sale, held under the Punjab Colonization of Government Lands Act, without bidding against each other, is not opposed to public policy. (Vol 19) 1932 Lah 32 (33).

[6] An agreement by which one party agreed to withdraw his tender to postal authorities to carry mails on bus, in consideration of the other paying certain amount, is not invalid under S. 23 as being opposed to public policy. (Vol 38) 1946 Mad 289 (291)

28. Monopoly. — [1] An agreement, the object of which is to create a monopoly is void, as being opposed to public policy. (1905) 28 Mad 520 (523) (DB).

[2] Agreement attempting to monopolise right to ply on hire motor boats, tends to fix hire at artificial figure and as such is against public policy. (Vol 23) 1936 All 112 (115).

[3] A contract by a District Board giving a person a monopoly to ply lorries along a road undertaking to permit no other lorry proprietor to use the road is void being opposed to public policy. (Vol 21) 1934 Lah 474 (475).

[4] Agreement of plaintiff not to set up business in consideration of which defendant promised to pay off certain sum for life is unlawful under S. 23 in spite of the fact that it was partly carried out. (Vol 3) 1916 Low Bur 51 (54) : 8 Low Bur Rul 389 (FB).

[5] Grant of a monopoly in favour of a person by a panchayat to sell vegetables in the village is opposed to public policy under S. 23. (Vol 15) 1928 Lah 33 (34).

[6] A contract purporting to be a license, granting exclusive right to collect hides of animals from a certain area amounts to granting a monopoly and is unenforceable by reason of S. 23. (Vol 25) 1938 Pat 473 (475, 476) : 17 Pat 255 (DB).

[7] Defendant executing kabuliya in plaintiff's favour agreeing to pay him specified rent for privilege of carrying on trade within certain area—Contract held was not in nature of monopoly, as lessor did not bind himself against giving similar lease to others. (Vol 3) 1916 Pat 304 (305) : 1 Pat L Jour 37 (DB).

[8] A claim to an absolute right of sending scavengers in Madras to various houses and thereby to extort from the scavengers a certain portion of the wages earned by them is opposed to public policy as being an oppressive monopoly, and no rights arising from such claim are enforceable. (Vol 27) 1940 Mad 558 (559) (DB).

29. Restraint of trade. — [1] Agreement to form combination of ginning factories to fix rates and to divide profits in certain manner is not in restraint of trade or opposed to public policy. (1912) 34 All 587 (588) (DB) & (1905) 29 Bom 107 (119) (DB).

[2] An agreement whereby it is provided that the manufacture and sale of certain produce shall be distributed according to certain proportions, that the manufacturing capacities of the parties to it shall remain in *status quo*, and the produce, if and when manufactured, shall be sold at a particular rate does not fall within S. 23. (1905) 29 Bom. 107 (119, 120, 121) (DB).

[3] Where the Government allows a market to be held on its land and restricts the admission of brokers, there is nothing illegal or contrary to public policy in it. It cannot be urged that it is against public policy because

it places restriction upon a man's right to exercise a trade. (Vol 1) 1914 Cal 202 (203) (DB).

[4] Traders agreeing to carry on business among members of their private association only and to penalise the breach of condition — Agreement does not offend against the provisions of S. 23. (Vol 18) 1931 All. 83 (85) : 53 All 316 (DB).

30. Slavery bond. — [1] A contract under which a labourer engages to work without any payment under conditions which make it practically impossible for him to discharge the debt is wholly void. Such a contract is indistinguishable from slavery. (Vol 5) 1918 Pat. 249 (250) : 3 Pat L Jour 412 (DB).

[2] *Harwahi* bond executed by an agricultural labourer which binds the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unenforceable being opposed to public policy. (Vol 3) 1916 Cal 718 (719) : 42 Cal 742 (DB).

[3] Where a bond provided for payment of interest in the shape of work to be done by the executant and his wife and the wages to be paid were low, and there was no provision for repayment, it was held that it was a slavery bond and unenforceable. (Vol 16) 1929 Mad 267 (268) (DB).

[See also (Vol 14) 1927 Mad 818 (819) * (Vol 5) 1918 Mad 917 (917). (Bond by which executant undertakes to work in lieu of interest is opposed to public policy.) * (Vol 5) 1918 Cal 409 (410) (DB). (Agreement whether opposed to public policy is doubtful.)]

[But see (Vol 14) 1927 Mad 531 (532) (DB).]

[4] A contract to do gratuitous service, in lieu of rent for the land occupied, is not illegal as being against public policy under S. 23. (Vol 16) 1929 Cal 224 (224) : 56 Cal 862.

[5] Contract to engage dancing boy on payment of certain sum is not contrary to public policy. (Vol 6) 1919 Cal 1002 (1003) (DB).

31. Agreements not opposed to public policy. — [1] The following agreements have been held to be not opposed to public policy : —

(a) Contract whereby Government agreed to establish telegraph office in certain locality, on the merchants of locality undertaking to make good loss in its undertaking. (Vol 25) 1938 Cal 151 (153, 155) : 1 L R (1938) 1 Cal 463 (DB).

(b) Contract for sale and purchase of sovereigns. (Vol 7) 1920 Bom 251 (254, 255) : 44 Bom 6 (DB).

(c) Agreement to pay remuneration for effecting settlement of civil dispute. (1912) 16 Cal W N 480 (481, 482) (DB).

(d) Contract by carrier, exempting himself from liability for negligence. (1909) 32 Mad 95 (107) (SB).

(e) Risk note exonerating railway company from liability except for loss of complete package. (Vol 5) 1918 Cal 796 (797) (DB).

(f) Sale of *jajmanka brit*. (Vol 11) 1924 Pat 321 (322).

(g) Insurance policy covering risk of death by suicide. (Vol 32) 1945 Oudh 152 (160) : 20 Luck 194 (DB).

(h) Custom of *Dhadwai* charging certain percentage on commodities sold. (Vol 14) 1927 Nag 89 (95).

(i) Marriage performed outside British India to evade provisions of Sarada Act. (Vol 27) 1940 Mad 901 (902).

(j) Partition suit among co-sharers—Award—Clause that none of such co-sharers should acquire interest in tenancy falling to share of another and on such acquiring to transfer it to such co-sharer without price—Provision, held, was not opposed to public policy. (1986) 163 Ind Cas 847 (350) (Cal).

(k) Sale of calf for less amount on reserving right of pre-emption and on condition not to castrate — Agreement providing for damages for breach—Contract, held,

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is not opposed to public policy. (Vol 2) 1915 Cal 53 (54) (DB).

(l) Promissory note executed to induce witness to give evidence in executant's favour. (Vol 1) 1914 Mad 366 (367) (DB).

(m) An agreement by a widow not to claim enhancement of the maintenance. (Vol 11) 1924 Mad 687 (688): 47 Mad 308 (DB).

(n) Contract of pre-emption in United Provinces. (Vol 11) 1924 All 400 (403, 404) : 46 All 333 (DB).

(o) Rule providing that on death of share-holder his legal representative should apply for transfer of shares in his name, else shares would not vest in him is reasonable. (Vol 13) 1926 Mad 785 (786).

(p) Where during the minority of *Khatib*, his mother appointed a person as deputy and the latter agreed in consideration therefor to pay a certain sum of money, *held*, that the agreement was not opposed to public policy. (1910) 8 Ind Cas 745 (745) : 9 Mad L Tim 159.

(q) Plaintiff and defendant, owners of motor buses, making tenders to postal authorities to secure license for carrying mails — Agreement that defendant should secure license — Plaintiff to withdraw his tender in consideration of payment of money by defendant, in certain instalments — Agreement, *held*, was not opposed to public policy. (Vol 33) 1946 Mad 289 (290, 291).

(r) An agreement by an executor to receive remuneration for services rendered by him, not from the estate but from third person, is not unlawful and not necessarily opposed to public policy. (1895) 22 Cal 14 (20) (DB).

32. Void contracts.—If enforceable. — [1] In cases which fall under S. 23, the agreement is void *ab initio*. (Vol 23) 1936 Nag 268 (269) : 1 L R. (1937) Nag 94.

[2] Where a contract is illegal being contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. (Vol 3) 1916 Cal 266 (268) : 43 Cal 115 (DB) * (Vol 6) 1919 Low Bur 71 (73, 74) * (Vol 1) 1914 Lah 353 (353).

[But see (Vol 15) 1928 Mad 476 (476). (Person, to whom improper payment is made, if consenting party to payment and has the benefit of it, is liable to repay it.)]

[3] When a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the '*particeps criminis*' to relieve him from the legal effects of the transaction. (Vol 8) 1921 Mad 326 (327) : 44 Mad 329 (DB) * (Vol 28) 1941 Oudh 529 (555) * (Vol 17) 1930 Oudh 196 (199) : 4 Luck 669. (When parties to contract are in *pari delicto* Court will not help any one of them.) * (Vol 11) 1924 Pat 321 (322) * (Vol 10) 1923 Mad 626 (628) (DB) * (Vol 6) 1919 Nag 43 (43) : 16 Nag L R 129. (Rule, *in pari delicto potior est conditio possidentis*, debars plaintiff from succeeding, unless he can show that illegal purpose did not go beyond stage of intention.) * (1888) 12 Bom 422 (424) (DB).

[4] Where a contract is void for illegality as opposed to being merely nugatory, money paid in pursuance of it cannot be recovered unless it is still executory because of the maxim '*ex turpi causa non oritur actio*.' But where the contract is made illegal by statute, with the object of protecting a particular class of persons, in which case restitution can be ordered. (Vol 25) 1938 Nag 335 (344) : 1 L R (1939) Nag 1 (FB) * (Vol 5) 1913 Low Bur 77 (81).

[5] A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. (Vol 3) 1916 Cal 266 (268) : 43 Cal 115 (DB) * (Vol 6) 1919 Pat 316 (316) : 4 Pat L Jour 542 (DB).

[But see (Vol 17) 1930 Lah 1018 (1020).]

[6] Where an illegal purpose of a void contract has been carried out even in part, a Court of equity will not only refuse to enforce the obligation created or to restore property given away, but will also refuse to grant relief by way of declaration on the principle that no relief could be given to a wrong doer. (Vol 3) 1916 Pat 284 (288, 290) : 1 Pat L Jour 43 (DB).

[7] Transferee of property for illegal purpose cannot get transfer annulled if intended purpose has been carried out. (Vol 11) 1924 Mad 849 (849).

[See (Vol 25) 1938 Lah 732 (734) (DB).]

[8] Where an agreement is illegal or immoral or one which is hit by S. 23, the money due under the agreement cannot be recovered by a change in the form of action based on another agreement, which is naturally connected with or has for its support the original illegal agreement. (Vol 22) 1935 Cal 748 (750).

[9] Where a deposit has been made in connection with an illegal contract, such a deposit can be recovered by a suit if the plaintiff does not rely for his claim on the illegal contract. (Vol 19) 1932 Nag 32 (33) : 27 Nag. L R 376.

[10] Where a promissory note is void being made payable to bearer on demand, the creditor can sue on the basis of any obligation independently of the execution of the promissory note. (Vol 15) 1928 All 871 (876) : 50 All 839 (SB).

[11] A party to an illegal and void contract, willing to perform his part, cannot enforce performance. (Vol 3) 1916 Low Bur 51 (54) : 8 Low Bur Rul 389 (FL).

[12] Defendant borrowing money from plaintiff intending to utilise same for gambling — Plaintiff not privy to this intention — Plaintiff can recover money by suit. (Vol 18) 1931 All 458 (458).

[13] The right of a person who pays money to another, in pursuance of an illegal agreement, to claim its refund is not lost by the fact that it was really due to the payee. (Vol 4) 1917 Mad 607 (608) : 40 Mad 285 (DB). (Per *Wallis, C. J.*—*Seshagiri Aiyar, J.* contra.)

[14] Purchasers are not entitled to refund by reason of fact that they are deprived of the benefit of portion of what they purchased under a deed of conveyance which turned out to be unenforceable. (Vol 14) 1927 Sind 62 (65) (DB).

[15] A Court cannot decline to enforce a contract which is legal as between the parties on a mere assumption that in reality it is intended for the benefit of a third person, against whom a statutory prohibition to enter into such contract exists. (Vol 12) 1925 Lah 65 (66).

[16] When a contract is void because prohibited by statute, the Court has power to work out the equities and place the parties upon terms. No question of limitation arises in connection with the Court's power to place the parties upon terms if the suit is otherwise good. (Vol 25) 1938 Nag 335 (344) : 1 L R (1939) Nag 1 (FB).

[17] While it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and the facts constituting illegality established. (Vol 17) 1930 Mad 361 (363) * (Vol 12) 1925 Rang 275 (277) : 3 Rang 275. (Defendant alleging illegality must prove it.) * (Vol 7) 1920 Cal 704 (705) (DB). (If illegality of transaction is brought to notice of Court, it will not assist the person invoking its aid, though defendant has not pleaded illegality.) * (Vol 27) 1940 Rang 73 (74).

[18] If the agreement is not *prima facie* illegal, Court should not take up such plea unless illegality is pleaded. (180) 1930 Mad W N 584 (586, 587) (DB).

Void Agreements.

Agreements void if consideration and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration.

A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

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[19] Objection that contract is illegal must be considered even though taken late. (Vol 31) 1944 Mad 337 (387).

[20] Although a contract is not enforceable at law, as being for an illegal purpose, it can form the basis of a prosecution. (Vol 20) 1933 Rang. 199 (200) : 34 Cri L Jour 1255. (Money paid for bribing public servant—Charge of cheating with respect to that money can be maintained.)

33. Contract of agency.—[1] Contract of agency is not by itself unlawful. When principal makes agent do something which is unlawful the act of the agent becomes unlawful. (Vol 17) 1930 Sind 9 (10) (DB).

[2] One of several judgment debtors got an assignment of decree in name of his agent who was to be paid commission for executing the same against the remaining judgment-debtors. Held that suit by principal against agent for money realised was maintainable as agency was not in itself unlawful. (Vol 8) 1921 Mad 334 (335) : 44 Mad 334 (DB).

[3] A principal having paid money to his agent for an unlawful purpose is entitled to a *locus penitentie* till the execution of the unlawful object and the unlawfulness of the commission, he was entrusted with, could not be set up by the agent in defence. (1898) 1893 Pun Re No. 63, page 218 (221) (DB).

[4] An agent can recover from his principal the amounts paid by him for the principal's gambling debt whether the payment was by way of adjustment of accounts or cash and a *hundi* executed by the principal in favour of his agent is for lawful consideration. (12) 1912 Pun L R No. 79, p. 249 (251, 252) (DB).

[5] As to non-liability of employer of agent to do a criminal act, see section 224.

34. Partnership.—[1] A partnership is *prima facie* legal, unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy. (Vol 17) 1930 Mad 361 (363).

[2] A suit to recover money lent to a partnership which is an illegal one or forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, is not maintainable. (Vol 23) 1936 Mad 603 (604)

[3] Money lent for illegal partnership but not known to lender to be so can be recovered. (Vol 13) 1926 Mad 772 (774) (DB).

[4] Illegal association—Suit by member for dissolution and realization of his share—Per *Sulaiman J.*: Simple partition of assets can be granted—Per *Mukerji and Walsh JJ.*: Relief of partition amounts to dissolution of partnership and so cannot be granted. (Vol 13) 1926 All 591 (594, 597, 601) : 48 All 735 (DB).

SECTION 24—Synopsis

1. Applicability and scope.
2. Distinct Covenants—Severability.
3. Mortgage transaction.

1. Applicability and scope.—[1] One entire consideration for two several contracts, one of them for

doing illegal act.—The whole is void. (Vol 27) 1940 Rang. 45 (47) : 1939 Rang L R 711 (DB).

[2] Section 24 does not apply to a transfer of immovable property. (Vol 21) 1934 All 246 (249) (DB) (Vol 23) 1935 Oudh 501 (505) (DB) (Vol 17) 1930 All 1 (3) : 52 All 338 (FB). (Where, however, the object of the consideration of the transfer is unlawful, as that word is defined in S. 23, the transfer is not effective.)

[3] Section 24 does not apply to cases of an out and out transfer. (Vol 12) 1925 All 474 (476).

[4] Section 24 has no application to a contract which is a single contract and has no contingent part. (Vol 24) 1937 Rang 47 (49).

[5] There is nothing in Ss. 23 and 24 to support the view that a sale, made with the view to defeat a probable execution, would be a sale with a fraudulent and unlawful object, and, therefore, void. (1879-80) 4 Bom 70 (73) (DB).

[6] Section 24 has no application to promises which are offered in the alternative. Such a case is expressly provided for in S. 53 under which in the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced. (Vol 18) 1931 All 589 (592) (DB).

[7] The bad part may be rejected and the good retained. A bond may be good though consideration is partly good and partly illegal. (Vol 20) 1933 Pat. 306 (409) : 12 Pat 359 (DB) (Vol 13) 1926 Oudh 270 (271) (DB) (11) 10 Ind Cas 465 (465) (All).

[8] Section 24 has no applicability to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. (Vol 4) 1917 All 290 (292) : 39 All 539 (DB). (Per *Walsh J.*) (Vol 22) 1935 All 862 (863) : 58 All 230 (DB).

[9] Where, after the marriage, the Muhammadan husband agreed by a *kabi nama* in favour of his wife that he would do nothing without the permission of his wife, that if he so did, she would be at liberty to divorce him, that he would pay over to her the whole of the money which he might earn during the time the marriage continued, and so on: Held, in a suit by the wife to enforce such a contract, that S. 24 did not apply, there being nothing unlawful in the consideration for the agreement whether it was the marriage or the natural love and affection between the parties arising from the relation created by the marriage. (1875) 15 Beng L R (App) 5 (7).

[10] Part of transaction without necessary sanction of Magistrate—Whole is invalid. (Vol 15) 1928 Nag 283 (283) (DB).

[11] Debtors executing bond with interest at high rate—One of them to render service without pay till bond becoming payable—Consideration as to render service is unlawful—Contract being indivisible is void. (Vol 5) 1918 Pat 249 (250) : 3 Pat L Jour 412 (DB).

[12] Defendant agreed, by a *kabuliat*, to pay the plaintiff an enhanced rent by more than two annas in the rupee, thus contravening provisions of S. 29 (b), Bengal Tenancy Act. The plaintiff contended that the decree be given for so much of the enhanced rent as does not exceed the two annas in the rupee. Held, the

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contract was to pay the enhanced rent; the contract, qua the payment of the enhanced rent, did not consist of two parts. The contract was not severable and, therefore, was void. (1897) 24 Cal 895 (896) (DB).

[13] Pending a criminal prosecution against the defendant, his pleader stood bail for his appearance in the Criminal Court; and to indemnify the pleader against any loss which he as bailee might suffer, a nominal sale-deed and a nominal rent-note were passed to the pleader's relative, the plaintiff. In a rent suit by the plaintiff: *Held* (1) that contract for indemnifying the pleader for his bail-bond was illegal, and this illegality rendered sale-deed void in law; (2) that rent-note was tainted with same illegality which affected sale-deed and could not stand on any separate footing; (3) that agreement was indivisible agreement; part of a single consideration for one object was unlawful and therefore whole agreement was void under S. 24, Contract Act, 1872. (1908) 32 Bom 449 (453, 454) (DB).

[14] Where the finding of the Court was to the effect that the consideration for the promissory notes was, at least in part, losses to the plaintiffs in respect of gambling debts and the Court could not ascertain the exact proportion of such consideration: *Held*, the whole of the suit was properly dismissed. ('13) 35 All 558 (559) (DB).

[15] If adultery, past or future, is consideration or indivisible part of the consideration for an agreement, such agreement is illegal and the contract would be void. (1905) 27 All 266 (269).

[16] Consideration for an agreement by a person to pay a certain sum of money to a prostitute, if she allowed him to cohabit with her, is immoral and unlawful and the contract is, therefore, void under S. 24, Contract Act, although a contract to compensate made about past cohabitation can come under cl. (2) of S. 25, Contract Act, even though the consideration for it is unlawful under S. 23. (Vol 22) 1935 Oudh 71 (71, 72).

[17] Where an agreement between parties creates a false evidence to defeat the succession of real owner to property and also purports to compound a non-compoundable case no suit lies under S. 65, Contract Act, to recover any money advanced in pursuance of agreement. (Vol 25) 1938 Bom 54 (59, 60) (DB).

[18] Client agreeing to pay pleader money and part of the suit property as Inam for "religious purposes"—*Held*, that in spite of the words "religious purposes" the consideration for the services of the pleader was the money agreed to be paid and the gift of part of the property in suit. Agreement being inseparable the whole of it was void. (Vol 12) 1925 Bom. 470 (470, 471): 49 Bom 619 (DB).

[19] Objects one of which is unlawful if inseparable the whole agreement is void. ('34) 1934 Mad W N 568 (573) (DB).

[20] Transfer of occupancy holding is forbidden by law and contract, a part of consideration for which is such a transfer, is void. ('13) 13 Ind Cas 9 (10) (All).

[21] Where it is brought to notice of Court that whole part of consideration for contract sought to be enforced was for illegal purpose, Court is bound to take notice of such fact and to give effect to it, notwithstanding the fact that contract might appear on the face of it to be perfectly legal contract and that no question of illegal consideration was raised in pleadings by defendant. (1905) 27 All 266 (270).

[22] Provision in a will or contract partly for illegal purposes can stand though not separated from valid purposes. (Vol 15) 1928 P C 119 (121) (PC). (Case from Honduras and not under Indian Contract Act).

[23] Where contract is legal and as evidence of contract something illegal is done, the whole contract can-

not be said to be illegal. Signature of one of the executants of pronote forged by other—Plaintiff lender concurring — Intention not to cheat executant whose signature was forced — Contract is not wholly void—Plaintiff can succeed against party who had really executed pronote. (Vol 12) 1925 Mad 929 (931).

2. Distinct covenants—Severability.—[1] Where the various promises of the two parties are quite interdependent, one large part of the contract, if void, vitiate the whole. (Vol 9) 1922 Upp Bur 9 (11): 4 Upp Bur. Rul 110.

[2] Where a part of the consideration is unlawful, then general rule is that when you cannot sever the illegal from the legal part of a contract, the contract is altogether void. (Vol 20) 1933 Bom 132 (134): 57 Bom 278 (DB).

[3] In an agreement, if different classes are separable, the fact that one clause is void does not necessarily cause the other classes to fail. (Vol 18) 1931 Bom 264 (265) (DB) & (Vol 20) 1933 All 468 (470). (There is nothing in the terms of S. 24 to prohibit the creditor from enforcing that part of the agreement which the borrower was competent to make.) & (Vol 17) 1930 All 1 (3): 52 All 338 (FB). (Where part is within competence of promisor, promisee can enforce the part enforceable.) & (Vol 4) 1917 All 290 (291, 292): 39 All 539 (DB). (Section 24 does not render wholly invalid a mortgage by one deed of the mortgagor's occupancy holding which by law he has no right to mortgage and his fixed rate tenancy which he can validly mortgage.) & ('10) 7 All L Jour 778 (781). (The compromise consisting separate and distinct portion is lawful excepting the unlawful portion.)

[4] Agreement to pay additional rent for increase in area and an agreement to pay enhanced rent for release of an obligation by the tenant in same instrument — Former agreement void—Validity of the latter agreement is not affected. Where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which are legal and some illegal the performance of those legal can be enforced. (Vol 9) 1922 Pat 171 (177, 178) (DB).

[5] There is distinction between contract and transfer in pursuance of contract. Section 24 does not apply to transfers under Transfer of Property Act. Where, therefore, transfer of several items of properties can be split up and separated, the whole transaction is not void because one part of it is vitiated. (Vol 22) 1935 Oudh 501 (504, 505) (DB).

[6] Debtor alienating property though restrained under Sch. 3, Para. 11, Civil P. C.—Such transfer is no transfer in law — But agreement contained in such transfer deed to repay money from his person is enforceable. (Vol 20) 1933 All 468 (470, 472) (DB).

[7] If sale and surrender form part of same transaction but are separable, sale is not void though surrender is void. (Vol 18) 1931 Nag 6 (7): 27 Nag L R 113.

[8] Where a suit was based upon a bond for a certain sum of money, part of which was interest upon the amount covered by the first bond, and it was agreed in the second bond that the whole amount of the consideration as mentioned in the bond should bear interest. *Held*, that the obligee can recover such sums of money as in law he is entitled to recover, notwithstanding that part of the consideration is compound interest which could not, under the law in Sonthal Parganas, be decreed by Courts. (1899) 26 Cal 238 (240) (DB).

[9] Where the sale of lands and surrender of occupancy rights therein were both contended to be void as being one transaction and intended to defeat the Tenancy law. *Held* that the surrender was separable from the sale and the former alone was void. (Vol 12) 1925 Nag. 302 (304): 22 Nag L R 136 (DB).

Agreement without consideration void, unless—

25. An agreement made without consideration is void unless—

- (1) it is expressed in writing, and registered under the law for the time being in force for the registration of [documents]^a and is made on account of natural love and affection between parties standing in a near relation to each other, or unless
- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do, or unless
- (3) it is a promise, made in writing, and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, D, Rs. 1,000. A puts his promise to B into writing, and registers it. This is a contract.

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[10] The void part of an agreement would not invalidate the rest of the agreement if it could be properly separated from it. But where the parties thereto have treated the two debts as a lump sum the contract must be regarded as an integral one and void. (1885) 9 Bom 176 (179) (DB).

[11] Wrestling match — Agreement that party failing to appear should pay certain sum and the winner should get the gate money — Former being legal and separate from the other illegal one, is enforceable. (Vol 18) 1931 Bom 264 (265) (DB).

[12] Bond agreeing to repay money on a certain date—Further condition that if money was not repaid on that date the creditor to enter into possession of plaintiff's cultivatory holding as a usufructuary mortgage—Whole contract is not illegal though the latter covenant was contrary to the provisions of the Tenancy Act, and the plaintiff could get money decree. (Vol 11) 1924 All 80 (80) : 45 All 621 (DB).

3. Mortgage transaction. — [1] While an application for execution was pending, the defendants executed a mortgage for satisfaction of judgment-debt providing for payment in excess of the decretal amount. The mortgage was for an amount S and bore an interest at 9 p. c. p. m. on the whole amount. In a suit to recover the amount of mortgage, with future interest, one of the pleas raised by the plaintiff was that so far as the provisions of S. 13, cl. (c), Dekkhan Agriculturists Relief Act went, the only time that could at the most be deleted is the clause in the mortgage as to provision for interest. *Held*, the money that was agreed to be paid in consideration of the mortgage, is the entire sum of money mentioned as principal in the deed along with interest on it and it was not permissible to split up the consideration. The mortgage therefore was void. (Vol 19) 1932 Bom 237 (239) (DB).

[2] Mortgage of occupancy holdings with other properties legally transferable, for single consideration—Mortgage given possession of occupancy lands not transferable. Suit to recover possession of the remain-

ing lands—*Held* that, he was not entitled to seek any relief in Court at all as part of mortgage contract was illegal. (Vol 12) 1925 All 543 (544) : 47 All 780 (DB).

[3] Mortgage of occupancy holding with covenant for indemnity if mortgagee is not paid.—As the two portions of the deed were inseparable and the mortgage of the occupancy holding being illegal, the covenant also could not be enforced. (Vol 8) 1921 All 392 (392) : 43 All 81 (DB).

[4] If a usufructuary mortgage of an occupancy holding is void a personal covenant to that effect embodied in the deed is also void and unenforceable. (Vol 9) 1922 All 134 (135) : 44 All 486 (DB) * (29) 27 All L Jour 479 (480). (If, however, the mortgage was to come into existence on the breach of a personal covenant to pay, the failure of the mortgage would not lead to the failure of the personal covenant.) * (Vol 13) 1926 Rang 186 (187). (Even money decree cannot be passed against mortgagor for mortgage which is illegal under S. 6 (d), T. P. Act.)

[5] In a contract where one of several considerations moving from the defendant was the mortgage of reversionary interest which was illegal under S. 6 (d), T. P. Act: *Held*, the whole agreement was void. (Vol 4) 1917 Oudh 230 (232) : 20 Oudh Cas 155.

SECTION 25 — Synopsis

1. Scope and applicability.
2. Compromise and forbearance.
3. Transfer of immovable property.
4. Negotiable instruments.
5. Clause (1).
 6. "Agent generally or specially authorised in that behalf."
 7. 'Debt', meaning of.
8. Clause (2).
 9. Promise to perform existing obligation.
 10. Promise to pay time-barred debt—Clause (3).
 11. Explanation 1.
 12. Explanation 2.
1. Scope and applicability. — [1] Section 25 is intended to give effect to agreements, which would

(c) A finds B's purse, and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract, notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

[a] Substituted by the Amending Act, 1891 (12 [XII] of 1891), for "assurances."

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otherwise be void as being without consideration. (Vol 8) 1921 Lah 205 (207) : 2 Lah 263 (DB).

[2] This section is exhaustive; so that, instances of agreements wanting in contractual capacity, agreements by bankrupts, after they had obtained final discharge to pay their debts, and promise to pay time-barred debts cannot be placed on the same footing, as done in English law. Certain agreements, like agreements to pay time barred debts, are made valid under Indian law; while they are illegal contracts under English law. (1906) 16 Mad L Jour 422 (425).

[3] An agreement without consideration is void under this section and therefore, it cannot be enforced. (Vol 14) 1927 Mad 1102 (1102)* (Vol 16) 1929 Lah 169 (170) (DB). (Agreement without consideration in favour of adopted son by adoptive father not to alienate his property is void.)* (1913) 24 Mad L Jour 855 (857) (PC). (Hypothecation bond.)* (1875-77) 1 All 809 (310). (Mortgage.)

[4] Mortgage of mortgagee rights for sum due on previous accounts which was time-barred — Mortgage not completed — Suit for recovery of amount held not to lie, there being no consideration for mortgage and there being no express promise to pay in the mortgage deed as required by S. 25 (3). (Vol 22) 1936 Lah 164 (165).

[5] A bond given by a person arrested in execution of a decree for money, passed by Court having no jurisdiction, to the holder of such decree, for the decree amount plus the cost of stamp paid for him, in order that he might be released from such arrest, is one given under decree and executed without consideration. The small sum paid for the stamp not being in any legitimate sense of the term "a consideration," such a bond is void. (1882) 4 All 352 (354, 355) (DB).

[6] Woman living in adultery with a Hindu till his death is not entitled to maintenance from estate. Promise by the widow to pay maintenance to such woman is not valid as it is not supported by consideration. (Vol 9) 1922 Oudh 27 (28) : 25 Oudh Cas 145.

[7] Defendant had agreed to pay, out of his pocket certain sums proportionate to the value of goods imported by him, to a charitable society. As such sums were in arrears, he executed a hatchita in favour of society promising to pay the sum with interest. In a suit on hatchita, it was held that the promise to contribute out of his pocket was unenforceable as being without consideration and that it was merely a voluntary promise. (Vol 24) 1937 Pat 353 (359, 360) (DB).

[8] An agreement executed by the father after his son's marriage that he would pay maintenance to the son's wife on the happening of certain event was held to be one without consideration. (11) 1911 Pun L R No. 245, page 910 (911, 912).

[9] An agreement to take less than what is due and to give time for payment being without any consideration is a mere *nudum pactum*, and cannot be binding in law. Section 63 cannot validate such an agreement as that section cannot override the provi-

sions of S. 25. (Vol 15) 1928 Rang 144 (144) : 6 Rang 191 (DB).

[See however (Vol 12) 1925 Mad 660 (666). (Agreement to give up a portion of claim needs no consideration.)]

[10] Subscriptions were raised from persons of the caste of plaintiff and defendant for festival but it was not in consequence of any prior agreement by defendants that plaintiff incurred obligations. There was not any promise by defendants to compensate plaintiff for something done by him for defendants. Held, the promise by defendants to pay was purely voluntary for no legal consideration and payment could not be enforced as payment of money due under contract. (Vol 10) 1923 Mad 330 (330).

[11] A bond remains valid though the consideration was not paid in full; the bond is operative to the extent of the sum actually advanced. (Vol 8) 1921 Cal 435 (440) (DB).

[12] Where a newly admitted partner, along with the existing partners, acknowledges a debt due from the partnership to their creditor there is consideration for the new partner's undertaking to pay the debt. The new partner obtains the promise of a partnership as the condition of his liability. (Vol 30) 1943 P C 147 (152) : I L R (1944) Kar P C 85 (P C). (Reversing (Vol 26) 1939 Pat 323.)

[13] Where the manager of a firm writes an account demanded by the servant for the purpose of knowing his remuneration and the manager states it for the purpose of enabling the servant to know it, it was held, that this was a case of a promise made to pay the balance for a good consideration. (Vol 21) 1934 P C 144 (147) (P C).

[14] Where an arrangement has been arrived at between certain members of the family that is designed to promote peace and good will among certain of its members, this, by itself, is a good consideration to support the transaction. In cases of family arrangements, Courts will not scan too closely the quantum of consideration. (Vol 19) 1932 All 174 (176) (DB).

[15] Whenever a third person undertakes the liability of another, in whom he is interested, the third person's promise cannot, in law, be considered as being made without consideration or vitiated by illegality. (Vol 24) 1937 Mad 223 (225) (DB).

[16] A receipt is merely evidence of a fact. It is not an agreement requiring consideration to make it a valid contract. (Vol 11) 1924 Nag 156 (156).

[17] Tenants executing pro-notes in favour of Manager of indigo factory in order to obtain release from their supposed obligation to grow indigo on their lands — *Bona fide* belief of both parties in existence of such obligation — Agreement held was supported by consideration. (Vol 7) 1920 Pat 552 (553) (DB).

[18] Contract of sale — Vendee agreeing to defend contemplated suit by a collateral of the vendor by expending money left with him — Such promise is legal consideration for sale — Fact that suit was not, in fact, brought and that vendee was not required to expend

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money cannot affect the validity of contract. (Vol 7) 1920 Lah 466 (469) (DB).

[19] A, a ward of Court of Wards, executing a promissory note in favour of B—After release of estate from Court of Wards and after A's death A's son executing a bond, a substantial portion of the consideration being the debt under the promissory note—Agreement held was not without consideration and could not be brought within S. 25. (Vol 10) 1923 All 590 (590) (DB).

[20] Document reciting receipt of consideration by the executant—Burden of proving want of consideration is on him who denies it. (1931) 32 Pun L R 577 (578) (DB).

2. Compromise and forbearance. — [1] A compromise entered into by parties during the pendency of a suit irrespective of their rights and wrongs is a good consideration—It is immaterial that claim was false. (Vol 33) 1946 Pat 97 (98, 99).

[2] A compromise of a doubtful claim or right is a sufficient foundation for an agreement. (Vol 12) 1925 Pat 68 (94) (FB)* (Vol 15) 1928 Bom 539 (543). (But a compromise of an obviously groundless claim is not good consideration.)* (Vol 11) 1924 Pat 736 (744) (DB). (Even though the suppositions turn out to be wrong.)

[3] An agreement by a husband to pay maintenance to his wife in settlement of a doubtful claim of maintenance is not void for want of consideration. (Vol 18) 1931 Nag 197 (198) : 27 Nag L R 281.

[4] Threat of bringing a false suit cannot be regarded as good consideration for contract—Compromise entered into by a person on threat of being sued on a document was held to be void for want of consideration. (Vol 23) 1936 Lah 6 (6, 7).

[5] In a case of mutual compromise, consideration passes from either side and it is impossible to hold that such a compromise is without consideration. (Vol 13) 1926 All 715 (717) : 48 All 637 (DB).

[6] Relinquishment by a party of his counter-claim is a good consideration for the withdrawal by the plaintiff of his claim. (Vol 11) 1924 Sind 41 (45).

[7] A promise to pay the amount found due and acknowledged in writing is supported by consideration where, by reason of such promise, the creditor abstained from suing the debtor. (Vol 17) 1930 Nag 298 (299) : 26 Nag L R 320.

[8] The forbearance to enforce a claim *bona fide* believed to exist and enforceable is a good consideration for the contract. (Vol 9) 1922 All 260 (262) : 44 All 424 (DB) * (Vol 16) 1929 Lah 485 (486) (DB). (Even though no proceedings have been commenced.)* (Vol 6) 1919 Oudh 120 (120) : 22 Oudh Cas 163. (Forbearance to file unmaintainable claim cannot be treated as forbearance.)* (Vol 2) 1915 Lah 285 (286) (DB). (Bond executed in consideration of plaintiff abstaining to sue for interest.)

[9] Withdrawal of proceedings by plaintiff under S. 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties to the suit. (Vol 1) 1914 Lah 131 (132) : 1914 Pun Re No. 20 (DB).

[10] See also Notes under S. 2 (d).

3. Transfer of immovable property.—[1] Mortgage without consideration is a nullity and so inoperative. (Vol 4) 1917 Mad 492 (495) (DB).

[2] A transfer of property in consideration of a time-barred debt is valid. (Vol 12) 1925 Oudh 267 (268) * (1913) 21 Ind Cas 69 (72) (DB) (Oudh).

4. Negotiable instruments.—[1] Presumption that there was a consideration for executing a bond, can only arise under S. 118 of the Negotiable Instruments Act, and a bond executed by a minor, being void is not a negotiable instrument, nor can such a presump-

tion ever arise with regard to a contract made by a minor. (Vol 25) 1938 Oudh 14 (15).

5. Clause (1).—[1] 'Parties standing in a near relation' do not mean 'near relatives' only. The parents of a Mahomedan lady stand in a near relation to her husband and an agreement to pay them certain maintenance is a valid disposition within S. 25 (1). (Vol 14) 1927 Oudh 146 (146, 147) (DB).

[2] A suit is not maintainable by a wife for an allowance for maintenance on an agreement, for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband. In such a case there can be no question of S. 25, Contract Act, applying; for obviously no natural love and affection can exist between the parties. The wife must establish some valid and legal consideration for any such agreement. (Vol 13) 1926 Nag 501 (503).

[3] Husband promising to pay wife for maintenance, and separate residence, by a registered deed, which stated certain quarrels and disagreements as the cause, which were not enough to entitle the wife to claim the amount under Hindu law : Held, that the agreement was without consideration and S. 25, cl. (1) did not apply as the agreement was not made on account of natural love and affection, the document showing quite a contrary state of affairs. (1900) 4 Cal W N 488 (490) (SB).

[4] Where a person undertakes by means of a registered document, out of natural love and affection, to discharge the debt due by another and, on the former failing to do so, the debtor himself discharges the debt, the debtor is entitled to recover from such person the amount paid by him to discharge the debt, as the breach of the obligation becomes actionable under S. 25. (1903) 13 Mad L Jour 428 (428) (DB).

[5] A sued B, his brother, who was on bad terms with him, for a half share in certain ancestral property—Suit dismissed on oath of B that property was not ancestral—Subsequently, B executing a registered document by which he agreed to give half share to A—Suit by A to recover share—Held that the agreement was valid under S. 25 (1) as B had such natural love and affection for his brother that he was willing to give him the property in order to be reconciled to him—Held also that the document was a valid gift or family settlement. (1899) 1 Bom L R 495 (497) (DB).

[6] Father executing mashahara patra in favour of widowed daughter providing for monthly allowance and charging certain property with its payment—Allowance not to be allowed to fall into arrears for more than one year—Grantee restricted from bringing suit for more than one year—Mashahara patra held to be agreement within S. 25 (1) and the restrictive condition was void under S. 28. (Vol 19) 1932 Cal 720 (721) (DB).

[7] Where a person settles an annuity upon his alleged wife who was not validly married to him, the settlement cannot be construed to be a contract for consideration of love and affection but is a gift pure and simple and no consideration is necessary. (Vol 19) 1932 P C 34 (35) (PC).

6. "Agent generally or specially authorised in that behalf."—[1] Section 25 (3) specifically requires that the person renewing a time-barred debt must be either the person himself or his agent generally or specially authorised in that behalf. (Vol 26) 1939 Bom 464 (465) * (1882) 11 Cal L R 581 (583) (DB).

[2] A power of "*mookhtarnama*" to pay debts, or to secure debts, or otherwise to deal with debts, is *prima facie* a power to deal with existing debts, and it does not authorize the agent to revive time-barred debts. (1882) 11 Cal L R 581 (554) (DB).

[3] Executor can promise to pay the deceased's time-barred debts. (Vol 15) 1928 Bom 539 (544).

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[4] A Hindu father or grandfather can pass a promissory note for a time-barred debt and such a note constitutes a binding contract under S. 25 (3) even on the sons and grandsons. (Vol 19) 1932 Bom 522 (523) * (Vol 9) 1922 All 402 (402) : 44 All 628 (DB). (Execution of bond by father in lieu of time barred debt is binding on son.)

[5] A guardian of an infant cannot make a promise to pay a time-barred debt. (Vol 15) 1928 Cal 850 (852) (DB) * (Vol 26) 1939 Bom 464 (465). (*De facto* guardian — No presumption that he is generally or specially authorised to renew a time-barred debt.)

[6] Agent to Court of Wards has no authority to bind a minor by promise under S. 25 (3) to pay debt barred by limitation. (1896) 19 Mad 255 (257) (DB).

[7] The Deputy Commissioner, acting on behalf of the Court of Wards, is not an agent authorised to pay a time-barred debt of the ward. (Vol 27) 1940 Oudh 107 (110) : 15 Luck 308 (DB).

[8] Pleador's statement in Court, promising payment of time-barred debts on certain conditions, does not bind his client in absence of special authority. The statement is not a new contract within S. 25 especially when it is not signed. (Vol 11) 1924 All 12 (15) (DB).

7. 'Debt,' meaning of. — [1] The word 'debt' in S. 25 must be taken to have been used in its ordinary meaning of a sum payable in respect of money demand recoverable by action. (Vol 5) 1918 Mad 1145 (1146) : 40 Mad 31 (FB) * (Vol 19) 1932 Lah 212 (213) : 13 Lah 448 (DB).

[2] Word 'debt' in S. 25 (3) includes a judgment-debt — Execution — Application filed when decree was barred by limitation — Application by judgment-debtor stating that he has failed to pay instalments owing to his illness, and that he agrees to pay the decretal amount by monthly instalments to which the decree-holder has agreed, and that execution should be stayed for the present, is a promise to pay a barred debt. (1881) 3 All 781 (785) (DB) * (1890) 14 Bom 390 (391, 392) (DB) * (Vol 11) 1924 Cal 388 (389) : 50 Cal 974 (DB). (A promise for consideration to be acted on when previous judgment is barred is valid, even when not in writing.) * (1879) 4 Cal 500 (506, 508) (DB).

[3] The liability of a member of a joint family to have his property sold for a debt contracted by the manager for the joint family purpose and binding on the joint family property is a debt within the meaning of S. 25. (Vol 9) 1922 Mad 23 (24, 26, 27) : 45 Mad 345 (DB).

[4] A promise to pay amount which might be found due by arbitrator on taking accounts of the partnership between parties does not amount to a promise to pay debt under this section. (Vol 5) 1918 Mad 1145 (1146) : 40 Mad 31 (FB).

8. Clause (2). — [1] This clause appears to cover cases where a person without the knowledge of the promisor, or otherwise than at his request, does the latter some service and the promisor undertakes to recompense him for it. In such cases the promise does not need a consideration to support it. (1896) 20 Bom 755 (758) (DB).

[2] Where a man promises to pay a woman an allowance in consideration of past co-habitation, he merely undertakes to compensate for past services voluntarily rendered to him. (1881) 3 All 787 (788) (DB) * (1875-77) 1 All 478 (480) (DB). (Registered settlement creating charge on estate for annuity in consideration of past-cohabitation — Agreement is not void for want of consideration.) * (Vol 22) 1935 Oudh 71 (72). (Obiter.)

[But see (Vol 11) 1924 Bom 135 (137) (DB). (Such agreement will not come under S. 25 (2) as the services must be deemed to have been rendered at the request of the promisor and not voluntarily.)]

[3] A contract entered into by a minor is null and void and any consideration received by the minor cannot be a good consideration for a fresh promise by him after attaining majority. Such promise does not fall under S. 25 (2) and therefore cannot be expressed. (Vol 15) 1928 All 440 (441) : 51 All 164 (FB). (*Mukerji J.*, contra.) * (Vol 25) 1938 Lah 159 (160) * (Vol 22) 1935 Lah 561 (565) : 16 Lah 546 (FB). (Overruling (Vol 7) 1920 Lah 37; (Vol 8) 1921 Lah 205 : 2 Lah 263 (DB); ('11) 1911 Pun Re No. 31 (DB) and ('88) 1888 Pun Re No. 86 (DB).) * (Vol 14) 1927 Lah 24 (25, 26) (DB) * (1906) 16 Mad L Jour 422 (423) (DB). (Promote executed after attaining majority in settlement of earlier one is without consideration.) * ('41) 1941 Nag. L Jour 363 (364). (Subsequent ratification of contract entered into by a minor cannot form a valid contract.) * (Vol 25) 1938 Oudh 14 (15) * (Vol 21) 1934 Pesh 123 (125). (Do.)

[4] Where a person executed a mortgage after attaining majority in consideration of the mortgagee paying off certain debts due to a third person which the mortgagor had incurred during his minority : *Held*, payment by mortgagee to creditor was valid consideration. (Vol 20) 1933 All 659 (660) (DB).

[5] Where plaintiff had voluntarily expended money for establishing a market, to please District authorities, and not at the request of defendants (shopkeepers) or for their benefit, agreement by defendants to pay plaintiff in consideration of such expenditure certain commission on articles sold through their agency in such market, is one that does not come within S. 2 (d) of Contract Act, and is void for want of consideration. (1881) 3 All 221 (227) (DB).

[6] X agreed to pay Y Rs. 5 per mensem for life in consideration of Y having trained X in the art of singing and dancing at his own cost. It was found that Y's sister and not Y himself had rendered those services for X. In a suit by Y it was held that, as Y himself had done nothing for defendant, there was no consideration for the agreement and therefore it was unenforceable. (Vol 3) 1916 Pat 80 (81).

[7] A Mohamadan son based his claim upon a *Rukka* written by his father by which he was appointed manager of his father's shop and the *Rukka* was not gratuitous but was by way of remuneration for work done. The *Rukka* was written by the father under the apprehension of immediate death and was against the rule of Muhamadan law : *Held*, that the agreement was without consideration and it did not fall under cl. (2) of S. 25 as it was not a promise to compensate one who had voluntarily done something for the promisor. ('93) 1893 Pun Re (Cri.) No. 61, page 272 (272) (DB).

[8] Agreement to pay a certain annuity to a person in consideration of past services rendered by him voluntarily and also for future services that might be rendered by him — No promise to render future services by such person — *Held*, that the agreement so far as regards future services was without consideration and that with regard to past services was valid under S. 25 (2) — The agreement being one and indivisible was wholly void. (Vol 6) 1919 Cal 765 (766) (DB).

[9] Two joint Hindu brothers applied to have their property taken up under Court of Wards and while it was being so managed an agreement was made between them whereby one of them H. D., became manager of the property with an allowance of Rs. 12000 per annum and ceded to the other, S. D., absolutely and unconditionally, his interest in the family property. *Held*, that the agreement between the brothers was not bad for want of consideration, as S. D., had foregone the profits of his share of property during the management of Court of Wards and that he refrained from suing his brother for an account after the cessation of management by Court of Wards; and even if it were not so,

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the agreement would be good either under S. 25, Cl. (2) or under S. 70 of the Act, (1895) 17 All 264 (269, 271) (DB).

9. Promise to perform existing obligation. —

[1] Promise to pay what the promisor is already under an obligation to pay is without consideration. Any separate promise to pay the amount at a particular place must be supported by consideration before it can be legally enforced. (Vol 5) 1918 Low Bur 101 (102) : 9 Low Bur Rul 75.

[2] No right of suit arises, where a person promises a pleader any extra money for winning the case, after his remuneration is fixed and he has been engaged on his behalf. The promise has no consideration. (1871) 3 N W P H C R 25 (26) (DB) * (1877-78) 2 Bom 362 (364) (DB).

[See (1880-81) 5 Bom 258 (261) (DB). (Agreement for further remuneration before acceptance of Vakalat-nama—Agreement not void for want of consideration as it constitutes one transaction.)]

10. Promise to pay time-barred debt.—Cl. (3).—

[1] A time barred debt, can form a good consideration because the debt is not extinguished although the remedy is lost. (Vol 16) 1929 All 657 (657) (DB) * (1912) 16 Cal W N 636 (638). (The promise to pay may be conditional or absolute.) * (Vol 13) 1926 Lah 633 (634) (DB).

[2] A promise to pay time-barred debt referred to in this clause constitutes novation of the contract which can form the basis of a suit independently of the original debt. (Vol 17) 1930 Oudh 287 (289) : 6 Luck 7 (DB) * (Vol 25) 1938 Lah 505 (507) * (Vol 22) 1935 Lah 984 (984) * (Vol 10) 1923 Lah 481 (483) (DB) * (Vol 2) 1915 Mad 242 (242) (DB) * (1909) 31 All 495 (496, 497) (DB) * ('05) 1905 Pun Re No. 102 Page 306 (307, 308) (DB).

[3] Unless a promise to pay is in writing it cannot fall under the purview of S. 25 (3). (Vol 28) 1941 Nag 100 (101) : I L R (1941) Nag 144 (DB) * (Vol 27) 1940 Mad 678 (678) * (Vol 25) 1938 Nag 180 (181) : I L R (1940) Nag 441 * (Vol 24) 1937 Lah 382 (383) : I L R (1937) Lah 562 (DB). (Mention of debts in Schedule of Creditors is mere acknowledgment and not promise to pay.) * (Vol 12) 1925 Mad 1147 (1148). (An oral settlement of account under which a barred debt is promised to be paid is not binding on the promisor.)

[4] In order that a document may be valid under S. 25 (3), it is enough if there is an express promise to pay; there need not be any reference to the time barred debt. (36) 83 Cal 759 (762) * (Vol 25) 1938 Rang 134 (135) : 1938 Rang L R 6 (DB). (Following (Vol 16) 1929 Rang 240 : 7 Rang 292 * (Vol 23) 1936 Lah 1016 (1018) * (1910) 33 Mad 159 (161, 162) (DB).

[But see ('41) 1941 Nag L Jour 363 (364). (If the debt is barred against the father, the sons are no longer under a pious obligation to pay it. By S. 25 (3) of the Contract Act the son may promise to pay such a debt, but the promise must be a conscious and explicit one i. e., the debt must be referred to in such a way as to identify it. 23 Mad 94 (DB) Foll.)]

[5] Where actual consideration was something, different from that recited in document, effect must be given to real consideration and this rule is equally applicable to contracts falling under S. 25 (3). (Vol 23) 1936 Lah 1016 (1018) * (1910) 33 Mad 159 (160, 161) (DB).

[6] Under S. 25 (3) a promise to pay a debt barred by limitation must be express promise to pay and not merely an unconditional acknowledgment involving an implied promise to pay. (Vol 25) 1938 Bom 460 (461) (DB). (The Gujarati words "*bali nikalya te deva sahi*" which mean "the balance found due is duly payable" is no express promise and cannot be a valid contract under S. 25 (3).) * (Vol 30) 1943 All 63 (64, 67) : I L R

(1943) All 171 (DB) * (Vol 29) 1942 Nag 92 (94) : I L R (1942) Nag 369. (Receipt acknowledging amount as found due on understanding account—No express promise to pay such as S. 25 (3) requires.) * (Vol 28) 1941 Cal 449 (451). (One debt barred and other not — Promise to pay latter cannot be interpreted as promise to pay former—Promise to pay imaginary debt cannot be interpreted as one to pay barred debt) * (Vol 28) 1941 Nag 100 (101, 102) : I L R (1941) Nag 144 (D B) * (Vol 27) 1940 Mad 678 (679) * (Vol 26) 1939 Lah 466 (467). (In order to keep alive a time-barred debt, the promise to pay must be expressed in unequivocal terms.) * (Vol 25) 1938 Lah 264 (266) (DB) * (Vol 25) 1938 Lah 155 (156) * (Vol 24) 1937 Lah 865 (866) : I L R (1937) Lah 234 (DB) * (Vol 20) 1933 Cal 658 (659) : 60 Cal 714 * (Vol 19) 1932 All 461 (464) : 54 All 506 (DB). ('Express promise' means that there should be some such word as 'I promise to pay'.) * (Vol 19) 1932 Oudh 49 (51) : 7 Luck 313 (DB) * (Vol 18) 1931 All 375 (376) (DB) * (Vol 18) 1931 All 160 (162) (DB) * (Vol 17) 1930 All 467 (469) : 52 All 480 (DB) * (Vol 17) 1930 Nag 236 (237) * (Vol 17) 1930 Pat 604 (605) * (Vol 16) 1929 Cal 444 (444, 445) : 57 Cal 394 (DB). (*Maflagbandi* is not a promise to pay under S. 25 so as to revive a barred debt.) * (Vol 16) 1929 Oudh 529 (529) (DB). (Suit on mere acknowledgment—No new contract created by it—Suit cannot succeed.) * (Vol 16) 1929 Pat 258 (260) : 8 Pat 706 (DB) * (Vol 15) 1928 Bom 319 (322) : 52 Bom 521 (DB) * (Vol 15) 1928 Nag 124 (125) * (Vol 12) 1925 Cal 338 (338) (DB). (*Maflagbandi* is not a promise to pay under S. 25, so as to revive a barred debt.) * (1912) 14 Bom L R 1020 (1026).

[But see (Vol 25) 1938 Lah 757 (757). (Usual acknowledgment of balance due in plaintiff's *bahi* is promise to pay within S. 25 (3). It is a valid agreement for purpose of suing irrespective of whether debts covered thereby are time-barred.) * (Vol 20) 1933 Lah 47 (47). (Unconditional acknowledgment implies a promise to pay and therefore a suit can be based on the acknowledgment.) * (Vol 19) 1932 Lah 400 (400) (do.) * (Vol 16) 1929 Lah 591 (591) (DB) (Do.)]

[7] Balance struck in creditor's account book — Balance concluded in words '*baqu rahe lena lekha karke*' signed by debtor and attested by witness amounts to an acknowledgment under Sch. 1, Art. 1, Stamp Act and not to agreement under Art. 5. (Vol 29) 1942 Lah 50 (54, 55) : I L R (1942) Lah 282 (FB). ((Vol 19) 1932 Lah 470 (DB); (Vol 21) 1934 Lah 835 : 16 Lah 258 (DB); (Vol 25) 1938 Lah 503 (DB); (Vol 25) 1938 Lah 511 : 40 Cri. L Jour 9 (DB) and (Vol 26) 1939 Lah 486 Overruled.)

[See ('04) 1904 Pun Re No. 68, Page 192 (196) (DB).]

[8] Accounts stated—Document showing credit and debit entries — Balance struck — Debtor signing below and admitting it to be correct. *Held*, that there was no express promise to pay the balance under S. 25 (3), Contract Act. (Vol 25) 1938 Cal 861 (862) (DB).

[9] The defendant's *Muamim*, duly authorised by the defendant, acknowledged in writing a certain time-barred sum due to plaintiff and there was also a written promise to pay within a month. *Held*, it was not a mere acknowledgment but an express promise, which was enforceable. (Vol 19) 1932 All 38 (40).

[10] The word '*devasahi*' in Gujarati does not connote an express promise to pay. (Vol 25) 1938 Bom 460 (461) (DB) * (1884) 8 Bom 405 (407) (DB). (Words '*Eahi leva*' merely mean 'balance due'.)

[11] Account of debit side with signature and with stamp affixed, is not "promise to pay" within meaning of S. 25 (3). (Vol 8) 1921 Pat 29 (30) : 6 Pat L Jour 121 (DB).

[12] Words "Rs. 375 have been found to be due including interest" held, do not indicate express promise to pay. (Vol 22) 1935 Nag. 221 (222).

Section 25 (contd.)

[13] Where a mortgage bond by guardian of a minor provided that the mortgagees should retain a portion of the consideration in order to pay a debt, it is impossible to hold that the mortgagor by acknowledgment contained in the mortgage bond made an implied promise to the creditor. S. 25 (3) is inapplicable in this case. (Vol 19) 1932 Mad 219 (220).

[14] Customer sending a letter to bank promising to pay time-barred debt as soon as he could arrange within a period of six months — This amounts to promise to pay a barred debt and is contract within S. 25 (3). (Vol 19) 1932 Lah 212 (213) : 13 Lah 448 (DB).

[15] Equitable mortgage—Promissory note executed on same for payment of mortgage debt—Fresh promissory note executed for balance of mortgage debt after three years when personal remedy under mortgage was barred—*Held* that, the fresh promissory note though it could not operate as valid acknowledgment for keeping alive the personal remedy, constituted a new promise within S. 25 (3). (Vol 25) 1938 Rang 134 (136) : 1938 Rang L R 6 (DB).

[16] Where A purchased the stock of an old firm by paying to B a certain sum of money in respect of debts due to B by the firm, and there was no obligation on A to pay anything, but he signed a letter to B acknowledging that a certain amount was due by him on account of the debts of the firm : *Held*, that as there was no obligation, there could have been no consideration for the implied promise and that the letter could not have been signed otherwise than in inadvertence and that it did not amount to an unconditional acknowledgment from which a promise to pay could be inferred. (Vol 20) 1933 All 175 (176).

[17] In order that a valid contract may be constituted under S. 25 (3), it is necessary that the statement should be in writing and should be signed by the person, to be charged therewith, or by his agent, generally or specially authorised. An unsigned statement, therefore, by a pleader that his client would pay a time-barred debt does not bind the client. (Vol 11) 1924 All 12 (15) (DB) * (Vol 30) 1943 Bom 447 (450) * (08) 1908 Pun Re No. 102 page 473 (479) (DB). (Statement of account — Balance struck not signed by debtor — Agreement does not come under S. 25 (3).) * (07) 1907 Pun Re No. 132 page 626 (634) (DB). (Unsigned statement of account.) * (1892) 6 Bom 683 (685) (DB). (Bare statement of account not a promise within S. 25 (3).)

[18] To bring a case under S. 25 (3) the creditor need not establish knowledge on the debtor's part, at the time of making a new promise, as to the debt having become wholly or partially barred. (1913) 18 Cal L Jour 329 (331) (DB) * (Vol 30) 1943 Bom 447 (450) * (Vol 2) 1915 Mad 242 (242) (DB) * (1918) 18 Cal L Jour 269 (271) (DB) * (1900) 23 Mad 94 (97, 98) (DB).

[But see (1910) 20 Mad L Jour 656 (656). (The endorsement "balance due was Rs. 80" in the plaintiff's account books, in the handwriting of the defendant and signed by him, though implies a promise it is not the promise to pay a barred debt required by S. 25, which must indicate a consciousness on the part of the executant, of the debt being barred.)]

[19] The words "by the person to be charged therewith" in S. 25 are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another, and need not be limited to the person who was indebted from the beginning. (Vol 27) 1940 Mad 678 (678, 679).

[20] Whenever an acknowledgment is coupled with an agreement to pay interest, it cannot be regarded as a mere acknowledgment but it should be regarded as an agreement with a promise to pay within the meaning of S. 25 (3), Contract Act. (Vol 30) 1943 All 63 (64) : I L R

(1943) All 171 (DB) * (Vol 25) 1938 Lah 234 (237) : I L R (1938) Lah 199 (F.B.). (Reversing (Vol 24) 1937 Lah 642.) * (Vol 16) 1929 Lah 695 (696, 697) * (Vol 16) 1929 Lah 511 (512). (*Rugga* containing acknowledgment of liability with a post-scriptum fixing rate of interest.) * (Vol 14) 1927 All 677 (679) : 49 All 496 (DB). (Where defendant acknowledged a debt under a statement of accounts from the plaintiff but added the words interest at annas 12 p. c. per mensem thereto. *Held*, that the endorsement is a valid promise to pay entitling the plaintiff to rely on S. 25 (3).) * (Vol 4) 1917 Lah 432 (434) : 1917 Pun Re No. 66 (DB).

[21] Where a debt is not binding on the defendant, and consequently not enforceable against him, there is no question of applicability of S. 25, Cl. (3) because the barred debt is not one which would be enforceable against the defendant, but for the law of limitation. (Vol 21) 1934 Mad 549 (551) (DB) * (Vol 24) 1937 Oudh 300 (301) (DB). (Promote executed in favour of plaintiff in lieu of a time-barred bond in favour of his minor son, was held to be without consideration.) * (Vol 15) 1928 Bom 539 (542). (A promise made by a person who is under no obligation to pay time-barred debt of another, is not within this exception of S. 25.)

[See (1906) 8 Bom L R 644 (645, 647) (DB).]

[22] Time-barred debts of Hindu father — Pro-note by sons—Sons cannot be made personally liable because under the law they are liable to the extent of the assets received. So if they personally promise to pay it would be without any consideration. (Vol 21) 1934 Cal 178 (179) * (Vol 25) 1938 Lah 159 (160) * (Vol 16) 1929 All 586 (586) : 51 All 983 (DB).

[See however (Vol 24) 1937 Lah 484 (484). (Agreement to pay a debt due from a third person is good consideration in law — Defendant acknowledging debt due by his father to plaintiff — Suit by plaintiff on basis of such acknowledgment — Personal decree, held, could be passed against defendant as there was consideration for personal liability.)]

[23] Where fresh though small advance is made and there is also an old time-barred debt, the consolidated *sarkhat* embodies a new contract for fresh consideration and the entire amount can be recovered. (Vol 30) 1943 All 63 (65, 66) : I L R (1943) All 171 (DB) * (Vol 23) 1936 All 160 (161, 162) : 58 All 382 (DB) * (1910) 5 Ind Cas 418 (419) (All) (DB).

[24] It is true that under S. 25 (3), an agreement to pay a time-barred debt is regarded as one without consideration, but this sub-section only applies when a wholly gratuitous promise is made to pay such a debt. It does not apply when a promise to pay a time-barred debt is made for some consideration though the consideration might be inadequate. (Vol 30) 1943 All 63 (65) : I L R (1943) All 171 (DB).

[25] A contract entered into by a guardian is voidable by the minor on attaining majority but not void. Sub-section (3) of S. 25 applies to the case of a minor who executes a promise in writing to pay a debt incurred by his guardian. (Vol 9) 1922 Nag 250 (252) : 19 Nag L R 135.

[26] If a person promises to pay a portion of a barred debt, he can only be sued for that portion alone. Illustration (e) indicates the real meaning of the words "wholly or in part of the debt." (Vol 27) 1940 Mad 678 (679).

[27] Section 25 (3) is based on an agreement—Offer not accepted is no agreement—Section 25 (3) would not apply where the offer was rejected. (Vol 33) 1946 Mad 72 (73). (Offer to pay time-barred debt, 7 annas in a rupee, rejected by creditor—Offer cannot be made basis of suit.)

[See (Vol 27) 1940 Rang 159 (160) : 1940 Rang L R 377. (Proposal to pay time barred debt by monthly instalments — Payment of some instalments accepted by

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business, of any kind, is to that extent void. One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein : Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exception 1. —

Saving of agreement not to carry on business of which good-will is sold.

to the Court reasonable,

[a] Exceptions 2 and 3 relating to agreements between partners upon, or in anticipation of dissolution of partnership and during continuance of partnership, respectively, were *repealed* by the Indian Partnership Act, 1932 (9 [IX] 1932), S. 73 and Sch. II. See now Ss. 11 (2) and 36 (2) of that Act.

Section 25 (contd.)

creditor — Proposal becomes promise by acceptance by conduct.]

[28] Where in settlement of time-barred debt due from joint family, several liability for one third of the debt was undertaken by each of the three branches of the family, it was held that this limitation of liability is in itself a good consideration which will support a new contract apart from S. 25. (Vol 8) 1921 Pat 29 (30) : 6 Pat L Jour 121 (DB).

[29] A promise to pay a barred debt by a manager of a Hindu family who is not the father of the junior member is not binding on such junior member. The question lies within the region of Hindu Law and not of Contract Act. Section 25 (3), Contract Act, does not apply to such a case. (Vol 24) 1937 Nag 327 (329).

[30] An agreement to pay the amount found due on a particular day which was acknowledged in writing, need not be in writing. Such agreement is for consideration and the contract being with reference to a debt not time-barred, Section 25 will not come into operation. (Vol 17) 1930 Nag 293 (299) : 26 Nag L R 320.

[31] On the death of the mortgagee the proceedings in which a preliminary decree was passed against the mortgagor, abated for failure to implead mortgagee's legal representative within the prescribed time. The mortgagor passed a fresh mortgage bond in favour of the heirs in consideration of the amount due under the earlier bond. *Held*, that the second bond was valid under S. 25 (3). (Vol 13) 1931 All 154 (155) : 53-All 374 (DB). (The expression "limitation of suits" should be literally interpreted so as to include limitation applicable to applications.)

[32] Where an equitable mortgage is effected to satisfy a time-barred debt, the equitable mortgage affords a sufficient ground of action to the mortgagee to sue for the debt even though the provisions of S. 25 (3) are not complied with. (1912) 14 Bom L R 1020 (1027).

11. Explanation 1. — [1] The rule laid down in *Explan. 1* applies as between a donee and persons claiming through the donor. (Vol 2) 1915 Low Bur 86 (87) : 8 Low Bur 185.

[2] Where a husband gifted away his property to his wife and land was changed to her name and then he mortgaged the property, held that (1) question as to validity of gift should be determined by reference to S. 5, Punjab Laws Act, and not to S. 25 of the Contract Act. ('99) 1899 Pun Re No. 38, p. 186 (186, 187, 188) (DB).

12. Explanation 2. — [1] Under this explanation inadequacy of consideration is not relevant unless it affects the question of free consent to contract. Moreover the section applies only to contracts which are wholly without consideration and not to contracts which may be for inadequate consideration. (Vol 30) 1943 All 63 (65) : I L R (1943) All 171 (DB) (Vol 10) 1923 All 590 (591) (DB).

[2] A party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition. (1878) 3 Cal 192 (196) (DB.)

SECTION 26 — Note 1

[1] Sections 23, 26 and 27 do not exhaust all instances of agreements contrary to public policy. (Vol 11) 1924 Oudh 404 (405) : 27 Oudh Cas 100.

[2] Though S. 26 is in general terms, it is doubtful whether partial or indirect restraint on marriage is within scope of the section. (Vol 29) 1942 All 351 (353) : I L R (1942) All 810 (DB).

[3] Section 26 is not restricted to the case of first marriage only but also applies to a person already married. Hence an agreement for repayment of money spent on the boy's education if he married another during the lifetime of his wife is void. (Vol 1) 1914 Low Bur 156 (1) (156) : 7 Low Bur 304 (DB).

[But see ('08) 4 Nag L R 86 (89, 90).]

[4] Though a stipulation not to take another wife is illegal as being in contravention of S. 26, yet promises to live in wife's house and to work and support her, are good and lawful and therefore enforceable. ('13) 15 Ind Cas 915 (916, 917) : 1 Upp Bur 108.

[5] Agreement to pay woman certain annual allowance only "until death or remarriage" or "during widowhood" is not illegal. ('12) 10 All L Jour 185 (186, 187).

[6] Compromise between co-widows in mutation proceedings—Both to be entered in equal shares—Either on re-marriage to forfeit her share : *Held*, compromise was not in restraint of marriage as no direct prohibition to remarry was imposed by it. (Vol 29) 1942 All 351 (353) : I L R (1942) All 810 (DB).

[7] A Kabinmah by a Mahomedan husband authorising his wife to divorce him in the event of his marrying a second wife, is not void under S. 26. (Vol 3) 1916 Cal 761 (762) (DB).

[8] Wakf deed giving share of profits to widows contained condition forfeiting such share on widow's re-marrying — *Held* condition was neither illegal nor improper and did not offend S. 26. (Vol 19) 1932 Oudh 168 (110) (DB).

[9] Promise to pay a bride price, while marrying a major girl, cannot be enforced as being immoral and in restraint of marriage. (Vol 7) 1920 Lah 357 (359) : 1 Lah 574 (DB).

[10] Contract restricting major girl's right of marrying according to her own choice is void. (Vol 21) 1934 Pesh 22 (22).

SECTION 27 — Synopsis

1. Agreement in restraint of trade.
2. Agreement for mutual benefit.
3. Service contracts.
4. Sale of good-will — Exception.

Section 27 (contd.)

1. Agreement in restraint of trade. — [1] Section 27 aims at contracts by which a person precludes himself altogether for a limited time or over a limited area from exercising his profession, trade or business and not at contracts by which, in exercise of his profession, he enters into ordinary agreements with persons dealing with him which are necessary for carrying on his business. ('90) 13 Mad 472 (475).

[2] Where a claim is founded on tort, S. 23 and S. 27 do not apply. (Vol 18) 1931 All 83 (85) : 53 All 316 (DB).

[3] Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment. (Vol 18) 1931 All 83 (89) : 53 All 316 (DB).

[4] Whether a contract is in restraint of trade within the meaning of S. 27 is a question of law. (Vol 21) 1934 Lah 110 (111).

[5] Whether contract is in restraint of trade within the meaning of S. 27, Contract Act, is question to be determined on construction of contract in each case. ('90) 13 Mad 472 (474).

[6] Where the restrictive clauses appear in the formal document of dissolution of partnership and no local limits are at all specified, it is not permissible to enter upon a consideration of what the parties were likely to have contemplated. As the place of restriction is not nominated in the bond limitation should not be imported which the parties have not seen fit to express, in order to aid so unprecedented a contract." (Vol 30) 1943 Sind 197 (210) : I L R (1943) Kar 49 (DB).

Burden of proof. — [7] To succeed under S. 27 one must establish that suit is one to enforce agreement whereby some one is restrained from exercising a lawful profession, trade or business of any kind. ('05) 29 Bom 107 (118) (DB).

[8] Burden of justifying covenant in restraint of trade lies on the party upholding it. (Vol 21) 1934 P C 101 (104) (PC).

Law applicable. — [9] Agreement in restraint of trade is governed not by *lex loci contractus* but by the law of the place of performance. ('76-78) 1 Mad 134 (148).

Restraint of trade. — [10] Bare agreement in restraint of competition cannot be upheld — Restrictive clause must be ancillary to main transaction and necessary in interest of both parties — Restriction on outgoing partner not to do business, in which he had specialised, in the whole world held not valid. (Vol 30) 1943 Sind 197 (210, 211) : I L R (1943) Kar 49 (DB).

[11] Defendants agreeing to remain subject to the head of their caste and not to carry on their profession of working in lead with assistance of any other persons than the caste people — Agreement cannot be enforced for want of consideration and being against public policy. ('78-80) 2 Mad 44 (44, 45) (DB).

[12] Agreement not to set up a business in consideration of promise to pay a sum for life is void as in restraint of trade though partly executed. (Vol 3) 1916 Low Bur 51 (54) : 8 Low Bur Rul 389 (FB).

[13] Defendant carrying on business as a carrier of passengers by boat agreed to pay large sum to the plaintiff in consideration that the latter should abstain from carrying on similar business. Held that the contract was void and did not fall within the exception 1 to S. 27 as the plaintiff had no goodwill in his rival business. (Vol 5) 1918 Cal 546 (551) (DB).

[14] Covenant giving person exclusive right to convey passengers to and fro on road between Ootacamund and Mettupolliam is not contract in general restraint of trade and can be enforced. ('68-69) 4 Mad H C R 77 (DB).

[But see (Vol 25) 1938 Pat 473 (475, 476) : 17 Pat 255 (DB). (Contract purporting to be license granting defendant exclusive right to collect hides of animals in particular area in plaintiff's zamindari amounts to granting monopoly to defendant and is therefore unenforceable.)]

[15] Contract between licensee for manufacture of salt with buyer whereby former agrees to sell all salt manufactured by him to buyer and not to any other and at fixed price is void in so far as it restrains the former from selling to any other. (1890) 13 Mad 475 (476, 477).

[16] In a contract between a manufacturer and a purchaser of salt a stipulation that the former should not sell to other people than the latter is not in restraint of trade. But the stipulation that the former should not manufacture more than the quantity specified amounts to restraint of trade but if it is separable from the rest, it does not affect the validity of the other condition. (1892) 15 Mad 79 (80, 81) (D B).

[17] Agreement not to supply coolies to one of the rival cooly suppliers is void. (Vol 1) 1914 Mad 673 (674).

[18] Broker agreeing to give up admitted claim to brokerage in consideration of plaintiff selling like quantity of goods for future only through him — On failure, brokerage on whole to be paid by defendant — Agreement is not void as being in restraint of trade or for uncertainty. (1875) 23 Suth W R 146 (146) (D B).

[19] Agreement to supply silica sand for one year, with stipulation not to supply sand, during that period, to four specified factories, is void only to the extent to which it restrained trade or business. (Vol 18) 1931 All. 539 (540).

Partial restraint. — [20] Section applies even when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to S. 27. (Vol 29) 1942 Sind 114 (115) : I L R (1942) Kar 25 (D B) * (Vol 24) 1937 Oudh 445 (445) : 13 Luck 405 (D B). (Contract to sell hides only to plaintiff is partial restraint and is void.) * (Vol 9) 1922 Upp Bur 9 (10) : 4 Upp Bur Rul 110. (Clause preventing each party from carrying on business for long periods at a time makes an agreement in partial restraint of trade and is void.) * (1909) 9 Cal L Jour 216 (225) (D B). (Agreement by plaintiff with 29 out of 30 manufacturers of combs in a city whereby latter agreed to supply to plaintiff alone the goods manufactured by them and no others, held was void, being in restraint of trade and being an attempt to suppress competition.) * (1892) 19 Cal 765 (770) (D B) * (1890) 13 Mad 472 (474) * (1871) 22 Suth W R 370 (372, 375) (D B). (Contract between Hindus whereby one of them agreed to cease to carry on his business in certain locality in Calcutta in consideration of receiving certain sum of money from other, is void.)

[But see (1904) 6 Bom L R 223 (27). ("Restraining a person from" implies a total restraint.) * (1890) 17 Cal 320 (323) (D B). (Goods purchased at certain rate for particular market — Stipulation for higher rate should goods go to any other market is not one in restraint of trade.) * (1890) 13 Mad 475n (476, 477). (When restraint is only partial in respect to time or place, and there is good consideration given to party restrained the restraint is not unlawful.) * (1882) 3 Cal 809 (818, 819) (D B). (Stipulation in contract against sale of goods of certain description to any others till fixed date is not one in restraint of trade.)]

2. Agreement for mutual benefit. — [1] Agreement for a fixed period between two millers not to charge less than certain price for milling other people's rice and to work their respective mills during alternate

28. Every agreement, by which any party thereto, is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Section 27 (contd.)

weeks, and providing for fixed sum as penalty in case of breach, is not contract in restraint of trade. (1913) 18 Ind Cas 183 (184) (Low Bur).

[2] Rules framed for regulating use of market amounts to restraint of trade, if they are unreasonable and stifle trade. Restraint is reasonable if it affords fair protection to the parties and does not interfere with public interests. (Vol 31) 1944 Nag 73 (77) : 1 L R (1948) Nag 740 (D B).

[3] Agreement between neighbouring landowners that market for sale of cattle shall not be held on same day on lands of both is not void. (Vol 2) 1915 All 94 (95) : 37 All 212 (D B).

[4] Agreement between traders to carry on business among members of their private association is valid. (Vol 18) 1931 All 83 (85) : 53 All 316 (D B).

[5] The fact that the scheme of the agreement would limit competition and keep up prices, does not necessarily bring it within the terms of S. 27. (1905) 29 Bom 107 (118) (D B).

[6] Agreement by Barrister carrying business in partnership not to practice for certain time is valid. (1918) 17 Cal W N 215 (218) (P C).

[7] Agreement between ice factory owners to work one factory alone and to divide profits — Agreement is not 'in restraint of trade.' (Vol 21) 1934 Lah 110 (111).

[8] The abandonment of a *bona fide* claim is good consideration for a compromise even though the agreement on which the claim was based was void as being in restraint of trade. (Vol 1) 1914 Mad 673 (674).

3. Service contracts. — [1] Section 57 of the Specific Relief Act extends to agreements of negative character such as are necessarily implied from the contracts for whole time service and the operation of such contracts as contracts for service appear to prevent the application of S. 27 of the Contract Act to such negative agreements so far as they purport to impose restriction only during the period of affirmative agreement for service. (1903) 5 Bom L R 878 (882) & (1946) 48 Bom L R 90 (91, 92). (Question whether particular covenant is unreasonably wide has to be decided on the nature of the agreement, the qualifications of employee, and service he has to render considered along with places where employer can get alternative service of the same nature.)

[2] Contracts by which persons are restrained from competing after term of their engagement is over, with their former employers within reasonable limits fall under the general prohibition contained in S. 27. (1885) 11 Cal 545 (549) (D B) & (1876-78) 1 Mad 134 (142). (Stipulation that after the expiration of the term of service the employee not to carry on the same business within 800 miles of Madras, held, amounted to an agreement in restraint of trade the limit as to space being unreasonable.) & (Vol 8) 1921 Low Bur 19 (22) : 11 Low Bur Rul 26 (D B). (Contract restricting employee from serving for specified period in other firm in a certain territory is valid.)

[3] Physician agreeing to serve as assistant stipulating not to practise as physician and surgeon for three years—Agreement is not void. (1899) 23 Bom 103 (117, 118) (D B).

[4] Contract by theatrical party with a proprietor of a theatre to play for the latter and not to play for any one else or in any other place till the termination of certain period or till the former went to England—

Agreement, held, void being in restraint of lawful profession, trade or business, in the absence of any suggestion that the proprietor was bound to employ the party so as to bring the case under S. 57, Specific Relief Act. (1912) 16 Cal W N 534 (535, 536).

4. Sale of good-will—Exception.—[1] Contract selling real good-will in the trade of plying ferry-boats between certain landing places — Contract does not amount to agreement contravening S. 27. (Vol 9) 1922 P C 167 (168) : 48 Ind App 508 : 48 Cal 1030 (PC).

[2] Restraint in a contract selling a good-will can be said to be injurious to public if it is calculated to produce pernicious monopoly, prohibiting other persons to trade in the line, so as to enhance prices to unreasonable extent. (Vol 28) 1941 P C 75 (84) (PC).

[3] A bare covenant not to compete cannot be upheld, unless it is ancillary to main covenant and necessary to make it effective. It can be upheld only if it is reasonable and is consistent with interests of public. (Vol 21) 1934 P C 101 (104) (PC).

[4] When the Court is satisfied that restraint was reasonable as between the parties it must always be very difficult to prove in a case connected with the good-will that public interest was affected. (Vol 28) 1941 P C 75 (84) (PC).

[5] Vendor company carrying on business in Canada transferring same to another company — Covenant restraining vendor from doing any similar business whatsoever in Dominion of Canada—Restriction as to space, held, not unreasonable—Holding of small shares by vendor company in another company, carrying similar business was not a breach of agreement. (Vol 28) 1941 P C 75 (80, 84) (PC).

[6] Where the vendor of a good-will contracts not to "directly or indirectly engage" in similar business, the phrase is not void for uncertainty. (Vol 28) 1941 P C 75 (80) (PC).

SECTION 28 — Synopsis

1. Scope of the section.
2. Agreements affecting jurisdiction of Courts.
3. Agreements affecting limitation for enforcing rights under contract.
4. Agreements restraining enforcement of rights.
5. Exception 1.

1. Scope of the section. — [1] Agreement by which one party thereto is restricted absolutely from taking usual legal proceedings is void to that extent. (Vol 21) 1934 Sind 1 (8) : 27 Sind L R 280 & ('76) 1 Cal 466 (469) (DB).

[2] Section 28 cannot be construed so as to exclude agreements to refer to arbitration without order of Court in a pending suit. (Vol 14) 1927 Bom. 565 (576) : 51 Bom. 908 (FB).

[3] Section cannot be applied to rights under a decree. (1885) 7 All 124 (125, 131) (DB).

[4] Agreement not to appeal against decree is not a void agreement and is not prohibited by S. 28. (Vol 21) 1934 Pat. 644 (645) (DB) & ('75-77) 1 All 267 (270) (FB) & ('82) 8 Cal 455 (458) (DB) & (Vol 16) 1929 Oudh 451 (452) : 5 Luck 391 (DB). (Agreement by which parties agree as to procedure to be adopted by Court in deciding case on merits and also consenting that the decision will be binding on them is tantamount to saying that no right of appeal will be exercised by the parties.)

[5] Compromise of doubtful rights arising out of a previous contract is not void. It is outside the scope of S. 28. (Vol 18) 1926 Sind 202 (206).

Exception 1. — This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2. — Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.^b

[a] The second clause of Exception 1 was *repealed* by the Specific Relief Act, 1877 (1 [I] of 1877). The *repealed* clause is reproduced here as the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply :—

“When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.”

[b] Cf. the Indian Arbitration Act, 1940 (10 [X] of 1940), and the Indian Companies Act, 1913 (7 [VII] of 1913), S. 152.

Section 28 (contd.)

2. Agreements affecting jurisdiction of Courts. — [1] By private agreement parties cannot divest the Court of its inherent jurisdiction to try disputes arising out of the agreement. (Vol 22) 1935 Nag. 48 (49) * (Vol 17) 1930 Bom. 185 (186, 187); 54 Bom. 278 (DB). (Words “to that extent” mean that only the stipulation which ousts the Court’s jurisdiction is void and not the whole agreement.)

[2] Parties cannot make agreement that suits relating to disputes will be brought only in a particular Court even if cause of action arose outside its jurisdiction. (‘09) 3 Sind L R 45 (47).

[3] Agreement that another Court to the exclusion of Court having jurisdiction shall have jurisdiction to adjudicate upon the disputes arising under the agreement of the parties, is illegal. But if such an agreement specifies the place, where, according to the facts stated in the agreement, the cause of action is deemed to arise, the agreement is legal. (Vol 17) 1930 Lah. 611 (612).

[4] Where two Courts have jurisdiction to try suit, agreement restraining party to sue the other in one of them, particularly, is not in absolute restraint of legal proceedings and is not void under S. 28. (Vol 12) 1925 Mad 1145 (1146) * (Vol 33) 1946 Lah 57 (61) : I L R (1945) Lah 281 (FB). ((Vol 10) 1923 Lah 425; (Vol 16) 1929 Lah 605 and (Vol 30) 1943 Lah 295 overruled — Nor is such an agreement opposed to public policy under S. 28 — Per *Mahajan J.*) * (Vol 31) 1944 Mad 47 (48) * (Vol 31) 1944 Oudh 275 (276); 20 Luck 105 * (Vol 24) 1937 Nag 334 (335) : I L R (1939) Nag 641 * (Vol 22) 1935 Bom 198 (199) * (Vol 18) 1931 Cal 279 (279) : 57 Cal 1280.

[But see (Vol 33) 1946 Cal 112 (112, 113).]

3. Agreements affecting limitation for enforcing rights under contract. — [1] Condition in life insurance policy that no suit shall be brought on the policy after one year from death of assured is void. (‘11) 11 Ind Cas 766 (756) (Low Bur).

[See (Vol 19) 1932 Lah 169 (172) : 12 Lah 692 (DB). (A claim cannot be time-barred under an indent providing that no claim can be recognised if not made in writing within 60 days from due date of payment, as such clause cannot take away plaintiff’s statutory right to bring claim within prescribed time)]

[See however (‘12) 14 Bom L R 741 (743) (DB). (Clause in declaration that no suit shall be brought against the company in connection with the policy later than one

year after cause of action accrued. *Held*, that clause was valid for parties agreed thereby that if no suit were brought within a year then neither party should be regarded as having any rights as against the other.)]

[2] Condition in contract that on happening of certain event one party shall lose his rights is not a condition limiting period within which he may seek relief in ordinary Courts—Condition is not void. (Vol 13) 1926 Rang 3 (4) : 8 Rang 383 (DB).

[3] Condition in fire insurance policy that company would not be liable for loss or damage after expiration of twelve months from happening of the loss or damage, unless claim was the subject of pending action or arbitration, does not contravene S. 28. (Vol 21) 1934 Rang 15 (16) : 11 Rang 475.

[4] A condition in Insurance-policy providing for forfeiture of all benefits unless an action is brought within three months from the rejection of the claim does not infringe S. 28. (Vol 11) 1924 Cal 186 (187) (DB) * (Vol 11) 1924 Rang 351 (351) (DB) * (Vol 1) 1914 Bom 225 (229) : 38 Bom 344 (DB). (Phrase “thus enforce his rights” refers to enforcement by usual legal proceedings in ordinary tribunals—Per *Batchelor J.*)

[5] Article III Cl. (IV) of the schedule to Carriage of Goods by Sea Act does not limit time within which holder of bill of lading may enforce his rights against carrier. It extinguishes the right itself and is irretrievably lost — Insertion of clause in a bill of lading incorporating the article is not void. (Vol 18) 1931 Sind 124 (126) : 25 Sind L R 222.

[6] The stipulation, on the back of the railway receipt, that no claim for overcharge of freight be entertained, unless made within six months is of a nature referred to in S. 28. (‘88) 1888 All W N 59 (60, 61) (DB).

[7] Father executing “masha hara pa’ra” in favour of his widowed daughter providing for monthly allowance of Rs. 10—Grantee restricted from bringing a suit for arrears of more than one year — Restriction held to be void under S. 28 (Vol 19) 1932 Cal 720 (721) (DB).

[8] Condition in bill of lading that carrier and ship would be discharged from liability for loss or damage unless plaintiff brought suit within one year from date of delivery — No suit brought within one year — *Held* that rights of plaintiff were extinguished—S. 28 did not help him. (V 119) 1932 Bom 330 (332).

4. Agreements restraining enforcement of rights. — [1] Agreement restraining transferee from enforcing

Agreements void for uncertainty.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Section 28 (*contd.*)

in any way his rights under the transfer is void. (Vol 8) 1921 Mad 599 (606) : 44 Mad 919 (FB).

[2] Agreement restraining party to arbitration from raising objections to the award in any way is opposed to the spirit of S. 28 and is void. (Vol 8) 1916 Lah. 89 (91) : 1916 Pun Re No. 117 (DB) * (1898) 6 Mad 368 (369) (DB) * (Vol 15) 1928 Sind 81 (81) : 21 Sind L R 253 (DB) (Following (Vol 4) 1917 Sind 38 : 11 Sind L R 43 ; (Vol 5) 1918 Sind 13 : 13 Sind L R 75 Not followed) * (Vol 4) 1917 Sind 38 (39) : 11 Sind L R 43.

[See (10) 34 Bom 13 (27). (Where a clause in agreement was that all kinds of disputes shall be decided according to certain rules and the exclusive authority rested with a committee, so as to make its decision final, it was held that the parties can come to Court and question the finality of its decision, in spite of the agreement.)]

[But see (Vol 5) 1918 Sind 13 (21) : 13 Sind L R 75.]

[3] Agreement in writing between parties to refer disputes between them to arbitration filed in Court—Order of reference made—No award filed by arbitrators—Reference superseded by order of Court—*Held*, agreement to refer did not bar under S. 28 one of the contracting parties from filing suit after supersession of reference. (176) 1876 Pun Re No. 87 Page 67 (71) (DB).

[4] Even if a barrister Advocate makes a special contract with his client that the latter would not be sued for fees, such a contract would be void under S. 28. (Vol 20) 1933 All 417 (420) : 55 All 570 (FB). ((1903) 25 All 509 overruled.)

[5] Plaintiff agreeing to forbear to sue debtor at the request of defendant who agreed to indemnify plaintiff—Agreement so far as it restricted plaintiff's right to sue, held, void. (179) 1879 Pun Re No. 120 page 358 (360) (DB).

[6] Claimant under O. 21, R. 58, Civil P. C., withdrawing claim and agreeing not to file suit under O. 21, R. 68, Civil P. C. — Decree-holder agreeing not to press petition for enquiry as to genuineness of *hatchitta* alleged by him to be forged: *Held*, (Per *Wort J.*) Section 28 was no bar to the enforcement of the above contract. (Vol 27) 1940 Pat 683 (689) : 19 Pat 715 (DB). (But such contract is invalid under S. 28).

5. Exception 1. — [1] Exception 1 only applies to class of contracts where parties have agreed that no action shall be brought until some question of amount has first been decided by arbitrators. (1875-76) 1 Cal 466 (469) (DB).

[2] To make agreement conform to Exception 1, jurisdiction of Courts must be excluded in all respects except matter which is the result of arbitrator's award. Section does not forbid action for damages for breach of such agreement to refer to arbitration. (1875-76) 1 Cal 42 (50, 51) (FB).

[3] A person may not contract himself out of his right to have recourse to Courts of law; but lawful agreement to refer matter to arbitration can be made a condition precedent before going to a Court of law. (10) 34 Bom 13 (23).

[4] Exceptions 1 and 2 do not legalize agreement not to object at all to validity of award. (1898) 6 Mad 368 (371) (DB). (Per *Muttusami Ayyar J.*)

[5] No question of limitation arises where agreement to refer to arbitration falls within four corners of Exception 1. (Vol 16) 1929 Sind 55 (57, 58) (DB).

[6] Exception 1 covers an arbitration clause in a contract. (1906) 33 Cal 1169 (1173).

[7] Suit will not lie to enforce agreement to refer to arbitration, even in the case referred to in the first

exception to S. 28. (1875-76) 1 Cal 466 (469) (DB) * (1875-77) 1 Cal 42 (49, 50) (FB). (*Quare*).

[8] A contract appointing arbitrators is a contract "uberrima fide" and unless there is complete confidence between the tribunal and the parties it would be wrong to bind a party to his contract, when there is a probability that injustice would result from doing so. (Vol 20) 1933 Sind 317 (350).

[9] Agreement to refer disputes arising between parties out of various contracts, to arbitration and to abide by the award—No prohibition to taking proceedings thereafter in Court of law—Agreement is valid. (Vol 24) 1937 All 650 (652).

[10] Deputy Commissioner engaging plaintiff as workman—Agreement providing that in case of breach, workman was to accept amount given by Deputy Commissioner and to be bound by his decision in other matters—Suit by plaintiff for balance of wages after grant of amount by Deputy Commissioner—*Held*, suit fell within Exception 1 and was barred under S. 21, Specific Relief Act. (Vol 19) 1932 Oudh 265 (266) : 8 Luck 98 (DB).

[11] Agreement by servant of company, that Manager of Company shall be sole judge as to company's right to retain whole or part of wages for breach of rules and his certificate in writing in respect of the amount so retained, and the cause of such retention, shall be conclusive evidence between the parties in all Courts of justice was held to be an arbitration clause covered by Exception I. (1885) 11 Cal 232 (235) (D B).

[12] A clause in the grant under Crown Grants Act (1895) that in the event of any boundary dispute between lessees, they shall be bound to submit such dispute to the Commissioner, and that the decision of the Board of Revenue on appeal shall be final and binding on the lessees, such a clause is not affected by S. 28 by reason of S. 3, Crown Grants Act. (Vol 25) 1938 Cal 211 (215) : 1 L R (1938) 1 Cal 626.

[13] Contract between person and company—Party agreeing that decision of engineers of company will be final in respect of the contract whose execution is put under their supervision. *Held*, that though the engineers are not arbitrators, they are persons exercising judicial functions and the party can come to Court to question the decision if there is remissness in the proceedings. (Vol 22) 1935 Mad 356 (359) (D B).

[14] Submission to arbitration clause in bill of lading—Arbitrators and umpires to meet in England—Submission to be made rule of High Court in England—Submission clause held not rendered illegal by S. 28. (Vol 19) 1932 Sind 111 (112) : 26 Sind L R 497 (D B).

[15] Where a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract, he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause, unless it can be shown to be arbitrary or otherwise unjust. (Vol 20) 1933 Sind 93 (98) : 26 Sind L R 469 (D B).

[16] Building contract—Parties agreeing to abide by certificate of architect named in agreement—Decision of architect must be accepted however erroneous—Final certificate can be challenged only on ground of fraud, collusion or misconduct, on part of architect. (Vol 29) 1942 Bom 334 (335).

Section 29—Note 1.

[1] Uncertainty explained—Where a reasonable meaning can be construed into the contract, the con-

Illustrations.

(a) A agrees to sell to B 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in cocoanut-oil only, agrees to sell to B 'one hundred tons of oil.' The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) A agrees to sell to B 'all the grain in my granary at Ramnagar'. There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B 'one thousand maunds of rice at a price to be fixed by C'. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B 'my white horse for rupees five hundred or rupees one thousand.' There is nothing to show which of the two prices was to be given. The agreement is void.

Section 29 (contd.)

tract is not void for uncertainty. (13) 1913 Pun L R No. 805 page 1027 (1031) (D B).

[2] It is impossible for a Court of justice to give effect to a contract, the meaning of which it is unable to find out with reasonable clearness. (Vol 2) 1915 Lah 328 (329) (D B).

[3] Section 29 contemplates that the meaning of an agreement shall be clear on the face of it. (Vol 32) 1945 Mad 10 (10) : I L R (1945) Mad 521 (D B). (An agreement to pay certain amount "after deductions as would be agreed upon" between the parties, held, void for uncertainty).

[4] The construction of an ambiguous stipulation in a deed may be governed or qualified by a recital, but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital. (1880) 2 Mad 239 (257) : 7 Ind App 83 (P O).

[5] Where the term in an agreement is vague in the extreme and might be interpreted in as many ways as there are interpretations thereof, the agreement is certainly one which must be considered as void because of uncertainty under S. 29. (1921) 4 Nag L Jour 67 (69).

[6] No contract is void merely because no time for performance is specified. (Vol. 11) 1924 All 657 (658) : 46 All 514 (D B).

[7] Plea that the agreement was void for uncertainty held could not be availed of where the parties themselves did not regard it as vague and had acted on it. (Vol 16) 1929 Nag 194 (197) : 25 Nag L R 131 (D B).

[8] Illustrative cases where contract is not void for uncertainty :

(a) Contract to execute a Kabala "containing necessary stipulations." (Vol 14) 1927 Cal 889 (893, 894) : 55 Cal 285 (D B).

(b) Where the indigo cakes mortgaged are described as those to be manufactured from the crops to be grown on lands of the Pupri Factory from the date of the execution of the mortgage up to the date of its being paid off, held that there is no vagueness as to the indigo cakes. (1904) 31 Cal 667 (678) (D B).

(c) A covenant for renewal without specifying period and rent must be presumed to be for the same period and rent as in the original and therefore not void for uncertainty on that ground. (Vol 4) 1917 Cal 509 (510) (DB.)

(cc) A contract to grant a renewal of a lease on such conditions as shall be reasonable and proper at the time of such renewal. (Vol 14) 1927 Mad 513 (515) : 50 Mad 595 (D B).

(d) Contract to sell land at a fair valuation when there is no difficulty in ascertaining what a fair valuation would be. (1880) 5 Cal 175 (188) (D B).

(e) Where the mortgagors described the mortgaged property in the mortgage deed as "their property" and at the date of the mortgage the mortgagors had specific interest in the mortgaged property, it was held that the

words were sufficiently certain or at any rate were capable of being made certain. (1890) 12 All 175 (178, 179) (D B).

(f) Where the contract for supply of goods did not mention the maximum limit of purchase, it was held that the contract was not uncertain. (Vol 3) 1916 Bom 315 (317) (D B). (It was open to Courts to reject dishonest claims for damages based on alleged failure to comply with large and unreasonable orders.)

(g) 2nd defendant executing an agreement in favour of plaintiff and making himself liable for all loans advanced by the plaintiff to his brother, the 1st defendant: Held that the fact that no amount or limit is stated does not make the agreement uncertain and unenforceable. (1937) 1937 Mad W N 760 (761).

[h] Where a Nattukotal Chetty impliedly agreed to give something extra to his agent as remuneration for the collection of outstandings left uncollected by the agent's predecessor, but did not fix a rate of percentage: Held, that in view of the nature of the business of Nattukotal Chetties, the contract was enforceable and the agent was entitled to a reasonable amount as remuneration. (Vol 2) 1915 Mad 981 (934) (DB).

[9] Illustrative cases where contract is held to be uncertain and therefore void :

[a] A contract for pre-emption entered into by the co-sharers for an unlimited period is unenforceable against the heirs and representatives of the co-sharers as being too vague and uncertain. But a contract for pre-emption between the co-sharers entered into at the time of the settlement, held must be presumed, in the absence of anything to the contrary, to have been intended to hold good for the whole period of the settlement and not longer and therefore not uncertain. (Vol 11) 1924 All 400 (403) : 46 All 333 (DB).

[b] Certain persons describing themselves as residents of X, giving a bond for payment of money in which as collateral security they pledged "Kul haq haq" (their properties) Held, that the general hypothecation was too indefinite to be acted upon and no charge on their property situated in X was created. (1875-77) 1 All 275 (276) (DB).

[c] *Iqarnamah* covenanting to grant land to society whenever required for building Mandir or Dharamshala and empowering to take it if refused—Held, covenant was personal but inoperative owing to vagueness. (Vol 3) 1916 Pat 226 (228, 230) : 1 Pat L Jour 238 (DB).

[d] Agreement to sell at favourable or concession rate. (Vol 16) 1929 Mad 243 (246) : 52 Mad 300 (DB).

[e] A covenant of partnership giving one party the right of specifying the share of the profits to be assigned to the other and affording no indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty. (Vol 2) 1915 Lah 328 (329) (D B).

[f] An agreement to pay rent in cash without the rate being definitely fixed. (Vol 7) 1920 Mad 115 (116) (DB).

30. Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing. This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.^a

Section 294A of the Indian Penal Code not affected. Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply.

[a] Cf. the Gaming Act (8 and 9 Vict., c. 109), S. 18.

SECTION 30 — Synopsis

1. Scope.
2. Wager and speculating contracts.
3. Collateral agreements.
4. Suit relating to recovery of deposit, winnings or losses.
5. Evidence and proof.

1. **Scope.** — [1] There is no distinction between the expression "gaming and wagering" in the English Gaming Act 1845, and the earlier Indian Act XXI of 1848, and the expression "by way of wager" used in S. 30 of the Indian Contract Act, (IX of 1872). ('03) 29 Cal 461 (467) : 28 Ind App 239 (PC) (Vol 4) 1917 Low Bur 18 (20).

[2] Section 30 requires that there must be at least two parties, the agreement between them must be by way of wager and further both sides must be parties to that wager. ('04) 28 Bom 616 (621) (DB).

[3] Betting is not illegal but law is unwilling to assist in enforcing obligations arising out of it or wagers. Section 30 expressly says that agreements by way of wager are void. (Vol 12) 1925 Cal 1007 (1008) : 52 Cal 677 (1885) 9 Bom 358 (364) (DB) (Vol 16) 1929 Rang 241 (242) : 7 Rang 263.

[4] The words "entrusted to any person to abide the result of a game, etc." in S. 30 refer only to monies deposited with stake-holders. (Vol 5) 1918 Mad 163 (164) (DB).

2. **Wager and speculating contracts.** — [1] A speculative contract is not necessarily a wagering contract. (Vol 10) 1923 All 273 (276) (DB).

[2] To bring a contract under S. 30, it is necessary to show that both parties intended that no delivery or acceptance shall take place and agreed that the mere difference in price shall be paid; but if only one of the parties intends that no delivery shall take place, the contract is not vitiated (Vol 9) 1922 Pat 220 (221, 222) (Vol 4) 1917 P C 101 (102) : 42 Bom 373 : 45 Ind App 29 (PC). (Absence of intention to give delivery is not enough.) (Vol 31) 1944 All 196 (197) : ILR (1944) All 397 (Vol 29) 1942 All 170 (174) : I L R (1942) All 289 (DB). (Option to demand delivery or acceptance does not take out the transaction out of wagering contract.) (Vol 25) 1938 Lah 781 (783, 784) (DB). (The mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, does not vitiate the transaction.) (Vol 21) 1934 Nag 129 (130, 131) (Vol 19) 1932 Lah 278 (274) (DB) (1900 02) 1 Low Bur Rul 107 (108) (DB). (Promissory notes in respect of transactions which were really intended only for payment of money by either party to other according to chances in market, though purporting to be agreements for actual purchase of goods, held to have been given in consideration of gambling transaction.) (Vol 17) 1930

Nag 273 (276) : 26 Nag L R 277 (DB). (Whether a contract is a wagering one depends upon the intention of the parties at the time of the contract.) (Vol 17) 1930 Nag 111 (113) : 26 Nag L R 125. (Subsequent agreement not to demand or give delivery does not make the contract a wagering one.) (Vol 16) 1929 All 890 (893) : 51 All 1027 (DB) (Vol 16) 1929 All 134 (138) (DB) (Vol 16) 1929 Bom 157 (170) : 53 Bom 367 : 30 Ori L Jour 595 (DB) (Vol 18) 1926 Lah 318 (319) : 7 Lah 442 (DB). (Definite agreement not to enforce actual delivery of goods has to be shown.) (Vol 13) 1926 Mad 326 (331, 332) (DB). (If a contract is wagering in its inception the mere fact that in certain contingencies delivery could be asked for would still not render the contract enforceable.) (Vol 12) 1925 Bom 511 (512) : 49 Bom 689 (DB). (Contract for forward delivery. Settlement by cross-contract. Contract held wagering contract within S. 1, Bombay Act III of 1865, though not under S. 30, Contract Act.) (Vol 12) 1925 Bom 79 (84) (DB). (Understanding between principal and agent alone to deal in differences only is not enough. The third parties on the one side and the agent and principal on the other must together agree to deal only in differences.) (Vol 12) 1925 Rang 284 (285) (DB) (Vol 11) 1924 Mad 378 (378). (Mere contemplation that delivery would not in fact be likely to be demanded is not sufficient to make a contract a wagering one.) (Vol 11) 1924 Nag 290 (292). (It is not sufficient to show that neither party intended nor contemplated that there should be any delivery of goods. It must be shown further that there was an agreement that neither party would have the right to make nor demand delivery.) (Vol 11) 1924 Oudh 186 (186) (Vol 10) 1923 Nag 324 (325) (Vol 8) 1921 Sind 114 (116) : 15 Sind I. R 5 (Vol 1) 1914 Cal 868 (869). (Contracts in which only differences are payable and delivery is either excluded or optional, are wagering contracts.) (Vol 13) 37 Bom 264 (277) (Vol 13) 15 Bom L R 750 (760, 761). (Seller may, technically speaking, be said to deliver goods to his buyer by giving him a delivery order on a certain person but just as mercantile contracts for payment of differences so also delivery orders may be used and passed from hand to hand amongst persons who have no other intention than that of adjusting differences amongst themselves.) (Vol 09) 11 Bom L R 997 (1004) (Vol 07) 9 Bom L R 125 (138) (Vol 08) 5 Bom L R 503 (505) (Vol 02) 29 Cal 461 (467) : 28 Ind App 239 (PC) (1899) 1 Bom L R 263 (266). (Both sides must clearly understand not only that no delivery is ordinarily to be given or taken but that none could even be asked for under any circumstances—Mere guess is not enough.) (1893) 22 Bom 399 (903) (1894) 17 Mad 480 (491) (DB).

[3] The test as to true character of a transaction is comparison between magnitude of transaction and capa-

Section 30 (*contd.*)

city of person who seeks to have it declared a wager. (1910) 12 Bom L R 1062 (1066).

[4] There is nothing illegal in speculating. This method of doing business is common place and embraces all commodities. Whether commodities are paid for and held with a view to making profit or are re-sold before delivery is irrelevant as far as the distinction between speculation and gambling is concerned. Gambling and wagering are not dealings in commodities at all. They are only bets on market price of goods in future, though they may take the form of a transaction of sale and purchase. There is no obligation on either party to deliver, or take delivery of any goods. The buyer simply pays the difference between the price of the bargain and the price at some future date. The essence of gaming and wagering is that one party is to win and the other to lose upon a future event which is uncertain. Thus, the difference between the two can be seen by seeing whether the transaction is real or a mere peg to hang the bet upon. Where parties could be compelled to carry out the contract of sale it is real. It is necessary to look behind the contract for its true understanding. It must be borne in mind that there is nothing wrong in different contracts so long as the parties are not absolved from delivering commodity or paying its price. (Vol 24) 1937 Nag 345 (351) : 1 L R (1938) Nag 308 (DB).

[5] The essence of wager is that each side stands to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken. To make an agreement a wager there ought to be common intention to bet. ('04) 28 Bom 616 (621) (DB).

[6] To constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation" and neither must look to anything but the payment of money on the determination of an uncertainty. (1885) 9 Bom 358 (363) (DB).

[7] The essence of wagering contract is that neither of the parties should have any interest in the contract than the sum which he will win or lose. (Vol 22) 1935 Mad 185 (187).

[8] There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying S. 57 of the Contract Act. ('10) 34 Bom 519 (533) (DB).

[9] Persons in a position to carry out contract at the time of making contract or at the time of performance—Contract is not necessarily wagering contract even if contract provides for alternative of receiving or paying on differences instead of actual delivery. (Vol 9) 1922 All 360 (361); 43 All 585 (DB); (Vol 12) 1925 Bom 115 (117) (DB). (Contract containing stipulation to pay differences between contract price and market price in the event of breach of contract by either party.)

[10] A contract containing a condition that one of the parties becoming unable from pecuniary circumstances to perform the contract shall not put an end to it but if contract be beneficial to that party, damages shall be ascertained and paid then and there to the party, is not of the nature of gambling transaction. ('05) 7 Bom L R 154 (156).

[11] Where two wrestlers agreed to play match on condition that party not appearing was to forfeit a certain sum and that winner was to receive certain amount out of gate money, the contract held was not wagering one. (Vol 18) 1951 Bom 264 (265) (DB).

[12] The purchase of option or right to call for shares is not necessarily wagering contract; test is whether in such contract, differences only are intended to be paid ;

so also double option is not more necessarily gamble than single option. Contract is not wagering contract unless neither of parties intend to give or take delivery. (Vol 1) 1914 Low Bur 183 (189).

[13] The transaction may be cloaked behind the forms of genuine commercial transactions which neither party intended to have legal operation. Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incur personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases, the fact that no delivery is required or tendered is of practically no value. Ordinary speculation conducted on the stock exchange through a broker who makes himself by the rules personally liable to the other members of the stock exchange for the performance of the contract cannot be a bet. (Vol 29) 1942 P C 19 (21) (PC).

[14] The mere fact that various contracts are in the nature highly speculative will not *per se* render them void as wagering contracts, unless the facts are of such a nature that they are incompatible with a lawful contract. (Vol 21) 1934 Nag 129 (131).

[15] An agreement of a forward sale containing a provision for delivery and resale to the first party of the same quantity as that of the previous transaction, before the date of that transaction and at the rate prevailing on the date of the resale though highly speculative does not amount to a wagering contract. (Vol 23) 1936 Rang 319 (323) : 14 Rang 347 (DB).

[16] Merchant buying goods in Japan and desirous of paying for them in Rupees and not in Yen, entered into contract with Bank—Contract taking form of purchases of Yen to be delivered during specified period at fixed rate — Bank covering itself by Yens purchased against Yens sold. It was held that transactions were genuine and not wagering contracts. (Vol 23) 1936 Rang 269 (271) (DB).

[17] Where grain pit was purchased by plaintiffs as commission agents on behalf of defendants and latter not being able to pay purchase-money former sold it at loss and sued defendants for loss; : *Held*, that case did not come under S. 30, even though the probabilities to the knowledge of the plaintiffs were that the defendants would resell the contents of the grain pit through plaintiffs as commission agents getting the benefits of any rise in prices or suffering any fall. (Vol 1) 1914 All 321 (322) : 36 All 426 (DB).

[18] Where under a contract for purchase of rubber coupons the buyer was entitled to delivery of coupons purchased and formal tender of coupons purchased was in fact offered to him. *Held* that the contract was not a wagering contract. (Vol 33) 1946 P C 63 (64) (PC). (Case from Ceylon).

[19] Vendor agreeing to sell what he has not and may never have — Price fixed upon calculation of risk taken by purchaser for sum far below real value. Contract is eminently speculative, not to say gambling one. (1867-69) 12 Moo Ind App 292 (308) (PC). (Purchaser retaining part of price until risk is determined — Risk contracted is *pro tanto* diminished and contract becomes incapable of being performed.)

[20] To constitute wager parties must contemplate determination of uncertain event on which risk depends as the sole condition of contract. Agreement to advance money for litigation in consideration of the return thereof without interest together with a share in property is not opposed to public policy; nor is it in the nature of a wager. It should be treated as a conditional promise or guarantee. ('09) 8 Ind Cas 500 (500) (Oudh)

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[21] The tenant of a field agreed to allow another to pick the cotton crop of that field in exchange for a promise to deliver 2½ *khandis* of cotton at the time of picking. *Held*, that this was not wagering contract. (Vol 10) 1923 Nag 291 (292) : 19 Nag L R 21.

[22] Where a contract for purchase of salt was successively transferred from one to another, every transferee paying the amount of profits and delivery was likely to be much delayed and the actual date of delivery was doubtful. *Held* that contract was one by way of wager. (Vol 12) 1925 Lah 564 (564).

[23] Transactions of sale and purchase—No delivery—Only one khata for all transactions—Panchayat fixing artificial rates for a certain day—Khata not showing loss or profit—The transactions held wagering ones. (Vol 21) 1934 Lah 85 (86) (DB).

[24] Contract to deliver certain documents to a party to a suit for a certain amount if the suit were compromised, but if the party won the suit four-times the amount was agreed to be paid. *Held*, the transaction was not a wager but only a contingent contract and was enforceable. (Vol 22) 1935 Mad 135 (137).

[25] Where two persons holding opposite views about the issue of a future uncertain event, mutually agree that, dependant upon the determination of that event, one shall win from the other and the latter shall pay a sum of money or other stake, neither party having any other interest in that contract than the sum or stake and there being no other real consideration for the contract by either party, the transaction is a wagering contract within S. 30. (Vol 13) 1926 Sind 202 (207, 208).

Teji Mandi transactions.—[26] *Teji Mandi* contracts are not presumed to be wagering contracts in the absence of evidence to the contrary. (Vol 13) 1926 P C 119 (120) : 53 Ind App 241 : 51 Bom 1 (P C) * (Vol 25) 1938 Lah 825 (826). (Defendant at Delhi placing with plaintiff, pakka ahrti of Bombay, order for forward transaction of certain amount of cotton bales and undertaking to pay mandi as soon as a telegram was received—Contract held complete between parties—Defendant failing to pay amount of mandi on demand—Plaintiff selling bales at loss—Defendant held liable for mandi and loss suffered by plaintiff.) * (Vol 12) 1925 Bom 79 (82) (DB) * (Vol 9) 1922 Bom 408 (408, 409) : 47 Bom 263 (DB) * (Vol 9) 1922 Bom 66 (70) * (Vol 1) 1914 Bom 183 (185). (Each contract, whether *Teji* or *Mandi*, is unilateral and not reciprocal.)

[But see (1913) 37 Bom 264 (272). (*Teji Mandi* transactions must be regarded as wagering ones. The onus of proving the contrary lies heavily on party alleging so.) * (1910) 12 Bom L R 590 (591). (*Teji Mandi* transactions are in nature of gambling transactions.)]

[27] Forward contracts for purchase and sale of goods are legitimate commercial transactions though speculative. They may be wagering or gambling transactions. When there is bargain for differences they are wagering contracts, even if one party has option to demand delivery. In spite of the terms of the contract, extrinsic evidence may establish the common intention of both parties that there was to be no delivery but only to take differences according to rise or fall in prices on date of delivery. But when it is established that substantial parts of goods were actually taken delivery of, the transaction may be taken to be genuine commercial transaction. (Vol 28) 1941 Cal 341 (344, 345) (DB) * (Vol 12) 1925 Rang 284 (285) (DB) * (1913) 15 Bom L R 85 (93).

The Patta Patti Contracts.—[28] The patta and patti contracts are highly speculative but not opposed to public policy as wagering contracts. (Vol 21) 1934 Nag 129 (130) * (Vol 15) 1928 P C 80 (82) : 55 Ind App 32

: 51 Mad 96 (P C). (In absence of proof that contracts were entered into upon the terms that their performance should not be demanded but the differences only should be payable if the seller was unable to give delivery and buyer was not agreeable to take delivery through third parties so as to exonerate seller, making of patta patti resulting in agreement to pay differences only would not make the transaction a wagering one.)

Nazrana contracts.—[29] What are known as nazrana contracts in the Punjab are not necessarily wagering contracts. (Vol 19) 1932 Lah 350 (353) : 13 Lah 766 (DB)

Badni transactions.—[30] Liabilities incurred on badni transaction are unenforceable. In absence of common intention to wager there can be no badni or wagering transactions. Where transactions included sales and purchases by the same dealers for a fixed date coupled with failure to deliver in practically all cases : *Held* that the transactions were badni. (Vol 15) 1928 Lah 420 (422) (DB).

[31] Where the contract for sale of goods specifically provides that the goods would be delivered after weighing them and the purchaser asks for delivery and is not repudiated that delivery was not contemplated, the mere fact that the contract involved very large quantities of the goods does not make the contract a badni transaction though they are highly speculative forward contracts. (Vol 16) 1929 Lah 689 (690) (DB).

[32] Where the transactions which parties entered into are beyond their means and there is no intention on the part of either contracting party from the very beginning to give or take delivery, the transactions are badni and so void. (Vol 16) 1929 Lah 875 (876).

Insurance policy.—[33] In India an insurance for a term of years on the life of a person in which the insurer has no interest is void as wagering contract under S. 30. (1899) 23 Bom 191 (210) * (Vol 28) 1941 Lah 33 (35, 36) (DB). (Person effecting insurance on his younger brother's life, held had no insurable interest, and hence the insurance contract was void under S. 30 and S. 23).

Lottery.—[34] Transaction between definite number of persons—Each to contribute rupee 1 for first week—On week end prizes drawn—A prize winner getting gramophone out of transaction—Remaining subscribers 4 annas more for next week and drawing made next week end—Prize winner getting gramophone and dropping out—Similar drawings continuing for 20 weeks—Remaining subscribers each then getting one gramophone—There was, held, no offence under S. 294A, Penal Code and since each one got his money's worth, though some got less and some more by lot and since there was no invitation to public to join, the transaction did not amount to wager. (Vol 21) 1934 Mad 136 (137).

[35] An agreement to decide a suit by lottery is void *ab initio* as being one by way of wager and opposed to public policy. (1909) 5 Nag L R 107 (110).

[36] Effect of Government sanctioning lottery is that no prosecution would lie in respect thereof. But the sanction does not affect civil law relating to lotteries—Agreement to purchase ticket of such lottery is void. (Vol 4) 1917 Bom 138 (140) : 42 Bom 876.

[37] Lottery and wagering contracts are two distinct things. A scheme may amount to a lottery though none of the competitors is a loser. If the subscribers have purchased a chance of winning a prize the scheme would be a lottery, whether the prizes are paid circuitously from the interest earned on the subscribers, contributions or are paid directly from those contributions. A lottery is not in British India unlawful in the sense that it is prohibited by law. It is only in relation to S. 294A, Penal Code, that it becomes illegal. (Vol 28) 1936 Mad 22 (227, 229, 244) : 59 Mad 562 (FB). (The chit fund held amounted to lottery and the promoters of the kuri by

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keeping place for conducting it and by its publication committed offence under S. 294A, Penal Code.)

[38] Where an agreement provides that winners are to get prizes and subscribers to get refund of contribution without interest in the end and the promoter to retain only interest, it was held the chit fund is not a wagering agreement. (Vol 14) 1927 Mad 583 (585) : 50 Mad 696 (FB).

[39] Though kuri, as ordinarily conducted in Malabar, is not lottery, yet if some subscribers obtain as prizes amounts which are in excess of the amounts subscribed by them, it comes within definition of lottery and suit to recover money paid for such lottery is not enforceable. (Vol 6) 1919 Mad 139 (139).

[40] Chit fund with arrangement for payment of prize every month by casting lots, was held illegal as lottery. (Vol 12) 1925 Mad 281 (282, 286) (DB).

[41] Sale of a share in sweepstake ticket after that ticket has drawn a horse, for a definite amount, is not a wager and is not opposed to public policy and the vendee can enforce the payment of his share in the prize money. (Vol 1) 1914 Lah 72 (73) (DB).

Other cases. — [42] Where the parties to arbitration contract that neither they nor their witnesses shall give evidence and the arbitrators cannot fairly use judicial discretion in the absence of evidence, the submission merely amounts to wager and is invalid. (1913) 7 Sind L R 113 (115).

[43] A lent a sum of money to B on the risk or security of a ship belonging to B under sail to Nicobar from Negapattam. B stipulated that as soon as the ship returned back after its voyage he would repay the amount with interest. The ship having been lost in the voyage A sued B for recovery of the amount. Held that the agreement was one by way of wager and therefore the suit was liable to be dismissed. (1902) 25 Mad 561 (566).

3. Collateral agreements — [1] A contract collateral to a wagering contract is not necessarily unenforceable. (Vol 31) 1944 All 196 (197) : 1 L R (1944) All 397 (Vol 6) 1919 Low Bur 71 (75). (Difference between void and illegal transactions lies in their effect on collateral transactions. It is holding of lottery that is prohibited and not receiving prize money and agent receiving such money for winners is bound to account for the same.) (1901) 23 All 165 (166) (DB) (1900-07) 1 Low Bur 128 (130) (FB).

[2] Two partners entering into wagering contract with third person — One partner satisfying liability of both — He can claim the other's share of the loss — Transactions collateral to wagers are not affected by S. 30. (Vol 10) 1923 Nag 48 (49).

[3] The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter constitutes a good consideration for the fresh agreement, though the original contract was wagering transaction, and the plaintiff is entitled to recover on fresh agreement. (Vol 25) 1938 Lah 781 (784) (DB).

[3a] A party to a wagering contract can sue to set aside an award made in pursuance of arbitration clause contained in the wagering contract. (Vol 20) 1933 Cal 759 (761) : 60 Cal 856.

Principal and agent. — [4] A contract is not illegal merely because it is for a wager. It is merely void. Accordingly, contracts which are not by way of wager, but are collateral and subsidiary to wagering contract may be enforced by a suit. Where the plaintiff, a commission agent, bets in his own name for the defendants and pays the losses, the plaintiff can recover from defendants the sums so paid. (1904) 17 C P L R 67 (73) (Vol 27) 1940 All 95 (96, 97) (1940) 2 Mad L J 997 (1000). (Dealings in stocks and shares.) (Vol 22) 1935 Lah 761 (762) : 16 Lah 1077 (DB). (Badni transaction.)

(Vol 19) 1932 Lah 356 (358) : 13-Lah 766 (DB). (A set-off of adjustment in the accounts of third parties should be treated on the same footing as cash payment by the agent.) (Vol 16) 1929 Lah 375 (376). (Badni transactions) (Vol 15) 1928 Lah 420 (422) (DB) (Vol 14) 1927 All 823 (824) : 49 All 926 (DB) (Vol 12) 1925 All 102 (102) (Agent must act as agent and not as principal.) (Vol 12) 1925 Rang 284 (286) (DB) (Vol 10) 1923 All 585 (585) : 45 All 503 (DB) (1911) 33 All 219 (222) (DB) (1908) 1908 Pun Re No. 74, p. 341 (342, 343) (DB) (Agent must prove either actual payment on his principal's behalf, or that liability has been incurred which is enforceable by law, and that surrender of claim to profits made under badni contracts does not constitute actual payment.) (1904) 14 Mad LJ 326 (328) (1901) 23 All 165 (166) (DB) (1895) 1895 Pun Re No. 80, p. 380 (386) (DB). (Agent failing to prove either an actual payment upon the principal's behalf, or that a liability has been incurred which is enforceable at law — He cannot claim set-off on that account in a suit by the principal but in such a suit it is open to the agent to repudiate his liability by advancing the plea that they were wagering transactions.)

[But see (Vol 9) 1922 Lah 408 (409). (A suit by agent against principal for loss caused to him for having entered into wagering contracts on his behalf with third parties cannot lie and the plaintiff cannot be allowed to alter their claim to one for refund of losses paid upon wagering contract.)]

[5] An agent, who has received money on an illegal contract between him and the third party, cannot put forth the plea of illegality of the contract as a defence in an action by his principal to recover money from him. (1903) 25 All 639 (641) (DB) (Vol 16) 1929 Rang 244 (244) : 7 Rang 300. (The onus lies on the principal to prove affirmatively that the agent actually received the money on his behalf.) (Vol 14) 1927 All 795 (796) (DB) (Vol 14) 1927 All 238 (238, 239) : 49 All 438 (DB) (1901) 1901 Pun Re No. 46, p. 152 (154, 155).

[6] Munim of firm of defendant entering into forward contract with plaintiff — Goods not delivered — Adjustment of accounts — Balance found due to defendant — Suit for balance — Defendant held bound by transaction entered into by munim but transaction being only for differences was wagering one and hence could not be enforced. (Vol 1) 1914 Bom 142 (144) : 39 Bom 1 (DB).

[7] Commission agent is not debarred from recovering his commission fees on the ground that they were earned in respect of services relating to wagering transactions. (1895) 1895 Pun Re No. 80, p. 380 (383) (DB).

[But see (1900) 24 Bom 227 (230) (DB). (Case under Bombay Act (III of 1865))]

[8] No proof that contract is wagering — Agent not proving that he made payments to third party on behalf of principal or entered into enforceable liability — Agent can recover from principal amount of loss sustained in such transaction. (Vol 19) 1932 Lah 273 (274) (DB).

[9] If commission and losses are agreed to be paid to broker, presumably the transaction is not a wagering one. (Vol 7) 1920 Sind 29 (30) : 14 Sind L R 227 (DB).

[10] When broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. (Vol 28) 1941 Cal 125 (127) : 1 L R (1940) 2 Cal 385.

[11] Wagering contract between agent and third party — Agent cannot claim immunity on the ground that he is only an agent for another. (Vol 20) 1933 Cal 759 (765) : 60 Cal 856.

[12] Where owing to default of his client on one side or the other, the pukka adatia has been compelled either to find goods or money, and he seeks to recover from the defaulting client the amount he has been obliged to pay, it is impossible to say that as between him and

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his client any deference of wagering can succeed. (1913) 15 Bom L R 85 (97, 98).

Pakka Adat dealing. — [13] Pakki Adat dealings are legitimate modes of conducting commercial business in Bombay market. (Vol 4) 1917 P C 101 (102): 42 Bom 373: 45 Ind App 29 (PC)* (Vol 14) 1927 Bom 125 (127) (DB) * (Vol 22) 1935 Sind 38 (41) (DB). (Pakki Adat contracts are almost necessarily of a speculative nature and bordering upon wager.)

[14] Adatia does not make contracts with third parties as agent but as principal, the constituents having no right to be brought into contact with third parties. Thus in a suit against his constituents for recovery of losses incurred by pakka adatia—on contracts entered by him with third parties for his constituents—in order to win, the defendants must prove that there was an understanding between them and the plaintiff, (i) that they were not only speculating but gambling, (ii) that there was no intention of effecting any delivery of goods, (iii) that if the plaintiff incurred losses he would be indemnified, (iv) that differences would be received and paid. (Vol 18) 1921 Bom 288 (243): 45 Bom 386 (DB).

[15] Where the correspondence between the parties showed that the plaintiff who was pakka adatia knew that defendant was gambling and not merely speculating and where he assisted the defendant in carrying on the wagers and delivery was never intended to be given or called for and where even the constituents of plaintiff knew that the transactions were to be closed either before or at the *vaidha* by payment of differences only, the transactions came within the purview of S. 30. Mere agreement to fix the losses or gains prior to the *vaidha* will not take the case out of the section under the above circumstances. Per *Macleod, C. J.*: Where pakka adatia is under contract of employment with his constituent only, bar under Bombay Act III of 1865 can defeat suit by pakka adatia. Pakka adatia contracts as principal, his constituent having no right to be brought into contact with third parties, while broker contacts agent for client who himself is personally responsible to person with whom broker contracts. (Vol 8) 1921 Bom 288 (243): 45 Bom 386 (DB).

[16] Contract between *pacca arhiya* and his constituent providing that there should be no delivery but that only difference should be paid, held wagering contract and so void. (Vol 27) 1940 All 182 (184): ILR (1940) All 136.

[17] Wagering contracts between pakka adatia and his constituents are not valid if pakka adatia has entered into other contracts to shield first contract. (Vol 7) 1920 Bom 88 (89) (DB).

[18] Contract of cutcha adatia agency is not a wagering contract. (Vol 13) 1926 P C 119 (120): 53 Ind App 241: 51 Bom 1 (PC).

4. Suit relating to recovery of deposit, winning or losses. — [1] A deposit made by one gambler with the other as security for the observance of the terms of wagering contract can be recovered unless the amount has in fact been appropriated for the purpose for which it was deposited. (Vol 31) 1944 Mad 321 (321): I L R (1944) Mad 713 (DB)

[But see (Vol 7) 1920 All 167 (167): 42 All 449. (Money deposited as security in respect of *satta* transaction (wagering contracts) cannot be recovered by suit.) S. 65 does not apply.]

[2] Claim for recovery of loss sustained in consequence of contract in nature of wager is not enforceable. Person entering into wagering contract with partner of firm as between principal and principal cannot recover losses from other partners. (Vol 17) 1930 All 525 (526) (DB).

[3] As between the original parties, a promissory note having for its consideration debt due on wagering

contract is void and so not binding in the hands of the original payee. (1898) 22 Bom 899 (902).

[4] Section 30 does not bar suit by principal against agent in receipt of prize money on a lottery on behalf of his principal. (Vol 24) 1937 Cal 297 (301): 63 Cal 1234.

[5-6] Plaintiff pledging diamond ring with manager of gambling house to obtain money for gambling—Plaintiff can recover ring by paying money advanced, agreement not being wagering agreement. (1872-92) 1872-92 Low Bur Rul 128.

[7] Person supplying money for betting in horse race to another—Actual better keeping winnings.—This is merely received on behalf of another—Suit for recovery of his share of winnings with interest is maintainable and is not barred by S. 30. (Vol 28) 1938 Mad 486 (487).

[8] Paying over which bars suit of person who has deposited money as wager and seeks to get it back means paying over upon event of wager, and does not cover application of money to other purposes. Where plaintiff in suit to recover money deposited with stakeholder does not repudiate wager but demands whole winning, he can get nothing, not even stake he had himself deposited. (1904) 1904 Upp Bur Rul 3.

[9] Deposit on a wagering contract can be recovered before it is paid over by the stakeholder. (1872-92) 1872-92 Low Bur Rul 30* (Vol 13) 1926 Rang 48 (48): 3 Rang 543. (Money paid to the winner in spite of depositor's protests cannot be recovered by the depositor.) * (Vol 5) 1918 Low Bur 77 (81). (Money paid can be recovered before contract is carried out.) * (1897) 1897 U B R 329.

[10] K owing money to N on betting transactions—N demanding and on K's refusal threatening to post him before club by way of punishment—K giving cheque to pay on a certain date—Held that N's refraining from posting K was good consideration for passing of the cheque and that S. 30 did not make a promise based on such consideration illegal. (Vol 16) 1929 Rang 241 (242): 7 Rang 263* (Vol 10) 1923 Cal 445 (448). (Where consideration for hundi was that plaintiff would not report the defendant as defaulter to the Turf Club, the consideration was held to be legal.)

[11] Suit for amount deposited by plaintiffs with stakeholder on wager is maintainable; but suit for amount deposited by both parties to wager is barred by S. 30 as it is based on wagering contract. (1908-1904) 2 Low Bur Rul 271 (271).

[12] Section 30 is applicable to prevent a case only when the party suing is claiming the amount under the terms of the contract. (Vol 15) 1928 Mad 434 (435)* (1929) 80 Pun L R 596 (597) (DB). (A suit based on a wagering contract should be dismissed, though defendant confesses judgment.) * (Vol 16) 1929 Rang 244 (244): 7 Rang 300 * (Vol 15) 1928 Mad 434 (436, 437). (Money paid to stakeholder in a cock-fight which according to plaintiff ended in draw and consequently money became repayable, is a claim based on a wagering contract.)

[13] Prohibition applies only to case of winners. Person, who has won wager or bet, cannot sue to recover amount deposited by loser with stakeholder. (1910) 12 Bom L R 590 (594).

[14] No suit lies for damages for breach of a wagering contract. (Vol 12) 1925 Mad 971 (972) (DB).

[15] A party who is not a party to fraud is entitled to get back the money which he left with another, for performance of a wagering contract. (Vol 5) 1918 Mad 163 (164) (DB).

[16] Money paid on wagering or *Badni* contracts are not recoverable. (1908) 1908 Pun Re No. 74, page 341 (344, 345) (DB).

[17] Where person lends money for the purpose of paying of gambling debt with knowledge of its being applied for payment of such debt, there is nothing to

CHAPTER III. OF CONTINGENT CONTRACTS.

"Contingent contract" defined.

31. A 'contingent contract' is a contract to do or not to do something, if some event collateral to such contract does or does not happen.

Illustration.

A contracts to pay B, Rs. 10,000 if B's house is burnt. This is a contingent contract

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disentitle him to recover back money. (1900) 22 All 452 (453, 454) (DB).

[18] If money won in a lottery is paid to third person as agent for the winner the taint would be purged by its passing into the hands of a person who is bound to account and winner can sue for recovery from the agent. (Vol 4) 1917 Low Bur 18 (21).

[19] A provision in a kuri entitling the stake-holder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable. (Vol 28) 1941 Mad 231 (234); ILR (1941) Mad 486 (DB).

[20] Kuri transaction—Successful bidder executing mortgage under terms of kuriwari, for due payments of remaining instalments—Liability on mortgage, incurred on date of its execution—The mortgage bond cannot be regarded as only affirming the pre-existing liability of the successful bidders as subscribers to the kuri obit to pay their subscriptions according to the instalments fixed in the Kuriwari. (Vol 20) 1941 Mad 231 (233)* (Vol 28) 1941 Mad 231 (233); ILR (1941) Mad 486 (DB).

5. Evidence and proof. — [1] The difference between speculative and wagering transactions is very narrow and not always clear, and depends upon the evidence in each case. (Vol 8) 1921 Sind 99 (99, 100) : 15 Sind L R 193 (DB)* (Vol 18) 1931 P C 136 (140) : 53 All 190 : 58 Ind App 173 (P C). (Question could not safely be left to decision of Commissioner under Order 26, Rule 11, Civil P. C.)

[2] The question whether the transactions between parties were wagering transactions, is one of fact. (Vol 29) 1942 P C 19 (20) (P C)* 1894 17 Mad 480 (491) (DB)* (Vol 8) 1921 Sind 99 (99) : 15 Sind L R 193 (DB).

[3] The party who sets up that an agreement is void by way of wager, should be allowed to let in oral evidence to prove that it is so. (1905) 32 Cal 437 (442) (FB).

[4] Court will not allow party, setting up defence of wagering, to interrogate his opponent generally as to his business transaction apart from the one in question. (1918) 37 Bom 347 (351).

[5] The Court must for itself find out what were primary intentions of the parties when they entered into transaction in question before it and must not be misled by the mere protestation of one of the parties as to his real intentions. (1907) 9 Bom L R 125 (137).

[6] In transactions entered through brokers according to usage of particular market, there is a strong presumption against intention to wager which can be rebutted by evidence of common intention to wager. (Vol 25) 1938 Bom 44 (46, 48, 49) (DB)* (1908) 5 Bom L R 768 (772, 776). (Contract between stock-holder and stock-jobber—But capacity to pay in delivery does not necessarily prove *bona fides* of offer.)

[7] Person alleging a transaction to be a wagering contract must show that under terms of arrangements no goods were to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of differences. (1939) 182 Ind Cas 416 (417) (P C)* (Vol 21) 1934 Nag 129 (130)* (Vol 12) 1925 Mad 330 (330) (DB). (Onus is greatly increased when both parties themselves are stock-brokers)* (Vol 11) 1924 Nag 290 (291, 292)* (Vol 10) 1923 Bom 453 (459) (DB)* (Vol 9) 1922 Bom 81 (81)

(DB)* (Vol 8) 1921 Sind 99 (99) : 15 Sind L R 193 (DB). (This is so even when the contract is between same parties)* (1894) 17 Mad 480 (491) (DB)* (1913) 37 Bom 347 (350).

[8] If the contract between pakka adatias and their constituents is a contract of employment it is not wagering contract and the pakka adatia must win unless constituent brings contract within the provisions of Bombay Act, III of 1865. (Vol 8) 1921 Bom 238 (239) : 45 Bom 386 (DB).

[9] Section 30 requires a common intention between contracting party and broker to wager and the burden lies on the former to show that the transaction is by way of wager. (Vol 7) 1920 Sind 29 (30) : 14 Sind L R 227 (DB).

[10] That there has been no delivery but only payment of differences in numerous other transactions between the parties is not enough to rebut the evidence against the contract being a wagering one. (Vol 11) 1924 Nag 290 (291).

[11] General rule in India is that Teji Mandi transactions must be regarded as wagering ones and that the onus of proving the contrary lies heavily on party alleging so. Ability to pay full price is not sure guide. (1913) 37 Bom 264 (272).

[12] The Courts must look to surrounding circumstances besides the terms of original contracts indicating the original agreement between the parties. Common intention to wager must be established, that there was to be no actual delivery but only payment of differences. (Vol 21) 1934 Nag 129 (130)* (Vol 29) 1942 All 170 (174) : 1 L R (1942) All 289 (DB). (Court is entitled to consider the course of dealings between party)* (Vol 23) 1936 Lah 215 (215). (Intention may be gathered from oral evidence)* (Vol 28) 1936 Rang 319 (321) : 14 Rang 347 (DB)* (Vol 20) 1933 Cal 759 (766) : 60 Cal 856. (Intention cannot be expected to be declared in writing)* (Vol 17) 1930 Nag 111 (112) : 26 Nag L R 125* (Vol 8) 1921 Cal 362 (362) (DB). (Court is bound to scrutinize with suspicion the defence of wagering contract set up by defendant, who has accepted payments in successful dealing but has recourse to plea of wagering contract when transactions end in loss)* (Vol 1) 1914 Bom 319 (320) : 38 Bom 204 (DB)* (1913) 37 Bom 347 (350)* (1906) 30 Bom 83 (89). (The Court must prove among all surrounding circumstances including parties' conduct)* (1903) 5 Bom L R 503 (505, 506) (DB). (Court must look into the contract itself, also at dealing of parties immediately before and after transaction and into the circumstances of persons dealing in commodities under dispute)* (1900) 24 Bom 227 (230) (DB)* (1898) 22 Bom 899 (903). (Court can even go behind written agreement.)

[13] Where it appeared that the sale price was far beyond the means of the parties, and that no attempt was made to complete the transaction by delivery of goods. Held, that parties intended, not an actual transfer of goods, but a mere adjustment of prices according to fluctuation of market rate, and that the agreement was a wagering contract. (Vol 3) 1916 Lah 329 (330).

Section 31 — Note 1

[1] Person contracting to buy shares if appointed sole agent of company—Contract is contingent. (Vol 12) 1925 All 658 (661, 662).

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations.

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay D a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything, if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.

Illustration.

A agrees to pay B a sum of money if a certain ship does not return. This ship is sunk. The contract can be enforced when the ship sinks.

Section 31 (contd.)

[2] Agreement between plaintiff and one of defendants that if plaintiff succeeded in suit with regard to certain land in defendant's possession, plaintiff should purchase same for Rs. 300 — Agreement held to be contingent contract. (1900) 2 Bom L R 118 (119) (DB).

[3] Guardian of minor entering into agreement to sell land for fixed price contingent upon leave of Court — Court sanctioning sale but at higher price — *Held*, contract was never complete contract at any time as it was contingent upon Court's permission which did not extend to whole contract as agreed. (1886) 12 Cal 152 (155) (DB).

[4] A wrote a letter to B as security for the repayment of a loan of Rs. 1½ lakhs advanced to him. The letter ran as follows "in consideration of your having at my request acceded to the proposal to advance Rs. 1½ lakhs, I hereby bind myself to procure a loan, within two weeks, of Rs. 11 lakhs on the first mortgage of the Mill property and to pay to you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you". B sued A for breach of contract contained in the letter. *Held*, that the contract was not a contingent contract but it amounted to a substantial undertaking by A that a loan of Rs. 11 lakhs should be procured and that out of the loan Rs. 1½ lakhs would be repaid to B. (1912) 36 Bom 387 (395) : 39 Ind App 152 (PC).

Section 32 — Note 1

[1] The law allows the enforcement of a contingent contract after the event upon which it was contingent has happened. (1932) 33 Pun L R 207 (208) (DB).

[2] Where the execution of a further contract is a condition or a term of the bargain, there cannot be an enforceable contract unless the condition or the term is fulfilled. (Vol 29) 1942 Pesh 33 (34, 35) (DB).

[3] Co-sharer in undivided land contracting with person to sell certain land adjoining person's land — Co-sharer promising in sale-deed to get specified land measured out and to hand it over to purchaser — Purchaser's suit for specific performance on failure of promise — Contract held depended on contingency not yet happening, hence suit premature — Contract held within S. 32 — Hence purchaser not entitled to compensation. (Vol 23) 1936 Sind 26 (23) (DB).

[4] Ante-nuptial agreement to give land in consi-

deration of marriage is contingent contract and becomes enforceable on marriage. (Vol 15) 1928 Rang 286 (287).

[5] Contingent contract depending upon future event is void if the event becomes impossible. (Vol 2) 1915 Nag 15 (16) : 12 Nag L R 69.

[6] Pleader retained by plaintiff to appear in certain suit — Plaintiff paying fees in advance — One S agreeing to pay further fees if plaintiff obtained decree — Suit compromised without pleader's advice and in his absence — *Held* that case was of contingent contract within S. 32 and event having become impossible, contract was void. (1879) 1879 Pun Re No. 155, page 440 (442) (DB).

[7] An agreement to sell land held on restricted tenure the performance of which is contingent on sanction of revenue authorities being obtained under S. 73A of the Bombay Land Revenue Code, cannot, on refusal of such sanction, be enforced specifically or an action for damages maintained for breach thereof. (Vol 15) 1928 Sind 63 (65) : 22 Sind L R 396.

[8] Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered into the contract to the performance of which such consent is necessary will not, if such consent cannot be procured, be decreed to obtain it and thus perform an impossibility. (Vol 2) 1915 Nag 15 (17) : 12 Nag L R 69.

[9] Contract to purchase shares on being made sole agent of Company — Company going into liquidation before appointing purchaser as sole agent — Latter is not liable as a contributory. (Vol 12) 1925 All. 658 (661, 662).

[10] Where a contract stated that certain conditions therein would be void if there should be any fluctuation in the rates issued by a certain syndicate : *Held*, that the non-issue of the rates by the syndicate due to its ceasing to exist did not bring into operation the condition rendering the contract void. (Vol 8) 1921 P C 46 (47) (PC).

Section 33 — Note 1

[1] Acceptance by telegram with condition that it would be confirmed by post if mistake found in telegram — Condition is, what is known as condition subsequent — Contract is complete subject to the "uncertain future event" which is possible discovery of telegraphic mistake. (Vol 9) 1922 All 219 (221, 222) : 44 All 472 (DB.)

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

otherwise than under further contingencies.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or

Illustration.

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die, and that C may afterwards marry B.

When contracts become void, which are contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

will not happen.

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired, and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event

Illustrations.

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations.

(a) A agrees to pay B 1000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

Contracts which must be performed.

37. The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Section 35 — Note 1

[1] In contracts under S. 35 the specified event as a rule is independent of will of either party. There is no question of breach of any agreement. (Vol 10) 1928 Rang 26 (26) : 4 Upp Bur Rul 99.

[2] Where in surety bond surety undertook to get judgment-debtor to deposit decree amount before certain date or to pay amount himself in case of default, and judgment-debtor died before specified date : *Held*, that S. 35 (2) applied to case and not para. (1). Specified uncertain event was the payment of the decretal debt by the judgment-debtor and as that event did not happen before the specified event, the contingent contract became enforceable. (1910) 8 Ind Cas 985 (986) (Low Bur).

[3] Sale contingent on not repaying amount within certain time is contingent contract and becomes void if payment is made within that time. (Vol 13) 1926 Bom 107 (107, 110) (DB).

Section 37 — Note 1

[1] The Hindu law rule of 'damdupat' is "other law" within the meaning of S. 37 and that section"

therefore does not affect the operation of the rule of damdupat (Vol 33) 1916 Nag 210 (212) : 1 L R (1916) Nag 407 (DB).

[2] Legal representatives have right to require specific performance or are bound by promise to perform contract in absence of contrary intention. (Vol 13) 1920 Bom 97 (100) : 49 Bom 862 (DB).

[3] A contract for pre-emption can be enforced against the representatives of the parties to the contract and also against a person who has taken the property affected by the contract with notice of the contract. (Vol 11) 1924 All 657 (658) : 46 All 514 (DB).

[4] Lease for building and residential purposes does not fall within the class of personal contracts contemplated by S. 37. Upon death of lessee tenancy is not determined, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. (1910) 37 Cal 877 (881) (DB).

[5] Where certain co-sharers agree to divide profits in particular manner, the agreement is binding on their heirs until it is terminated. (Vol 21) 1934 All 139 (141) (DB).

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations.

(a) A promises to deliver goods to B on a certain day on payment of Rs. 1000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1000 to A's representatives.

(b) A promises to paint a picture for B by a certain day at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

38. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Effect of refusal to accept offer of performance.

Every such offer must fulfil the following conditions:—

- (1) it must be unconditional;
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration.

A contracts to deliver to B at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Section 37 (contd.)

[6] Under S 37 promises bind representatives of promisors before performance. Hence registered contract of lease by Hindu father would bind his son, especially if he has possession of property, subject of lease, during the period for which rent is claimed. ('02) 1902 Pun Re No. 4, page 7 (8) (Rev).

[7] Partition between two brothers—Agreement that if share of one is sold, the other would be entitled to buy for certain price is enforceable against sons of parties. Section 14, Transfer of Property Act, does not invalidate agreement. (Vol 31) 1944 Nag 187 (187, 188) : I L R (1945) Nag 174.

[8] Vendee undertaking to pay off mortgage—On default sale of mortgaged property effected—Mortgagee becoming owner after final foreclosure decree—There is breach of contract and after vendee's death sons are liable. (Vol 15) 1928 Oudh 148 (151) (DB).

[9] A universal legatee is the legal representative of the deceased testator and is liable for the debts of the testator to the extent of property of the testator in his hands. (Vol 23) 1936 Oudh 7 (9) : 12 Luck 1 (DB).

[10] Personal contract by manager of joint Hindu family—Other members are not his representatives and cannot enforce it after his death. (Vol 10) 1923 Pat 589 (589, 590) (DB).

[11] Complete and concluded contract followed up by performance of material terms — Parties are bound in equity by contract, though it is deficient in some requirement as to form. (Vol 21) 1934 Cal 235 (238) : 30 Cal 1372 (DB).

[12] It is not obligatory under S 37 to make a decree according to the terms of the contract and on no other terms. (Vol 26) 1939 Pat 55 (60) : 18 Pat 13 (FB).

[13] Assignment of contract—Parties may agree that one of them should drop out and third person assume benefit and liabilities of contract — Third party's consent need not be express. (Vol 27) 1940 Cal 466 (469) : I L R (1940) 2 Cal 53.

[14] A usufructuary mortgagee who has agreed to pay off the creditors mentioned in the mortgage but has failed to perform his part of the contract is not entitled to get possession from the mortgagor under the terms of the mortgage. (Vol 11) 1924 Oudh 425 (426) : 27 Oudh Cas 60.

[15] In an ejectment suit, the defendant pleaded an agreement for grant of a permanent lease to him, which could be enforced. Defendant had failed to perform his part of the contract. *Held*, that he could not rely on the agreement and he could be ejected. (Vol 20) 1933 Pat 579 (581).

SECTION 38 — Synopsis

1. Scope.
2. Tender.
3. Tender in part.
4. Unconditional tender.
5. "Able and willing."
6. Reasonable opportunity of inspection.
7. Tender to one of joint promisees.
8. Refusal or acceptance of offer.
9. Waiver of tender.

1. Scope.—[1] Section 38 requires, in case of payment, a genuine and unconditional offer to pay unconditionally at a proper place, made by person in a position to pay. (1880) 5 Cal L R 105 (107).

[2] Section does not apply to a case of principal and agent. (Vol 10) 1923 Pat 464 (465) : 2 Pat 585 (DB).

[3] In construing S. 38, rule of English law as to tender should not be relied on. (Vol 26) 1939 Cal 131 (133) : I L R (1938) 2 Cal 337.

2. Tender. — [1] Where payee does not agree to accept payment to third party as equivalent to payment to himself there is no proper tender. (Vol 12) 1925 Lah 180 (181).

Section 38 (*contd.*)

[2] A formal tender is unnecessary when its refusal is quite evident (Vol 10) 1923 P C 26 (28) : 50 Ind App 41 : 46 Mad 108 (PC).

[3] Where condition in contract that notice should be given of arrival of goods is not essential part of it, failure to give such notice or mistake in notice given, is not breach of contract entitling one party to avoid it. Nor can that notice by itself be deemed to be offer of performance within meaning of S. 38. Where on receipt of notice of arrival of goods, one party has to apply for delivery of goods but fails to do so, he commits breach and is liable in damages. (Vol 3) 1916 Mad 1066 (1067) (DB).

[4] A valid tender on a contract of debt is as much a performance and discharge of a debtor's duty as an actual payment. (Vol 15) 1928 Cal 68 (70) : 55 Cal 624 (DB).

[5] Offer of performance is not discharge of obligation. (10) 20 Mad L Jour 709 (713) (DB).

[6] Promisor, after he makes a tender is not responsible for non-performance and will not be required to pay interest from date of tender. (10) 20 Mad L Jour 709 (713) (DB).

Tender by cash. [7]—The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. (Vol 25) 1938 P C 26 (32) (PC).

[8] Agreement entered into in London — One party employed by the other in New Zealand on certain remuneration of \$700 sterling — The word "sterling" held, referred to English Currency and not to New Zealand one. (Vol 25) 1938 P C 136 (138) (PC).

[9] Where there is an obligation to pay a foreign unit of account, the form must be regulated by the municipal law of the country whose unit of account is in question and what would be a legal tender must depend upon the law in force at the time when the tender should have been made. (Vol 26) 1939 P C 74 (77) (PC).

[10] Mortgage in one country covenanting repayment of given number of notes of different country — Tender of equivalent of such notes in currency of former country according to market rate in such country held proper. (Vol 30) 1943 P C 69 (71) (PC).

[11] In the case of money claims, in order to stop the running of interest a tender before suit must be followed by payment into Court. (Vol 19) 1932 Mad 109 (111) : 55 Mad 458 (DB).

[12] Tender by cheque will be valid tender if the person to whom it is tendered is willing to receive payment by a cheque. (Vol 16) 1929 Mad 230 (232) : 52 Mad 322 (DB).

[13] Debtor sending *hawala* to creditor to be presented to debtor's debtor and get payment — Creditor not presenting it due to his own laches—Debtor's debtor becoming insolvent — Debt can be deemed satisfied. (Vol 28) 1936 Rang 164 (165) (DB).

[14] Payment by voucher—Creditor accepting voucher and presenting it at treasury—Voucher not cashed due to mistake of creditor in endorsing it — Tender held valid. (Vol 25) 1938 All 15 (16) (DB).

3. Tender in part.—[1] Creditor is not bound to reduce costs of proceedings by accepting tender of part payment and thereby bringing suit within pecuniary jurisdiction of less costly tribunal. (Vol 26) 1939 Cal 131 (134) : 1 L R (1938) 2 Cal 337.

[2] Rule treating tender of part of debt as nullity

applies only when tenderor admits that more is due than is tendered. (192) 16 Bom 141 (150).

[3] Part payment is no valid tender—Its acceptance will not preclude a creditor from claiming the residue unless under a condition of tender, he accepted it in full discharge.—If there are several distinct debts, the tenderor should make appropriation specific or it will not be good for any. (Vol 10) 1923 Cal 527 (530) (DB).

[4] Refusal of cheque on the ground that it was for less amount and not that it was not in cash is wrong—The tender is valid. (Vol 18) 1931 Bom 118 (120) : 55 Bom 525 (DB).

[5] Where tender made by the lessee is not for the full amount which was due and the name of the sender is not disclosed, the tender is invalid. (Vol 27) 1940 Nag 140 (141).

[6] Tender to be proper must be of whole amount due — This applies to mortgages also. (Vol 10) 1923 Oudh 241 (242) : 26 Oudh Cas 59 (DB).

[7] Tender of principal only where interest is expressly stipulated is not a proper tender. (Vol 3) 1916 Mad 1040 (1040).

[8] Mortgage deed providing for payment by yearly instalments and also delivery of possession—Mortgagee held could not refuse tender of the yearly instalment on the ground of the breach of the condition for delivery of possession. (Vol 10) 1923 P C 26 (28) : 50 Ind App 41 : 46 Mad 108 (P C).

[9] Where only for one consideration, a party to contract undertakes to do number of things which constitute only one contract, contract cannot be enforced piecemeal. (Vol 30) 1943 Nag 266 (269) : 1 L R (1943) Nag 643.

4. Unconditional tender. — [1] Incomplete or conditional tender is not equivalent to payment. (Vol 9) 1922 P C 347 (349) (PC) (Vol 18) 1931 Nag 91 (93).

[2] Deposit in Court not good if made with condition — But if accepted by Court and upon objection by decree-holder, petitioner withdrew condition, it cannot be held as invalid. (Vol 10) 1923 Pat 418 (419, 420) : 2 Pat 534 (DB).

[3] If the offer is accompanied by a condition which prevents it from being perfect or complete in itself, it is not equivalent to payment, and the promisee is under no obligation to accept it. Where the plaintiff sends a single cheque for two items, only one of which was due at the time while the other was payable after some time the cheque being one and indivisible can be accepted as a whole or not at all, and hence the tender of one of the items by that cheque is not good and the promisee is therefore within his rights in rejecting it. (Vol 23) 1936 Lah 168 (175, 176) (DB).

[4] Conditional tender of rent demanding receipt that tenant paying rent was *kaimi* riyat is not good tender. (Vol 6) 1919 Cal 332 (333).

[5] Debtor tendering portion of debt and asking creditor to take that in full satisfaction — This is tender with condition—Creditor is entitled to reject it. (Vol 11) 1924 Bom 264 (272).

[6] Where tenant tendered reduced amount of rent and interest on arrears, on plea that not having been in possession of entire area he was entitled to abatement of rent, but no ground was made out for such abatement, tender is not good tender. (14) 41 Cal 493 (513) : 40 Ind App 223 (PC).

[7] Tender is not valid *pro tanto* if larger sum is in fact due and if tender is accompanied by demand for cancellation and delivery of mortgage deed. (Vol 2) 1915 Mad 402 (404).

[8] Tendering higher priced goods, cannot be performance of contract. (Vol 9) 1922 Mad 28 (30) (DB).

Section 38 (*contd.*)

[9] There cannot be tender or agreement to waive tender of unascertained sum. Offer to pay amount found due on settlement of accounts if payee undertook to execute indemnity bond, is not valid tender. ('11) 34 Mad 320 (322) (DB).

[10] A tender made "under protest" is not bad in law. Similarly the tender of more than what is due is also good. (Vol 23) 1936 Lah 168 (175) (DB).

5. "Able and willing." — [1] Offer made by promisor through solicitor to pay debt with interest due thereon on date of offer does not of itself afford reasonable opportunity to promisee of ascertaining whether promisor is able and willing to perform his promise—Offer to representatives of creditors stands on same footing. (Vol 26) 1939 Cal 131 (133); ILR (1938) 2 Cal 337.

[2] Plea of tender is good only if it is accompanied by deposit in Court. It must not only allege that person raising plea is still ready. (Vol 15) 1928 Cal 874 (875) (DB).

[3] Mere offer by postal letter to tender expenses of sale and registration by vendee is not legal tender. (Vol 2) 1915 Mad 546 (547) (DB).

[4] Offer to perform — Must fulfil all requirements regarding delivery. (Vol 5) 1918 Low Bur 97 (100).

[5] In order to be considered to be ready and willing to deliver, a seller need not be in physical possession of the goods. (Vol 12) 1925 Mad 971 (972) (DB).

[6] Vendor to notify an arrival of goods from Mills and vendee to take delivery at vendor's godowns — Vendor need not prove presence of goods at godowns. (Vol 12) 1925 Mad 1290 (1291) (DB).

[7] Contracts of purchase — Defendants offering to deliver goods to plaintiff though they themselves had not taken delivery from their own vendors—Plaintiff refusing though repeatedly asked — Tender held valid and plaintiff held committed breach. (Vol 12) 1925 Mad 888 (889).

[8] Mere expression by letter of willingness or readiness to deliver is not proper offer, nor willingness to execute release deed without having document ready for delivery. (Vol 2) 1915 Mad 210 (216); 38 Mad 959 (DB).

6. Reasonable opportunity of inspection.—[1] Section 38 only requires reasonable opportunity to be given to buyer to examine goods sold. (Vol 5) 1918 Low Bur 144 (144) & (Vol 14) 1927 Mad 62 (65) (DB) & (Vol 12) 1925 Mad 1168 (1171) (DB). (Promisor is under no obligation to prove identity of goods.)

[2] Natural place of inspection is place of delivery unless such place is not final destination of the goods to vendor's knowledge and inspection at that place is unsuitable or unreasonable. (Vol 19) 1932 Cal 879 (883); 39 Cal 928.

[3] Though joint survey would be, by itself, reasonable opportunity, yet it is not essential element to constitute reasonable opportunity. Also it cannot be taken that purchaser is entitled to continue inspecting and examining goods until expiration of period for delivery. Reasonable opportunity afforded for examination is reasonable limit alike for vendor and purchaser. (1881-82) 6 Bom 692 (698, 699). (Period of twenty-four hours held to be reasonable opportunity.)

[4] Vendor not bound to see that purchaser takes delivery in time when he has accepted tender of delivery and drawn samples. (Vol 8) 1916 Sind 35 (36); 9 Sind L R 160 (DB).

[5] Tender of money locked up in box or of goods enclosed in case, which other party is not allowed to open is not sufficient tender and plea of tender as an answer to action is incomplete unless accompanied by tender in Court. (Vol 2) 1915 Mad 210 (216); 38 Mad 959 (DB).

7. Tender to one of joint promisees — [1] Coheirs of a single promisee are not joint promisees within the meaning of S. 38 ('09) 1 I C 219 (219) (DB) (Mad).

[2] Assignees of mortgagee are not joint promisees within S. 38 — Receipt by co assignee of his share of mortgage-debt, is not on behalf of others—His liability to account for amount realised cannot be enforced. (Vol 26) 1939 Mad 818 (822) (DB).

[3] Mortgagees must be regarded, unless contrary is shown, as to be in position of tenants-in-common. Payment to one of two mortgagees is not discharge of mortgagor's liability to the other. (Vol 8) 1921 Pat 27 (28); 5 Pat L Jour 376 (DB). & (Vol 5) 1918 Upp Bur 19 (21); 3 Upp Bur Rul 42.

[4] This section does not deal with legal consequences of accepted tender. ('13) 36 Mad 544 (545) (FB). (Per *White C. J.* dissenting from the Full Bench decision—Per Full Bench: Payment to one promisee has legal effect of payment to all joint promisees.) & (Vol 32) 1945 All 511 (515, 516); I L R (1945) All 165 (DB). (Particularly so if it is not *bona fide* and is either collusive or fraudulent.) & (Vol 4) 1917 Lah 443 (445, 446); 1917 Pun Re No. 68 (FB). (Payment of mortgage money to one of several co-mortgagees, without consent of other mortgagees is not discharge that will bind all mortgagees. Section does not deal with case of offer accepted by one of several joint promisees but refers only to case of offer which has been rejected.) & (Vol 1) 1914 All 518 (518) (DB).

[See also (Vol 15) 1928 Bom 420 (421) (DB). (Collusive and fraudulent payment of rent to one does not mean payment to whole body of landlords.) & ('12) 35 Mad 685 (687) (DB). (Do.)]

[But see (Vol 24) 1937 All 527 (527). (Payment of rent to one of co-sharers gives valid discharge.) & (Vol 12) 1925 Mad 261 (263); 48 Mad 693 (DB) & ('23) 73 Ind. Cas 682 (687) (Pesh). (In absence of fraud or intention to defeat rights of other mortgagees payment to one of the several joint mortgagees discharges the mortgagor) & ('09) 1 Ind Cas 219 (219) (DB) (Mad). (Payment to one of joint mortgagees discharges mortgagor.) & ('93) 1893 Pun Re No. 60, p. 267 (271) (DB). (Adult co-owner of house is competent to demand rent payable jointly to himself and to minor co-owners, and grant valid discharge, so as to bind minors.)]

[5] *Obiter*—Acceptance by one of joint promisees absolves debtor from liability to the other where postal money order is addressed to both. (Vol 10) 1923 All 465 (466).

[6] See also under Section 43.

8. Refusal or acceptance of offer. — [1] Mortgagee's reply to equity of redemption that no tender need be made as mortgagor's right has vested in him but also mentioning the amount due on the mortgage, is not a refusal of a tender, so as to stop running of interest. (Vol 10) 1923 P C 26 (28); 46 Mad 103; 50 Ind App 41 (P C).

[2] Interest ceases to run when valid tender is improperly refused. (Vol 13) 1926 Cal 310 (311) (DB) & (Vol 16) 1929 Mad 230 (232); 59 Mad 322 (DB). (Creditor is estopped from disputing validity of tender on ground that it was by cheque.) & ('11) 34 Mad 320 (322) (DB). & ('09) 10 Cal L Jour 538 (541) (DB) (It does not, however, extinguish indebtedness.) & ('07) 34 Cal 305 (323) (DB).

[3] Debtor ready to pay dues under contract—Creditor dead — No legal representative—Interest ceases to run till there is a proper representative capable of giving valid discharge. ('08) 4 Mad L Tim 335 (339).

9. Waiver of tender.—[1] Contract of repurchase — Production of cash only is strict compliance but vendee's conduct may amount to dispensation with literal compliance. (Vol 12) 1925 Oudh 533 (534) (DB).

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations.

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

SECTION 39 — Synopsis

1. Scope and applicability.
2. "Disabled himself from performing."
3. "In its entirety."
4. "Promisee may put an end to the contract."
5. Waiver.
6. Promisor's insolvency—Effect.
7. Contract of service.
8. Compensation for breach.
9. Rescission — Plaintiff's default — Effect.
10. Restitution.

1. Scope and applicability. — [1] Section 39, Contract Act, applies to cases of what are called "executory" contracts and not to "executed" contracts. (Vol 31) 1944 Pat 8 (5) : 22 Pat 306 (DB).

[2] Section 39 does not apply to transaction which is an actual conveyance of immovable property. (1877-78) 2 Bom 547 (548) (DB) * (Vol 4) 1917 Pat 514 (515) : 2 Pat L Jour 168 (DB) * (1912) 34 All 273 (277) (DB).

[See also (Vol 17) 1930 All 506 (508) (DB)]

[3] The word "anticipatory" nowhere occurs in the section. This section applies to all breaches which occur before the expiry of the last date on which the contract can be performed in the whole or in part though it also covers all earlier breaches. (Vol 14) 1927 Lah 693 (695, 696) : 8 Lah 501 (DB).

[4] Section 39 only enacts what was the law in England and the law in India before the Act was passed. The illustration (a) is not quite happy and is likely to lead to misapprehension. (1879) 4 Cal 252 (256) (DB).

[5] Remedy in S. 39 is not only remedy to party who has done his part of contract ; he can also sue other party to recover debt, arising from part of contract done by him. (1910) 34 Bom 192 (198) (DB).

2. "Disabled himself from performing." —

[1] Where a party has by his own conduct made it impossible for himself to perform his contract in its entirety within the stipulated time, the other party is legally entitled to put an end to the contract without incurring any liability for damages. (1931) 32 Pun L R 593 (597) (DB).

[2] East Africa Order, 1897, Part IV, Art. 11 (b)—Party bound to convey timber by wagons, selling off wagons and oxen and disabling himself from performing his promise in its entirety — Promisee may put an end to the contract. (Vol 6) 1919 P C 190 (192) (PC).

[3] Where a widow enters into a compromise with the sole person entitled to the estate, whereby she obtains a life estate in the property on condition that she would not exercise the right of adoption conferred by her husband, she cannot take any advantage under the compromise if subsequently she adopts in pursuance of the authority of her husband. (Vol 14) 1927 Oudh 265 (275) (DB).

[4] Contract of affreightment—Demand by shipper for space as per terms of contract — Fact that shipper had

no goods to ship and was attempting to obtain advantage due to rise in freight does not entitle the shipowner to repudiate the contract—On the date of demand it cannot be said that shipper had disabled himself from performing his part of the contract under S. 39. (Vol 28) 1941 Sind 146 (150).

[5] Party not to cut trees more than he had paid for—Cutting in breach—Promisee entitled to rescind. (Vol 9) 1922 Oudh 259 (268) : 25 Oudh Cas 169 (DB).

[6] The defendant agreed to sell to plaintiff property, for a certain sum which he had received from plaintiff, after buying the property at an auction sale. The defendant bought it, but by collusion with a third person put it out of his power to perform his part of the contract. The plaintiff sued for the refund of his money — Held, that a suit lay for cancellation of the contract under S. 39, and was triable by Small Cause Court for the refund of the amount. (Vol 16) 1929 All 62 (62).

[7] Agreement between landlord and tenant — Tenant to use specified area for grove — Tenant breaking condition by using small portion for other purposes — Zamindar is entitled to eject the tenant if he has not acquiesced in the breach. (Vol 15) 1928 All 117 (118).

3. "In its entirety." — [1] Right of rescission arises only when other party fails to perform contract in its entirety. (1912) 6 Sind L R 103 (106) (DB).

[2] Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. (1906) 33 Cal 477 (482) (SB). (1874) 9 C P 208, applied.)

[3] Repudiation must be total, absolute and clear. (Vol 11) 1924 Bom 247 (251) : 47 Bom 924 * (Vol 18) 1931 Rang 126 (126).

[4] Where there was contract to deliver goods in two instalments and plaintiff failed to tender for, or take delivery of, first instalment although market was in his favour, but, as regards second instalment, made tender which defendants refused to recognise because of such failure, held, under circumstances, conduct of plaintiff had not amounted to renunciation, to absolute refusal to perform contract, such as would amount to rescission and therefore defendants could not accept it as reason for not performing his part. (1906) 33 Cal 477 (482, 484) (SB).

[5] Where a party to a contract complains about delay in carrying out the contract and protests against the other party's right to put an end to it, it cannot amount to a refusal to perform. (Vol 11) 1924 Cal 427 (431) (DB).

[6] Mortgagee failing to pay part of the consideration—S. 39 does not apply. (Vol 17) 1930 All 506 (508, DB) * (Vol 14) 1927 Oudh 527 (527) (DB) * (1907) 11 Oudh Cas 69 (75, 76) (DB). (Mortgagor can sue mortgagee for damages for non-performance of contract where mortgagee undertook to pay off prior mortgagee

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with part of consideration left with him.) * (1906) 10 C W N 932 (933) (DB).

[But see (06) 1906 Pun Re No. 103, page 363 (366) (DB).] (Mortgage—Part of consideration left with mortgagee who undertook to pay off prior encumbrance with it—Default by mortgagee—Mortgage contract never came into existence owing to non-payment of consideration as agreed—Even if there was a completed contract it came to an end owing to mortgagee's default to carry out its terms—This was a case of rescission under S. 39—Mortgagee cannot claim repayment.) * (1895) 18 Mad 126 (127). (Mortgage—Part of consideration left with mortgagee to pay prior mortgagee—Default—*Held*, that mortgagor was entitled to cancel the mortgage under S. 39, but mortgagor was bound to give up the benefit he had received—Mortgagee was not entitled to treat the mortgage as one in force for the sum already received.]

[7] Property mortgaged for 15 years in consideration of mortgagee paying mortgagor's decree-holder—Mortgagee making default, mortgagor pays off decree-holder—Mortgagor entitled to redeem before expiry of 15 years as mortgagee breaks condition. (Vol 14) 1927 Oudh 12 (14) : 2 Luck. 279 (DB).

[8] Contract for supply of goods contained condition regarding cash payment on delivery of railway receipts but credit had for long been allowed to purchaser—Rescission of contract on ground of purchaser's refusal to pay cash on one occasion cannot be sustained under S. 39. (Vol 1) 1914 Lah 298 (301) : 1914 Pun Re No 63 (DB).

[9] Defendant in Madras agreed to take goods to be supplied by plaintiffs by monthly shipments from England. There was also proviso in agreement by which plaintiffs were excused from monthly shipments if space in ships sailing for Madras was not available. Second shipment was not made within one month from first, though ship was available few days earlier for such shipment. Defendant having rescinded contract, plaintiffs sued him for damages for non-acceptance : *Held*, reasonable construction was that interval contemplated by parties to agreement was not precisely one month or 30 days, but one month more or less, regard being had to time which it may be reasonable to allow to plaintiff to find steamer available for required shipment ; and that, plaintiffs having failed to make second shipment by steamer which was available, defendant was entitled to rescind contract. (1895) 18 Mad 63 (70, 72) (DB).

[10] The defendants who contracted to purchase 25 bales of yarn from the plaintiff and take delivery of the bales one day after notice of arrival, took delivery of three bales and did not take delivery of seven bales, though notice was given about their arrival as well. The plaintiffs treated this as a repudiation of the entire contract and did not give notice of arrival as regards the remaining 15 bales. In a suit by plaintiffs for damages for breach of contract in respect of 22 bales, held, the plaintiffs were not entitled to treat the conduct of the defendant as a repudiation of the entire contract and were bound to give the notice. (Vol 12) 1925 Mad 1290 (1291) (DB).

[11] Talking of refusing to perform but asking for further information and speaking of sending definite reply when it arrives is no repudiation. (Vol 9) 1922 Mad 28 (29) (DB).

[12] Unreasonable postponement will entitle vendor to terminate contract for sale of land. (Vol 8) 1921 Mad 141 (142) (DB).

[13] Where, in contract, under which defendants agreed to deliver certain goods to plaintiffs, to be paid for, on delivery, defendants made part delivery, for which, however, plaintiffs declined to pay until certain

cross claims of theirs had been adjusted, and defendants, thereupon, refused to deliver remainder and cancelled contract, it was held that there was not such refusal on part of plaintiffs to perform their part of contract as to entitle defendants to rescind under S. 39. (1879) 4 Cal 252 (256) (DB).

[14] Contract for sale—Vendor unable to make out good title—Vendee can repudiate contract under S. 39 or treat the case as one of want of mutuality. (Vol 14) 1927 Bom 195 (202, 203) : 51 Bom 247 (DD)

[15] Sale of house—Possession not delivered forthwith—Vendee can rescind contract. (32) 1932 Mad W N 122 (125) (DB).

[16] Agreement by B to supply goods to A—Ready delivery within one week—Delivery of all the goods within one week not asked for by A—A held had impliedly refused to perform the contract in its entirety and S. 39 applied. (1911) 10 Ind Cas 18 (20) (Oudh).

[17] Promise of indemnity is an implied term of the contract of agency, hence the refusal of the principal to indemnify the agent for any act done by him in the course of agency, justifies him to rescind the contract of agency under S. 39. (Vol 2) 1915 Sind 30 (32) : 9 Sind L R 77 (DB).

[18] Parties to a contract agreeing to substitute old contract by a new one, by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for balance—Cash not paid—Assuming that registration receipt was offered to promisee and he refused to accept it, held that promisor refused to perform his part of the contract in its entirety as cash payment was part of agreement of passing liability for balance on mortgage bond—S. 39 applied and parties were relegated to their own position under the old contract—There was no novation under S. 62. (Vol 27) 1940 Pat 121 (124) (DB).

[19] Promisee is not bound to accept part performance. (21) 3 Lah L Jour 141 (144) (DB).

[20] The party repudiating the contract is entitled before the date fixed for completion of the contract to withdraw his repudiation, unless and until the other party has accepted the repudiation and elected to treat the contract as terminated, and to insist upon the contract being performed in its entirety. (Vol 12) 1925 Lah 217 (220) : 5 Lah 497 (DB) * (Vol 14) 1927 Lah 693 (695, 696) : 8 Lah 501 (DB).

[21] Under a contract for sale, yarn to be delivered on steamer at Madras in July, August and September, in three shipments—No yarn shipped in July and August, but ten bales shipped together in September—Defendant not complaining of even delays in deliveries but just before tender of the goods, gave notice to plaintiffs of his intention to put an end to entire contract—Defendant was not entitled to rescind entire contract but plaintiffs should be awarded damages in respect of the bales allocated for the September shipment. (Vol 8) 1921 Mad 675 (676) (DB).

4. "Promisee may put an end to the contract."

[1] Repudiation by promisor before time of performance—Promisee may at once accept repudiation and bring his action as on a breach of it, or he may treat notice of intention as inoperative and await the time for performance and then hold the other party responsible for all the consequences of non-performance—Contract is not necessarily broken by the mere notice of intention to break the contract. (Vol 13) 1926 Mad 778 (781) : 49 Mad 681 (DB) * (Vol 12) 1925 Lah 217 (220) : 5 Lah 497 (DB) * (12) 6 Sind L R 187 (189) (DB) * (1872) L R 7 Ex 111 (112, 113). (Same considerations apply to a contingent contract.) * (1868) 1 Mad H O R 162 (163).

[2] Where the promisee treats the notice of intention of promisor not to perform the contract as inoperative, the promisee keeps the contract alive for the benefit of

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the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. (Vol 13) 1926 Mad 778 (781) : 49 Mad 781 (DB) & (Vol 9) 1922 Bom 303 (312) : 46 Bom 489 (DB) & (11) 1 Mad W N 265 (266) (DB) & (1872) L R 7 Ex 111 (112).

[8] Repudiation before time of performance — Acceptance determines the contract — Party repudiating cannot turn round and insist on performance or sue for damages for non-performance. (Vol 12) 1925 Lah 217 (220) : 5 Lah 497 (DB).

[4] Where one party to contract has not merely offered to cancel the contract but has definitely expressed an unalterable resolve to refuse to perform it, the other party to the contract may accept the termination several months after the offer after making vain efforts to induce the buyer to change his mind. This is to be distinguished from the case where one party to a contract makes a definite offer to put an end to the contract and that offer has been definitely rejected by the other party, in which case it will not be open to the latter party to cancel the contract several months afterwards by merely accepting the offer to terminate the contract. (Vol 12) 1925 Lah 217 (220) : 5 Lah 497 (DB).

[5] On renunciation of a contract by one party, the other party will be justified in regarding himself as discharged from all liability. (Vol 3) 1916 Cal 136 (147) : 43 Cal 790 (DB).

[6] A, party to contract informing his intention not to perform contract to B, the other party to contract — Contract terminates when B exercises his option of treating the contract as cancelled, and so, breach takes place when A receives letter of cancellation. (Vol 21) 1934 All 740 (764) : 56 All 828 (DB). (Reversed on a different point in (Vol 25) 1938 P C 165 : 65 Ind App 182 : I L R (1938) All 601 : 32 Sind L R 531 (PC).)

[7] Contract for sale — Defect in vendor's title — Vendee cannot be compelled to rescind contract or accept the title without investigation. (Vol 7) 1920 Mad 859 (861) (DB).

[8] Contract for lease of toll—Default by contractor in payment of kist—Re-sale of toll—Sale postponed for want of bidders — Subsequent sale and suit for loss incurred—*Held*, that notice of re-sale put an end to contract—S. 39 applied and not Ss. 107 and 68—Limitation for suit for loss ran from date of re-sale and not date of actual sale. (Vol 20) 1933 Mad 704 (706).

[9] Per *Scott, C. J.*—The fact that party to contract under S. 39, when other side has refused to perform it, may put an end to it and sue for compensation for breach, does not oblige him to take that course at his peril; he may, if he prefers it, sue to recover any debt due to him which has arisen from his execution of his part of contract. (10) 34 Bom 192 (198) (DB).

[10] Repudiation of the contract by one of several joint promisors entitles the promisee to rescind the contract as against others. (09) 19 Mad L Jour 28 (31) (DB).

5. Waiver.—[1] Promisor refusing to perform his part of the contract in its entirety — Promisee not rescinding contract but acquiescing in its performance — Promisee not entitled to demand price under the contract before the date due under the contract. (Vol 12) 1925 P. C. 188 (193) (PC).

[2] Legatee agreeing to pay *guzara* to testator from date of execution of will — Will executed — Legatee making default in payment of *guzara*—Will not revoked by testator — Legal representatives of testator cannot

revoke will and rescind contract. (Vol 33) 1946 Oudh 193 (209, 210) : 21 Luck 314 (DB).

[3] Mortgage suit — Preliminary decree—Subsequent agreement—Plaintiff agreeing to take property at valuation less than amount fixed by preliminary decree — Judgment-debtor agreeing to pay additional sum—Security for latter offered — Default — Plaintiff asking for personal decree for amount due on preliminary decree and also praying execution against surety — Plaintiff is not estopped by acquiescence from proceeding with preliminary decree from the mere fact that the plaintiff mistakenly pursued both the remedies at the same time. (Vol 25) 1938 Rang 353 (355) (DB).

[4] Contract for sale of property—Portion of purchase money left with vendee — Vendor being unable to give possession of property sold, vendee obtaining possession of other equivalent property but making default in payment to creditor—*Held*, that vendee having waived his right to put an end to the contract, was bound to return the balance of the purchase money as agreed. (Vol 21) 1934 All 617 (618).

[5] Contract of agency continuing—Principal is liable to pay agents' commission according to agreement till their dismissal in spite of all shortcomings in discharge of their duties as there was acquiescence in the continuance of managing agency. (Vol 16) 1929 All 87 (94) (DB).

[6] Contract to sell timber—Vendor insisting on payment of full price before vendee can be allowed to remove timber—Vendor selling part of contract timber to third party — Vendee keeping contract alive, has no cause of action to sue for damages if he claims credit for value of timber sold. (Vol 17) 1930 Lah 979 (982) (DB).

6. Promisor's insolvency — Effect.—[1] A bare notice of insolvency does not necessarily and in all cases amount to a declaration of intention not to fulfil obligation under the contract. It is a question of fact in each case. (Vol 1) 1914 Sind 53 (55) : 8 Sind L R 95 (DB).

7. Contract of service. — [1] Sections 39 and 64 and justice, equity and good conscience require that servant who quits his master's service in India before expiry of contract period, should be ordinarily paid for full period he worked under master deducting the damages caused by breach. (12) 23 Mad L Jour 680 (682).

8. Compensation for breach. — [1] Repudiation by promisor before time of performance—Acceptance by promisee and later suing at once for damages for non-performance—Promisee will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. (1872) L R 7 Ex 111 (113) & (12) 6 Sind L R 187 (189) (DB). (Law as to damages as in case of anticipating breach of forward contracts discussed.)

[2] If a promisor performs his promise after the time fixed for performance and the promisee accepts the performance, the promisor is not liable to damages unless at the time of accepting performance the promisee gives notice of his intention to claim compensation. (12) 14 Ind Cas 129 (130) (All).

[3] Contract to pay debts of another — Breach — Starting point of limitation for suit for damages for breach—Time does not begin to run against the promisee from the date of repudiation of agreement by the promisor—Fact that promisee himself paid the debts in itself gives him no cause of action—If the promisee paid them before the expiry of a reasonable time after the agreement, the defendant may plead want of reasonable time to perform and that consequently there was no breach—If the plaintiff (promisee) waited till the expiry of a reasonable time, defendant's breach of contract

By whom Contracts must be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the person by whom promise is to be performed, the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations.

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

Effect of accepting performance from third person. **41.** When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

42. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

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would give him cause of action, whether he himself paid the debts or not. (1912) 22 Mad L Jour 207 (210, 211) (DB).

[4] See also under S. 78.

9. Rescission — Plaintiff's default—Effect. —

[1] Contract for sale of immovable property—Defect in title — Vendor cannot sue for rescission of contract. (Vol 7) 1920 Mad 859 (861).

[2] Party committing breach cannot require other party to perform his part of the contract. (Vol 21) 1934 Lah 474 (475).

10. Restitution.—[1] The party putting an end to the contract under S. 39, is liable under S. 64 to restore to the other party any benefit received by him under the contract. (Vol 80) 1948 P C 34 (39) : 70 Ind App 35 : 1 L R (1948) Kar P C 80 (P C). (Case of contract coming under S. 39 comes under the phrase 'voidable contract.')

[2] For a fuller discussion, see under Ss. 64 and 65.

Section 40 — Note 1

[1] On death of banker liability of his sons to pay sums to customers is not changed. (Vol 27) 1940 Pat 129 (131) (DB).

[2] Specific performance regarding contract for purchase of immovable property can be claimed against legal representative. (Vol 16) 1929 Rang 274 (274) : 7 Rang 423 (DB).

Section 41 — Note 1

[1] The section applies only where a contract has been in fact performed by some person other than the person bound thereby. (Vol 3) 1916 P C 68 (70) : 39 All 178 : 44 Ind App 60 (P C) * (Vol 29) 1942 Cal 87 (90) : 1 L R (1942) 1 Cal 287 (DB).

[2] What is required by S. 41 is actual performance and not a substituted promise. According to the section, performance by a stranger, accepted by the promisee, produces the result of discharging the promisor, although the latter has neither authorized nor ratified the act of the third party. (Vol 15) 1928 Mad 972 (974).

[3] Subsequent mortgage in lieu of a prior mortgage — Suit on subsequent mortgage — Subsequent mortgage found invalid therein—Revival of right of suit on proper mortgage — Contract Act, S. 41, does not apply. (Vol 8) 1916 P C 68 (70) : 39 All 178 : 44 Ind App 60 (P C).

[4] A instituted suit against B and C. The plaintiff averred that the amount in suit was due to A by B and that C was liable for the reason that he had undertaken to make the payment. It was alleged that C had intimated this fact to A whereupon the debit and credit entries had been made in accounts but subsequently C informed in writing that inasmuch as B had failed to pay him he withdrew his undertaking to pay to A. Subsequently A withdrew his case against C and proceeded only against B. The lower appellate Court applied S. 41 and dismissed the suit. On appeal held that there was no novation within meaning of S. 62 and that S. 41 did not apply to the case. (Vol 20) 1933 Lah 335 (338).

[5] Just like S. 63, S. 41 also enables a promisee not only to release a debt at the instance of a third party, but also to enable the promisor whose debt has been released at the instance of the third party to take advantage of that release. The intention is that release need not be made in favour of the person liable. (Vol 18) 1931 Bom 123 (124) (DB).

[6] A adopted B. Subsequently B renewed promissory notes executed by A — B's adoption set aside — Creditor can fall back on original notes as in such cases B is not 'third person.' (Vol 15) 1928 Mad 972 (974).

[7] A was the cashier and accountant of a company and B was the auditor of the company. A misappropriated large sums of the company and executed a promissory note for Rs. 50,000 in favour of the company for the amount misappropriated by him. B was liable to the company for his negligence and paid Rs. 60,000 to the company in full discharge of that liability. It was contended that by reason of payment by B, A's liability under the promissory note was discharged under S. 41 of the Contract Act. Held, that S. 41 had no application as A's liability was a contractual one while B's liability was one in tort. (Vol 32) 1945 Cal 218 (226) (DB).

[8] Where pre-emption decree proved abortive, after payment by pre-emptor of the unpaid purchase money to vendor, the vendor cannot enforce his lien for unpaid purchase money, against vendee, till he has reimbursed the pre-emptor, money paid by him. (13) 16 Oudh Cas 1 (3, 4).

Section 42 — Note 1

[1] Under S. 42, the obligation to perform the promise of the promisor devolves jointly on all his representatives and on the death of one of them, his heirs

43. When two or more persons make a joint promise, the promisee may, in the absence of any one of joint promisors express agreement to the contrary, compel any [one or more] of such joint promisors to perform the whole of the promise.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.— Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(a) A, B, and C jointly promise to pay D, 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B, and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c) A, B, and C are under a joint promise to pay D, 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B, and C are under a joint promise to pay D, 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

[a] Substituted by the Amending Act, 1891 (12 [XII] of 1891) for "one".

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are not discharged but take their place with reference to the liability. ('96) 1896 Pun Re No. 53, p. 148 (151) (D B).

[2] The rule of survivorship among joint tenants is modified by Ss. 42 and 45, Contract Act which puts the representative of the deceased joint tenant in his place so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies. (Vol 17) 1930 All 350 (352) : 52 All 548 (DB) & (Vol 22) 1935 All 975 (976).

SECTION 43 — Synopsis

1. Scope.
2. Joint promisors.
3. Separate suits against joint promisors.
4. Co-heirs of a promisor.
5. Co-tenants.
6. Partners.
7. Joint tort-feasors.
8. Contribution.
9. Accord and satisfaction by one.
10. Joint decree for costs—Contribution.

1. Scope — [1] Sections 43, 69, 70 do no more than state in written form what was law before the Act. (1898) 9 Cal 395 (397) (DB).

[2] Section 43 operates to enable the creditor to sue one of several joint promisors without impleading the others and has the effect of converting a joint contract into a joint and several contract. (Vol 21) 1934 Pesh 94 (95) & (5) 1905 Pun Re No. 81, page 254 (255) (DB).

[3] Under the provisions of S. 43 it is quite within the competency of the lender to sue all or any of the joint promisors as he may choose. There is nothing in the Civil P. C., which mitigates such a course. (Vol 11) 1924 Pat 164 (165) : 2 Pat 466 (DB).

[4] Where A and B bound themselves for conduct of C, but could terminate suretyship on giving notice to postal authorities in whose service C got in, suit for contribution against heirs of A will lie by B who had to pay under surety bond for misconduct of C as guarantee was continuing guarantee and properties of A were

liable therefor. (Vol 8) 1921 All 287 (258) : 43 All 132 (DB) & (Vol 14) 1927 Pat 426 (427) : 7 Pat 353 (DB).

[5] The creditor gets a right to proceed against any one of his joint debtors, and such right must be exercised before the creditor brings his suit. ('96) 1996 Pun Re No. 53, page 148 (153) (DB).

[See however (Vol 8) 1921 Lah 357 (358) (DB).]

2. Joint promisors. — [1] Where the debts are jointly incurred the liability of each is for the whole amount. (Vol 15) 1928 Lah 962 (963) & (Vol 20) 1933 Pat 24 (25) (DB).

[2] Joint contract of agency created by registered Kabulyat is not put an end to by death of one of promisors as agency is joint and several according to S. 43. Surviving agent will be liable to render accounts and suit against him is governed by Art. 116 of Limitation Act. (1913) 17 Cal L Jour 201 (204, 205) (DB).

[3] Whether a sale-deed is joint transaction making all vendees jointly liable or is really several transaction making each vendee responsible for his own share only is a question of fact depending on the intention of the parties. (Vol 17) 1930 Lah 806 (807) (DB).

[4] One joint promisor cannot plead minority of the other as a bar to the promisee's claim against himself. (Vol 3) 1916 P C 2 (3) : 39 Mad 409 : 43 Ind App 99 (P C) & (Vol 21) 1934 Pat 663 (664) : 14 Pat 275 (DB) & (Vol 11) 1924 Lah 146 (147) : 4 Lah 334 (DB).

[5] Insolvency of one of the joint promisors does not bar a suit as against other joint promisors for recovery of a debt. (Vol 21) 1934 Pat 43 (43) & (Vol 22) 1935 Mad 1055 (1055) & (Vol 6) 1919 Cal 781 (782) (DB).

[6] A joint contract unenforceable against one on the ground of his not signing it can be enforced against the other signing and receiving consideration. (Vol 13) 1926 Nag 196 (196).

[7] Suit against Company illegally formed—Liability is joint and several — Suit can be maintained against some members. (Vol 17) 1930 Bom 5 (11) : 53 Bom 652 (DB)

3. Separate suits against joint promisors.—[1] Where a promisee chooses to proceed against one co-promisor, and obtains judgment he cannot proceed against

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the other co-promisors, or co-contractors. (Vol 23) 1936 Bom 344 (845) : 60 Bom 954. (Per *Beaumont C. J.* ; *Rangnehar J.* dissenting.) * (1935) 62 Cal 612 (616) (DB) * (Vol 4) 1917 Bom 262 (264) * (Vol 4) 1917 Bom 268 (273) * (1862) 5 Mad 37 (46) (DB) * (1877-78) 3 Cal 333 (359, 360, 362) (DB).

[But see (Vol 21) 1934 Pat 52 (53) * (Vol 20) 1933 Bom 407 (409) * (1910) 33 Mad 317 (320) (DB) * (1900) 22 All 307 (319) (DB)]

[2] Loan taken by firm—Pro-notes signed by principal partner — Principal partner can be made to pay. (Vol 11) 1924 Lah 148 (149) : 4 Lah 239 (DB).

4. Co-heirs of a promisor. — [1] Section 43 applies only where two or more persons have made a joint promise and not where two or more persons have become jointly interested by inheritance in a contract made by a single person. (Vol 16) 1929 Lah 783 (784) (DB) * (Vol 5) 1918 Cal 512 (514) (DB) * (Vol 4) 1917 Cal 829 (829) (DB).

[2] Suit for rent is maintainable against some of the heirs or successors-in-interest of deceased tenant without bringing all on the record. (Vol 12) 1925 Cal 1056 (1058) : 53 Cal 197 (FB). (*Ghosh and Mukerjee J.J.* dissenting.)

[3] Heirs of joint tenants are not each of them liable for whole rent. (1910) 12 Cal L Jour 642 (644).

5. Co-tenants. — [1] In view of S. 43, a landlord can sue some of his tenants for the whole rent of a holding. (1938) 17 Pat 662 (665) (DB) * (Vol 22) 1935 Pat 146 (147) (DB) * (Vol 14) 1927 Pat 426 (429) : 7 Pat 853 (DB) * (Vol 14) 1927 Pat 2 (4) (DB) * (Vol 1) 1914 Lah 500 (501) : 1914 Pun Re No. 107.

[2] Where one of the two co-tenants dies, a suit by the landlord against all the heirs of the deceased tenant for the entire rent is maintainable without making the other tenant a party thereto. (Vol 10) 1923 Cal 615 (618) (DB) * (Vol 11) 1924 Cal 165 (166) : 50 Cal 737 (DB).

6. Partners. — [1] Section 43 applies as much to partners as to other co-contractors. (Vol 20) 1933 Bom 407 (409) * (Vol 14) 1927 Lah 819 (821) : 9 Lah 217 (DB) * (1893) 17 Bom 6 (11) (DB) * (1881-82) 6 Bom 700 (702) * (1898) 21 Mad 256 (257) (DB).

[2] Cause of action against firm is a joint cause of action against all partners and each partner is jointly and severally liable for the whole claim. (Vol 13) 1926 Sind 75 (76).

[3] One partner paying partnership debt is entitled to contribution from other partners. (Vol 29) 1942 Nag 72 (72, 73) : 1 L R (1942) Nag 340.

[4] A person who is a partner in a firm and also a creditor of it is not only a promisee of the firm, but he is also one of the joint promisors to himself and under S. 43 (2) he can only call upon each of the other joint promisors to contribute equally to the payment to be made to himself as promisee. (Vol 8) 1921 Nag 45 (46).

[5] Suit instituted against partners in private capacity, if unsuccessful, cannot be continued against them as firm and S. 43 has no application to such a case. (Vol 2) 1915 Lah 167 (168) : 1915 Pun Re No 76 (DB).

7. Joint tort-feasors.—[1] If an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either civil wrong or a criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results therefrom. An express promise of indemnity to him for the commission of such act is void. (Vol 19) 1932 Mad 1 (5) (FB) * (Vol 23) 1936 Pat 49 (51) : 15 Pat 219 (DB) * (1902) 25 Mad 399 (601, 602) (DB).

[2] As between conscious joint tort-feasors no right of contribution exists. (Vol 19) 1932 All 334 (336) : 54 All 371 (DB).

[3] Person in wrongful possession cannot bring suit for contribution if payment was made in support of his own title. (1911) 13 Cal L Jour 646 (647) (DB).

[4] Where joint debtors (who were joint tort-feasors in the suit) have under compromise in Court contracted to pay a sum to plaintiff and some of them pay the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise. (Vol 3) 1916 All 160 (161) : 38 All 237 (DB).

8. Contribution. — [1] "Contribution" signifies payment by each of the parties interested of his share in any common liability. Mutuality is thus the test of contribution. (Vol 21) 1934 Cal. 626 (626) (DB) * (Vol 2) 1915 Cal 278 (279) (DB).

[2] Where A and two others jointly executed a hand-note and there was no provision in the contract by which A and the others bound themselves to repay the loan to the promisee, to the effect that A would not be entitled to compel the other joint promisors to contribute equally with himself to the performance of the promise, and on a joint decree being passed in a suit by the promisee, the amount was realised from A who thereupon filed a suit for contribution against his co-promisors :

Held, that under S. 43, Contract Act, the Court had no option but to grant a decree to A especially as there was no material before the Court to enable it to come to the finding that under the terms of the contract, the entire liability for the money borrowed was to be borne by A alone. (Vol 21) 1934 Pat 411 (413) (DB).

[3] One of the co-vendors paying compensation to vendee in pursuance of a clause in sale-deed is entitled to contribution from other co-vendors even though they were not consulted when payment was made. (Vol 20) 1933 Mad 382 (383).

[4] Decree passed jointly against A and B in proportion to their shares under thikanama, A and B being in possession under same thikanama — Decretal amount paid by A only—B is bound to contribute to the extent of his share. (Vol 16) 1929 All 792 (793) (DB) * (Vol 18) 1931 Pat 234 (235) : 10 Pat 168 (DB).

[5] One of three judgment-debtors alone having paid the whole amount decreed is entitled to one-third from each of the joint judgment-debtors, and if nothing can be realised from either of them, he is obviously entitled to get half the total amount from the other. (Vol 9) 1922 Lah 148 (149).

[6] Co-sharer landlord brought suit for his share of rent against all except one of several co-tenants, and sold holding in execution of decree obtained therein. A purchaser of interest of remaining co-tenant applied under S 310A, Civil P. C., (1882) and sale was set aside on his making required deposit : *Held* (Per *Doss J.*) that plaintiff was entitled to recover defendant's share of decretal debt, not under S. 70 as, being co-tenant, he was himself liable to landlord for whole debt, but under S. 43 his obligation to pay remaining, notwithstanding that decree was passed against other co-tenants only. (1911) 33 Cal 1 (6, 7, 11, 12).

[7] Debt kept alive by acknowledgment — Joint promisor bound to contribute towards debt—One promisor paying decretal amount has cause of action against other for contribution from date of payment—The other is bound to contribute. (Vol 16) 1929 Mad 309 (310) (DB) * (1897-1901) 1897-1901 Upp Bur Rul 331.

[8] Where a joint debtor sues for contribution against his co-debtor alleging that he has paid up a decree debt due by them jointly, it is open to him to enforce the defendant's liability on the strength of the original

44. Where two or more persons have made a joint promise, a release of one of such joint

Effect of release of one promisor by the promisee does not discharge the other joint promisor or joint promisors. joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.^a

[a] See S. 138.

Section 43 (contd.)

liability, even if the decree as such is found to be not binding on the defendant. (Vol 21) 1934 Mad 386 (387, 388) : 57 Mad 973 (DB).

[9] Payment by one of the co-debtors which does not exonerate other co-debtors from liability does not give a right of contribution to the co-debtor making such payment. (Vol 11) 1924 Mad 279 (280) (DB).

[10] A mere undertaking to pay the amount at some future date is not equivalent to payment. (Vol 12) 1925 Mad 261 (263) : 48 Mad 693 (DB).

[11] Where the defendants were co-principals with the plaintiff, each being bound to pay only his share of the debt, to discharge his own part of obligation, it was held that the mere fact that there was a decree against the plaintiff (one of the several joint debtors who were new defendants) did not entitle him to sue the others for contribution. (1878) 11 Beng L R 76 (82, 83) (DB).

[12] In a suit for contribution, the respective liabilities of all the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. Hence, a suit for contribution would fail *in limine* where a person, who is a necessary party and in whose absence the liabilities of the parties to the suit cannot be satisfactorily ascertained, is not impleaded in the suit. (Vol 27) 1940 Pat 119 (121) (DB).

[13] All partners must be joined in suit for contribution by one or more partners if partnership has come to an end and no adjustment has been made. (Vol 3) 1916 Lah 9 (9).

[14] Where the claim for contribution is not based on the ground that as a partner the defendant is liable to contribute but the basis of the claim is a joint decree made against the plaintiff and the defendant in respect of debt contracted for partnership trade in execution of which the plaintiff alone had to pay the entire amount due under the decree, in such a case, the law of partnership does not prohibit the entertainment of a claim for contribution against other partner. (Vol 26) 1939 Mad 508 (508).

[15] When one of the members who was compelled, at the suit of certain creditors of the partnership, to pay the whole amount due to them, he or his legal representative after his death can sue for contribution from the other partners after the dissolution of the partnership, though his right to sue for accounts or for a share in the partnership assets had become barred. In such a suit the defendants can show that on a settlement of accounts the amount payable by them as contribution would be wiped out or reduced. (1909) 32 Mad 203 (205, 206) (DB).

[16] Under the terms of a compromise arrived at between two partners, in a suit for dissolution of partnership, one of the partners agreed to accept as binding upon him a mortgage of partnership property executed by the other partner and originally disputed by him and to pay a sum of money in consideration of his share in the mortgaged property being released, a major portion of which amount, however, he failed to pay. The Privy Council subsequently held in a suit brought by the mortgagee on the foot of the said mortgage, that it was not binding on the partner who originally disputed the same but subsequently accepted it and the whole of the mortgage money was realised by the mortgagee from the executant of the mortgage alone :

Held that the other partner was liable to contribute to the said debt by paying the amount originally agreed to be paid by him under the terms of the compromise notwithstanding the fact that the mortgage in dispute was subsequently pronounced by the Privy Council not to be binding on him. (Vol 1) 1914 P C 10 (11) : 11 Nag L R 53 (P C).

[17] For contribution, a *prima facie* case is made by the production of the judgment and the certificate of satisfaction. (Vol 21) 1934 Oudh 437 (439).

[18] As to liability of co-sureties to contribute equally as between themselves, see section 146.

9. Accord and satisfaction by one. — [1] Under the English Law, accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt, discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under S. 43, Contract Act. (Vol 29) 1942 Cal 87 (91) : ILR (1941) 2 Cal 237 (DB).

10 Joint decree for costs—Contribution. —[1] On broad grounds of justice and equity there appears no reason why a decree for costs should be excepted from the doctrine of contribution. The only ground on which such an exception could possibly be based would be the doctrine that no contribution lies between joint tort-feasors. (Vol 8) 1921 Oudh 128 (129) : 24 Oudh Cas 145 (DB).

[2] Where in a suit in which both the defendants were equally delinquent in taking up the defence and a decree for cost is passed against them and one of them pays the same, he is entitled to contribution from the other. (Vol 22) 1935 Mad 347 (349) * (Vol 25) 1938 Lah 579 (580) * (Vol 23) 1936 Mad 167 (168, 169) : 59 Mad 250 (DB).

[3] *M* borrowing sum on simple mortgage from *N* and *S*—Portion of amount paid by *N* and rest by *S*—Mortgage decree passed and property put to sale—Suit by *R* against *N* and *S* for declaration of title to half property—Decree with costs—Costs recovered only from *S*—Suit by *S* against *N* for contribution—*S* and *N* held liable for costs only in proportion to their interest in property affected by *R*'s suit and not equally. (Vol 25) 1938 All 631 (632) : I L R (1938) All 950.

[4] A co-defendant paying the full amount of costs cannot claim contribution unless some equity exists in his favour. In this respect a decree for costs stands on a different footing from a decree for payment of money arising out of a joint liability. (Vol 19) 1932 Mad 146 (147).

[5] Defendants neither taking interest nor defending suit are equitably entitled to exemption from contribution for costs in joint decree against them. (Vol 16) 1929 All 654 (655) * (Vol 33) 1946 Cal 63 (65) * (Vol 24) 1937 All 227 (228).

[6] Mere execution of mortgage to satisfy the joint decree for costs does not entitle a defendant to claim contribution from other—Suit for contribution is premature until he redeems mortgage or mortgaged property is sold in satisfaction of mortgage. (Vol 23) 1936 Oudh 253 (255) : 12 Luck 45 (DB).

SECTION 44 — Synopsis

1. Scope and applicability.
- 1A. Co-sureties.
2. Co-mortgagors.
3. Co-heirs.
4. Co-judgment-debtors.
5. Decree against one co-promisor—Effect.
6. Contribution, right of.

45. When a person has made a promise to two or more persons jointly, then, unless a *Devolution of joint rights*. contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.³

Illustration.

A, in consideration of 5000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly.

[a] For an exception to S. 45 in case of Government Securities, see the Indian Securities Act, 1920 (10 [X] of 1920), S. 4.

Section 44 (contd.)

1. Scope and applicability. — [1] English law doctrine that release of one of several joint debtors releases all from liability has no application to India. ('11) 14 Cal L Jour 854 (857, 858) (DB).

[2] Section means, generally, that release to one of several contractors does not discharge co-contractors, and applies as well to a discharge after breach as to a release before breach. (1879) 4 Cal 336 (338).

[3] Section 44 applies as much to partial discharge as to complete discharge. ('42) 46 Cal W N 234 (237, 238) (DB).

1A. Co-sureties.—[1] As to whether release of one co-surety discharges others, see Section 188.

2. Co-mortgagors.—[1] Release by the creditor of one of the mortgagors, jointly and severally liable, has not the effect of releasing others. (Vol 4) 1917 Cal 502 (505) : 44 Cal 162 (DB).

[2] The qualified release of a part of the mortgage security in favour of some of several joint mortgagors, resulting from the mortgagee not seeking to enforce his right as against any surplus sale-proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right. ('03) 30 Cal 953 (958) (DB).

[3] Where five brothers had made themselves jointly liable for a sum of money under a bond and mortgaged certain village as security for the debt and the mortgagee having subsequently taken a separate bond from each of the two brothers for one-fifth of the whole amount, sought to recover the remaining three-fifths of the said amount from remaining three brothers: *Held* that any one of the five might be sued for the whole amount and the promisee was entitled to recover the three-fifths from the remaining three brothers. (1876) 25 Suth W R 419 (419) (DB).

3. Co-heirs. — [1] Claim for rent barred against some co-heirs—Remaining heirs not separately liable for entire rent. (Vol 6) 1919 Cal 861 (862) (DB).

4. Co-judgment-debtors.—[1] The release of a joint judgment-debtor does not operate as a release of the others. (Vol 31) 1944 Cal 328 (330) (DB) * (Vol 20) 1933 Lah 505 (507) * (Vol 11) 1924 Cal 209 (211) : 50 Cal 718 (DB) * (Vol 2) 1915 Mad 934 (936) : 39 Mad 548 (DB). (The other judgment-debtors can claim the benefit of the amount actually paid by the released judgment-debtor.) * (1880) 6 Cal L R 212 (214).

[See also (Vol 14) 1927 All 830 (831) (Joint decree against father and son—Father becoming insolvent and compounding with decree-holder—Son is liable only for such portion of decretal amount as had not already been realised by decree-holder in pursuance of the composition.)]

[2] Where some of the original defendants against whom joint decree for costs was passed die during the pendency of a Privy Council appeal and no substitution is made, it does not amount to a release by the decree-holder of the interests of those judgment-debtors and the interests of all the other judgment-debtors are not

also released from all liability under the decree. (Vol 20) 1933 Pat 24 (25) (DB).

[3] Release granted to one of several judgment-debtors without any intention to release others will discharge others only *pro tanto* and not in respect of the entire amount decreed. (Vol 5) 1918 Cal 51 (53) (DB).

5. Decree against one co-promisor — Effect.—

[1] Where a promisee chooses to proceed against one co-promisor, and obtains a judgment, he has no right to proceed against the other co-contractors or co-promisors. (Vol 28) 1936 Bom 344 (345) : 60 Bom 954 (DB).

6. Contribution, right of. — [1] Where the promisee releases one or more of the joint promisors, the liability as between joint promisors to contribute equally does not end. (1941) 45 Cal W N 357 (361).

[2] Joint promissory note—Part payment by co promisor—Other co-promisor is liable for balance subject to his right of contribution. (Vol 24) 1937 Rang 197 (137, 138).

SECTION 45 — Synopsis.

1. Scope.
2. Discharge by one.
3. Performance of promise during joint lives.
4. Devolution of joint rights.
5. Partnership.

1. Scope. — [1] It is doubtful whether S. 45 applies to claim for possession of land. Where, however, suit is really for specific performance of contract, defendant may plead S. 45 as bar. ('12) 1912 Pun L R No. 49 page 150 (158) : 1911 Pun Re No. 57 (DB)

[2] The words "as between him and them" in S. 45 signify that as between the debtor and original body of creditors, the right to claim payment would rest with the body, but if by part-payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors. Where a partner of a dissolved firm collects his share of debts, impleading others, the other partners can sue for their share of debts. (Vol 6) 1919 Lah 14 (15) : 1919 Pun Re No. 128.

2. Discharge by one. — [1] Payment to one of three persons who are jointly entitled to receive money is not good payment against others. (1913) 17 Cal Jour 372 (375) (DB) * (1913) 36 Mad 544 (549, 552) (FB). (One of two or more payees of negotiable instrument can give valid discharge of entire debt without concurrence of other payees)

[But see (Vol 4) 1917 Pat 32 (34) : 2 Pat L Jour 520 (DB). (A joint creditor, in equity, can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors.)]

[2] Where a tenant pays off the entire rent due from him to one of two co-sharers, he can escape liability to the other, if he shows that his payment to that co-sharer was one made *bona fide*. But if the payment by him was made to defeat the claims of the other co-sharer, the latter's right to recover his share of rent is not affected. (Vol 8) 1916 Mad 208 (208, 209) (DB).

Section 45 (*contd.*)

[3] Payment to one of heirs of mortgagee does not bind the other heirs. (Vol 2) 1915 Oudh 29 (30) : 18 Oudh Cas 154 (DB) * (1937) 169 Ind Cas 531 (531, 532) (Lah). (One co-heir cannot give valid discharge without consent of other. Payment to one is valid to the extent of his share; other's right to recover from the debtor is not affected.) * (Vol 5) 1918 Mad 29 (29) : 41 Mad 637 (DB) * (Vol 8) 1916 Mad 1128 (1128) (DB).

[But see (1911) 33 All 327 (331) (DB). (One debt gives single cause of action. One of several heirs of deceased obligee cannot sue for his share.)]

[4] Payment to one co-mortgagee without consent of others does not give discharge of debt due to others. (Vol 17) 1930 All 98 (98, 99) (DB) * (Vol 15) 1928 Mad 983 (935) (DB) * (Vol 14) 1927 Cal 425 (429) (DB). (Payment operates as discharge as to share of payee only.) * (Vol 9) 1922 Lah 64 (64) (DB). (Consent is necessary.) * (1921) 3 Lah L Jour 502 (504). (Do.) * (Vol 8) 1921 Pat 27 (28) : 5 Pat L Jour 376 (DB). (Unless contrary is shown, mortgagees must be regarded as having separate interest in money advanced by them although they take joint security and must be treated as tenants-in-common and not joint tenants.) * (Vol 7) 1920 Pat 464 (468) : 5 Pat L Jour 151 (DB). (Release given by one co-mortgagee is not a discharge of entire mortgage much less a release given by one of heirs of a deceased mortgagee.) * (Vol 6) 1919 Cal 593 (596) (DB). (Consent of other is necessary.) * (Vol 5) 1918 Oudh 91 (92). (Where two co-mortgagees advanced money without any specification of the shares, the presumption is that each of them advances half of the money. If one of them accepts his full dues, the other can and must sue for half the amount.) * (Vol 4) 1917 Sind 71 (72) : 10 Sind L R 203 (DB) * (Vol 2) 1915 Cal 528 (528) (DB) * (1911) 14 Oudh Cas 45 (47). (Consent of others is necessary.) * (1910) 32 All 164 (167) (DB). (Co-mortgagees advancing money equally.)

[But see (Vol 12) 1925 Mad 261 (263) : 48 Mad 693 (DB). (Payment made to one joint-mortgagee is valid discharge of mortgage liability. But a mere undertaking to pay the amount at some future date is not payment.) * (1909) 1 Ind Cas 219 (219) (DB) (Mad). (A release of a mortgagor by one of several joint mortgagees, on payment to him of the mortgage-debt, discharges the mortgagor from all liability under the mortgage to the other mortgagees, inasmuch as the mortgagor had made a promise to two mortgagees jointly and the right to claim performance rested with both mortgagees jointly.)]

[5] Where money was lent on joint account by two brothers who were appointed executors of the deceased testator by his will, the mortgagor in making repayment must see that he made the payment to and obtained a receipt from a person entitled to give him a discharge. (Vol 3) 1916 Cal 568 (568, 569) (DB).

[6] Co-mortgagees being tenants-in-common their interests are severable or partible among themselves; so that one of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants. Similarly, if some of the co-mortgagees are estopped from suing, Court can sever debt and give decree to others for their share. (Vol 5) 1918 Cal 411 (412) (DB).

[7] See also S. 38.

3. Performance of promise during joint lives.—

[1] Joint promisees are not entitled to split up their claims and sue separately for their shares. All of them must join the suit which must also include the entire debt. (Vol 14) 1927 Mad 84 (84, 85) * (Vol 23) 1938 Pat 274 (276) : 37 Ori L Jour 848. (Promissory note executed in favour of two brothers forming joint Hindu

family.) * (1913) 20 Ind Cas 151 (151) (DB) (All). (Suit by one of co-mortgagees for sale of entire property to recover his share.) * ('89) 1889 Pun Re No. 156, p. 516 (540) (FB). (Defendant can validly object.) * ('82) 1882 Pun Re No. 175, p. 519 (519) (DL). (Case of joint mortgages—It must appear that mortgagee suing is solely entitled under bond.) * (1912) 11 Mad L Tim 192 (192) (DB). (Suit for specific performance.)

[2] Mortgage—Several mortgagees — Suit by one mortgagee to enforce part of security—All mortgagees made parties—Allegation that other mortgagees had received their share of mortgage money—Plaintiff undertaking to increase amount of claim and pay court-fee if other mortgagees' claim not satisfied—Suit as framed competent—Suit as framed cannot possibly be defeated when all the mortgagees are parties thereto and plaintiffs seek to recover whatever is due in the security. (Vol 1) 1914 Cal 788 (789) (DB).

[3] Plaintiff sued for money decree on promise to himself alone, but lower Courts rightly found that debt was due, not to him alone, but to him and two others jointly, and the plaintiff appealed against this finding. Held that the proper decree to make would be to dismiss appeal and confirm decree dismissing his suit, without going into any question as to permitting or refusing to permit him to amend plaint. (1591) 1891 Pun Re No 86, p. 422 (426, 427) (FB).

[4] In the case of a joint lease, one of the co-lessors cannot maintain a separate suit against the lessee for his share of rent but where the lessee collusively and not *bona fide* pays the rent to one of the co-lessors, the payment operates as a discharge of that co-lessor's share only and the other co-lessor can maintain a suit for his share of rent without making the other co-lessor, who has received the money, party to it. (Vol 32) 1945 All 311 (315, 316) : 1 L R (1945) All 165 (DB).

[5] The defendants sold a certain village to the plaintiff and his brother, fixing the price on the basis of the net income which the defendants stated at the time of the contract to be a certain amount. The plaintiff later on discovered that the defendants had overstated the income and made certain other fraudulent representations, alleging that on a partition entered into subsequent to the purchase between himself and his brother the village fell to his share. The plaintiff sued for compensation for the fraud of the defendants at the time of the sale. Held, that the suit was not one of pure tort, but was one for a wrong arising out of a contract, and that the suit was bad for non-joinder it having been brought only by one of the joint promisees; Held, also, that the fact that there was subsequent partition between the plaintiff and his brother did not confer on plaintiff the right to sue the defendants for compensation. (Vol 19) 1932 Mad 583 (584) (DB).

[6] All co-owners must join in suit to recover their property—Defendant cannot be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone. (1886) 10 Bom 32 (34) (DB).

[7] One co-promisee may sue on his own account. S. 45 does not prohibit this and one plaintiff must not be held to have lost his rights to enforce an obligation because others entitled to share in that right have lost their remedy only by the expiry of the period of limitation, and have been joined as defendants. ('05) 1905 Pun Re No. 57, p. 192 (198) (FB).

[8] The principle that payment to one of several joint creditors does not operate as a discharge of the debts in so far as the other creditors are concerned is not applicable to a case where the payment is to a joint mortgagee who was the manager and agent of the others. (Vol 15) 1928 Cal 125 (126) (DB).

Section 45 (contd.)

[9] Where after mortgage to one member on behalf of family partition had taken place, payment to one of divided members is not valid discharge. (1910) 20 Mad L Jour 709 (715) (DB).

[10] Members of joint Hindu family firm having a joint cause of action against defendant—Defendant has a right to ask to join all members in suit for enforcement of claim, though plaintiff may adjust sums recovered from his co-contractors. (1881) 6 Cal 815 (826) (DB).

[11] Transaction of mortgage really entered into by joint Hindu family but executed in favour of minor member. Tender of mortgage money to managing member of family is good and valid tender in law. (Vol 9) 1922 All 355 (356) : 44 All 64 (DB).

[12] Manager of joint Hindu family can enforce contract made with family—Junior members not necessary parties. (1911) 33 All 272 (277, 278) : 38 Ind App 45 (PC).

[13] Where the right of a person to recover certain debt has devolved upon his sons jointly and the sons constitute a joint Hindu family, they can file only one suit against their debtors for the recovery of the whole amount. Some of them cannot split up the claim and institute a suit for a part thereof on their own behalf on the ground that others did not join with them as co-plaintiffs. In such a case, it would be incumbent upon those instituting suit to claim the whole amount on behalf of themselves and their brothers on payment of the full court-fees and to make their brothers who refused to join as co-defendants. (Vol 26) 1939 Sind 178 (176) : ILR (1939) Kar 602 (DB).

[14] Payment made to junior member of joint Hindu family during lifetime of its manager in whose favour the bond was executed does not discharge the promisor. (Vol 6) 1918 Mad 29 (29) : 41 Mad 637 (DB).

[15] Joint cause of action by members of an undivided Hindu family against defendant — Suit in name of only one member not maintainable. (1895) 18 Mad 33 (35, 36) (DB).

[16] Plaintiff suing defendant in his name only for joint debt due to him and three brothers in a joint Hindu family—Defendant can insist on all the contractors being made co-plaintiffs when there is a joint cause of action notwithstanding an expression of willingness by the other members of the family that the plaintiff should sue alone. (1888) 7 Dom 217 (219) (DB).

[17] One of several joint promisees may sue alone if other promisees refuse to join in action in which case they may be added as co-defendants and notice may be given to them. (1909) 9 Cal L Jour 331 (334) (DB). * (Vol 6) 1919 P G 24 (26) : 47 Cal 175 : 46 Ind App 272 (PC) * (1908) 35 Cal 331 (345) : 35 Ind App 73 (P C). (Rent due to several co-sharers.) * (1911) 38 Cal 270 (277) : 38 Ind App 1 (PC). (Do).

[18] Suit for recovery of debt, secured or unsecured, due to Hindu joint family — Some members refusing to join as plaintiffs can be made defendants. (1912) 9 All L Jour 410 (417) (DB).

[19] Suit on pro-note—Pro-note not standing in the name of beneficiary but in the name of one who is a party to the litigation—Beneficiary in a position to give a valid discharge—*Held*, suit by beneficiary was maintainable. (Vol 21) 1934 Pat 85 (86) (DB).

[20] Suit on pro-note — Pro-note standing in the name of plaintiff and not of the holder, a party, although not a plaintiff and in a position to give valid discharge — *Held* that suit by plaintiff was maintainable. (Vol 19) 1932 Pat 346 (348) : 11 Pat 616 (DB).

[21] Where two brokers were employed in respect of the same transaction, the proper procedure for one

broker is to file a suit for the entire amount of commission impleading the other broker either as a co-plaintiff or as a defendant. If he institutes suit for his own share which is mentioned in the agreement without impleading the other, the suit is liable to be dismissed. (Vol 15) 1928 Sind 16 (16) (DB).

[22] Where a hatchita was executed by a person in favour of himself and three others each having a definite share, it was held that a suit by two of the three promisees for their shares under the hatchita against the executant and the other promisee who refused to join with plaintiffs was maintainable. (Vol 29) 1942 Cal 595 (597, 598) (DB).

[23] Joint lease entered by co-promisees—Some suing for possession — Others impleaded as defendants on their refusal to join—Suit held maintainable. (12) 1912 Pun L R No. 49, p. 150 (158) : 1911 Pun Re No. 57 (DB).

4. Devolution of joint rights. — [1] Where one of several joint tenants is liable for whole rent on the death of one of such joint tenants leaving several heirs, no question can arise as to whether the liability is joint. (Vol 11) 1924 Cal-165 (166) : 50 Cal 737 (DB).

[2] Where the agreement between the parties does not specify any shares and it is impossible to say in what shares the consideration was to be paid by or the land to be divided between the parties, the right to enforce the contract, on the death of one of the parties, vests in his legal representative along with others and not in others alone. (Vol 22) 1935 Lah 478 (479) (DB).

[3] Mortgage in favour of B and D—Suit by B alone — D dying during course of suit—B acquiring D's rights of recovering debts — Non-joinder of D held immaterial—B, although he had no right to sue on the day when he instituted the suit, had acquired the full and exclusive right when D died. (Vol 26) 1939 Nag 242 (244) : I L R (1939) Nag 515 (DB).

[4] Appeal by all plaintiffs in suit by several co-sharers—Common cause—One appellant dying during pendency of appeal—No legal representative brought on record—Court can pass any decree as the case required even though no legal representative is brought on record —Section 45, Contract Act, does not apply. (Vol 28) 1941 Oudh 155 (158) : 16 Luck 382.

[5] Part-assignment of debt is valid in law, and action can be maintained thereon by the transferee provided he makes both the transferor and other assignees that may be concerned parties to the suit. (Vol 28) 1941 Lah 337 (340) (DB).

[6] In a case of a joint debt, an assignment by one of the joint creditors does not enable the assignee to enforce the payment of the whole debt. (Vol 24) 1937 Cal 532 (533).

5. Partnership. — [1] Section 45 of the Act has no application to debts due to trading partnerships. Although the right of the deceased partner devolves on his executors, the remedy survives to his co-partners, who alone must enforce the remedy by action. (Vol 10) 1923 Lah 197 (200) : 4 Lah 142 (DB) * (Vol 16) 1929 Rang 306 (307) : 7 Rang 806. (Burmese Buddhist husband and wife are regarded as partners) * (94) 17 Mad 103 (117) (DB).

[But see (97) 21 Bom 412 (421, 422). (Representative of deceased partner alone may sue for recovery of debt due to the firm, even where the business of the firm is continued by the surviving partner.)]

[2] Right of suit on death of partner—See O. 30, R. 4, Civil P. C.

[3] Representatives of deceased partner may be joined in such a suit but are not necessary parties. (13) 17 Cal L Jour 648 (651) * (93) 17 Bom 6 (14) (DB).

Time and Place for Performance.

Time for performance of promise, where no application is to be made, and no time is specified.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time,

Explanation.—The question, "What is a reasonable time?" is, in each particular case, a question of fact.

Time and place for performance of promise where time is specified and no application to be made.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day, and at the place at which the promise ought to be performed.

Illustration.

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question, "What is a proper time and place?" is, in each particular case, a question of fact.

Section 45 (contd.)

[4] If surviving partners refuse to sue for recovery of debts due to firm the remedy of the legal representative of deceased partner lies in suit against others for winding up, for accounts and for appointment of receiver. (Vol 1) 1914 Low Bur 58 (61); 8 Low Bur Rul 130 (DB).

[5] Where firm is dissolved, suit by one partner for individual share of a debt, owing to the firm, is not maintainable even if other partners are made co-defendants. (Vol 11) 1924 Nag 196 (197).

[6] Payment to one of two partners constituting firm operates as discharge. (Vol 7) 1920 Lah 53 (54).

[7] Where a partner of a dissolved firm collects his share of debts, impleading others, the other partners can sue for their share of debts. (Vol 6) 1919 Lah 14 (15); 1919 Pun Re No. 128.

[8] Although one partner alone cannot sue for partnership debt, yet he can use name of firm and of co-partners so as to be able to sue, and unwilling partner can only claim indemnity for costs. (Vol 4) 1917 Pat 246 (246) (DB).

[9] Section 45 has not been modified by the Civil Procedure Code, save as appears in O. 30, which is confined to cases where suits are brought not by individuals but in the name of firms. (Vol 14) 1927 Lah 115 (117); 8 Lah 1 (DB).

[10] Rule 4, O. 30, Civil P. C., is enacted to set at rest doubt in connection with S. 45, Contract Act, regarding suits by or against firms. (Vol 14) 1927 Bom 581 (591); 51 Bom 986 (DB).

Section 46 — Note 1.

[1] When no time is fixed for completion of sale, it must be implied that it is to be completed in a reasonable time. (Vol 17) 1930 P C 165 (169) (PC).

[2] Person borrowing ornaments for use in ceremony — It is unreasonable for him to detain them after completion of ceremony and demand by their owner. (Vol 17) 1930 Oudh 895 (896, 897); 6 Luck 80 (DB).

[3] Contract for sale of goods — Goods to be delivered in instalments — Dates of delivery of instalments not fixed — Instalments must be deemed to be rateably distributed over period appointed for delivery of whole

quantity of goods. (Vol 4) 1917 Cal 721 (727); 43 Cal 805 (FB).

[4] C. I. F. Contract—In absence of any stipulation as to time for payment, payment must be made when bill of lading and other shipping documents are presented to buyer. (Vol 29) 1942 Mad 139 (141); 1 L R (1942) Mad 33 (DB).

[5] Subsequent mortgagee to redeem prior mortgages — Time not fixed for such redemption — Puise mortgagee must redeem within reasonable time, i. e., by the first date when redemption is obtainable. (Vol 5) 1918 Oudh 331 (332) & (Vol 12) 1925 Oudh 132 (134) & (1900) 23 Mad 441 (443, 444) (DB).

[6] Mining leases not containing time for payment of royalty — Royalty must be paid within reasonable time of coal being raised. (Vol 27) 1940 Pat 609 (609, 610) (DB).

[7] B agreeing with A to pay certain debts owing by A—Three years from date of contract held was reasonable time for performance. (1912) 22 Mad L Jour 207 (211).

Section 47 — Note 1.

[1] Section 47 applies only when a certain day is fixed for performance. (1907) 9 Bom L R 903 (909).

[2] Contract governed by rules of Bombay Cotton Trade Association—Vendor is bound to tender delivery order backed by goods before 1 p. m. of due date—Vendor not tendering goods before specified time fails to perform his part of contract. (Vol 3) 1916 Bom 268 (272); 40 Bom 517.

[3] Acceptance by mortgagor of part of mortgage money after agreed period does not amount to new contract but is mere acquiescence in late payment. (Vol 11) 1924 Pat 825 (829) (DB).

[4] Electric supply company—Discount to be allowed for prompt payment — Consumer receiving bill after expiry of date fixed for payment with discount is not entitled to fresh bill fixing fresh date for payment. (Vol 21) 1934 Lah 292 (292, 293); 15 Lah 729.

Section 48 — Note 1.

[1] Sections 48 and 49 clearly indicate that the mode of performance of a contract is a question of fact in a particular case. (Vol 31) 1944 Nag 330 (332); 1 I. R. (1945) Nag 252.

Place for performance of promise where no application to be made, and no place fixed for performance.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration.

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Section 48 (contd.)

[2] No doubt a limited company entitled to receive money is not on the same footing as an ordinary individual who may at any moment change his residence and there may be a good reason to infer that money due to a company is to be paid by a debtor in another country at the office of the company. (Vol 31) 1944 Nag 330 (332) : 1 L R (1945) Nag 252.

[3] The plaintiff took a licence from the defendant to take wood from the defendant's forest and deposited a certain amount as security in the treasury maintained by the defendant. The deposit was to be refunded on the expiry of the term of the licence. On a demand being made by the plaintiff by letter for refund of the deposit, the defendant insisted on the personal attendance of the plaintiff at the place where the treasury was maintained. In the suit by the plaintiff to recover the security deposit, the defendant contended that he was justified in insisting on the plaintiff's personal attendance at the place of the treasury for payment and should not, therefore, be made liable for costs of the suit. It was not established by the defendant that personal attendance by the plaintiff was a term to be annexed to the contract to refund : *Held*, that though the matter may not be governed directly by S. 48, the plaintiff in applying for refund must be taken to have applied at a proper place in circumstances where performance could be made within usual hours of business by remittance of the amount. The defendant was not justified in insisting on the personal attendance of the plaintiff for payment of the security deposit and should have remitted the amount to the plaintiff when the plaintiff had applied for refund of the same. As the litigation was due to the defendant's fault, the plaintiff was entitled to his costs. (Vol 31) 1944 Nag 330 (332) : 1 L R (1945) Nag 252.

Section 49 — Note 1.

Scope—[1] Indian Contract Act makes no provision for place of performance when no time or place is fixed and where there is no provision to perform without application. (1907) 9 Bom L R 903 (910).

[2] Where place of performance is not mentioned in the contract, a Court is not precluded from finding out implied intention of the parties in regard to the place of performance. (1941) 22 Pat L Tim 282 (283).

[3] Section 49 clearly indicates that the mode of performance of contract is a question of fact in a particular case. When the manner and the place of repayment of money are not the subject of express contract it is the duty of the Court to gather what, by necessary implication, having regard to the nature of the contract and the circumstances in which it was entered into, the parties must have meant. (Vol 31) 1944 Nag 330 (332) : 1 L R (1945) Nag 252.

[4] Section 49 is one of those provisions of the Contract Act which have no application to matters governed by the law merchant, which is contained, for the most part, in the Negotiable Instruments Act. (Vol 29) 1942 Bom 251 (255) : 1 L R (1942) Bom 620 (DB).

Debtor to find creditors—[5] It is common law rule that debtor must seek out his creditor. But in India rule as to place of performance, whether it be payment

or any other mode of performance, is to be determined by S. 49 of Contract Act, 1872. (1905) 7 Bom L R 99. (994) (DB).

[6] Contract silent as to place of payment of liability — Payment should be made where creditor is — Intention of parties to the contract must be seen. (Vol 14) 1927 P C 156 (158) : 54 Ind App 265 : 5 Rang 451 (PC) & (Vol 17) 1930 Nag 207 (208) : 26 Nag L R 300 & (1908) 30 Bom 167 (171).

[7] Section 49 does not preclude the application of the rule of English Common Law that the debtor must seek out his creditor and pay his debt where the creditor happens to reside, unless there is an arrangement to the contrary and does not get rid of the inference which should justly be drawn from the terms of the contract itself or from the necessities of the case. (Vol 28) 1941 Mad 695 (698) (DB) & (Vol 23) 1936 Rang 251 (252) & (Vol 14) 1927 P C 156 (158) : 54 Ind App 265 : 5 Rang 451 (PC) & (Vol 2) 1915 Nag 65 (67) : 11 Nag L R 189 & (1913) 20 Ind Cas 683 (683) (Low Bur).

[8] The promise to pay the creditor implies that the debtor will find the creditor to pay him and will pay where the creditor is; under S. 49, Contract Act, it is reasonable to suppose that if the debtor applies for a place to be appointed the creditor will appoint the place where he himself resides, at any rate, he has the power so to appoint; if the debtor fails in his duty to apply, he cannot by his failure better his position, or deprive the creditor of his statutory powers to appoint a reasonable place. (Vol 22) 1935 Bom 283 (284) : 59 Bom 365 & (Vol 23) 1936 Cal 97 (99, 100) : 63 Cal 726 & (Vol 20) 1933 Sind 62 (64) (DB).

[9] By British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. (Vol 12) 1925 PC 290 (292) : 53 Ind App 58 : 53 Cal 88 (PC).

[10] In the case of a wife claiming maintenance from her husband and claiming return of ornaments against her father-in-law : *Held* that neither the husband nor the father-in-law were debtors and the English rule had no application to the case. Even if they were debtors, the common law rule did not apply inasmuch as in the case of husband, his liability, if any, did not arise out of contract. It arose, if at all, because he maltreated his wife to such a degree that she could not live with him any longer and in the case of the father-in-law, it was reasonable to infer that the parties contemplated re-payment and delivery of the cash and articles at the family house or at the place where the wife was residing with her husband. (Vol 28) 1941 Mad 695 (698) (DB).

[11] Where lease is silent as to the place where the rent is to be paid, the question as to where it is payable is to be decided with reference to S. 49. If from the circumstances in which the contract in question was entered into, it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that, inference should be drawn whether the rule of the English Common Law which requires the debtor to seek the creditor applies or not to India. (Vol 25) 1938 Mad 977 (978, 979) & (Vol 20) 1933 All 147 (148).

Contract of agency—[12] Barring the earlier Bombay decisions, there has been a pronounced disinclination on the part of the Indian Courts to apply to this

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions.

Illustrations.

(a) B owes A, 2000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B, 2000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part-payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Performance of Reciprocal Promises.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Section 49 (contd.)

country unreservedly the general maxim that a debtor should find and pay his creditor. It might, in some cases, strictly arising out of the relationship of debtor and creditor be useful to invoke it as a matter of inference or of implication; but in other cases and particularly in cases where the relationship is one of agency, the place of payment has to be determined independently of any such general maxim with reference to the terms of the contract, the circumstances attending on it and the necessities of the case. (Vol 33) 1946 Mad. 300 (304).

[13] In the case of Pakki Adat agency primarily the place of payment is the place where the constituent resides but where the constituent has chosen to give directions to the effect that the payment should be made at any other place, it should be so done—Per *Chandavarkar J.* (1909) 93 Bom 364 (368) (DB).

[14] Insurance company at Lahore appointing certain person working at Meerut as its chief agent for Rajputana and Bundelkhand area—Appointment made at Lahore and all payments to be made at Lahore—Appointment subsequently cancelled—Suit by agent at Ajmer for damages for cancellation of the appointment—Subsequent suit by the company at Lahore for recovery of certain amount due by agent: *Held* that the cause of action arose at Lahore and that S. 49 was not applicable to the case. (Vol 27) 1940 Lah 85 (86, 87)

Delivery of goods—[15] Section 49 applies to promises for payment of money as well as to promises for delivery of goods. (Vol 20) 1933 All 147 (148) & (Vol 14) 1927 P C 156 (158) : 54 Ind App 265 : 5 Rang 451 (PC).

[16] Section 49 is only a general provision and in the case of a contract for sale of goods is modified by S. 93 of the Contract Act. (S. 95 of the Indian Sale of Goods Act). (1911) 10 Ind Cas 18 (19) (Oudh).

[17] *Place of delivery* : "At any place in Bengal"—Buyer has the choice of place subject to the condition that it must be reasonable and within Bengal (1897) 24 Cal 8 (17) : 23 Ind App 119 (PC).

[18] Even in a case where goods are sent by V. P. P. the contract is intended to be performed at the place where the goods are to be received and the Court at that place has jurisdiction to try the suit arising out of the contract. (Vol 21) 1934 Mad 581 (582).

Promissory note payable on demand—[19] S. 49 has no application where money payable under a promissory note is payable on demand (1908) 81 Mad. 223 (228) (DB) & (Vol 29) 1942 Bom 251 (254, 255, 256) :

ILR (1942) Bom 620 (DB). (Section does not apply to negotiable instruments.) & (Vol 27) 1940 Cal 445 (445) : ILR (1940) 1 Cal 323.

[See also (1912) 16 Cal L Jour 279 (281) (DB).]

[20] Section 49 does not apply to a promissory note which is payable on demand and which is silent as to the place of repayment and *a fortiori* the Common Law rule applies, and it being necessary for the debtor to seek out his creditor and pay him, in the absence of any agreed place for payment, the place of repayment must be deemed to be the place where the creditor resides. The Court at such place has therefore jurisdiction to entertain the suit on the pro-note. (Vol 27) 1940 Cal 443 (445) : ILR (1940) 1 Cal 323.

[But see (Vol 29) 1942 Bom 251 (255, 256) : I L J. (1942) Bom 620 (DB)].

Section 50 — Note 1.

[1] The method of payment in discharge of a contract includes also mere transfer of figures in accounts. (Vol 12) 1925 Sind 144 (146) : 20 Sind L R 335.

[2] Where a subscriber of a chit fund conducted by a company deposits money towards the future instalments he has to make in a bank as directed by the rules of the company, the performance of the promise by him is good. And if the bank goes into liquidation, the promisee company has to take the risk. (Vol 29, 1942 Mad 337 (338)).

[3] Where the defendant, not entitled to have delivery of goods until he had paid for them, procured the delivery from an unauthorised agent of the plaintiff, and paid money to the agent who embezzled the amount so paid to him : *Held*, that the plaintiff could sue defendant for recovery of the price of goods sold to him. (1874) 12 Beng L R 360 (365) (DB).

[4] When a person agrees with his partner, who is also his creditor for Rs. 6000 by setting aside 6 As. of his share of partnership profits towards its liquidation, it was held that the creditor could not recover the debt in any other way than that stipulated for in the contract. (1912) 16 Cal W N 636 (638) (DB).

SECTION 51 — Synopsis

1. Scope.
2. Simultaneous performance.
3. Readiness and willingness to perform.
4. Burden of proof.

1. Scope. — [1] Where promises are reciprocal each party has always the option to perform his part of the contract but one party cannot insist on the other

Illustrations.

(a) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

A need not deliver the goods unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

Section 51 (contd.)

performing his promise without himself performing what he has agreed to do. (Vol 12) 1925 Mad 1029 (1080).

[2] Reciprocal agreements—One part thereof void — Other part cannot be enforced. (28) 106 Ind Cas 823 (823) (Lah).

[3] Part of mortgaged property along with other property sold—Part of consideration left with vendee to pay off mortgage — Vendee not paying off mortgage — Vendee dispossessed by third person later on — Mortgagees obtaining decree for sale—Mortgaged property sold and purchased by mortgagee — Suit by vendor for breach of contract by vendee — Ss. 51 and 54 did not apply as the promises by vendor and the vendee were wholly independent and not reciprocal. (Vol 38) 1946 Pat. 263 (266) (DB).

[4] Ordinary law as to performance of contracts in Ss. 51 and 52 applies where the Railway makes a special contract contrary to Risk note. (Vol 11) 1924 Pat. 39 (40).

2. Simultaneous performance. — [1] Unless otherwise agreed, delivery of goods and payment of price are concurrent conditions in a contract for sale of goods. (Vol 12) 1925 Mad 971 (971) (DB) & (1870) 2 N W P H C R 60 (61).

[2] On payment by *E D* costs of receiver and on his writing certain letters to receiver, *F* to pay £5000 to *R D*—Reciprocal promises held, incapable of simultaneous performance within S. 51. (Vol 20) 1938 P C 233 (236) : 60 Ind App 368 : 58 Bom 101 (PC).

3. Readiness and willingness to perform. — [1] Illustration (a) is the ordinary case of buying and selling goods when neither the buyer need pay the price nor the seller deliver the goods unless the other party is ready and willing to perform his part. (Vol 17) 1930 Mad 364 (371) (DB).

[2] Where consideration for contract consists of promise, the party bound to do act promised, fully performs his part of contract if he is ready to do the act when required. (Vol 1) 1914 Cal 166 (166) (DB).

[3] Contract to deliver cotton—Non-delivery—Breach of contract—Suit for damages—Plaintiff willing to take delivery and keeping money ready for payment—Actual tender of money is not necessary to entitle plaintiff to damages. (1903) 80 Cal 865 (871) & (Vol 14) 1927 Lah 176 (177) : 8 Lah 198 (DB) & (Vol 10) 1923 Sind 50 (52) : 16 Sind L R 278 (DB).

[4] Vendee not completing sale due to vendor's defective title—Vendee need not pay brokerage. (Vol 12) 1925 Sind 220 (221) (DB).

[5] In a suit for breach of contract to purchase goods, it is not necessary for the plaintiff to prove that on the due date he had the goods actually in his possession. It is quite sufficient if he is able to prove that he had the capacity to deliver them to the purchaser when called upon to do so, in other words that he was in a position to fulfil his part of the contract on the due date on a demand being made by the purchaser. (Vol 18) 1926 Lah 818 (319) : 7 Lah 442 (DB).

[6] Readiness and willingness to perform includes capacity to perform or proper arrangements for securing

purchase money—Suit for damages by buyer—He must prove that he was ready and willing to perform—Buyer proved in acute financial embarrassment on date of delivery—There is no readiness on part of buyer—Seller absolved from performance of his part. (Vol 27) 1940 Rang 284 (285) : 1940 Rang L R 593 (DB).

[7] Absconding of person to whom goods are to be delivered — Party absolved from delivering goods — Actual tender of goods not necessary. (Vol 19) 1932 Sind 9 (14) : 26 Sind L R 167.

[8] Contract to sell shares—Ability of vendor to constitute vendee the legal owner of shares willingly amounts to "readiness and willingness" on his part. (1864-66) 2 Bom H O R 246 (249). (It is immaterial whether vendors are owners or not if the defendant vendees can obtain what they contracted for.)

[9] Contract for sale of Government Securities—Seller in a position to transfer securities by due date and informing purchaser of this by going to his place of business — In absence of evidence to the contrary, this constitutes readiness and willingness. (1883) 9 Cal 791 (797) (DB).

[10] Neglect to pay for past deliveries is no reason for refusing to make all further deliveries. (1879) 4 Cal 252 (257) (DB).

[11] Agreement containing reciprocal promises—Plaintiffs prepared to perform their part — No allegation in plaint that plaintiffs are ready and willing to perform their part—S. 51 does not bar suit when plaintiffs have shown willingness to perform their part of the contract. (1895) 19 Bom 546 (550) (DB).

[12] Promisee agreeing to reduce rate of interest provided promisors pay it regularly and pay principal within certain time—Promisee's persistent refusal to be bound by agreement — Promisors prevented from performing their part of agreement—Promisors entitled to reasonable time to perform their part after the promisee has performed his part. (Vol 26) 1939 Rang 84 (86) : 1938 Rang L R 660 (DB).

4. Burden of proof. — [1] In the absence of any provision in the law of the place or any local ordinance which deals with the question whether in an action to recover damages for breach of contract the plaintiff is bound to establish his readiness and willingness to perform his part, regard must be had to the English Law applicable in the case of concurrent obligations. (Vol 21) 1934 P C 91 (92) (PC).

[2] In case of a Common Law action seeking damages for breach of an alleged contract, no plaintiff can maintain it unless he can aver and prove that he has performed, or has at all times been ready to perform, his part of the contract. (Vol 23) 1936 P C 236 (238) (PC).

[3] In a suit for specific performance, the plaintiff has to allege and if the fact is traversed, to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. (Vol 19) 1932 Lah 265 (267) (DB). (Suit for specific performance alleging inclusion of certain property in agreement to sell and claiming damages if it could not be sold — Finding that defendant had not agreed to sell it — Held plaintiff was not

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation^a from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

[a] See S. 73.

54. When a contract consists of reciprocal promises, such, that one of them cannot be performed, or that its performance cannot be claimed, till the other has been performed, and the promisor of the promise last-mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Section 51 (contd.)

ready and willing to perform contract as it really was and could not, therefore, obtain specific performance.) * (Vol 15) 1928 Lah 20 (26); 9 Lah 148 (DB). (Suit for damages for non-delivery of goods.) * (Vol 12) 1925 Mad. 971 (971) (DB). (Suit for damages — Buyer must show that he was ready and willing to pay for goods and seller must prove that he was ready and willing to deliver goods.) * (Vol 10) 1923 All 220 (224) (DB).

[4] In order to prove readiness and willingness of the sellers, it is sufficient to show that on due date they had control of the requisite goods or capacity to deliver them when called upon to do so. (Vol 15) 1928 Lah 834 (836); 10 Lah 148 (DB).

[5] Unless special contract to the contrary is proved, it must be presumed that the goods are to be paid for at delivery. The onus is upon the buyer to prove his assertion contrary to usual practice. Very strong and cogent evidence would be required. (Vol 10) 1923 Lah 368 (365) (DB).

SECTION 52 — Note 1

[1] Debenture-holder's action by A against company — Receiver appointed — Company offering A his invested money if he paid costs of receiver and wrote to his solicitors that company's affairs were satisfactory — On failure of A, company withdrew the offer — Funds found insufficient for distribution of shares in the debenture-holder's action — Suit by A claiming his invested money — *Held*, S. 52 applied — Company was bound to comply only on A's performing his promise — A not having performed his part, his suit must fail. (Vol 20) 1933 P C 233 (236); 60 Ind App 368; 58 Bom 101 (P C).

[2] Vendor causing delay in showing a good title is not entitled to claim interest on purchase money. (Vol 5) 1918 Mad 716 (717) (DB).

[3] Where the lessee has not performed his part of the contract he cannot say that the lessor committed a breach. (Vol 15) 1928 All 360 (362) (DB).

[4] Work is not usually paid for in advance unless there is an express agreement on the part of the person for whom it is done. (Vol 14) 1927 Oudh 616 (617).

[5] A party who desires to enforce submission clause for arbitration must specify nature of the dispute and must also nominate his arbitrator first. (Vol 16) 1929 Sind 58 (60) ((Vol 8) 1921 Mad 58; 44 Mad 406 (DB) Disting. (1879) 4 App Cas 337 and (1884) 53 L J Q B 133 Relied on.).

[6] Plaintiff's promise was to be fulfilled first — Plaintiff breaking his promise — Defendant not bound to perform his. (198) 1898 Pun Re No. 17, page 39 (43) (FB).

[7] In cases of settlement of cross contracts the Court may allow a set-off as regards delivery and price for everything except the difference. (Vol 32) 1945 Mad 59 (60).

SECTION 53—Note 1

[1] Wrongful repudiation by one party does not end the obligation unless other party elects to treat it so — Such repudiation by itself does not absolve the other party suing on the contract from proving his performance of a condition precedent. (Vol 20) 1933 P C 233 (236); 60 Ind App 368; 58 Bom 101 (P C).

[2] Obligees sued by B for enforcement of bond hypothecating immovable property, to the discharge whereof he had agreed by a sale of the property — Vendors ready to put B in possession — B failing to pay covenanted price — Contract of sale not acted upon — *Held*, B could not enforce the bond. (1875) 7 NWP HCR 152 (154).

SECTION 54 — Synopsis

1. Applicability.
2. "Fails to perform".
3. Breach of contract—Effect—Promisee.
4. Breach of contract—Effect—Promisor.

Illustrations.

(a) A hires B's ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by A, A receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

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1. Applicability.—[1] Property mortgaged—Part of property along with other property subsequently sold — Part of consideration left with vendee to pay off mortgage — Vendee not paying off mortgage — Vendee dispossessed of portion of property by third person later on — Mortgagee obtaining decree for sale — Mortgaged property sold and purchased by mortgagee — Suit by vendor for damages, and compensation for breach of contract by vendee—Section 54, Contract Act, held, did not apply, as there was no promise, by vendors, on which payment of mortgage money depended — Section 78, held, applied and plaintiff was entitled to compensation. (Vol 33) 1946 Pat 263 (266, 267) (DB).

[2] Where the agreement has been embodied in a compromise decree the judgment-debtor cannot say that, because the decree-holder committed the default first, he was entitled to avoid his own obligations under the terms of the decree; especially, when those terms were independent of each other. (Vol 16) 1929 Nag 164 (168) : 25 Nag L R 110.

[3] Breach of essential term of contract, alone, entitles the other party to repudiate contract—Breach of non-essential term entitles the other party to damages only. (Vol 11) 1924 Sind 105 (105) (DB).

2. "Fails to perform."—[1] Where contract consisted of twelve parts, non-performance of one does not necessarily indicate an intention to put an end to contract. (Vol 1) 1914 Bom 312 (315) (DB).

[2] Sale of property—Part of consideration left with vendee to pay off mortgage by vendor—At time of sale vendor failing to put vendee in possession of very small proportion of property — Still vendee cannot refuse to redeem mortgage. (*Obiter*.) (Vol 33) 1946 Pat 263 (267) (DB).

[3] Vendor, desiring to enforce contract for sale, with condition that title adduced should be approved by purchaser's solicitor, must prove that solicitor did approve of title or that such title was tendered, as made it reasonable not to approve of it. (1911) 35 Bom 110 (120).

3. Breach of contract — Effect — Promisee.—

[1] When promisor fails to perform his part of the contract, promisee can rescind the whole contract; but, if the promisee treats it as a subsisting contract, he must do his part fully to entitle him to insist on the promisor's carrying out the contract. (Vol 12) 1925 P C 188 (189, 193) (PC) (Vol 17) 1930 Lah 979 (982) (DB). (Contract to sell certain timber — Vendor insisting on payment of full price before vendee could be allowed to remove timber—Vendor selling part of contract timber to third party — Vendee keeping contract alive — But claiming credit for value of timber sold — Vendee cannot be said to be willing to make full payment and could not, therefore, sue vendor for damages.) (Vol 17) 1930 Lah 979 (982) (DB) (Vol 6) 1919 Mad 379 (382).

[2] Seller agreeing to send "delivery telegram" but failing to do so — Buyer is entitled to rescind contract as being broken and to sue seller in damages; for a covenant as to delivery is as much an essential part of a contract for sale as a covenant for payment of price. (Vol 10) 1923 Mad 103 (107) (DB).

[3] Where vendee does not complete sale owing to vendor's defective title, vendee need not pay brokerage if he had joined the vendor. (Vol 12) 1925 Sind 220 (221) (DB).

[4] Where defendants agreed to charter a ship, of which the tonnage was guaranteed by the plaintiff, and the ship actually was found to weigh more, it was held, that the defendants were justified in repudiating the contract and thus refusing to charter that ship. (1891) 15 Bom 389 (396, 399) (DB).

[5] Where the plaintiff agreed to sell "entire stock of coal or 7 to 8 hundred tons of coal" the words were not only words of estimation but descriptive of the stock; and, therefore, the plaintiff was liable to pay damages to the defendant when the entire stock sold was only 469 tons. (1910) 37 Cal 334 (337, 338) (DB).

[6] Where in a mortgage, the mortgagee does not pay prior mortgagee as per agreement, the mortgagor was held entitled, in a separate suit, to claim damages from the mortgagee resulting from non-performance of the contract by him. (1907) 10 Oudh Cas 69 (75).

[7] Mortgagor mortgaged his property for 15 years and the condition was that mortgagee should pay decree-holder of the mortgagor regularly by instalments. Mortgagee failed to pay after some instalments and it was held that mortgagor was entitled to redeem his property before the expiry of the period of 15 years. (Vol 14) 1927 Oudh 12 (13, 14) : 2 Luck 279 (DB).

[8] When a ship owner has contracted to give a certain notice to a charterer or to do any other act, with a view to inform the charterer when the ship will be ready, the charterer is not bound to ship his goods until the ship owner has given him that notice or has done that act.

Therefore, in an action for not shipping goods under the following contract, "H. S. to arrive after completion of two country voyages for London on notice in May or June" it appearing that the plaintiffs had sent the vessel for one country voyage only, held, that the defendants were entitled to refuse to ship the goods. (1879) 4 Cal 237 (243, 251).

[9] Where parties to a contract consisting of reciprocal promises failed to perform their respective promises, one wilfully, and the other, because he was not bound to perform his part until the other had fulfilled his, the contract is broken by act of both parties and a suit for specific performance will not lie, though the latter is entitled to compensation for breach of contract. (Vol 2) 1915 Mad 210 (216) : 38 Mad 959 (DB).

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time in contract in which time is essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon. If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.^a

[a] Compare Ss. 62 and 63.

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4. Breach of contract — Effect — Promisor. —

[1] Contract to collect arrears of rent prior to sale for the vendor on vendor's executing a deed of assignment — Deed of assignment not executed — Contract could not be enforced. (Vol 16) 1929 Pat 395 (397).

[2] A party, cancelling a contract without any justification, is precluded from making any defence, which would have been open to him in an action for damages by the other party. (Vol 7) 1920 Bom 181 (182).

[3] Agreement to sell house for consideration to be paid — Consideration converted into cash debt, evidenced by three bonds — Suit for money on bonds — Held, that bonds were without consideration as the contract of sale was not carried through and that the remedy of vendor was to sue for specific performance of contract or for damages for breach. (1936) 19 Nag L Jour 232 (236).

[4] *Hundi* given on consideration of execution by A to B of a mortgage for money due on accounts — Mortgage not executed — D suing on *hundi* — Suit must be dismissed under S 54, Contract Act — No decree can be passed on consideration other than shown in *hundi*. (1908) 3 Mad L Tim 405 (405).

[5] Where contract loan is for consolidated sum of money to be paid from time to time, and lender refuses to lend small portion remaining due to borrower, lender, by his conduct, puts end to contract and cannot claim interest at contract rates. (Vol 1) 1914 Mad 210 (215).

[6] A and B were both *chelas* of C, the late *mohunt* of a *muth*. According to custom and practice of the *muth*, there was one *mohunt* only and two *chelas* cannot become *mohunts* at the same time. Both the *chelas* had become *mohunts* with the result that dispute had arisen between them. They therefore executed an *ekernama*. They agreed that A should be declared to be the *mohunt* and B *adhiakari* of the said *muth* to the end of their lives and that in the event of difference between the parties A would give to B Rs. 40 a year for maintenance. Notwithstanding this agreement B brought a suit against A claiming the *mohuntship* — Held, that B, by his action, in bringing a suit for *mohuntship*, broke his promise and defeated the whole intention of the agreement, and that he could no longer hold A to his part of the contract to pay B the maintenance. (Vol 12) 1925 Pat 496 (497) (DB).

[7] Ship need not remain for the whole of the laying days at a port, if the charterer dispenses with it. The shipper must be ready with cargo before he can enforce the obligation on the shipowner, to call at the port of

shipment and take action against him in damages. (Vol 4) 1917 Mad 294 (296).

SECTION 55 — Synopsis

1. Scope and applicability.
2. When time is essence of contract.
3. When time is not essence of contract.
4. Extension of time.
5. Sale of land.
6. Merchantile contracts.
7. Agreement to lease.
8. Acceptance of performance after time fixed — Paragraph 3.

1. Scope and applicability. — [1] Section 55 provides for a special rule in regard to the performance of a promise to do a certain thing at or before a specified time namely that (unlike terms of contracts generally) the Court is not to enforce such a promise in accordance with its term but is to enforce it subject to the provisions of S. 55. (Vol 24) 1937 Bom 417 (421) : 1 L R (1937) Bom 782 (DB).

[2] Section 55 of Contract Act does not lay down any principle which differs from law of England as to contracts for sale of land. In such cases, equity looks at substance and not at letter of agreement in order to ascertain whether properties notwithstanding that they named specific time within which sale was to be completed, really and in substance intended more than that it should take place within reasonable time. *Prima facie* equity treats importance of such time limits as being subordinate to main purpose of parties. Specific performance of contract to sell land will be granted, although there has been failure to keep dates assigned to it, if justice can be done between parties and if nothing in express stipulations of parties, nature of property or surrounding circumstances, make it inequitable to grant relief. Intention to make time essence of contract must be expressed in unmistakable language; it may be inferred from what passed between parties before but not after contract is made. (Vol 2) 1915 P C 83 (84, 85) : 40 Bom 289 : 43 Ind App 26 (P O). (Vol 1) 1914 Bom 23 : 38 Bom 77, Reversed. * (Vol 20) 1933 Bom 71 (76) : 57 Bom 292 (DB) * (Vol 18) 1931 Lah 205 (205) : 11 Lah 99 (DB) * (1926) 98 Ind Cas 890 (891) (DB) (Lah) * (Vol 7) 1920 Cal 651 (652) (DB) * (1912) 15 Cal L Jour 40 (47) (DB).

[3] Question whether time mentioned in contract is of essence or not depends upon facts and circumstances of each case — Real intention of parties to agreement has to be deduced from all surrounding circum-

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stances. (Vol 32) 1945 All 70 (74, 75) : I L R (1944) All 473 (DB) & (Vol 10) 1928 Bom 441 (444) : 47 Bom 607 & (Vol 6) 1919 Sind 68 (69) : 12 Sind L R 144 & (1903-1904) 2 Low Bur Rul 99 (100) (DB). (Oral evidence is not admissible to show intention of parties.)

[4] Section 55 does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. Time essence of contract—Promisor's failure—Promisee's intimation of rescission after long time—Damages held to be difference of rates at date of breach and not of intimation to rescind. (Vol 1) 1914 Mad 573 (574, 576) : 37 Mad 412 (D B).

[5] Section 55 applies to cases where property in the goods passed by the contract, as much as to contracts where the property did not pass. (1881) 6 Cal 64 (69) (D B).

[6] Performance of an act till or by a certain day connotes performance on that day. ('33) 1933 Mad W N 88 (88) (DB).

[7] Where the performance of a contract falls due on a holiday, seller is bound to establish that he was entitled to perform the contract on the day following the holiday, by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties. He must not only prove existence of trade usage, but also establish that usage when read into written contract does not make it insensible or inconsistent. (Vol 8) 1921 Cal 809 (812) (DB).

[8] Where the plaintiff claims remuneration on the basis of the contract, in which time was of essence, and that contract, which was foundation of the claim, fails completely, the plaintiff is not entitled to remuneration on the basis of *quantum meruit* of his services. (1912) 15 Cal L Jour 40 (49) (DB)&(1913) 19 Ind Cas 48 (50) (Low Bur). (Where time is the essence of contract, claim for *quantum meruit* is unsustainable when work is delayed.)

[9] Failure to perform by specified time—Promisee is entitled to rescind in case time is of the essence of contract—If time is not of the essence, he is entitled only to damages—Whether time be of essence or not contract must be performed within reasonable time. (Vol 3) 1916 Sind 71 (72) : 9 Sind L R 137.

[10] Sale of house site by municipality—Stipulation that construction of house should be completed within three years and that, in default, title of vendee would cease and vendee will be entitled only to 90 per cent. of the purchase money—Default by vendee—Contract, held, did not become void on happening of contingency but was only voidable at the option of Municipality and vendee was not entitled to claim refund. (Vol 21) 1934 Mad 135 (136).

[11] As soon as contract for sale of goods within a specified date is broken, obligation of purchaser to take delivery vanishes; he is not bound to take the goods when delivered later. (Vol 2) 1915 Cal 194 (197) (DB).

2. When time is essence of contract.—[1] Where in execution of a money decree, the decree-holder agrees to accept less amount in full satisfaction if paid within two months, but on failure the decree-holder is to proceed with the execution, time is the essence of the contract, and the Court will not relieve against the forfeiture. (Vol 24) 1937 Pat 542 (544, 546) : 16 Pat 395 (DB).

[2] Where the words of a contract are that in case the judgment debtor fails to pay up the decretal amount within the time specified, the sale would stand confirmed and no order is necessary, the wording shows that the parties meant that the benefit which was to accrue to the judgment-debtors would be lost to them if the payment was not made within the specified time;

or in other words, that time was of the essence of the contract (Vol 24) 1937 Pat 118 (116) : 16 Pat 202 (FB) & (Vol 12) 1925 Pat 691 (692) (DB).

[8] In *kuri* transactions, time being of the very essence of the contract, the bidder loses his right to the amount payable to him, unless the security is furnished within the period prescribed. (Vol 7) 1920 Mad 822 (823).

[4] Compromise decree—Payment by instalments over a long period—It cannot be laid down as a matter of law that time is not the essence of the contract in such a case. (Vol 18) 1931 Lah 696 (702) (DB).

[5] Where by a consent decree, the decree-holder has agreed to accept by way of certain instalments a lesser amount than actually due and there is a default clause in the decree, time will ordinarily be deemed to be the essence of the contract, and in case of default of any of the instalments the decree-holder would be entitled to claim the whole amount. (Vol 27) 1940 Lah 46 (46, 47).

[6] Where a creditor agrees to accept part of debt, in full satisfaction, only if it is paid within certain time, time is essence of such agreement. ('35) 1935 Mad W N 1032 (1032) (DB) & (Vol 18) 1926 All 278 (280, 281) & (Vol 24) 1937 Mad 234 (235).

[7] Contract for supply and purchase of molasses—Quantity to be supplied in twelve monthly instalments, each instalment to be delivered within specified period. Held, on the facts of the case that the time was of essence of the contract and that the vendor was, therefore, entitled to put an end to the contract on breach of stipulation to take delivery of one instalment. (Vol 30) 1943 All 370 (377, 378) : I L R (1943) All 752 (DB).

3. When time is not essence of contract.—[1] Where time is not of essence of contract, failure to comply by specified time entitles promisee to damages only. (Vol 3) 1916 Sind 71 (72) : 9 Sind L R 137.

[2] Where time for performance is fixed but time is not made the essence of the contract either party can give notice to the other fixing reasonable period for performance. (Vol 11) 1924 Bom 357 (358) : 48 Bom 368 & (Vol 18) 1926 Nag 435 (443). (Agreement for sale) & (Vol 11) 1924 Bom 473 (474) : 49 Bom 1. (Notice may be reasonable in spite of promisor's difficulties.) & (Vol 11) 1924 Bom 282 (286, 287). (Agreement for sale—Time not of essence—Failure to complete sale within time—Subsequent notice giving three weeks' time for completion held reasonable) & (Vol 11) 1924 Bom 119 (129) : 48 Bom 259. (What is reasonable time depends on circumstances of each case.)

[3] Where there is an express provision that time is of the essence of the contract and at the same time the contract provides for extension of time in certain contingencies, and provides for the payment of a fine or penalty for every day or week the work undertaken under the contract remains unfinished on the expiry of the time provided in the contract, such provision is inconsistent with time being of the essence of a contract, and would be calculated to render ineffective an express provision in a contract to that effect. It cannot be said in such a case, that it was intended that time should be of the essence of the contract. The principle applies equally to P. W. D. contracts. (Vol 27) 1940 Sind 1 (7) (DB) & (Vol 10) 1923 Nag. 140 (140). (Under building contract work was to be completed within four months from date of getting permission of certain person and a fine of Rs. 5 was to be paid for every day after that date if work remained incomplete—Time was held not to be of the essence of the contract).

[4] Where an agreement to cut timber stipulated for payments in instalments and against any area being cut until the corresponding portion of the consideration

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money had been paid, held, the clause about payment of the instalments every quarter did not show that time was of the essence of the contract. (Vol 9) 1922 Oudh 259 (262) : 25 Oudh Cas 169 (DB).

[5] Contract of sale and act of transfer embodied in same deed.—Clause as to cancellation on failure to satisfy the dues of certain creditors by a certain date—Finding that appellants were not responsible for failure of the respondents to pay the whole dues by the fixed date; *Held*, that the time was not of the essence of the contract. (Vol 23) 1936 P C 24 (25, 26) : 15 Pat 127 : 63 Ind App 26 (PC).

[6] Agreement granting remission of part of debt if debtor paid the rest, of the debt in two instalments on specified dates.—In case of default in payment of instalment on date fixed, the remitted amount was to become due and was to be recoverable from the properties given as security for the debt or personally from the debtor.—Time fixed for payment of instalments, held, was not essence of contract. (1861) 8 Moo Ind App 239 (257) (PC).

[7] Agreement to sell leasehold property — Vendee given possession on payment of money — *Pucca* documents to be executed and registered within six months after obtaining the consent of the lessor — Time, held, was not essence of contract. (Vol 20) 1933 Bom 71 (78) : 57 Bom 292 (DB).

[8] A consent decree or order is only the order of the Court carrying out the agreement between the parties and consequently no greater sanctity can be placed upon a consent decree than upon the agreement itself and if such an order names a specific time by which a particular term embodied in order has to be performed unless the language shows unmistakably that it was the intention of the parties to make the right of the parties depend on the observance of the time limit prescribed, the stipulation as to time is tantamount to this, that the term shall be carried into effect within a reasonable time. (Vol 17) 1930 Pat 234 (235).

[9] Consent decree providing for exchange of houses of plaintiff and defendant, after plaintiff had contracted well in his house.—Exchange to be effected by a certain date—Plaintiff failing to construct well but applying for execution of decree — Defendant contending that time being of essence of decree it was voidable—Time, held, was not of essence as conduct of defendant in not protesting against the delay showed that he did not regard time as of vital importance. (Vol 3) 1916 Bom 282 (283).

[10] Contract to deliver linseed in two instalments at specified periods—Terms as to payment were cast on delivery—Part delivery made by defendant — Claim by plaintiff for excess refraction — Defendant refusing to deliver remainder of linseed unless plaintiff paid in full for the portion already delivered. *Held*, time was not of essence of contract so as to entitle defendant to cancel the contract. (1879) 4 Cal 252 (257) (DB).

[11] Stipulation either to transfer certain bonds and decrees in two months or to pay the amounts due under them, does not of itself show that time is of essence of contract. (1909) 5 Mad L Tim 247 (248) (DB).

4. Extension of time.—[1] Under S. 55 the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. (Vol 33) 1946 Bom 429 (432).

[2] If the time is originally of the essence of the contract, it does not cease to be of the essence of the contract because a party agrees to grant a short extension. (Vol 27) 1940 Oudh 443 (445) : 16 Luck 357.

[3] When the purchaser seeks to have damages for breach of contract, assented at a later date than that

fixed by the contract for delivery, the effect of S. 55 is to put an agreement, come to after the original date of performance of a contract has expired, on the same footing as the original agreement. Mere forbearance from suing or giving a formal notice of rescission does not amount to extension of time for the performance of contract so as to alter the relevant date on which damages are to be assessed. (Vol 33) 1946 Bom 429 (431) ((Vol 9) 1922 PC 178 : 48 Ind App 175 : 43 All 357 (P C) Relied on.) * (Vol 33) 1946 Bom 1 (5) (DB).

[But see (Vol 30) 1943 Bom 229 (235). (A party to a contract may forbear from insisting upon delivery at the contract time and may allow time to be extended, without binding himself to do so, or may expressly contract for an extension of time, and that he may claim damages for non-performance at the extended time.)]

[4] Compromise between parties that amount due under mortgage decree should be paid by instalments, and that the mortgagor should furnish additional security within specified time—Time essence of contract — Failure of mortgagor to furnish security within time — Court, held, could not enlarge time. (Vol 27) 1940 Rang 62 (64) (DB).

[5] Parties by consent fixing date for payment of decretal amount—Sale to be cancelled on payment — Time being of the essence of the contract could not be extended by Court. (Vol 12) 1925 Pat 691 (692).

[6] Contract for delivery of goods within specified time—Failure to perform—Several agreements extending time for performance — There need not be continuous and unbroken chain of extension—Final agreement of extension is necessary. (Vol 33) 1946 Bom 429 (432, 435).

[7] Though time is of the essence of the contract, a default by payee, such as renders proper tender by the purchaser by due date impracticable, would be interpreted as extending time, when purchaser was prepared with ready and willing tender. (Vol 11) 1924 Rang 57 (60) : 1 Rang 472.

5. Sale of land.—[1] Where Specific Relief Act is inapplicable, in a suit on an agreement to sell land, rule of justice, equity and good conscience apply. (Vol 3) 1916 Cal 259 (260) (DB).

[2] As regards contracts for the sale of land the Court must look not at the letter, but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place really intended no more than that it should take place within a reasonable time. (Vol 14) 1927 Sind 49 (50) : 19 Sind L R 41 * (Vol 21) 1934 Pat 518 (519, 520) (DB). (Where a contract for sale of share in a village provides that if the vendee does not pay the balance of the purchase money within a specified time, the vendee will not be entitled to get back the earnest money paid by him the time is not of the essence of the contract.) * (Vol 11) 1924 Lah 151 (153, 154) : 4 Lah 327 * (Vol 8) 1921 Cal 356 (360) (DB).

[3] In all matters of specific performance of contract for sale of land, time is not of essence unless parties make it expressly so. (Vol 3) 1916 Cal 259 (260) (DB) * (Vol 14) 1927 Bom 111 (112) * (Vol 12) 1925 Lah 481 (481) : 6 Lah 308 * (Vol 8) 1921 Mad 141 (141) * (Vol 8) 1921 Sind 197 (198) : 15 Sind L R 21 * (Vol 3) 1916 Sind 71 (72) : 9 Sind L R 137.

[4] The presumption that, time is not the essence of a contract to sell land is rebuttable, when sale is arranged to meet expenses of a marriage taking place on a certain date. (Vol 2) 1915 Mad 546 (547).

[5] Although in a contract for sale of land, time may not be of the essence of the contract, yet unreasonable

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delay by the vendee will entitle the vendor to terminate the contract. (Vol 8) 1921 Mad 141 (142).

[6] In the absence of express stipulation or other circumstances, the date fixed in the contract to sell land is not of the essence of contract, but it can be made so by serving notice by either party to complete within reasonable time. (Vol 13) 1926 Cal 339 (342, 343) (DB) * (Vol 20) 1933 Mad 736 (742) (DB) * (Vol 16) 1929 Nag 164 (168) : 25 Nag L R 110 * (Vol 12) 1925 Mad 211 (212) * (Vol 7) 1920 Cal 651 (654) (DB). (Reasonableness of time so limited is determined by the Court with reference to all circumstances of the case.) * (Vol 3) 1916 Cal 259 (260) (DB).

[7] The doctrine that time may not be essence of a contract does not apply to a contract for resale of property conveyed — The right to repurchase being an option must be exercised according to strict terms of contract. (Vol 6) 1919 Mad 544 (544) : 42 Mad 802 * (Vol 14) 1927 All 321 (324) : 49 All 405 * (Vol 10) 1923 Rang 42 (43, 44) : 11 Low Bur Rul 441.

[8] Where in a contract for the sale of land time is expressly made 'of the essence of the contract in all respects', specific performance cannot be decreed in favour of the party in default and the default, though trivial, will entitle the other party to stand on the letter of the agreement — Time being of the essence of the contract, the vendor was entitled to rescind it on the expiry of the prescribed period. (Vol 3) 1916 P C 152 (157) (P C).

[9] Agreement to sell immovable property — Conduct of parties showing time as not of essence — Subsequent notice by defendant to complete the contract within the short time of four days — The plaintiff sent the engrossment of the conveyance just on the 5th day of notice — The defendant wrote the same day that the earnest money was forfeited — The purchase money also was refused — Plaintiff sued for specific performance — Court can enforce contract beyond time fixed, if notice is unreasonably short. (Vol 9) 1922 Bom 14 (16, 17).

[10] Contract for sale of immovable property to be performed within a certain time — Time not essence of contract — Vendee performing his part but not vendor — Vendor disentitled to claim specific performance — Vendee entitled to avoid the contract and claim return of purchase money. (Vol 20) 1933 Bom 71 (76) : 57 Bom 292 (DB).

[11] In a contract purchaser agreed to purchase some land and paid advance, the agreement was that the balance would be paid within a fixed time. In part performance of the contract, some land was transferred to the nominee of the purchaser and the vendor served a notice on the vendee for completion of sale by a fixed date; otherwise sale would be avoided. The purchaser failed :

Held, the purchaser was not entitled to return of the deposit as the contract was avoided on failure of the purchaser to perform his part at a fixed time when time was of the essence of contract. ('10) 33 Mad 375 (382) (DB).

[12] Even where time is not essence of contract purchaser must show his readiness and willingness to perform his part of contract within reasonable time. (Vol 4) 1917 Mad 8 (9).

6. Merchantile contracts. — [1] In cases other than commercial contracts, the ordinary presumption is that time is not of the essence of the contract but this presumption is rebuttable. (Vol 19) 1932 Cal 493 (494) (DB) * (Vol 27) 1940 Oudh 443 (444) : 16 Luck 357.

[2] In cases of merchantile contracts stipulations as to time are *prima facie* to be regarded as of the essence of such contracts. (Vol 27) 1940 Oudh 443 (445) : 16 Luck 357 * (Vol 22) 1935 Nag 111 (112) : 31 Nag L R

250 * (Vol 3) 1916 Cal 901 (901). (Especially when the promisor obtains an extension of time from the promisee.) * (Vol 3) 1916 Sind 4 (6) : 10 Sind L R 4 * ('09) 5 Mad L Tim 247 (248) (DB).

[3] Where goods are sold on condition that they would be taken delivery of, on payment within certain time, failing which seller being at liberty to re-sell same to another, time is of the essence of the contract. ('13) 1913 Pan L R No. 144 p. 493 (496) : 1913 Pun Re No. 80 (DB).

[4] Contract for purchase of 6 cases of printed cloth to be shipped in November — December 1907 — Subsequent alteration in contract, no fresh stipulation made as to time of delivery — *Held*, in merchantile contracts the stipulations as to time are of the essence of contract and in absence of fresh stipulation the previous stipulation was to hold good. ('10) 8 Ind Cas 945 (947) (Low Bur).

[5] Contract for purchase of bales of yarn — Condition that vendee should take delivery within certain period on payment — Failure to take delivery entitling vendor to sell goods and recover damages from vendee — *Held*, time was of the essence of contract in such sales and therefore S. 55, cl. 2 was not applicable. ('13) 1913 Pan L R No. 144 p. 493 (496) : 1913 Pun Re No. 80 (DB).

[6] In the case of *Hazarmal* contracts, as distinguished from forward delivery contracts, no date for delivery is fixed, but the expectations of the purchaser and the vendors are that delivery could be demanded and given as soon as possible if the goods are ready or after they became ready. (Vol 13) 1926 Nag 410 (412).

[7] Contract for sale, time being of the essence — Custom alleged to exist that the purchaser could take delivery after some days of the fixed date — Definite custom must be proved by the purchaser. (Vol 12) 1925 Mad 1232 (1233).

[8] Notices for the purpose of making time of the essence of a contract are not expressly mentioned in S. 55 but are no doubt available in relation to merchantile contracts. (Vol 11) 1924 Cal 427 (434) (DB).

7. Agreement to lease. — [1] Where time is distinctly of the essence of contract, it is within the power of the lessee to rescind it when the lessor has broken the contract by not putting the lessee in possession on the date agreed upon — The Transfer of Property Act and the Contract Act have to be read together, and under Part 1, S. 55, Contract Act, the lessee can rescind the contract. (Vol 15) 1928 Nag 328 (328).

[2] Agreement to lease fixing four months for giving formal *patta* — Time not of essence — Lease in possession paying rent to lessor — Purchaser of leasehold property with knowledge of agreement to lease suing lessee for ejectment — Lessee's right to claim specific performance of contract, *held*, not barred by efflux of time. (Vol 21) 1934 Cal 235 (237, 238) : 60 Cal 1372 (DB).

[3] Time is not usually of essence in a contract for the sale of leaseholds. (Vol 20) 1933 Bom 71 (73) : 57 Bom 292 (DB).

[4] Where the nature of the property intended to be sold requires that time should be of the essence as for instance, if the contract is for sale of a life interest or a mining lease given for a fixed period, the parties can make it so by express agreement in the contract itself or subsequently giving reasonable notice to complete on a certain day. (Vol 23) 1936 Cal 51 (52, 53) : 63 Cal 804.

8. Acceptance of performance after time fixed — Paragraph 3. — [1] Acceptance of payment after the expiry of the time fixed operates as a waiver of limitation as to time in the contract. (Vol 4) 1917 Pat 82 (83) : 2 Pat L Jour 520.

[2] Acceptance of performance of contract in which time is of essence after expiry of time without notice to claim compensation forfeits right to such compensation.

Agreement to do impossible act.

56. An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to the promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

(a) A agrees with B to discover treasure by magic. The agreement is void.

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

[a] But see S. 63 and see the Specific Relief Act, 1877 (1 [I] of 1877), S. 13.

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(1910) 8 Mad L Tim 40 (46) & (Vol 17) 1930 Oudh 417 (420) (DB). (Notice given after acceptance is too late to sustain a claim for damages for breach on defendant's part.)

[3] Time made expressly of the essence—Equity Court will not decree specific performance unless parties have waived the provision as to essence. (Vol 2) 1915 P C 94 (95) (PC).

[4] Purchaser may by his conduct waive although time is made the essence of the contract and where the time is once allowed to pass and parties continue to negotiate for completing the purchase then time no longer remains the essence of the contract. But simple extension of time without anything more amounts only to a waiver to the extent of substituting such extended time for the original time and does not destroy the essential character of the time. (Vol 12) 1925 Cal 324 (326) (DB).

[5] Mere delay on the part of a party to the contract should not be taken to amount to waiver or abandonment by him. Unless the parties have expressly or impliedly by their conduct made time the essence of the contract, delay is no valid plea in a suit on contract. Undue delay on the part of one party to a contract coupled with reasonable notice given to him by the other party will disentitle the party delaying from claiming any relief in equity. (Vol 12) 1925 Nag 58 (58) & (Vol 16) 1929 Nag 164 (168) : 25 Nag L R 110.

[6] Sale — Time as essence of contract — Earnest money paid and balance to be paid within thirty days — Balance paid by instalments extending beyond such period and accepted by vendor — Right to recover entire money within thirty days is waived — He cannot contend that time was essence of the contract. (Vol 25) 1938 Rang 367 (367) (DB).

[7] Time fixed for delivery but no delivery called for — Subsequently plaintiffs manufacturing goods and defendants taking delivery in small quantities for long time — Plaintiffs giving notice to defendants to take delivery of remaining goods and on defendants' default selling by auction and claiming difference — Written contract had come to an end and there being no second contract, plaintiffs were not entitled to relief. (1922) 24 Bom L R 142 (147, 148.)

[8] Contract to deliver goods within a specified time — Time essence of contract — Breach of contract — Promisee not avoiding contract but extending time — Failure to deliver within extended time. *Held*, there was breach of contract at the extended date, and plaintiff was entitled to damages — S. 53 (3) means that the promisee cannot claim damages for non-performance at originally agreed time, not that he cannot claim damages for non-performance at the extended time. (Vol 9) 1922 P C 178 (180) : 43 All 257 : 48 Ind App 175 (P C).

[9] As to the effect of novation, rescission and alteration of contract, see S. 62.

SECTION 56 — Synopsis

1. Scope.
2. Becomes impossible.
3. Becomes unlawful.
4. Refund and compensation.

1. Scope.—[1] Section 56, Contract Act, clearly does not apply to case, in which, although consideration of contract is lost, performance of promise on other side is still possible. (1880) 2 Mad 187 (190).

[2] Section 56 contemplates that a contract may be void under its provisions and yet compensation may be payable by the person, who is unable to perform it, whether the impediment is impossibility or unlawfulness, and whether the impediment existed at the time of the contract or supervened. The real question that must be considered, when it has to be determined whether S. 56 is applicable or not in any suit, except where the contract is sought to be specifically enforced, is not whether the contract was or became void, but whether the promisor has to make compensation for non-performance. The substance of S. 56 (viz., the payment of compensation being excused) can only apply when there is no contract to the contrary. (Vol 15) 1928 Sind 21 (24).

[3] Part of compromise decree, directing payment direct out of Court, to minor's next friend can be ignored on analogy of S. 56 as unlawful. (Vol 26) 1939 Mad 811 (816) (DB).

[4] Maintenance given under compromise in settlement of disputed claim to *talugdari* — Profits of *talugdari* dwindling : *Held*, that the maintenance rate can be reduced on principles of justice, equity and good con-

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science, rules of which can be applied, if they are not in conflict with the provisions of Contract Act. (Vol 24) 1937 Oudh 82 (84, 86) : 13 Luck 65 (DB).

[5] Co-sharer zemindar contracting to sell 800 acres of his undivided share to P — Land specified adjoining to P's — Sale-deed written crudely — Two postscripts — Co sharer promising in sale-deed to get land measured out and handed over to P. Held, that postscript could not be cut off from agreement and that P could not give general character instead of specific, to his claim — Contract was contingent and S. 32 applied. Section 56 did not apply (Vol 23) 1936 Sind 26 (28) (DB).

[6] Contract impossible of fulfilment owing to supervening condition can be relied on in defence. (Vol 13) 1926 Sind 27 (30) * (Vol 5) 1918 Cal 880 (834) : 45 Cal 28 (DB). (Even if defendant offers delivery on certain terms.)

[7] It is not accurate to say that impossibility excuses breach, without further qualification. It would be more correct to say that precisely opposite is the rule (*Obiter*). (Vol 6) 1919 P C 85 (90) (PC.)

2. Becomes impossible — [1] In English law, a contract to do act which becomes impossible in law after contract is made, becomes void when act becomes impossible, but contract to do act which becomes impossible in fact does not become void, unless, according to true intention of parties, agreement was conditional on its performance being or continuing possible in fact. Indian Contract Act makes no distinction of this kind. In second paragraph of S. 56, so far as contract to do act which becomes impossible in fact are concerned, it lays down as general rule what was English law only in certain exceptional cases. ('10) 1910 Upp Rul 2nd Qr 22 (24 & 25).

[2] Test of impossibility is whether it was practically impossible for party to perform the contract within specified time. (Vol 4) 1917 Mad 509 (510).

[3] 'Impossible' includes what has become impracticable but it does not include what has become more onerous and burdensome. ('10) 1910 Mad WN 686 (687).

[4] A security bond is, in essence a contract for the due performance of a certain thing, and a party is entitled to have that contract enforced by the Courts, unless it cannot be enforced due to some reason, if the latter falls ill. (Vol 15) 1928 Lah 61 (62).

[5] What is reasonable time for performance of contract is to be decided by circumstances of particular case. Where, in a contract for supply of goods by transport by boats, no time is fixed for performance, and the goods are shipped in time but the subsequent delay in transit is due to causes beyond defendant's control, the defendant is not liable for damages for delay. (Vol 6) 1919 Mad 287 (291, 292).

[6] Section 13 of the Specific Relief Act, 1877, provides that notwithstanding anything contained in Section 56 of the Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Frustration — [6a]. Section 56 does not cover every case of frustration. It applies only to cases of physical impossibility. A subsequent unforeseen event or contingency, for which neither of parties is responsible and for which they have not provided, may sometimes operate to avoid the contract. Regard must be had to the nature and circumstances of the transaction and the implied terms. But no Court has power of absolution and special care must be taken to avoid making new. (Vol 8) 1921 Cal 509 (513, 514).

[7] Doctrine of 'frustration of venture' is based not upon existence of any actual impossibility in fact but upon existence in the circumstances of the case, of an implied condition, which must be absolutely necessary to give effect to the transaction which parties must have intended. (Vol 29) 1942 Cal 291 (292) : 1 L R (1941) 2 Cal 78 * (Vol 21) 1934 Mad 85 (86) (DB).

[8] Where it has not become impossible for a party to perform his obligation under contract, but merely burdensome to him, doctrine of frustration can have no application. (Vol 32) 1945 Pat 300 (303, 304) : 24 Pat 197 (DB).

[9] Whether frustration occurs or not depends on the nature of the contract and on the events which have occurred. The doctrine of frustration may apply to a contract of unascertained goods. Where the specification of goods to be supplied does not define what was to be the source of the goods, the contract cannot be said to have frustrated if only one of the many ways of performing it has become illegal or impossible. (Vol 32) 1945 P C 144 (145, 146) (P C).

[10] If the seller has no goods at all ready for shipment, he cannot take advantage of the circumstance that shipment was impossible; that defence should be available only to a person who, but for the impossibility of shipment by reason of circumstances beyond his control, was in fact in a position to fulfil his engagement. (Vol 8) 1921 Cal 305 (306, 307, 308).

Implied term. — [11] Sections 56, 78 — Contract between A and B that B should manufacture certain goods for A who was to sell them in Australia — A accepting delivery of goods for some time — Subsequent prohibition of import of such goods in Australia — A losing market for goods and asking B to cancel his orders — B ceasing to manufacture goods but claiming damages for breach of contract — Contract, held, did not contain implied term as to its enforceability depending upon A's finding customers and did not become impossible of performance and could be fulfilled — A, held, guilty of breach and liable to pay damages. (Vol 32) 1945 Mad 291 (293, 294) : 1 L R (1946) Mad 192 (DB).

[12] In contract for delivery of goods, buyer is not entitled to claim damages, on sinking of goods, in the absence of any condition in contract specially providing for a contingency. (Vol 17) 1930 Lah 193 (195).

[13] Hire-purchase — Covenant that hirer to make good loss by fire is valid and the stipulation cannot be avoided under S. 56, hirer being liable as bailee under Ss. 151 and 152, Contract Act. (Vol 24) 1937 Sind 207 (207) (DB).

Commercial impossibility. — [14] Impossibility must be physical or legal impossibility and not impossibility in reference to ability or circumstances. "Commercial impossibility" i.e., extreme or unforeseen cost or difficulty of performance is no excuse (Vol 8) 1921 Cal 305 (307, 308) * (Vol 32) 1945 Pat 300 (303, 304) : 24 Pat 197 (DB) * (Vol 18) 1931 Lah 347 (348, 349) (DB). (Where in contract to supply ghee from particular provinces, the seller is stopped from supplying ghee from one of these provinces, the contract does not become void for it is a case of mere difficulty. At any rate if the seller continues to make tenders even after the prohibition, without suggesting that the contract has become void, any option he might have had of declaring that contract had become void, must be deemed to have been waived.) * (Vol 14) 1927 Mad 89 (89, 90). (Where the delivery of goods by Railway waggons was contemplated, damages for non-delivery of goods cannot be claimed, under contract when waggons were not available, due to restrictions put by Government and the parties were aware of these restrictions.) * ('10) 1910 Mad WN 686 (687). (Do.) * (Vol 10) 1923 P C 105 (111) : 50 Ind App 142 :

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47 Bom 563 (PC) (Contract for supply of coal within a certain time—Government restriction on the transport of coal from collieries—Coal available in local market—Contract had not become impossible of performance.) * (Vol 8) 1921 Nag 42 (45) * (Vol 7) 1120 Nag 161 (163) : 17 Nag L R 1 * (Vol 2) 1915 Bom 232 (236) : 40 Bom 301.

[15] Lease of dry dock—Lessee covenanting to insure—Insurance Company not insuring at current premium—Covenant containing no limitation that insurance must be at current premium only—Covenant is not impossible of performance. (Vol 6) 1919 P C 85 (90) (P C).

[16] Strike of workmen employed by lessee of salt pans does not of itself make performance of contract impossible, when the strike was not unforeseen and there was no condition that in such contingency the parties were to be excused from further performance. The lessee is liable for rent and costs of repairs to the salt pans. (Vol 15) 1928 Bom 61 (62) : 52 Bom 142.

[17] Where the specification of goods to be supplied does not define what was to be the source of the goods, the contract cannot be said to have frustrated if only one of many ways of performing it has become illegal or impossible. (Vol 32) 1945 P C 144 (145, 146) (PC).

Default of party — [18] Section does not apply to cases of impossibility due to the default of contracting party himself. (Vol 11) 1924 Pat 586 (589) : 3 Pat 581 * (Vol 22) 1935 P C 128 (131) (1 C). (Charter party contract becoming impossible of performance due to election of one of the parties—Party defaulting will be liable under contract.) * (1914) 7 Low Bur Rul 105 (109) (DB). (Clause providing for accident—Accident caused by promisor's own negligence) * (1907) 4 All L Jour 778 (802). (Where parties to contract agreed to sell and purchase certain property, but did not get sale completed in ten months after agreement, and allowed property to be auctioned : Held reasonable inference from their conduct was that parties had rescinded contract.)

[19] Auction-purchaser agreeing with judgment-debtor to reconvey property purchased at Court auction after applying for cancellation—Judgment-debtor depositing the amount as agreed upon—Auction-purchaser failing to get the sale cancelled—Suit for specific performance—Auction-purchaser held liable to perform the contract as failure to apply for cancellation did not make the contract impossible of performance. (Vol 4) 1917 Mad 67 (67, 68).

[20] Sections 56 and 2 (d)—Original patti divided into sub-pattis—Owner of one sub-patti agreeing to be responsible for rents of whole original patti—Agreement is for consideration and he is responsible for failure to realize amount—S. 56 does not apply. (Vol 31) 1944 Nag 307 (308) : I L R (1944) Nag 412.

Act of third party — [21] Contract to sell goods on getting them "as and when" from a third party but third party failing—Original contract is not frustrated—"As and when" did not mean "if and when". (Vol 10) 1923 P C 54 (56) : 50 Ind App 9 : 47 Bom 344 (PC)

[22] Vendor agreeing to supply goods "under manufacture by mill"—Contract anticipating supply—Mill failing to supply goods to vendor—Neither party held liable to the other. (Vol 7) 1920 Bom 187 (188) : 44 Bom 907.

[23] Agreement to refer dispute to three named arbitrators—One arbitrator dying before reference—Agreement held impossible of performance. (186) 1936 Mad W N 407 (408).

[24] Where plaintiff, who had contracted to cultivate land for defendant in different lots, lost possession of some of such lands, on account of failure of his im-

mediate landlord to pay rent, the case falls under S. 56 and the mere possibility of plaintiff paying rent due and retaining possession is not enough to take the case out of section. Plaintiff therefore is entitled to have that portion of contract which related to such lands cancelled on ground of impossibility of performance through no neglect on his part. (1881) 7 Cal 474 (478, 479).

[25] Where a sub-lease is entered into in the belief that the original contract will be subsisting during the period, the cancellation of contract terminates the sub-contract as well. (Vol 8) 1916 Mad 619 (619) * (1909) 6 Mad L Tim 375 (375) (DB).

[26] Where the elder brother agrees to execute a sale deed along with his younger brother he cannot plead that the contract has become impossible of performance due to refusal of his younger brother to join. (1907) 17 Mad L Jour 37 (38, 39).

[27] First part of 2nd para of S. 56 does not speak of act having become impossible by reason of the act of promisors. The Legislature did no intend to depart from general common law rule, which is that where party has not qualified his obligation under contract he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause beyond his control (such as failure to return hired lights due to damage caused by rioters) (Vol 28) 1941 Pat 129 (419 430).

Act of Government — [28] Contract on C. I. L. terms to ship certain goods of a certain brand to a certain port in a certain period—Contract containing a force majeure clause—The Steamer commandeered by the Government for purposes of war—Accommodation for that cargo on any other steamer not obtained—Force majeure clause held applicable—Contract is avoided and damages cannot be claimed. (Vol 12) 1925 Mad 626 (630) : 48 Mad 538.

[29] Contract for sale of goods—Parties waive restrictions imposed by Government on the supply of waggons but expecting normal conditions by date of performance—Wagon restriction still existing at date of performance—Failure to supply—Contract held void being impossible of performance—Parties relieved of their liabilities. (Vol 7) 1920 Cal 1021 (1024).

[30] Flower garden acquired by the Government under the Land Acquisition Act, during the continuance of a lease—Contract having become impossible of performance becomes void and the lessor is bound to compensate the lessee. (Vol 9) 1922 All 6 (6, 7) : 14 All 229.

[31] Parties not liable if contract for delivery of goods becomes impossible of performance owing to Government requisitioning ships. (Vol 15) 1928 Sind 21 (24).

[32] Contract of suretyship to produce judgment-debtor in Court becomes void the latter being in Criminal jail and cannot be enforced. (Vol 10) 1923 Rang 26 (26) : 4 Upp Bur Rul 99.

[33] Agreement between corporation or district of North Vancouver and Electric Power Company for supply of electricity by latter—Corporation to be entitled to acquire the system after 10 years—Portion of district incorporated as City of North Vancouver in the meantime—Right of corporation under agreement is not lost there being no abrogation of terms by supervening event. (Vol 4) 1917 P C 103 (105) (P C) (Case under British Columbia Acts, 1909, Ch. 35, S. 23).

Temporary interruption. — [34] Sale of right to collect toll—Destruction of bridges by unprecedented floods and temporary obstructions to traffic—Held, (1) damage caused by temporary obstruction to traffic did not make any difference and (2) contract did not become

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impossible of performance. (Vol. 21) 1934 Mad 55 (87) (DB).

[85] Temporary interruption followed by the possibility of proceeding with the contract does not avoid the contract. But unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. (Vol 4) 1917 Cal 411 (415).

[85A] For cases of temporary interruptions due to war conditions see Note 3 below.

Partial impossibility. — [86] A lease both for cultivation and manufacturing bricks is not void though land leased is found unfit for the manufacture of good bricks and cultivation. (Vol 17) 1930 Lah 772 (774).

[87] Portion of the contract becoming incapable of performance — Contract is not void or unenforceable — Toll contractor, purchasing right to collect tolls, cannot recover the purchase money from District Board on the ground that certain nature of traffic (food grains) was stopped by Government Ordinance. (Vol 12) 1925 Mad 907 (908).

Landlord and tenant. — [88] Tenant cannot refuse rent of lands under lease silted by floods when there is possibility of putting them right. (Vol 16) 1929 Mad 575 (576).

[89] Neither civil law nor Transfer of Property Act provides that contract to pay rent is to be void if owing to failure of rain the tenant does not get crop. (1910) 1910 Upp Bur Rul 2 d Qr 22 (24 & 25).

[40] The provisions relating to the remission of rent are not intended to apply to the case of lessees of Zemindari property — S 56 is not applicable to such a case. (Vol 22) 1935 Oudh 433 (434) : 11 Luck 317 (DB).

3. Becomes unlawful. — Effect of War — Trading with enemy. — [1] If after contract is entered into, it becomes illegal owing to declaration of war, etc., it cannot be enforced. (Vol 3) 1916 Low Bur 7 (8) * (Vol 5) 1918 Cal 830 (834) : 45 Cal 28. (Contract enuring to aid of enemy) * (Vol 5) 1918 Low Bur 46 (48) (do.) * (Vol 4) 1917 Bom 182 (185) : 42 Bom 473. (Partnership between subjects of belligerent countries.) * (Vol 8) 1916 Bom 251 (252, 255) : 40 Bom 570 (Contract with German firm in Bombay.)

[2] Contract of supply of goods by agent of enemy firm — Declaration of hostilities before arrival of vessel — Capture of vessel by condemnation by Prize Court and subsequent release — Agents, held not liable on the contract — Condemnation of goods divested owners of goods from date of seizure — Defendants were under no obligation to purchase goods subsequently from Prize authorities. (Vol 5) 1918 Mad 515 (516) : 41 Mad 225 * (Vol 8) 1921 Cal 509 (514). (Contingency for delay due by capture due to war, not provided for in contract.) * (Vol 5) 1918 Mad 1124 (1128) (C I. F. contract.) * (Vol 5) 1918 Mad 322 (323) (C I. F. contract).

[3] Contract made before hostilities remains in abeyance during the continuance of hostilities and can be enforced when peace is established. But if the contract requires continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the war, and, further if the suspension of such mutual rights and obligations for an indefinite period would go much beyond merely placing the contract in abeyance, the contract becomes on the outbreak of war, void (Vol 4) 1917 Bom 182 (185) : 42 Bom 473.

[4] Unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. (Vol 4) 1917 Cal 411 (415).

[5] Contract between parties in India for purchase of goods — Condition that contract to become void if there was any fluctuation in rates of Syndicate composed of firms of German producers — War with Germany and

delivered, ceasing — Considerable stocks in India : *Held*, that there was no fluctuation in rates by reason of Syndicate becoming inoperative ; condition avoiding contract therefore did not come into existence and that original obligation on sellers to give deliveries remained untouched. (Vol 8) 1921 P C 16 (47) (PC).

Total or partial prohibition. — [6] P firm contracting to purchase goods from D at Rs 77 per cwt. on 16th September 1943 — Goods delivered to railway on 27th December 1943. D being consignee — Government order fixing price at Rs 48 per cwt. as from 1st January 1944 — P company taking delivery and making payment at contract rate on 3rd January 1944 — Suit by P to recover difference between two prices — *Held*, Government order affected contract — Contract held void under S. 56 — *Held*, neither S. 65 nor S. 72 applied and P firm could not recover difference from D company. (Vol 38) 1946 Cal 245 (247, 248, 249).

[7] N. W. P. Rent Act, 1873, making right of occupancy tenant non transferable — No provision saving contract entered into prior to enactment — Such contracts of sale became void on passing of enactment. (184) 1884 All W N 160 (160).

[8] Contract of sale of rights of defendant conditional on sanction of Cantonment authority becomes void if subsequent to execution of sale deed sanction is refused. (Vol 18) 1929 All 837 (839)

[9] Defendants contracting to convey passengers arriving from Singapore to Jedda — Defendants refusing to take them on board their steamer on ground that passengers had arrived from Singapore on board a ship which was infected with smallpox and that by their conveyance defendants would commit offence under S. 269, I. P. C. — *Held*, defendants had failed to show that carrying out of contract would have been in contravention of any law or regulation. If any special precautions were necessary, under the circumstances, it was for the defendants to have taken such precautions. Contract on the part of the defendants was thus lawful as well as possible so that they were bound to carry it out. (1890) 14 B m 147 (156, 157).

[10] Contract to carry bales — Motor trucks demanded by Transport Authority under D. I. Rules — Breach punishable — *Held*, there was frustration of contract and no damages could be claimed. (Vol 32) 1945 Nag 192 (196) : 1 L R (1945) Nag 475

[11] On December 4, 1939, defendant contracting to purchase from plaintiff fourteen bags of coriander seeds at Rs. 13-8-0 per maund — Plaintiff delivering bags to defendant on December 6, 1939, as per contract — On December 5, 1939 Government notification fixing maximum retail price of coriander seeds at 4 annas per seer — Plaintiff can recover at contract rate — Notification applied to retail price and it did not make it impossible or unlawful for defendant to pay — Doctrine of "frustration of venture" did not apply. (Vol 29) 1942 Cal 291 (292) : 1 L R (1941) 2 Cal 78.

[12] Contract for re-sale on freight paid for carriage of goods from Trinidad to New York made between British subjects in British territory — Meanwhile Act of U. S. A. penalizing such contract — Contract held not frustrated or rendered impossible of performance since British Law not prohibiting such contracts alone applied (case from Trinidad and Tobago). (Vol 7) 1920 P. C. 117 (119) (P. C.).

4. Return and compensation. — [1] Contract becoming impossible — Benefit under contract must be returned (Vol 31) 1944 Mad 239 (243) : 1 L R (1944) Mad 124.

[2] Contract to secure repayment of money advanced by usufructuary mortgage with possession to be given to lender — Land, however, already attached under decree and under management of Collector — Performance of

57. Where persons reciprocally promise, firstly, to do certain things which are legal, and, *Reciprocal promises to do things legal, and also other things illegal.* secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract; but the second is a void agreement.

Illustration.

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house, and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

Alternative promise, one branch being illegal.

58. In the case of an alternative promise, one branch of which is legal, and the other illegal, the legal branch alone can be enforced.

Illustration.

A and B agree that A shall pay B 1000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

- Appropriation of Payments.

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, *Application of payment where debt to be discharged is indicated.* either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations.

(a) *A owes B, among other debts, 1000 rupees upon a promissory note, which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B 1000 rupees. The payment is to be applied to the discharge of the promissory note.*

(b) *A owes B, among other debts, the sum of 567 rupees. B writes to A, and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.*

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contract becoming impossible — Lender held entitled to compensation, damages being amount of advance with interest from date when land should have been made over to him, had performance been possible. (1890) 17 Cal 432 (434).

[3] Contract with defendant German firm, having office in Bombay, becoming void on declaration of war—Plaintiff waiving breach committed by giving defendants time after breach—Defendants held were entitled to return of their deposit. (Vol 3) 1916 Bom 251 (255) : 40 Bom 570.

[4] Lease becoming void by acquisition of land by Government — Consideration for lease paid—Lessor is bound to compensate lessee. (Vol 9) 1922 All 6 (6, 7) : 44 All 229.

[5] As to obligation of person who has received advantage under void agreement or contract that becomes void, see section 65.

Section 57 — Note 1.

[1] Section 57 refers to persons who promise, firstly, to do certain things which are legal and, secondly, under specified circumstances to do certain other things which are illegal. (Vol 24) 1937 Rang 47 (49).

[2] Contract consisting of legal part and illegal part separable from each other—Court is bound to give effect to the legal part and reject the illegal part unless the whole transaction is prohibited by statute or is otherwise void. (Vol 25) 1938 Nag 335 (343) : I L R (1939) Nag 1 (FB) & (79) 1879 Pun Re No. 106 page 293 (294) (DB). (Contract of marriage—Agreement to pay the father or guardian of bride in consideration of marriage. Held that there are two separate sets of promises, one of marriage which was legal and the other for payment which was illegal.) & (1875) 23 Suth W R 66 (68) (DB). (Post-nuptial contract—Husband agreeing to do nothing without permission of wife—Wife to get divorce, den-

mohur, and all husband's earning on his failure—The last stipulation was held legal and entitled wife for fair maintenance.)

[3] Where the parties treat the legal as well as illegal parts as forming one indivisible contract, the whole becomes void. (1885) 9 Bom 176 (178, 179) (DB). (Agreement to pay interest not awarded in decree—Parties treating the two debts as a lump sum — The entire contract is one and vitiated.) & (Vol 4) 1917 Mad 77 (77) (FB). (Partition deed — Part of it relating to immovables not enforceable for want of registration—Intention of parties to treat the parts relating to immovables and movables as one contract — The whole falls.)

Section 58 — Note 1.

[1] Section 58 does not apply where there is no alternative promise separable from illegal portion of agreement. (1918) 18 Ind Cas 9 (10) (All). (A covenant for indemnity for failure to do an illegal act is unenforceable.)

[2] Promisee who had paid good consideration can enforce the legal promise where the contract contains also another distinct promise which is illegal. (Vol 29) 1942 Oudh 1 (6) : 17 Luck 249 (DB).

[3] Substituted contract by heirs of mortgagor to execute sale deed of 6 pies share in the *spes successionis* opening out of the event of death or relinquishment by a widow or in the event of failure to transfer share in another property which had fallen to them in partition — Mortgagee agreeing not to sue before death or relinquishment by widow—Held that although that part relating to the transfer of *spes successionis* is void, the contract was enforceable and the mortgagee was bound to wait till the death of the widow. (Vol 18) 1931 All 589 (591, 592) (DB).

Section 59 — Note 1.

[1] Single debt payable by instalments — Section 59

60. Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

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of the Indian Contract Act has no application. (1906) 3 All L Jour 430 (431). (Decree-holder can appropriate towards any instalment in spite of direction to the contrary) * (Vol 14) 1927 Bom 479 (479, 480) (Do.)

[2] Sections 59 to 61 do not deal with cases in which principal and interest are due on a single debt or where a decree has been passed on such debt. (Vol 28) 1941 Lah 886 (888) : 1 L R (1941) Lah 740 (FB).

[3] Section 59 applies to payments of Government revenue (Vol 18) 1926 Cal 866 (871) : 53 Cal 886 (DB) * (Vol 15) 1928 Cal 68 (71) : 55 Cal 624. (Will apply in the absence of any provisions in the Bengal Land Revenue Sales Act.)

[4] Sections 59 and 60 of the Contract Act apply to a debt under the Public Demands Recovery Act. (1910) 11 Cal L Jour 266 (339) (DB).

[5] Arrears due in respect of separate kists are distinct debts. (Vol 13) 1926 Cal 866 (871) : 53 Cal 886 (DB).

[6] Appropriation — Separate debts — Debtor can make payment towards any of them unless there is an agreement regulating the order of payment. (Vol 25) 1938 Pat 8 (10) (DB).

[7] Creditor must appropriate the payment as directed by debtor. (Vol 9) 1922 P C 26 (27) : 48 Cal 839 (P C) * (Vol 25) 1938 Cal 20 (21) : 1 L R (1937) 1 Cal 697 (DB). (Mortgagee dead directing appropriation towards interest first—Mortgagee must appropriate accordingly.)

[See also (Vol 18) 1931 Sind 73 (74) : 24 Sind L R 437 : 32 Cr L Jour 922 (DB). (Accused fined under different sections of I. P. C.—He can ask amount paid by him to be appropriated towards fine under any particular section or sections.)]

[8] Debtor can direct appropriation in a particular manner until he gets an intimation of an appropriation in a particular manner by the creditor. (Vol 13) 1926 Mad 792 (795).

[But see (Vol 13) 1926 Pat 330 (333) : 5 Pat 326. (Debtor's intimation must synchronise with the payment.) * (Vol 13) 1926 Lah 183 (183, 184) : 7 Lah 17 (Do.)]

[9] Circumstances "implying that the payment is to be applied to the discharge of some particular debt" should also be taken into consideration under this section. (1907) 11 Cal W N 939 (942) (DB).

[10] In the following cases it was held that the circumstances implied a direction as to the order of appropriation :

(a) Balance struck out in a running account — Subsequent payments are to be applied towards the balance. (Vol 23) 1936 Pesh 143 (144) (DB).

(b) Arrears of land revenue paid in respect of certain kist—Amount paid exceeding dues under that kist but very much less than under subsequent kist—*Held* it should be appropriated only in respect of former as there was implied direction to do so. (1908) 35 Cal 636 (639) (DB).

(c) Mortgagor subscriber to a fund under obligation to pay Rs. 20 to a fund—Money advanced on mortgage—Covenant to discharge debt by monthly payments—Payments to be applied towards discharge of mortgage debt and not his subscriptions. (1909) 1 Ind Cas 909 (909) (Mad).

[11] Principal and interest due—No implied indication as to appropriation of amount towards principal

can be inferred in the absence of express direction. (Vol 2) 1915 Lah 248 (249) : 1915 Pun Re No 24.

[12] Method of appropriation having been determined by the parties, law does not require specific appropriation to be made on each payment. (Vol 24) 1937 Oudh 87 (87, 88) : 12 Luck 435 (DB).

[13] A creditor has the option to refuse a payment at all with directions regarding appropriation — Once accepted, the direction will have to be carried out. (Vol 12) 1925 Rang 4 (5) : 2 Rang 204.

[14] Where the decree-holder has not accepted the payment the Court cannot force him to do so against his inclination. (Vol 32) 1945 Nag 277 (280) : 1 L R (1945) Nag 885.

[15] Appropriation made by both parties towards particular dues cannot be subsequently changed by one party without the consent of the other. (1911) 38 Cal 537 (541) : 38 Ind App 80 (P C).

[16] Payment by principal debtor — In absence of special agreement, surety has no right to control the appropriation. (Vol 4) 1917 Cal 537 (544) (SB).

[17] Plaintiff paid defendants money on behalf of S, in satisfaction of debt due by S to defendants—Defendants refused to appropriate the payment towards S's debt, appropriated it towards an alleged debt due by plaintiff and recovered from S the sum owed—Plaintiff sued defendants to recover money paid by him—*Held* the defendants were bound to restore the money to the plaintiff. (1900) 2 Bom L R 706 (707) (DB).

SECTION 60 — Synopsis

1. Applicability.
2. Creditor's right to appropriate.
3. Lawful debt actually due.
4. Whether recovery is barred by law or not.
5. Circumstances indicating particular appropriation.
6. Mode of appropriation.
7. Re-appropriation.
8. Proof of intention.
9. Appropriation to save limitation.

1. Applicability. — [1] A debt under the Public Demands Recovery Act is nothing but a debt and Ss. 59 and 60 apply to arrears of road cess. (1910) 11 Cal L Jour 266 (269) (DB).

[2] Sections 59 to 61, Contract Act, apply only where the debtor owes several debts to a person and voluntarily makes payment and not to a case where principal and interest are due on a single debt or a decree has been passed carrying interest on the sum adjudged to be due. (Vol 28) 1941 Lah 886 (888) : 1 L R (1941) Lah 740 (FB).

[3] Sections 59 to 61, Contract Act, apply to appropriation of payments under the Revenue Sale Law Act XI of 1859. (1908) 35 Cal 636 (640).

2. Creditor's right to appropriate. — [1] Where debtor omits to indicate to which of several debts the payment is to be appropriated, the creditor has the right to appropriate it to any debt actually due and payable to him by the debtor. (1899) 26 Cal. 39 (44) : 25 Ind App 179 (PC) * (Vol 24) 1937 Nag 198 (199) * (Vol 22) 1935 Oudh 209 (210) : 10 Luck 307 (DB) * (Vol 21) 1934 Cal 40 (42) : 60 Cal 1265 (DB) * (Vol 20) 1933 Pat 267 (268) (DB) * (Vol 11) 1924 Sind 137 (138) (DB) * (Vol 8) 1916 Pat 326 (327, 328) : 1 Pat L Jour 474 * (Vol 1) 1914 Lah 363 (364) : 1914 Pun Re No. 82.

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[2] A creditor is not bound to accept a payment on the conditions proposed by the debtor. Where he refuses he should return the money or the cheque by which money is proffered. (Vol 9) 1922 P C 26 (27). 48 Cal 839 (PC)

(3) The creditor's right to appropriate a payment towards any debt to him can be exercised even up to the time of trial. (Vol 18) 1926 Loh 183 (183, 184) : 7 Lah 17 * (Vol 24) 1937 All 1 (2) : 58 All 791 (FB). (Appropriation by creditor will not be allowed in appeal.) * (Vol 3) 1916 Mad 1196 (1201). (Unless it is inequitable to allow such appropriation.)

[See however (Vol 6) 1919 Mad 534 (535) (DB). (Right to appropriate is preserved to the creditor until the moment of the filing of plaint in Court.)]

[4] Security given for a debtor—Creditor is at liberty to appropriate payments after security just in the same way as before. (Vol 6) 1919 Mad 471 (471) * (Vol 28) 1941 Lah 16 (18) : I L R (1941) Lah 323 (DB). (Principal and surety—After creditor has exercised his option and appropriated a payment to the principal's independent account surety cannot object.)

[5] In appropriating a particular debt the probable prejudice that may be caused to third persons having claims against the debtor is no concern of the creditor—He can place himself in the most advantageous position so long as he does not act either unconscionably or inequitably. (Vol 6) 1919 Mad 534 (535) (DB).

[6] Executor *de son tort* cannot remit any debt due to beneficiary and give preference to his own dues. (Vol 22) 1935 Cal 39 (60, 61) : 61 Cal 711 (DB).

3. Lawful debt actually due.—[1] The creditor invoking this section must establish the existence of a lawful debt actually due towards which the appropriation was made. (Vol 15) 1928 Cal 229 (229)

[2] Bond silent as to post diem interest—No post diem interest will be actually and lawfully due in respect of which appropriation can be made. (Vol 4) 1917 Pat 510 (511).

[3] Creditor is not entitled to appropriate towards arrears of rent unless the arrears on the date of appropriation are proved. (Vol 9) 1922 Pat 446 (446).

[4] Part of debt incurred by manager of joint family for future immoral purpose—Creditor who has obtained decree cannot appropriate from sale proceeds towards that part of debt which was illegal and not binding because of its immorality. (Vol 25) 1938 All 437 (440) (DB).

[5] Decree partly set aside in appeal—Unless Court directs the defendant to recover his costs in the first Court there is no lawful debt to which he can appropriate. (Vol 14) 1927 Cal 906 (907).

4. Whether recovery is barred by law or not.—

[1] That the debt is barred by limitation is no bar to the creditor's right to appropriate towards it any payment not specifically paid towards any other debt. (Vol 27) 1940 Lah 166 (169) * (Vol 17) 1930 Mad 594 (595). (Advance paid under stipulation that it should be applied towards last year's rent—Landlord can adjust it towards an instalment of final year though its recovery is barred by limitation)

[See however (1913) 19 Ind Cas 6 (7) (Cal). (Creditor is entitled to appropriate payments made by his debtor to discharge prior dues then outstanding and not barred by limitation.)]

5. Circumstances indicating particular appropriation.—[1] In the absence of any stipulation regarding appropriation it is the duty of the Court to see whether there was any intention on the part of the parties to appropriate the payment to any particular debt. (Vol 24) 1937 Pat 432 (433).

[2] Two debts owing, one bearing compound interest and the other simple interest—Debtor not indicating

the appropriation—Creditor appropriating payments towards the simple interest dues—The fact that debtor was unwilling at the time of the execution of the bond to pay compound interest is not a circumstance which indicates that the payment ought to be appropriated towards the compound interest first. (1899) 26 Cal 89 (44) : 25 Ind App 179 (PC).

[3] Where accounts are taken and balance struck in a running account between the parties the inference is that any payment made subsequently should be applied towards the discharge of the balance. (Vol 23) 1936 Pesh 143 (144) (DB).

[4] Madras Agriculturists' Relief Act (4 of 1938), S. 8 (1)—Debtor making open payment before 1st October 1937 in excess of interest then due—Debtor knowing the extent of his indebtedness and the amount of interest—Intention of debtor unascertainable—*Held*, that the debtor in 1936 did intend to pay off part of the principal of his debt and indicated that intention by the very act of the payment. (Vol 30) 1943 Mad 236 (238, 241) : I L R (1943) Mad 563.

[5] Entries in books of the creditor may be taken as indicative of agreement to a proposed appropriation by the debtor. (Vol 9) 1922 P C 26 (27) : 48 Cal 839 (PC).

[6] Decree-holder filing accounts in execution application, merely entered credit and debit items and calculated interest on both and claimed execution for the balance : *Held*, that it resulted in appropriating the payments towards principal. (Vol 20) 1935 Lah 126 (126).

[7] Demand for January Kist and time extended for payment—Payment made in excess of January Kist and amount far below March Kist—No direction as to appropriation by debtor—*Held*, payment was to be treated as for January Kist. (1908) 35 Cal 636 (639).

6. Mode of appropriation.—[1] The creditor is entitled to appropriate a payment to debts in their chronological order. (Vol 13) 1926 Pat 330 (333) : 5 Pat 325 * (Vol 8) 1921 All 325 (325). (Tradesman's account—Customer paying from time to time without specifying particular item towards which to be credited—Trader can appropriate it in the chronological order.)

[2] Creditor who appropriates need not declare his intention in express terms. (Vol 21) 1934 Cal 40 (42) : 6 Cal 1265 (DB) * (Vol 24) 1937 Nag 94 (95) : I L R (1938) Nag 344 * (Vol 18) 1926 Mad 792 (795).

[3] Appropriation is a matter which arises when payment is made and accepted—Creditor not accepting—Court cannot force him to accept payment in respect of a particular debt. (Vol 32) 1945 Nag 277 (280) : I L R (1945) Nag 885.

[4] Though Ss. 59 to 61 do not expressly deal with interest, the principles underlying these sections apply to interest as well. (Vol 9) 1922 Pat 369 (370)

[5] Monies received by creditor on behalf of debtor must be credited as on the dates received for the current interest and principal. (1887) 9 All 713 (719) : 14 Ind App 142 (PC) * (Vol 33) 1946 P C 145 (150) (PC) * (Vol 9) 1922 P C 233 (234) : 48 Ind App 150 : 44 Mad 570 (PC).

[6] Decree providing for interest—The rule that in the absence of any appropriation by the debtor the creditor may appropriate a payment first towards interest applies. (Vol 5) 1918 Cal 605 (607) * (Vol 10) 1923 Pat 322 (324). (Instalment decree—Decree-holder has the right to appropriate the payment first towards interest.)

[7] Where interest due largely exceeds the amount paid towards liquidation of debt, the creditor can properly appropriate it towards interest. (Vol 6) 1919 Cal 235 (240).

[8] Creditor can be allowed to prepare his account so as to appropriate towards interest monies paid from

61. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

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time to time, though he did not appropriate them at the time when payments were made. (1910) 7 Mad L Tim 199 (200).

[9] Payment by debtor after dismissal of one claim and decree of another cannot be appropriated towards dismissed claim. (1894) 7 C P L R 57 (58).

[10] Two debts—One debt agreed to be liquidated by payment in kind — Payment in kind cannot be appropriated towards the other debt. (1886) 13 Cal 164 (168).

[11] A joint deposit cannot be appropriated towards the debt of one of the depositors. (Vol 15) 1928 Lah 316 (316).

[12] The amount deposited for a special purpose cannot be regarded as a repayment which the debtor at a subsequent date may claim to appropriate to any other debt. (Vol 8) 1921 Nag 133 (134).

7. Re-appropriation — [1] So long as notice had not been given as to the appropriation of any amount to any particular account it is open to the creditor to alter it and make re-appropriation. (Vol 17) 1930 Mad 374 (373) : 53 Mad 326 (DH) : (Vol 13) 1926 Mad 792 (795) : (Vol 13) 1926 Mad 330 (333) : 5 Pat 326

[2] Money paid expressly for being appropriated for January Kst and appropriated as such — The appropriation cannot be altered subsequently without the consent of parties. (11) 38 Cal 537 (541) : 38 Ind App 30 (PC).

[3] Chitti debt and rent debt due from the person to the landlord — Payment appropriated by landlord towards Chitti debt—Court holding that under S. 75, C.P. Tenancy Act the appropriation ought to have been towards rent dues — Held new cause of action arose in respect of the Chitti debt as a result of the re-appropriation of the payment to the rent dues. (Vol 33) 1946 Nag 130 (131).

8. Proof of intention — [1] Proof of intention as to how a payment was to be appropriated may be by circumstantial evidence. (Vol 30) 1943 Mad 236 (241) : 1 L R (1943) Mad 563.

[2] Burden of proof is on the debtor who alleges appropriation in a particular way. (Vol 14) 1927 P C 50 (51) (PC) : (Vol 2) 1915 Lah 248 (249) : 1915 Pun Re No. 24. (Principal and interest due — Amount paid appropriated towards interest — Person who objects to the appropriation should prove that there was direction to appropriate it first towards principal.)

[3] Account of creditor in which he pays in full interest due to him on date of settlement and applies balance towards principal is clear indication of intention to make appropriation towards interest in first place. (Vol 3) 1916 Mad 1196 (1201).

9 Appropriation to save limitation. — [1] The creditor may appropriate payments towards debts which could otherwise be barred by limitation. (Vol 20) 1933 Pat 267 (268) (DB) : (Vol 12) 1925 Cal 937 (939).

[2] Limitation is not saved by the mere appropriation by the creditor unless the debtor's intention to save limitation is also proved. (Vol 6) 1919 Lah 288 (289) : 10 Lah 750.

[3] Customer making payments to trader from time to time without directions as against what item it ought

to be credited — Trader cannot credit it towards the entire balance due up to date or as to time limitation (Vol 8) 1921 All 325 (325).

SECTION 61 — Note 1.

[1] The application of S. 61 is always subject to the condition that the parties have indicated no intention inconsistent with its application. (Vol 1) 1914 Bom 290 (291) : 38 Bom 255 (DB).

[2] Where neither party makes any appropriation payments are to be applied in the discharge of debts in order of time. (24) 78 Ind Cas 910 (911) (Pat) : (Vol 29) 1942 Oudh 311 (312) (DB) : (Vol 2) 1915 All 378 (379, 380) : 37 All 649 (DB) : (1870 71) 6 Mad H C R 32 (33) (DB).

[But see (Vol 9) 1922 Nag 219 (221). (Two debts — Personal debt being older than Havalah debt—Payment without appropriation by either party—There is no rule that payment must be credited towards older debt)]

[3] The Court should, in the absence of any appropriation by the debtor or creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately. (Vol 22) 1935 All 221 (228) : 57 All. 605 (FB) : (Vol 24) 1937 All 1 (2) : 58 All 791 (FB) : (Vol 3) 1916 Pat 326 (327, 328) : 1 Pat L Jour 474 (DB).

[4] Successive advances by creditor and successive payments by debtor — Each item of debt if unpaid becomes time-barred on expiry of three years — Balance outstanding in favour of creditor is not considered to consist of the oldest items of debts — Each payment ought to be appropriated towards the oldest then outstanding debt. (Vol 27) 1940 Pat 52 (53, 54) (DB).

[5] Payments by some debtors towards joint debt can be appropriated in order of time towards barred debt even though all debtors did not concur in making payment. (Vol 5) 1918 Cal 802 (803).

[6] Moneys received without any definite appropriation as to principal or interest must first be applied in payment of interest and then in payment of the capital. (Vol 9) 1922 P C 233 (234) : 48 Ind App 150 : 44 Mad 570 (PC) : (Vol 28) 1941 Lah 386 (389) : 1 L R (1941) Lah 740 (FB). (This principle applies even to the sale proceeds of the properties sold in execution of a mortgage decree. — (Vol 25) 1933 Lah 289 : ILR (1933) Lah 403, Overruled.) : (Vol 15) 1928 Lah 901 (901) : (Vol 10) 1923 Oudh 123 (138) : 25 Oudh Cas 349.

[7] Where creditor has not appropriated in taking accounts debt which does not carry interest should rank last (13) 18 Cal W N 25 (35).

[8] Where the creditor treats the account as a running account, the payments would go towards the earlier items in the account. (Vol 20) 1933 Pat 267 (268).

[9] In running account payments within three years can be treated as appropriated to the satisfaction of earlier time barred advances. (Vol 10) 1923 Bom 82 (83) : 47 Bom 123.

[10] Rule of appropriation under this section does not apply to fiduciary relation — Executor *de son tort* cannot therefore remit any debt due to beneficiary and give preference to his own debt. (Vol 22) 1935 Cal 89 (60, 61) : 61 Cal 711 (DB).

Contracts which need not be performed.

Effect of novation, rescission, and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations.

(a) A owes money to B under a contract. It is agreed, between A, B, and C, that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5000 rupees in place of the debt of 10,000 rupees. This is a new contract, and extinguishes the old.

(c) A owes B 1000 rupees under a contract. B owes C 1000 rupees. B orders A to credit C with 1000 rupees in his books, but C does not assent to the arrangement. B still owes C 1000 rupees, and no new contract has been entered into.

SECTION 62—Synopsis

1. "If the parties to a contract agree."
2. Novation of contract—Effect.
3. Novation by substitution of new party.
4. Cross contracts.
5. Agreement to substitute in future.
6. Section 62, whether applies after breach of original contract.
7. Invalid novation — Effect.
8. Negotiable instrument invalid—Whether plaintiff can fall back on original consideration.
9. Alteration of documents—Effect.
10. Consideration under S. 62.
11. Burden of proof.
12. Limitation.

1. "If the parties to a contract agree." — [1] Parties are not in a position to avoid a contract under S. 62 without the other side's consent. (Vol 22) 1935 Bom 225 (227) (DB).

[2] A contract is concluded when in the mind of each contracting party there is a consensus *ad idem* and a modification or revocation of the contract requires a like consensus. (Vol 12) 1925 P C 232 (232) (PC).

[3] No legal novation or modification of an existing contract is created in a case where one party proposes the novation but the other party accepts the proposal in a qualified manner. (Vol 2) 1915 Oudh 81 (53) (DB).

[4] Rights under leases granted already cannot be affected except by agreement by lessees. (Vol 7) 1920 P C 186 (188) (PC).

2. Novation of contract — Effect.—[1] Essence of novation lies not in the dissimilarity of the terms between the two contracts but in the intention of the parties to supersede the old by the new. (Vol 11) 1924 Oudh 169 (170) (DB) * (Vol 32) 1945 Oudh 29 (30) (DB). (Bond executed for arrears of rent) * (Vol 23) 1936 Nag 37 (38, 40) : 31 Nag L R (Sup.) 154 * (Vol 22) 1935 Oudh 366 (369) * (Vol 12) 1925 Mad 1260 (1261) (DB) * (1883) 1883 All W N 254 (255).

[See also (Vol 29) 1942 Bom 15 (16) : I L R (1942) Bom 101. (Vague statements or inferences cannot be relied upon to extinguish a right which had accrued under a negotiable instrument.)]

[2] A collateral agreement must be, in every sense, a complete legal contract and the effect must be to vary or add to the terms of the contract.—Such collateral agreements are viewed with suspicion and so must be proved strictly. The terms of the agreement and also the animus contrahendi on the part of all the parties must be established clearly. No laxity in this respect would be allowed. (Vol 82) 1945 P C 144 (145) (P C).

[3] Whether there is a novation or not depends on the intention of parties. One should look to the substance and not to mere form. (Vol 14) 1927 Cal 538 (542) (DB).

[4] Whether the parties intended the substitution of a new contract depends upon the circumstances of each case. (Vol 31) 1944 Oudh 63 (64, 65) * (Vol 29) 1942 Cal 87 (90) : I L R (1941) 2 Cal 237 (DB).

[5] Under S. 62, it is not always necessary to prove that a new contract has been substituted; it is enough if an alteration in the original contract is proved. Consequently, where an instalment bond is actually executed by the debtor after striking of the balance on the bank account, the terms of the original contract are varied, and this variation will be sufficient to absolve the debtor from the performance of the original contract. The creditor cannot, therefore, fall back upon the original contract and cannot sue thereon. (Vol 22) 1935 Lah 897 (898).

[6] Whether there has been a mere variation of terms or abandonment depends upon the facts of each particular case and is often not easy to determine but the following test may be applied, viz., that in the first case (variation) there are no such executory clauses in the second agreement as would enable one to sue upon that alone if the first did not exist; in the second (rescission) one could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first, but in a different way, it is impossible that the two should be both performed. (Vol 22) 1935 Cal 347 (353, 354) : 62 Cal 175 (DB).

[7] Parties must rescind the prior contract altogether in order that there may be valid novation; if there is no such intention, there is no substitution and original contract is available. (Vol 15) 1928 Mad 1201 (1203) 52 Mad 465 (DB) * (Vol 28) 1941 Rang 37 (39, 40) : 1940 Rang L R 603 (DB). (Prior mortgage by deposit of title deeds — Fresh promissory note only provides evidence of the original loan and does not extinguish prior mortgage.) * (Vol 27) 1940 Pat 121 (124) (DB) * (Vol 25) 1938 Lah 757 (758) * (Vol 23) 1936 Lah 51 (53) (DB). (Pro-note and subsequent bond with condition precedent — Condition not fulfilled—Suit on pro-note is maintainable, as there is no novation.) * (Vol 10) 1923 Nag 213 (213, 214) * (Vol 7) 1920 Cal 148 (149) : 46 Cal 534. (When a settlement contract is made re-selling the goods back again from the original buyer, the intention is not that after the settlement contract, the first contract should be gone. The intention is that the two contracts should stand together.) * ('08) 4 Low Bur Rul 365 (366, 367) (DB) * (1874) 1 Ind App 241 (263) (PC). (A agreeing with B to pay B's creditor C—A accordingly executing bond to C but C retaining his security against B also—A's transaction with C is not novation of C's transaction with B.)

[See also (Vol 26) 1939 Pat 323 (328).]

[8] When a contract is novated there is a fresh contract coming into existence, directly, or by implication, in place of the original contract. (Vol 12) 1925 Pat 222 (286) (DB).

Section 62 (contd.)

[9] There is implied rescission of contract when new and inconsistent contract is agreed upon regarding same subject-matter between same parties. (Vol 4) 1917 Cal 52 (62) (FB) * (Vol 3) 1916 Cal 186 (146) : 43 Cal 790 (DB).

[10] Consequence of S. 62 is that prior rights of the parties are extinguished. ('14) 41 Ind App 142 (146) (P C) * (Vol 25) 1938 P C 67 (69) : 65 Ind App 66 : 1 L R (1938) 2 Cal 72 : 32 Sind L R 374 (P C). (Where there is a contract between the parties to do a work with some specific rates but the rates are subsequently abandoned with the consent of both the parties and no new rates substituted therefor, but the work is finished and accepted by the parties; in a suit by contractor to recover money, the amount which the contractor is entitled to recover should be determined on the basis of fair and reasonable rates.) * (Vol 24) 1937 Cal 57 (58) (DB) * (Vol 23) 1936 Rang 396 (397, 398) (DB). (Where there has been a novation of the original contract, no suit can be founded on it.) * (Vol 21) 1934 All 246 (248) (DB) * (Vol 21) 1934 Lah 128 (129) (DB). (Accounts settled — Some amount paid in cash, some given up and *hundi* for rest—Receipt stating no accounts left except liability on *hundi* — *Hundi* inadmissible not being stamped. Held, there was a novation and the original cause of action merged in the *hundi*.) * (Vol 16) 1929 Sind 49 (49) (DB). (A composition between a debtor and his creditors operates as satisfaction of the debts. No action can be based by creditor on original liability.) * (Vol 12) 1925 Sind 144 (147) : 20 Sind L R 335. (Novation puts an end to a reference clause in the original contract.) * (Vol 10) 1923 Oudh 3 (4) : 26 Oudh Cas 201 * (Vol 4) 1917 Bom 262 (264). (Where a new note is accepted from surviving partners in place of old one, it operates as novation absolving estate of deceased partner from any liability.) * (Vol 2) 1915 Mad 254 (256) (DB). (In the case of mere contracts, a repudiation by one party assented to by the other might put an end to the contract. But this principle is not applicable to rights of property.) * (Vol 1) 1914 Lah 88 (88) * ('02) 6 Cal W N 905 (910, 911) (DB) * (1874) 1 Ind App 124 (142) (PC). (A holding debentures in B, a municipal body, agreeing to give them up to B in exchange of certain plots of land which A was at liberty to select for himself—Selection of plots made by A and accepted by B — Contract is complete — A cannot thereafter claim under the debentures.)

[See also (Vol 29) 1942 Cal 45 (46) : 1 L R (1941) 2 Cal 103. (Cheque drawn by debtor in favour of creditor negotiated with third party — Cheque outstanding in hands of third party, extinguishes the original debt.) * (Vol 8) 1921 Low Bur 44 (46) : 11 Low Bur Rul 137 (DB). (An indorsee of a pro-note can claim only on the notes and cannot fall back on the original loan.)]

[11] A balance signed by the defendant which states as payable a rate of interest different from the rate usually charged in the previous accounts, amounts to a new contract which can form the basis of a suit. (Vol 2) 1915 Lah 402 (402) : 1915 Pun Re No. 42 (DB) * ('09) 32 Mad 284 (288) (DB). (Where a debtor accepts the creditor's accounts to be correct and agrees to pay an existing debt in certain instalments with interest, the debtor not being liable for interest on the original debt, there is a fresh contract giving rise to a fresh cause of action to the creditor.)

[12] Voluntary payment of interest at a higher rate, without consideration is not a novation. (1867) 11 Moo Ind App 129 (137) (PC).

[13] Renewal of a debt does not *ipso facto* extinguish the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security. (Vol 2) 1915 Mad. 137 (143) * ('13) 35 All 211 (225) :

40 Ind App 105 (P C). (Mortgage by full owner—Renewal by life estate owner does not discharge the original mortgage debt.)

[14] Surety for treasurer renewed thrice — Old bonds not returned—Treasurer found guilty of defalcation—Surety is liable on all bonds — Renewal of bonds was no novation. (1872) 4 Moo Ind App 86 (88) (PC).

[15] A renewed bill or promissory note for debt giving time to the debtor in consideration of increased interest does not operate as novation. (Vol 14) 1927 Cal 538 (542) (DB).

[16] A pronote renewing a promise to pay the debt due under a former pronote wipes out the old debt and creates a new liability and Court need not enquire into the old transaction unless where the debt acknowledged is barred by time so as to exclude the application of S. 19. Limitation Act. (Vol 16) 1929 All 980 (983) : 52 All 169 (DB).

[17] Where a Hindu father executed a promissory note partly in renewal of an obligation incurred before partition and partly because of new advances made after partition, and the promissory note contained a more onerous obligation in respect of interest than what was originally agreed on, held, that the promissory note represented a novation by which there was a new liability in the place of old one. ('30) 1930 Mad W N 658 (672, 673) (DB).

[18] Agreement to give time for the payment of money due under a pro-note is operative in India. (Vol 4) 1917 Mad 539 (540) : 39 Mad 129 (FB).

[19] Acknowledgment of existing debt does not change nature of debt or operate to create a new debt. (1891) 14 Mad 253 (262) : 13 Ind App 37 (P C) * (Vol 29) 1942 Pat 170 (174) (D B). (Writing containing details of account and amount due, signed by the debtor—Debtor mentioning therein that he is giving certain documents on credit or in lieu of dues and dues mentioned as fully satisfied—Writing held only acknowledgment and not complete discharge of debt or new contract under S. 62.) * (Vol 26) 1939 Pat 323 (328) (DB). (Two persons forming partnership borrowing debt — Another person subsequently joining them and forming new partnership and signing *hatchitta* account book in respect of debts prior to his joining. Held, that the acknowledgment did not imply a promise to pay and there was no novation.) * (Vol 20) 1933 Lah 174 (175) * (Vol 19) 1932 Oudh 49 (50) : 7 Luck 313 (D B). (Acknowledgment does not create any new right of action but only enlarges the time.) * (Vol 7) 1920 Nag 244 (244). (Mere *Rasu Khata* unsupported by consideration does not form a fresh contract.)

[See also (Vol 16) 1929 Oudh 529 (529) (DB).]

[20] Accounts settled between parties and certain sums acknowledged by defendant and entry made in plaintiff's account books of defendants' agreement to pay with interest—Case held to be one of novation. (Vol 13) 1931 Oudh 97 (98).

[21] Where there is an existing debt, and the payment of it is secured by a deed intended to operate as a mortgage, there is no novation wiping out the pre-existing personal liability of debtor. (Vol 13) 1926 Cal 818 (318).

[22] When mortgagor agreed to accept part of the mortgage money by a certain period and actually accepted it after that period there is no new contract at the time of the acceptance of the part amount but there is merely an acquiescence in the late payment. (Vol 11) 1924 Pat 825 (829) (DB).

[23] Lease by manager of joint family—Addition of coparcener's name while getting it confirmed by widow of lessor on death of lessor does not operate as novation of lease. (Vol 12) 1925 Mad 919 (921).

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[24] Where one person executed a bond for a debt due by another and afterwards came to a settlement that the latter should pay the debt by instalments, should execute mortgage for the balance and that default in payment should make the latter liable as before : *Held*, that failure to carry on the settlement, though some of the instalments were paid, did not revive the former's liability as it was absolved by the settlement subsequent to the bond. (Vol 20) 1938 Lah 464 (465) (DB).

[25] If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly, in special cases, support along with other appropriate evidence, a claim for rectification. (Vol 25) 1938 P C 26 (29) (PC).

3. Novation by substitution of new party [1] To supersede a contract by another contract, all the parties to the first contract must be parties to the second contract. (Vol 12) 1925 Mad 261 (263) : 48 Mad 693 (DB).

[2] A person not a party to a novation is not discharged from his liability under the original contract. (18) 21 Ind Cas 222 (223) (D B) (Burma) & (03) 1903 Pun L R No. 80, page 818 (319).

[3] In each case the question is not only whether a new debtor has consented to assume liability but whether the creditor has agreed to accept his liability in substitution of the liability of the original debtor. (Vol 29) 1942 Cal 87 (90) : I L R (1941) 2 Cal 237 (D B) & (Vol 31) 1944 Sind 205 (206, 207) : I L R (1944) Kar 208 (DB) & (03) 5 Bom L R 617 (617) (DB).

[4] An assignment of contract to be operative must amount to a novation, requiring the consent of the other party to the contract. (1892) 16 Bom 441 (448).

[5] If the promisor being requested by the promisee, agrees to pay the debt to a third party, the original contract is replaced by a new one and the original promisee cannot enforce his claim against the promisor. The substituted contract is supported on this consideration namely, the original promisee's forbearance to demand the payment from the promisor. (Vol 12) 1925 Nag 66 (68).

[6] If a landlord came to know after the execution of the *kabuliyat* that the tenant had allowed his brother an interest in the tenancy, that would not amount to novation. (12) 16 Cal L Jour 271 (278) (DB).

[7] Defendant purchasing all property of plaintiff's debtor and agreeing to pay plaintiff's debt out of consideration—Simultaneous agreement between plaintiff and defendant, latter admitting and accepting liability—Plaintiff held entitled to decree against purchaser. (Vol 1) 1914 Cal 129 (132) : 41 Cal 187 (DB).

[8] A contract by the purchaser of a property to pay the whole or part of the consideration retained by him for payment to the vendor's creditors can be enforced by the latter, though they were not parties to the contract. Basis of liability is not novation but purchaser in that case becomes a trustee for vendor's creditors. (Vol 5) 1918 Cal 941 (941) (DB).

[9] In a suit by A against B and C the plaint averred that certain amount was due to A from B and that C had undertaken to make the payment. It was alleged that C had intimated this fact to A but subsequently C withdrew his undertaking to pay to A as B had failed to pay him. Held that there was no novation within S. 62. All that C did was to assume responsibility to A on be-

half of B and that later on C resiled from this undertaking. (Vol 20) 1933 Lah 335 (335).

4. Cross contracts.—[1] In "cross contracts" the second contract does not operate to extinguish the first contract completely nor is it effective as a novation. The two contracts are distinct and separate and intention of parties only to pay differences does not extinguish them. (Vol 12) 1925 Sind 144 (146) : 20 Sind L R 335.

[2] Where there are two contracts, one for sale and the other for purchase of the same amount, of the same class of goods, e.g., one hundred bales of cotton for settlement on the same day, the obvious intention of the parties is that the contracts should not be carried out according to their terms but should be treated as balancing each other. In such a case, generally speaking the parties intended that the contracts shall be cancelled, and that in lieu of the existing contracts, there shall be a fresh contract under which one party has to pay and the other to receive on the due date the difference, and neither party is to insist on the original contracts being carried out according to their terms. The Court may readily infer such a fresh contract, either from the terms of the instructions for the second contract in referring to an intention to close the first contract, or from the manner in which the contracts have been dealt with in the books, e.g., by treating the first two contracts as cancelled, and replaced by a liability to pay or a right to receive the difference, or by other sufficient evidence. But, the liability to pay or receive the difference on the contracts would only arise, in the absence of agreement to the contrary, on the day fixed for the performance of the original contracts. (Vol 21) 1934 Bom 91 (92) (DB).

5. Agreement to substitute in future. — [1] In order to operate as a novation under S 6 the new contract must involve present supersession or extinguishment of the liability arising under the old contract. A mere agreement between the parties to effect such a supersession or extinguishment at a future date cannot constitute novation. (Vol 15) 1928 Nag 289 (289, 290) & (Vol 23) 1936 Lah 476 (477) & (Vol 16) 1929 All 508 (508) : 51 All 799 (DB).

[See also (Vol 26) 1933 Nag 224 (224) : I L R (1941) Nag 464 & (1888) 1888 Pun Re No. 66, page 167 (169) (DB). (If there is no completed "contract", the other party is entitled to rescind it and to revert to the former consideration under the old contract.)]

6. Section 62, whether applies after breach of original contract.—[1] Section 62 contemplates that the original contract subsists and that the parties have agreed to replace it by a new contract. If there is a breach of the original contract S 62 does not apply (Vol 3) 1916 Mad 823 (824) (D B) & (Vol 29) 1942 Cal 87 (90) : I L R (1941) 2 Cal 237 (D B) & (Vol 26) 1939 Rang 413 (415). (Section 62 presupposes that the original contract is still capable of performance.) & (1888) 15 Cal 319 (325) (DB).

[See also (1936) 63 Cal 194 (201, 202). ('Parties to a contract' ordinarily signifies parties to an existing contract rather than parties to a contract that has already been discharged. There is, however, difficulty in applying this principle to a debt.)]

[See however (Vol 33) 1946 Nag 148 (150) : I L R (1946) Nag 36 (DB)].

[But see (Vol 9) 1922 Mad 314 (315, 316) : 45 Mad 180 (DB). (The provisions of S 62 apply to cases of substituted agreement after the breach of the original contract as well as to cases of substituted agreements prior to the date of performance under the original contract. The Common Law Rule, that there can be no accord and satisfaction after the breach of the original contract is by the enactment of S. 62 departed from.)]

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[2] If after a breach of contract parties enter into a new contract to settle the amount of damages suffered in the breach of old contract, cause of action on the old contract is wiped out and the plaintiff can only sue on later contract (Vol 10) 1923 All 518 (519) : 45 All 472 (DB) (Vol 10) 1923 Nag 332 (333).

[3] The effect of non payment of the mortgage money within the stipulated period is merely to furnish a cause of action to the mortgagee to sue on the mortgage; the mortgage remains in force so long as it is not discharged and until this is done, it can be substituted by a new contract. (Vol 26) 1939 Pat 477 (488).

7 Invalid novation — Effect — [1] Novation means the wiping out of the original contract as well as the creation of a new valid contract. If the new agreement is invalid it cannot serve as novatio, and the original contract continues unless the rights thereunder are expressly abandoned. (Vol 12) 1925 Nag 26 (26, 27, 28) (Vol 33) 1946 Nag 260 (261) : ILR (1946) Nag 500. (In order to constitute novation, there must be a new contract and not merely a new agreement, i.e., there must be a new enforceable agreement) (Vol 28) 1941 Mad 772 (779) : I L R (1942) Mad 95 (FB). (Pro-note executed by a person renewed by him after his adjudication as insolvent and before discharge—Creditor can sue on the original pro-note) (Vol 24) 1937 Lah 816 (818) (Vol 24) 1937 Nag 104 (104) : I L R (1937) Nag 353 (Vol 17) 1930 Lah 985 (989) : 12 Lah 239 (DB) (Vol 15) 1928 Mad 1201 (1203) : 52 Mad 465 (DB) (Vol 14) 1927 Nag 83 (84). (Earlier mortgage substituted by subsequent mortgage — Subsequent mortgage invalid for want of legal attestation — Mortgagees can fall back on earlier mortgage provided his rights under it are not otherwise barred) (Vol 8) 1921 Lah 80 (80, 81) : 2 Lah 323 (DB). (Defendant executed a bond in favour of plaintiff for a certain amount. Afterwards defendant executed a lease of his land in favour of one A and transferred to the plaintiff the right to recover the lease money. Defendant failed to deliver possession of the leased land to A and the scheme for payment of the bond debt fell through. Held, plaintiff could sue on his original bond) (Vol 7) 1920 Mad 352 (353) (DB) (Vol 3) 1916 P C 68 (70) : 44 Ind App 60 : 39 All 178 (PC). (Subsequent mortgage in lieu of a prior mortgage—Subsequent mortgage found invalid — Revival of right of suit on prior mortgage.) (1912) 14 Bom L R 26 (29) (DB). (Mortgage deed executed in consideration of previous bonds, unregistered and hence unenforceable. Promisee is entitled to sue on original bonds) (1910) 6 Nag L R 164 (166, 16). (Lease intended to supersede mortgage—Lease found to be inoperative, suit on mortgage not barred)

[2] Where plaintiff sued defendant for a certain amount for which the defendant had executed a *sarkhat* bearing an unobliterated one-anna stamp and there was no promise to pay contained in the *sarkhat*, but there was only an acknowledgment that a certain amount had been borrowed : Held, that if the plaintiff was able to prove *alunde* by oral evidence that the defendant had the money then he was entitled to a decree. (Vol 14) 1927 All 502 (504).

[3] When an oral agreement is subsequently embodied in a deed unenforceable due to improper stamp, the creditor cannot fall back on the oral agreement. (Vol 26) 1939 Lah 266 (267) (DB).

[4] To effect novation, contract substituted must be capable of enforcement in law. (12) 16 Cal L Jour 264 (268) (DB).

[See also (Vol 17) 1930 Pat 442 (450) : 10 Pat 63 (DB). (S. 62 cannot deprive promisor of any benefit under S. 6, Regulation 3 of 1872.)]

8. Negotiable instrument invalid — Whether plaintiff can fall back on original consideration —

[1] Where there is a pre-existing debt or liability and a promissory note or bill of exchange is passed in respect of it the plaintiff can fall back on the original consideration if for any reason the new contract fails. (Vol 20) 1933 Pat 575 (576) : 12 Pat 862 (DB) (Vol 14) 1931 Nag 113 (115) : 27 Nag L R 53 (Vol 14) 1929 Sind 164 (164) (Vol 15) 1928 Mad 12 S (1243) (DB) (Vol 13) 1926 Lah 356 (357) : 7 Lah 206 (DB) (Vol 10) 1913 Rang 254 (256) : 1 Rang 121 DL (12) 8 Nag L R 7 (8, 9) (08) 1903 Pun Re No. 7, page 26 (28) (97) 1897 Pun Re No 71 page 326 (328).

[2] The extinction of a promissory note in satisfaction of a debt does not necessarily mean that original debt is extinguished but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory note. It is however certainly open to parties to treat the original debt as discharged and substitute therefor the obligation under the promissory note. (Vol 10) 1928 Mad 317 (318) : 46 Mad 415 (11B) (Vol 15) 1923 Lah 424 (425). (Each case has to be decided on its own facts, the question being whether a new contract was substituted or whether a *hundis* was given in course of performing the prior contract and in the latter case the creditor can fall back on the original transaction) (11) 9 Ind Can 896 (897) (S nd). A pro-note accepted in full satisfaction of a claim debars the plaintiff from bringing a suit on the original claim though the defendants by subsequent fraud on their part might have made the pro-note invalid.

[3] The giving of a *hundis* in payment of the price of goods sold operate as a payment, only if the *hundis* is honoured and that if the *hundis* is dishonoured the right to sue on the original cause of action is revived; but if another *hundis* is substituted, it would operate as discharge of the first one only if the new contract could be legally enforced failing which the plaintiff can fall back on the first *hundis*. (Vol 9) 1922 Lah 56 (57).

[4] Renewed promissory note inadmissible in evidence for want of proper stamp—Plaintiff can fall back on old note (Vol 18) 1931 All 560 (562) (DB).

[5] The following views are held as regards the question as to whether where the giving of a bill of exchange or a promissory note is contemporaneous with the loan the plaintiff can sue for the original debt if the new contract fails.

(a) When a loan has been granted on the security of a negotiable instrument, there is no cause of action independent of the negotiable instrument itself, and when that negotiable instrument is inadmissible in evidence the suit must fail (Vol 14) 1927 Lah 89 (90) (DB) (Vol 22) 1935 Mad 23 (24) : 58 Mad 261 (DB) (Vol 13) 1926 Pat 432 (432)

(b) Where money is lent and at the same time a promissory note is given therefor the creditor can sue for the money due as on the original contract of loan (Vol 12) 1925 Rang 37 (38) (Vol 32) 1945 Cal 268 (265) (DB) (Vol 14) 1927 Mad 378 (378) (Vol 14) 1927 Rang 159 (160) (DB). (In a suit based upon a *hundis*, which, being insufficiently stamped, is not receivable in evidence, the plaintiff can disregard such *hundis* and can treat it as an agreement to pay the money had and received.) (Vol 13) 1926 Mad 1148 (1150).

(c) The question depends on the facts and circumstances of each case. The instrument may be given only as a collateral security or conditional payment. If the obligation to pay is proved to exist independently of the instrument the plaintiff can sue the defendant. (Vol 23) 1936 Nag 225 (228) (DB) (Vol 16) 1929 All 254 (256) : 51 All 530 (DB). (If a *hundis* is an embodiment

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of the whole of the contract between the parties, it is effective as novatio and if inadmissible, no evidence *aliunde* is possible while if it does not embody whole contract it is not effective as novatio.) * (Vol 15) 1928 All 371 (376) : 50 All 839 (SB)* (Vol 14) 1927 Bom 437 (437, 438)* (Vol 10) 1923 All 529 (530) (DB)* (Vol 8) 1921 Pat 317 (318) (DB)* (Vol 8) 1921 Sind 80 (81) : 15 Sind L R 185 (DB).

9. Alteration of documents—Effect. — [1] The rule relating to the effect of material alterations in a deed is that, if an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. (Vol 27) 1940 P C 160 (168) : ILR (1940) All 625 : ILR 1940 Kar (PC) 287 : 67 Ind App 318 (P C)* (Vol 23) 1936 Lah 1016 (1018). (Rule does not apply to documents which are merely evidence of the pre-existing liability.)* (Vol 20) 1933 All 443 (449) (DB). (A change of date of a document is material alteration avoiding document.)

[2] The deed materially altered no longer continues the same deed and no person can maintain an action upon it. (Vol 30) 1943 All 24 (25) : ILR (1942) All 938 (DB)* (Vol 27) 1940 Pat 245 (246, 247) (DB) * (Vol 20) 1933 Cal 196 (197).

[3] Any material alteration in an instrument even with the consent of the parties vacates the original instrument and makes it a new instrument. (Vol 6) 1919 Low Bur 45 (46).

[4] Where the alteration makes no material change as regards the rights of the parties, the party is entitled to sue on the instrument. (Vol 26) 1939 Cal 181 (182)* (Vol 32) 1945 Lah 177 (179) (DB) * (Vol 26) 1939 Lah 486 (487, 488)* (Vol 23) 1936 Lah 659 (659).

[See also (Vol 21) 1934 Lah 543 (544) (DB).]

[5] Where there has been a material alteration in the document, which is fraudulent, the Courts will not allow the plaint to be amended and the plaintiff to fall back on the original cause of action but where the alteration, though material, is innocent and the plaint is based on the original cause of action as well as on the altered document the claim, if properly proved, can be allowed on the original cause of action. (Vol 17) 1930 Bom 66 (68).

[6] An alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. (Vol 32) 1945 Lah 177 (179) (DB).

[7] The defendant executed a mortgage bond to the plaintiff in 1919. Subsequent to this, a simple bond was executed in 1922 for the balance, then owing under the bond of 1919. The plaintiff sued on the bond of 1922 but the suit was dismissed on the ground that the plaintiff had materially altered the terms of the bond. The plaintiff then sued on the original bond of 1919: *Held*, that the execution of the bond of 1922 was a novation of the contract embodied in the bond of 1919, and the fact that the plaintiff had, by his own act, rendered the bond of 1922 invalid could not have the effect of reviving the mortgage bond of 1919 and the suit was, therefore, not maintainable. (Vol 18) 1931 All 325 (326) (DB).

[8] Suit on hand-note—Hand-note found tampered—No cause of action independently of hand-note—Decree, *held*, cannot be awarded even if the defendant admits the debt. (Vol 24) 1937 Pat 572 (573, 575) : 16 Pat 527 (DB).

[9] No decree can be given on any previous oral agreement. (Vol 10) 1923 Lah 628 (629).

[10] Any alteration or interpolation appearing on the face of a document is presumed, in the absence of evidence to the contrary to have been made before the execution of the deed. The burden of proving that the interpolation was made later on would lie upon the contesting executant, more particularly when the deed was registered with the interpolation in question already in it. (Vol 32) 1945 Lah 177 (179) (DB).

[11] A contract note, relating to certain shares, was originally drawn in the plaintiff's favour. He requested the defendant, a share-broker, to delete his name from the note, so far as certain shares were concerned, and to substitute for it the name of another person *H*. A fresh contract note relating to these shares, was made out in the name of *H*, and sent to him by the defendant. The defendant admitted this, but maintained that the transactions relating to these shares were entered into by him not for *H*, but for the plaintiff, and that the plaintiff was liable in respect of them; *Held*, that the onus rested on the defendant of showing that despite the altered terms of the contract note, the plaintiff remained liable to him in respect of the transactions in the shares, and that the Court would require very strong evidence to discharge that onus. (Vol 22) 1935 P C 93 (94) (PC).

10. Consideration under S. 62. — [1] Section 62 does not require any further consideration for the validity of the substituted contract than the putting an end to the obligation under the original contract. (Vol 5) 1918 Mad 297 (299) (DB)* (Vol 30) 1943 P C 147 (153) : ILR (1944) Kar (P C) 85 (P C). (Novation constitutes a good consideration for a fresh promise.) * (Vol 29) 1942 Cal 87 (90) : ILR (1941) 2 Cal 237 (DB) * (Vol 18) 1931 Mad 200 (202).

[2] Plaintiff filed a suit for Rs. 810 — Defendant, pleaded a reference to arbitration, under which award was made for payment of Rs. 400 with annual instalments of Rs. 50 — *Held*, settlement of a dispute was a valid consideration and S. 62 applied. (Vol 21) 1934 Lah 163 (1) (163).

[3] A mere promise by a creditor, made at the request of his debtor, to forbear from suing him is regarded as a voluntary promise and is of no effect. (Vol 1) 1914 Lah 121 (128) : 1914 Pun Re No. 4 (DB).

[4] Section 63, Contract Act, would be applicable only if it were merely a case of an extension of time. Where a mortgagee not only gives further time to the mortgagor but enters into a new contract for the transfer of property, in payment of the outstanding mortgage debt, there is a substituted contract and S. 63 has no application. Such a case is governed by S. 62, and the agreement would not be binding if it is not supported by consideration. (Vol 18) 1931 All 589 (592) (DB).

11. Burden of proof. — [1] When a party wants to make out a case of novation, he should plead the necessary facts to found novation, and state what was the original contract and in what way it has been replaced by a new contract. (Vol 28) 1941 Nag 100 (102) : ILR (1941) Nag 144 (DB) * (Vol 26) 1939 Pat 477 (486) (DB).

[2] Burden of proof of the fact that there has been, by consent of parties, a departure from the terms of the original contract is on the person asserting it. (Vol 22) 1935 Cal 347 (353, 354) : 62 Cal 175 (DB).

12. Limitation. — [1] Novation of contract gives a fresh and independent cause of action, and limitation begins to run from the day on which new promise is broken. (Vol 12) 1925 Oudh 632 (632) : 29 Oudh Gas 24.

Promisee may dispense with or remit performance of promise.

which he thinks fit.

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,^a or may accept, instead of it, any satisfaction

Illustrations.

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B, 5000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2000 rupees paid at the time and place at which the 5000 rupees were payable. The whole debt is discharged.

(c) A owes B 5000 rupees. C pays to B 1000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.^b

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts the sum of 2000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B, 2000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a ^c[composition] of eight annas in the rupee upon their respective demands. Payment to B of 1000 rupees is a discharge of B's demand.

[a] But see S. 135. [b] See S. 41. [c] Substituted by the Amending Act, 1891 (12 [XII] of 1891), S. 2 and Sch. 2, for "compensation."

SECTION 63—Synopsis

1. Applicability and scope.
2. "Promisee."
3. "Dispense with or remit."
4. Extension of time.
5. "May accept instead of it any satisfaction."
6. Necessity for consideration.
7. Evidence.
8. Composition with creditors.

1. Applicability and scope.—[1] Section 63 constitutes a wide departure from the principles of the English Common law and those principles cannot be relied on to interpret the section. (Vol 33) 1946 Bom 1 (6) (DB) (Vol 29) 1942 Cal 87 (91); ILR (1941) 2 Cal 237 (DB) (Vol 20) 1933 Bom 245 (250) (DB).

[2] Pre-existing agreement, as under the English law, is not necessary for the promisee to do any of the acts mentioned in this section. (Vol 15) 1928 P O 99 (102) : 9 Lah 510 : 55 Ind App 154 (PC). ((1904) 28 Bom 66 (71, 72), Overruled.) (Vol 30) 1943 Cal 181 (184) : ILR (1943) 1 Cal 101 (DB).

[3] Section 63 does not apply to the case of a substituted contract. (Vol 18) 1931 All 589 (591, 592) (DB) (Vol 18) 1931 Mad 636 (638, 639) : 54 Mad 889 (DB).

[4] Section 63 does not apply where the parties stand in the position of decree-holder and judgment-debtor. (Vol 1) 1914 Cal 697 (700) (DB).

[5] Agreement made after breach of contract may be enforced. (Vol 33) 1946 Nag 143 (150) : I L R (1946) Nag 36 (DB) (Vol 16) 1929 Sind 153 (153) : 23 Sind L R 294 (DB).

[6] Section 63, Contract Act, has nothing to do with the interpretation of S. 92 of the Evidence Act. (Vol 17) 1930 All 721 (723) : 53 All 157 (FB).

[7] Section 55, Presidency Towns Insolvency Act, overrides S. 63, Contract Act, in insolvency matters. (Vol 22) 1935 Mad 1009 (1011) : 58 Mad 702.

2. "Promisee."—[1] Suit on promissory notes executed by defendants' father and their separated brother—Father dying *pendente lite*—Defendants also impleaded and decrees obtained—Defendants executing promissory note in consideration of the plaintiff not executing the decrees or filing suit against them and agreeing to assign the decrees in payment to defendants—Subsequent notice rescinding agreement as defendants failed to pay—*Held*, he could not do so, so long as the decree was in force and capable of execution and that he was not a promisee within the meaning of this section to take advantage of it. (Vol 22) 1935 Bom 225 (227) (DB).

3. "Dispense with or remit."—[1] Promisee is not bound to accept part performance of a contract. (1921) 3 Lah L Jour 141 (144) (DB).

[2] A claim which arises, not out of any promise, cannot be claimed to have been remitted or dispensed with. (Vol 31) 1944 Nag 122 (123) : I L R (1944) Nag 327.

[3] Dispensation should be by a voluntary conscious effort—Mere omission to assert does not amount to dispensation of the performance—Even negligence does not amount to it. (Vol 33) 1946 Bom 469 (476).

[4] Actual remission and not mere agreement to remit is permitted by the section. (Vol 16) 1929 Mad 794 (799) : 53 Mad 127 (DB).

[5] Conditional remission is not enforceable under the section. (Vol 2) 1915 Mad 1144 (1145) (DB).

[6] A notice to promisor that, if he did not perform a certain act the contract will be cancelled, does not operate as a rescission of the contract. (Vol 16) 1929 Nag 321 (324) : 26 Nag L R 88 (DB).

[7] Promisor or his assignee, though not party to agreement, can take benefit of release. (Vol 18) 1931 Bom 123 (124) (DB). (Release in favour of one member of firm, operates as absolute release in favour of the firm.)

[8] Remission by person on verge of insolvency, without consideration is not operative against Official Receiver—Section 53, Provincial Insolvency Act, invalidates it. (Vol 27) 1940 Mad 737 (738) (DB).

[9] No suit lies for the recovery of the amount remitted when a remission had been made and communicated by the creditor to the debtor. (1911) 9 Ind Cas 763 (764) : 9 Mad L Tim 270. (19 Mad. 391, Foll.)

4. Extension of time.—[1] Time of performance of contract cannot be extended without mutual consent. (Vol 10) 1923 Lah 117 (119) (DB) (Vol 1) 1914 Mad 573 (574) : 37 Mad 412 (DB). (Time cannot be extended without consent of promisor to claim heavier damages.)

[2] Party choosing contract as broken, and resale ordered—Promisee postponing the date of resale for want of bidders—There is no extension of time and S. 63 does not apply. (Vol 20) 1933 Mad 704 (706).

[3] A creditor can extend the time under S. 63 even after expiry of time for performance. (Vol 18) 1931 All 589 (592) (DB).

[4] Mere forbearance to sue or to give notice of rescission does not amount to an extension of time for the performance of a contract. Extension can be granted only at the request of the promisor. Nor does negligence result in extension of time. (Vol 33) 1946 Bom 1 (5) (DB)

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[5] Ultimate agreement to extend time—Gaps between intervening agreements to extend time since the expiry of date in the original contract—The gaps are of no importance—Final agreement to extend the time alone is necessary under the section. (Vol 38) 1948 Bom 429 (482) (DB).

[6] Written agreement, collateral to promissory note, postponing time for payment is valid and enforceable. (Vol 4) 1917 Mad 539 (540) : 89 Mad 129 (FB).

[7] Calculation of damages for breach of contract, where time has been extended, is to be made from date of extension and not from original date. (Vol 9) 1922 P C 178 (180) : 48 Ind App 175 : 43 All 257 (PC) * (Vol 30) 1942 Bom 229 (235).

[8] By mere extension of time for delivery, the contract does not necessarily become a new contract, but the promisee gets certain rights under S. 63, Contract Act. (Vol 1) 1914 Cal 294 (296) : 41 Cal 35.

5. "May accept instead of it any satisfaction."

— [1] Promisee may accept any satisfaction on, but until the satisfaction agreed upon remains executory, the original cause of action is not discharged. — But where the promisee accepted the promise itself in satisfaction the original cause of action is immediately discharged. (Vol 38) 1946 Nag 148 (150) : 11 R (1946) Nag 86 (DB) * (1922) 65 Ind Cas 812 (813) (DB) (Pat). Contract of marriage according to which *tilak* money was paid by plaintiff to defendant—Defendant refusing the marriage, returning part of money and promising to pay balance shortly — Suit for balance and damages — Held that the plaintiff never intended to accept the promise instead of the performance of the contract. * (1908) 4 Low Bur Rul 365 (367). (Creditor agreeing to part payment, in full satisfaction, on condition debtor paid the amount within a date or conveyed certain properties— There is no satisfaction and discharge of original debt until either of the things is done before the time.) * 1888) 15 Cal 319 (326, 327) (DB). (Subsequent arrangement after due date agreeing to take part of dues on bond in cash and part in the shape of fresh bond—Creditor not intending to accept the bare promise by debtor to pay and execute the bond—Held, there was no discharge of the original debt.)

[2] Accord and satisfaction imply an agreement to take the money, in satisfaction of the claim, in respect of which it is sent, which must be evident from an actual agreement between the parties or from the conduct of one of the parties. Therefore, mere retaining of the money sent by promisor does not imply satisfaction. (Vol 9) 1922 All 461 (463) : 44 All 719 (DB).

[3] Before a party can be said to accept something other than the performance stipulated for, in satisfaction of the contract it should be open to him to refuse such satisfaction and to insist on performance of the contract in accordance with its terms. (37) ILR (1937) 1 Cal 757 (763).

[4] The fact that remission was made under an oral agreement will not prevent the discharge taking effect under S. 63, independently of such agreement, which is not illegal. (1903) 26 Mad 195 (196).

[5] Agreement to accept a further part payment, in addition to the one made at the time, in full satisfaction is valid. (1913) 20 Ind Cas 544 (545, 546) (DB) (Oudh).

[6] Promissory note taken to reimburse loss on breach of contract for sale—Receipt for one of the payments under it stating that whole amount is recoverable if not paid within a particular time — Held there was no agreement reviving original cause of action. (Vol 18) 1931 Rang 189 (190).

[7] Agreement to sell property in satisfaction of debt may operate as a discharge of the debt if that is the intention of parties. (Vol 31) 1944 Mad 218 (220) : ILR (1944) Mad 742 (DB)

[8] Where a creditor discharges a person from his liability under a promote, directing the debtor to apply the sum for a particular purpose the discharge operates as a discharge of the note. (Vol 8) 1921 Cal 480 (481) (DB).

6. Necessity for consideration. — [1] In a case falling under S. 63, no fresh consideration is necessary. (Vol 18) 1931 All 539 (592) (DB) * (Vol 38) 1946 Bom 469 (476) * (Vol 30) 1943 Cal 181 (184) : ILR (1943) 1 Cal 101 (DB) * (Vol 26) 1939 Rang 84 (86) 1938 Rang. L R 660 (DB). (Held (Vol 15) 1928 Rang 144 : 6 Rang. 191 impliedly overruled by (Vol 15) 1928 P C 99 55 Ind App 154 : 9 Lab 510 (PC).) * (Vol 17) 1930 Sind 196 (202) (DB). (Section 62 need not be invoked for its enforcement.) * (Vol 16) 1929 Nag 137 (138). (Agreement to extend time) * (Vol 14) 1927 All 451 (452) : 49 All 599 (DB) * (Vol 7) 1920 Cal 463 (465) : 47 Cal 537 (DB) (Dower debt may be relinquished without consideration.) * (Vol 2) 1915 Mad 538 (588) : 15 Cri L Jour. 694. (Under S. 63 no consideration is necessary to force a portion of rent payable.) * (1911) 34 Mad 156 (158) (DB) * (1898) 20 Bom 636 (644) (DB) * (1896) 19 Mad 398 (408). (No consideration required for extending time)

[2] Where there is no actual dispensation or remission, but an agreement to remit in future, consideration is necessary for such agreement (Vol 30) 1943 Cal 181 (184) : ILR (1943) 1 Cal 101 (DB) * (Vol 26) 1939 Mad 688 (689) (DB) * (Vol 24) 1935 Rang 188 (189) (DB).

7. Evidence. — [1] Though an agreement to extend time cannot be proved by oral evidence, where the mortgage is in writing satisfaction of part of the debt by payment and balance of remission can be proved by oral evidence. (Vol 17) 1930 All 721 (723) : 53 All 157 (FB) * (Vol 16) 1929 Mad 794 (797, 798) : 53 Mad 127 (DB).

[2] Assignment of decree — Agreement reciting certain sum as consideration — Part of the amount—howsoever received was only paid—Suit for balance—Defendant should be allowed to prove orally, in rebuttal of his claim that the part not paid was never intended to be paid where the plaintiff is allowed to prove orally that only part was received. (Vol 13) 1926 Mad 35 (36) (DB) (Reversing (Vol 12) 1925 Mad 660)

[3] Conduct of party may be evidence of waiver by a party of his rights under a contract. (1922) 64 Ind Cas 461 (469) (Nag).

8. Composition with creditors. — [1] A composition is an arrangement between the compounding debtor and all or some of the creditors by which the creditor agrees expressly or impliedly with the debtor and also with each other to accept from the debtor lesser amounts in full satisfaction of the amounts due. (Vol 25) 1938 Lab 769 (771, 772) (DB).

[2] Composition deed — Every creditor need not execute deed—Signifying acquiescence by other means is sufficient— But he cannot simply stand by idly. (Vol 25) 1938 Mad 194 (201) (DB) * (Vol 22) 1935 All 441 (442).

[3] Defendant entering into composition with creditors, including plaintiffs—Plaintiffs' general agent refusing to accept payment at composition rate — Other creditors paid at that rate — Plaintiff's firm cannot rescind from the arrangement. (Vol 20) 1933 Oudh 361 (362).

[4] As to discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor, see S. 135.

64 When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promised. *Consequences of rescission of voidable contract.* The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received.

[a] See Section 75.

SECTION 64 — Synopsis

1. Scope and applicability.
2. Contracts by minors and their guardians.
3. Option to rescind.
4. Restoration of benefit received thereunder.

1. *Scope and applicability.* — [1] The principle "one who seeks equity must do equity" applies to person seeking to set aside voidable transfer — He must reimburse prior transferor to the extent of his loss. (Vol 9) 1922 Cal 150 (151, 152) : 49 Cal 911 (DB) & (Vol 18) 1931 All 201 (202) : 52 All 331 (DB)

[2] The principle on which Ss 64 and 65 rest is not confined to cases expressly included in either of them and is that no man can at once treat the contract as avoided by him so as to resume the property which he parted with under it and at the same time keep the money or other advantage which he received under it. The rule is applied as a rule of equity and good conscience. (Vol 19) 1932 Mad 303 (305) (DB).

[See (1872) 14 Moo Ind App 53 (65) (PC).]

[3] Section 55 shows that the contracts referred to therein are voidable. Therefore, S. 64 is not limited to contracts voidable under S. 19 or S. 19A. (1910) 33 Mad 375 (396) (DB).

[4] A party who has "put an end to" contract under S. 39 is liable under S. 64 to restore any benefit received from the other party. (Vol 30) 1943 P C 34 (38, 39) : I L R (1943) Kar (PC) 30 : I L R (1943) 2 Cal 213 : 70 Ind App 35 (PC) & (Vol 9) 1922 Oudh 259 (263) : 25 Oudh Cas 169 (DB). (Section 64 applies to all cases of voidable contracts, whether voidable under S. 19 or by reason of breach under S. 39.)

[5] Under mutual mistake of fact each party must return benefit derived through other's mistake. This principle is not limited to S. 64 and S. 65 only. (Vol 9) 1922 Oudh 152 (156).

[6] Where a person agrees to advance monies to another from time to time upto a certain limit with object of financing litigation by latter, but fails or refuses to pay the full amount, he is nevertheless entitled under S. 64 to a refund of the amount actually advanced by him. (Vol 6) 1919 Mad 718 (728) (DB).

[7] Suit on pro-note against one defendant withdrawn — Decree against other — Subsequent compromise whereby plaintiff not to file suit against other or execute decrees — Pro-note executed by other defendant — Money of new note not paid — Suit thereon — *Held*, that the contract was not voidable under S. 64. (Vol 22) 1935 Bom 225 (227) (DB).

[8] Neither S. 64 nor S. 74 is applicable to a deposit, the stipulation for forfeiture of which in case of breach of contract is not one by way of penalty. (Vol 31) 1944 Mad 526 (627) : I L R (1944) Mad 269 (DB).

[9] Agreement to execute contract to Municipal Committee — Agreement voidable as it was subject to approval of Municipal Committee — Municipality rescinding contract — Effect is to release the promisor from performing any promise under the agreement. (Vol 22) 1935 Pesh 124 (125) (DB)

[10] Purchaser advancing money to vendor to pay off encumbrances on property contracted to be purchased — Sale not completed through purchaser's default and therefore vendor rescinding contract — Vendor must restore the benefit received thereunder — No equitable

charge is created under S. 64 on the property in favour of the purchaser for the amount spent by the vendor for discharging the encumbrances as S. 64 has nothing to do with the question of charge. (Vol 14) 1927 Mad 204 (205).

[11] Life insurance — Fraudulent concealment of material facts by assured — Policy becomes void — Assured or his heirs cannot recover premiums paid even in absence of agreement as to forfeiture — Sections 64 and 65, Contract Act, do not apply. (Vol 31) 1944 Mad 281 (283, 284) : I L R (1944) Mad 842 (DB)

2. *Contracts by minors and their guardians.* —

[1] Sections 64 and 65 are applicable only to contracts between competent parties, and not to cases, where there is not, and could not be, any contract. A contract entered into by a minor is absolutely void, and therefore this section has no application to contracts by minors. (1904) 26 All 342 (342) (DB) & (1921) 60 Ind Cas 519 (520) (Lah) & (1904) 30 Cal 539 (548) : 30 Ind App 114 (PC) & (Vol 23) 1936 Nag 15 (16) : 31 Nag L R 62 (Sup) (DB) (Person whose estate is under superintendence of Court of Wards is incompetent to enter into contracts.)

[2] The term 'person' and 'party' in S. 64 are interchangeable terms. They have reference to such person as is mentioned in S. 11 of the Act i.e., a person competent to contract. (1899) 26 Cal 381 (389) (SB).

[3] Where a minor sues to cancel a mortgage executed by him during his minority, the Court cannot direct compensation to be paid by the minor as a condition of his getting the relief, the contract itself being void. (Vol 2) 1915 All 209 (211) & (Vol 11) 1924 Lah 294 (245). (Sale.) & (1898) 25 Cal 616 (625).

[4] Where a minor, representing himself to be a major, enters into a transaction and subsequently sues to set it aside on the ground of minority, equity requires that the relief should be granted to him conditional on his returning the benefit received by him. (Vol 9) 1922 Oudh 30 (31) : 24 Oudh Cas 348. (Sale.) & (Vol 8) 1921 All 326 (327) (DB). (Mortgage.) & (1921) 60 Ind Cas 519 (520) (Lah) & (1910) 1910 Pun L R No. 98, page 279 (281) : 1910 Pun Re No. 76 (DB). (Fact that Ss. 64 and 65 do not apply to such sale does not exclude application of rule of equity contained in S. 41, Specific Relief Act) & (1909) 31 All 21 (30) (DB).

[5] Sale of a shop by two Hindu widows, one of whom was minor — Sale-deed not registered — Suit by purchaser to recover certain money paid in reliance upon the sale — *Held*, that the sale being by a minor was void, and plaintiffs did not acquire any interest in the shop. Money advanced on such contract cannot be recovered. (1910) 32 All 25 (27, 30) (DB).

[6] Suit on promissory note executed by minor by representing himself to be major — Minor can plead his infancy — Minor is not liable to pay money received under the note — Sections 64 and 65 have no application. (1911) 3 All L Jour 1058 (1058, 1059) (DB).

[7] The doctrine that a minor may be compelled to refund the benefit received by him when any of his transaction is declared to be null and void at his instance, is only applicable to suits for possession so far as immovable property is concerned. In suits for possession, the Court may give the minor a decree to the effect that he will be entitled to regain possession of his property only if he pays the mortgagee or the vendee at

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least that part of the consideration which was required by him for necessary purposes. In a declaratory suit, this equitable relief cannot be granted to the defendants because the Court cannot tuck on the equitable relief for refund of the consideration, or part thereof, to the declaration sought by the minor plaintiff. (Vol 23) 1936 Lah 943 (944) (DB).

[8] A contract entered into by a certificated guardian, without authority, is not void, but only voidable and the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract, restore such benefit so far as may be. (Vol 16) 1929 All 890 (893) : 51 All 1027 (DB) * (Vol 25) 1938 All 369 (372) : ILR (1938) All 614 (DB) * (Vol 15) 1928 Lah 250 (253) (DB). (Sale by *de facto* guardian.) * (Vol 12) 1925 Bom 499 (499) : 49 Bom 576 (DB).

[9] Transfer of minor's property by a person, not duly appointed as guardian, is void *ab initio* but minor must, under Ss. 64 and 65, restore any advantage received under it or make compensation for such advantage. (1908) 11 Oudh Cas 1 (13) (DB) * (Vol 14) 1927 Lah 722 (723). (Alienation by self-constituted guardian.)

[10] Minor's property sold by guardian and some land purchased with purchase-money — Land so purchased does not constitute benefit within meaning of S. 64 and hence need not be returned by ward in setting aside sale. (Vol 6) 1919 Mad 650 (650, 651) : 42 Mad 36 (DB).

[11] Where a sale by a guardian on behalf of minor is declared void *ab initio*, the vendee cannot claim for the improvement effected by him on the property. Ss. 64 and 65 do not apply. (1913) 1913 Pun L R No. 98, page 359 (361).

[12] Where a mortgage executed by the guardian of minor's property is found to be voidable at the option of the minor, a subsequent sale of the property by the guardian, free from incumbrance, for the minor's benefit, amounts to a repudiation on behalf of the minor of the earlier mortgage and the vendee takes the property free from prior mortgage. (Vol 27) 1940 Pat 861 (662) (DB).

3. Option to rescind. — [1] The word 'rescinds' implies an express and unequivocal cancellation of the contract. Where a domestic servant leaves his service without notice and the master engages another servant, the contract with former servant is not necessarily rescinded by the master and the servant is not entitled to get the pay for the work done. (Vol 25) 1938 Rang 207 (208).

[2] In the case of a breach of a revocable contract or trust, the choice of the remedy lies with the party whose rights are infringed, and not with the promisor or trustee. (1913) 20 Ind Cas 783 (783) (DB) (Oudh).

[3] N an insolvent owing money to A — P owing to N — By arrangement between them P paying to A — P suing A for return of money — P cannot call in aid S. 64 or S. 65 — S. 64 provides for repayment only by the person at whose option the contract is rescinded. (Vol 23) 1936 Mad 973 (980) (DB).

[4] Under S. 64 person who puts an end to contract under S. 39 is party rescinding voidable contract. (Vol 3) 1916 Nag 104 (110) : 12 Nag L R 177 (DB).

[5] Contract with stipulation to rescind may be rescinded for reasons not necessarily specified — Such contract is not void. (Vol 10) 1923 Bom 75 (76, 77).

[6] As to whether a party rightfully rescinding a contract is entitled to compensation, see S. 75.

4. Restoration of benefit received thereunder. [1] Section 64 is in terms applicable to parties to contract and on equitable principle is extended to others

who are not parties, but the principle underlying the section is that the person made liable to refund must have received benefit under the contract. (Vol 13) 1926 Mad 398 (400) (DB).

[2] Where there is no evidence to show either that the money borrowed was spent for purposes of *tawashi* or that there was such a lack of *tawashi* money that it was necessary to borrow, the mere fact that it was borrowed by *karnavan* for expenses of *tawashi* does not render the *tarwad* property liable. Section 64 is inapplicable to such case as no benefit has been received by the other members who were no parties to the borrowing. (Vol 13) 1926 Mad 398 (400) (DB).

[3] Section 64 cannot mean that the person rescinding a contract must restore all that he has received under it, irrespective of what he has given under it. The reasonable view is that he may be made to restore any balance of advantages received under the contract which can be clearly separated off from the advantage for which consideration has been given by him. (Vol 9) 1922 Oudh 259 (263) : 25 Oudh Cas 169 (DB).

[4] The term "benefits under the contract" extends only to the money paid as consideration and not to the improvements effected by a usufructuary mortgagee. (Vol 18) 1931 All 201 (203) : 52 All 831 (DB).

[5] Party rescinding voidable contract must return benefit received so far as may be to the person from whom it was received — A executing sale deed in favour of B for cash consideration, and also in consideration of his services rendered at mutation proceedings, as a result of which objections to mutation were withdrawn — Subsequent suit by A to set aside sale on ground of fraud — A held liable to refund cash consideration and also a sum of money as compensation for services rendered by B. (Vol 21) 1934 Oudh 170 (171) (DB).

[6] Where a sale executed for recovering share of inheritance is set aside on the ground of undue influence, the vendees are entitled to compensation, the measure of which would be the expenditure which they incur on behalf of the vendor, recovering his share in the inheritance. (Vol 14) 1927 Oudh 92 (94) : 1 Luck 144 (DB).

[7] Where an unauthorised sale by an executor or administrator is set aside, and a *bona fide* purchaser is deprived of the property purchased by him, then he is entitled in equity to be reimbursed for any expenditure incurred by him which has the effect of improving the permanent value of the property. (Vol 25) 1938 Bom 71 (74, 75) (DB).

[8] Where a party to marriage contract, having accepted cash and jewels, subsequently repudiates the marriage contract he is bound to return what he has taken. (1922) 65 Ind Cas 812 (813) (DB) (Pat).

[9] Where a person at whose option, under S. 55 a contract is voidable, rescinds it, while he gets compensation under Ss. 73 and 74 for the breach, he has to restore, under S. 64, any benefit so far as may be to the other party, the object being to replace the parties in the position which they occupied before the contract was made. (1910) 33 Mad 375 (395) (DB).

[10] Buyer improperly declining to complete contract — Seller putting end to contract under S. 39 — Seller is liable under S. 64 to restore any instalments of price unless paid as earnest — Buyer is entitled not only to claim credit for payment but can sue for return of it — But he is not entitled to interest — Seller can make counter claim for damages if contract does not provide penalty. (Vol 29) 1942 Sind 37 (39) : I L R (1941) Kar 495 (DB) * (Vol 14) 1927 Nag 168 (169).

Obligation of person who has received advantage under void agreement or contract that becomes void.

65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations.

(a) A pays B, 1000 rupees, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the 1st of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1000 rupees which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1000 rupees paid in advance.

SECTION 65 — Synopsis

1. Scope.
2. "Discovered to be void."
3. Contract by person under disability.
4. "Becomes void."
5. "Received any advantage."
6. Compensation.
7. Limitation.

1. Scope. — [1] Section 70 is wider in scope than S. 65 and should not be invoked for a refund of benefit. Where a contract is void not on account of mistake of law, but a mistake of what has been done, S. 65 would apply. (Vol 13) 1926 Oudh 388 (391, 392) : 1 Luck 444 (DB).

[2] Section 65, Contract Act, applies to transfers also. (Vol 24) 1937 Oudh 410 (413) : 13 Luck 531 (DB).

[3] Section 65 is a departure from English law. It does not favour a person guilty of wilful default. (1940) 44 Cal WN 11 (37) (SB).

[4] Section deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. (Vol 9) 1922 P C 403 (404) : 50 Ind App 69 : 45 All 179 : 26 Oudh Cas 223 (PC).

[5] Section 65 applies only if agreement was discovered to be void or became void after it had been entered into. (1913) 18 Ind Cas 9 (10) (All) * (42) I L R (1942) All 817 (819) (DB).

[6] Section 65 starts on the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was, and never could have been, any contract. (1903) 30 Cal 589 (549) : 30 Ind App 114 (PC) * (Vol 16) 1929 Bom 89 (90) : 53 Bom 309 (DB) * (Vol 8) 1921 Bom 147 (147) : 45 Bom 225 (DB) * (1904) 26 All 342 (343) (DB).

[7] Section codifies rules of equity. (Vol 32) 1945 Lah 164 (168) (DB).

[8] The fact that Ss. 64 and 65 do not apply to the facts of a case does not exclude the application of the rules of equity contained therein. (10) (1910) Pun L R No. 98, p. 279 (281) : 1910 Pun Re No. 76 (DB).

[9] Sections 69 and 70, U. P. Municipalities Act; cannot be held to have repealed S. 65, Contract Act. That being a rule of statutory law must be given effect to. (Vol 13) 1926 Oudh 388 (392) : 1 Luck 444 (DB).

[10] Section 65 does not apply to a case in which there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance

of his part of the contract. (1902) 25 Mad 183 (214) (DB).

[11] Language of S. 65 is wide and general. The burden of proving that it does not apply is on the party alleging thus. The petitioner can always argue that he is entitled to relief under it. (Vol 29) 1942 Mad 111 (112).

[12] Relief under S. 65 cannot be claimed at the last moment in appeal. (Vol 24) 1937 Oudh 410 (414) : 13 Luck 531 (DB).

[13] Lessee according to a lease entering into possession and constructing tin shed and 'chabutra'. Lease subsequently held legally defective—Lessee claiming costs of construction — Held, that the agreement not being void, and there being no circumstances to justify equitable considerations, S. 65 did not apply and lessee could not recover. (Vol 29) 1942 Oudh 231 (237) : 17 Luck 530 (DB).

2. "Discovered to be void." — [1] The words 'discovered to be void' in S. 65 refer to an agreement which was void *ab initio*, but was not known to be void by the parties. (Vol 5) 1918 Mad 444 (447) : 41 Mad 197 (DB) * (Vol 13) 1926 Rang 7 (9) (DB). (The term 'discovered to be void' imparts that agreement, though found to be void, was not void on the face of it.)

[2] A purchaser cannot recover back the redemption money paid for an undisclosed mortgage, after his purchase was found to be sham and unenforceable. It is not an advantage under agreement and also the sale was not "discovered to be void." (Vol 18) 1931 Bom 59 (41).

[3] An agreement which amounts to fraudulent preference is not 'void' as between the parties under S. 65. (Vol 23) 1936 Mad 978 (980) (DB).

[4] The word "agreement" as used in expression "agreement, discovered to be void" has no application to transactions which are "contracts" under Contract Act. (Vol 7) 1920 Bom 192 (201) : 44 Bom 631 (DB).

[5] Agreement to transfer decree—Consideration paid in part to decree-holder in advance—Proposed transferee dead—Original decree-holder realising the decretal amount by execution—Suit for recovery of amount advanced with interest on the death of the proposed transferee—Contract being personal found to be incapable of fulfilment: Held, that the plaintiffs were entitled to recover the earnest money with interest. (Vol 10) 1923 Pat 588 (589, 590) (DB).

[6] Section 65 also applies to agreements that are void *ab initio*. (Vol 23) 1936 Mad 98 (98) * (Vol 23) 1941 Bom 378 (380) : I L R (1941) Bom 666 (DB).

Section 65 (contd.)

(Illegal agreement by village panchayat to farm out right to collect ground rent) * (Vol 28) 1941 Nag 278 (277) : I L R (1942) Nag 294 * (Vol 25) 1938 Lah 721 (723) (DB) * (Vol 28) 1936 Oudh 280 (289) : 12 Luck 185 (DB) * (Vol 9) 1922 P C 403 (404) : 50 Ind App 69 : 45 All 179 : 26 Oudh Cas 223 (PC). (The agreement to sell the right of reversioner is manifestly void from its inception. Vendee is entitled to get back consideration with interest)

[But see (Vol 3) 1916 Cal 266 (269) : 43 Cal 115 (DB) * (1913) 7 Sind L R 58 (60) (DB). (Section 65 does not apply to contracts that are void *ab initio*.)]

[7] Difference between a voidable instrument and one void *ab initio*.—In former case restoration cannot be claimed unless the instrument is avoided; while, in the latter, relief can be claimed independently of the instrument. (Vol 25) 1938 Nag 335 (346) : I L R (1939) Nag 1 (FB).

[8] If an agreement is void *ab initio* it cannot be discovered to be void when the Court finds it to be so because the parties are presumed to know the law. But under special circumstances, Court may hold that discovery was made later. Mortgage void for no necessity if acted upon by both parties shall be regarded as 'discovered to be void' only after decree to that effect. (Vol 12) 1925 Oudh 212 (215).

Contravention of statute — Civil P. C. Sch. III, Para II—[9] Defendant being incompetent to alienate the field under Paragraph 2 of Schedule III to the Code of Civil Procedure, plaintiff suing for refund of consideration money and damages—Section 65 of the Contract Act applied and plaintiff was entitled to a refund. (Vol 11) 1924 Nag 132 (133) : 20 Nag L R 87 * (Vol 30) 1943 P C 29 (33, 34) : 70 Ind App 1 : 18 Luck 130 : I L R (1943) Kar (P C) 19 (PC). (Lender is entitled to get back the money on principle that, where a defendant, who, when sued for money, pleads that the contract was void, can hardly regard with surprise a demand that he should restore what he received thereunder. (Vol 24) 1937 Oudh 410 : 13 Luck 531, Reversed.) * (Vol 16) 1929 Nag 257 (259). (Decree for possession in favour of vendor should be made conditional on his returning consideration.)

[But see (Vol 24) 1937 Nag 330 (332) : I L R (1937) Nag 111. (A person incompetent to transfer property under Para. 2 of Sch. III, Civil P. C., is incompetent to contract.)]

Contravention of statute—Municipal Law.—[10] General law of contracts grants relief to a party when a special law, like the Municipalities Act, considers an agreement unenforceable. (Vol 26) 1939 Mad 957 (960, 961, 962) : I L R (1939) Mad 928 (DB) * (Vol 23) 1936 Mad 98 (98). (Madras District Municipalities Act (IV of 1884), S. 69—Lease of land by municipality—Lease not complying with S. 69—Suit for damages for use and occupation lies.) * (Vol 21) 1934 Mad 335 (336). (The defendant must restore benefit received by him under contract which is found to be unenforceable under S. 69, Madras District Municipal Act)

[But see (Vol 20) 1933 Mad 332 (335). (Section 65 does not apply to contracts void under Madras District Municipalities Act, Ss. 44, 45. Principles of *quantum meruit* or *quantum valeat* do not apply.) * (Vol 19) 1932 Oudh 193 (195) : 8 Luck 1 (FB) (A party who has worked for Municipality under a contract, which is void, not being in conformity with S. 97, U. P. Municipalities Act, cannot claim any relief under S. 65.)]

Contravention of statute — Miscellaneous.—[11] Supply of goods to Municipality — Agreement not in

form prescribed by statute — *Held*, that though the contract was void, plaintiffs were entitled to compensation in proportion to the advantage received by Municipality. (Vol 21) 1934 Mad 480 (481) : 58 Mad 65 (DB).

[12] The municipality is entitled to benefit under S. 65, if lessee has secured benefit of lease, which is invalid, not being in conformity with Ss. 68 and 69, Madras District Municipalities Act. (Vol 25) 1938 Mad 746 (748).

Contravention of statute — Excise Laws.—[13] Agreement to make over excise shop in return for certain profit is illegal — Licensee is not entitled to claim back the amount paid. (Vol 30) 1943 Pat 374 (374, 375) : 22 Pat 334 (DB).

[14] Though partnership between partners to jointly work liquor shop is void refund is allowable under S. 65. (Vol 24) 1937 Nag 250 (251) : I L R (1937) Nag 376.

[But see (Vol 31) 1944 Mad 415 (415, 416). (No refund is allowable either under S. 84, Trusts, Act or S. 65, Contract Act.)]

Contravention of statute — Tenancy Law—[15] Lease of malguzari forest without sanction and in ignorance of fact that any sanction was needed—Deputy Commissioner taking forest under protection under S. 203, O P. Land Revenue Act, Lessee could recover consideration from lessor under S. 65. (Vol 18) 1931 Nag 137 (138).

[16] No suit can be brought for recovering money paid for the transfer of occupancy land, which law declares void. (Vol 12) 1925 Nag 119 (120).

[But see (Vol 12) 1925 Mad 885 (886). (Agreement to transfer karnam service Inam when it would be enfranchised is void and forbidden by law but refund of the money advanced can be claimed.)]

Contravention of statute — Registration Law.—[17] Person exchanging a house worth more than 100 rupees by an unregistered deed, can recover possession of the same but must refund the consideration. (13) 1913 Pun L R No. 203, page 687 (688, 689) (DB).

[18] Permanent alienation of agricultural land in favour of non-agriculturists — No sanction by Deputy Commissioner—Alienee cannot claim a refund of consideration. (Vol 25) 1938 Lah 820 (822) : I L R (1939) Lah 30.

[But see (Vol 21) 1934 Lah 979 (979). (Vendor alleging himself to be member of agricultural tribe but found to be non-agriculturist—Sale opposed to Punjab Alienation of Land Act—Case is covered by S. 65.)]

[19] Co-operative Credit Societies Act S. 29 — An agreement to advance money to non-member cannot be enforced — But if it is advanced it can be recovered on principle of implied contract to repay. (Vol 16) 1929 Lah 330 (331) (DB).

[20] Agreement, void under S. 19 of Punjab Act, V of 1912, loyally observed for several years — Agreement providing that in case of breach, the other party to pay a certain sum—Breach occurring—Apart from the express provision for payment of fixed amount the other party is entitled to refund of consideration. (Vol 20) 1933 Lah 291 (292) (DB).

[21] Party fulfilling his part of the contract can claim a return of benefit though the contract was invalid as being not reduced to writing. (Vol 16) 1929 Lah 742 (744) : 11 Lah 121 (DB).

[22] Panchayat board borrowing money from plaintiff for purposes falling under S. 3, Local Authorities Loans Act, without Local Government's sanction, as required under the Act — Contract is void, but plaintiff is entitled to restoration of his money from the board under S. 65—He can be permitted to amend his plaint accordingly—But if the purpose for which loan is taken does not fall under S. 3, plaintiff is entitled to no equit-

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able relief under S. 65. (Vol 29) 1942 Mad 111 (112, 113).

[23] Though *bona fide* character of transaction cannot be proved by virtue of S. 36, Civil P. C., still they are not illegal—Suit would lie to recover consideration. (Vol 10) 1923 Nag 11 (12).

[24] Alienation of trust property not provided by trust deed and in order to purchase one's own property is invalid and does not bind trust and as such alienor is entitled for refund of consideration money. (Vol 17) 1980 Mad 372 (374) (DB).

[25] Mortgage, without previous sanction of Deputy Commissioner, required under Punjab Colonization of Government Lands Act, S. 19—Parties knowing that sanction was necessary but not knowing that contract was void—Case falls within S. 65 (Vol 22) 1935 Lah 401 (402) (DB) & (Vol 31) 1944 All 276 (278): ILR (1944) All 574 (DB) (Even where there is no personal covenant in an illegal mortgage or *suri peshgi* lease deed, the plaintiff is entitled to claim refund of consideration.) & (Vol 29) 1942 All 409 (409): ILR (1942) All 817 (DB). (Cause of action arises when agreement is made—S. 68, T. P. Act, 1—not applicable.) & (Vol 27) 1940 P C 204 (207, 210): 67 Ind App 431: 1 L R (1940) Kar P C 419 (PC). (Execution proceedings of mortgage decree pending—Fresh mortgage of suit properties without Collector's permission.) & (Vol 22) 1935 All 256 (257) & (Vol 21) 1934 Lah 853 (857): 15 Lah 751 (FB) (61 Ind Cas 604 (Lah) and Letters Patent Appeal No 131 of 1921 Overruled.) & (Vol 16) 1929 Nag 241 (248) & (Vol 12) 1925 Oudh 212 (214). (Invalid mortgage acted upon by both parties.) & (Vol 5) 1918 Oudh 22 (24) 20 Oudh Cas 306 (DB). (Mortgage found to be void for want of proper attestation.)

[26] Invalid mortgage of tenancy rights under Oudh Tenancy Law serves as a valid acknowledgment of old debts and only a money decree can be passed on the original transaction. But the mortgage being void, compensation under S. 65 cannot be awarded. (Vol 12) 1925 Oudh 401 (402).

[27] Section 65 has no application to mortgages which are valid up to the mortgagor's lifetime. Hence the mortgagee cannot recover the mortgage money, when, after the mortgagor's death, the mortgage becomes void under S. 28, Broach and Kaira Incumbered Estates Act. (Vol 3) 1916 Bom 65 (65, 66): 41 Bom 546 (DB).

Illegal contracts.—[28] When the consideration to an agreement is unlawful and opposed to public policy under S. 23, S. 65 of the Contract Act is inapplicable; this being neither the case of an agreement which was discovered to be void, nor of a contract which became void, but of an agreement which was void *ab initio*. ('98) 1893 Pūn Re No 86, p. 346 (347) & (Vol 31) 1944 Mad 415 (415, 416) & (Vol 27) 1940 Pat 573 (575): 19 Pat 424 (DB) & (Vol 4) 1917 Nag 57 (57). (Contract not in accordance with statutory requirements is no contract at all and does not 'become void' and 'is not discovered to be void'.)

[29] Per *Bose J.*—When a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory because of the maxim *ex turpi causa non oritur actio*; in fact the test of illegality is the applicability of the maxim. But there are several exceptions to this rule, one of which is where the contract is made illegal by statute with the object of protecting a particular class of persons to which the plaintiff belongs. In such a case, restitution can be ordered. (Vol 26) 1988 Nag 335 (344): ILR (1989) Nag 1 (FB).

[See also ('05) 1 Cal L Jour 261 (268, 269).]

[30] Criterion which makes Court to assist or not to assist party in recovering money paid under unlawful agreement, is morality and public policy and not *locus penitentiae*. (Vol 23) 1936 Rang 358 (368): 14 Rang 597 (DB) & (Vol 25) 1936 Bom 54 (61) (DB).

[31] Though *brit* is no, saleable, contract for sale of *Jajmanka brit* is not illegal and suit lies for repayment of consideration. (Vol 11) 1924 Pat 321 (322).

[32] Section 65 cannot be taken advantage of in case of wagering contracts. ('85) 9 Bom 358 (362) & (Vol 13) 1926 Mad 168 (169) (DB). (Chit fund) & (Vol 5) 1918 Mad 163 (163, 164) (DB). (But person who is not a party to the fraud can get back the money left by him with another.) & ('02) 25 Mad 561 (567) (DB).

[See also (Vol 23) 1936 Mad 225 (229): 59 Mad 562 (FB). (Suit for recovery of price and refund of money paid—Latter is maintainable but not former—Subscriber cannot in such case claim benefit under S. 65 but he is entitled to rely on S. 84, Trusts Act.)]

[33] Agreement void being in restraint of trade—Damages cannot be recovered—Court, however, allowed recovery of Rs. 150 given for security and price of monopoly. ('05) 28 Mad 520 (525) (DB).

[34] Where circumstances under which the defendant received the money constitute an offence under S. 215, Penal Code, the plaintiff's suit for recovery of the money is not maintainable. ('95) 1895 Pūn Re No. 66, p. 330 (332) & (Vol 18) 1931 Rang 83 (85): 32 Cr L Jour 934. (Money paid as bribe.)

[35] If illegal contract remains totally unperformed, a party can claim a refund even in the very suit brought for the enforcement of such illegal contract (Per *Carr J.*—He must bring another suit.) (Vol 12) 1925 Rang 49 (53, 54): 2 Rang 414 (DB) & (Vol 24) 1937 Sind 211 (212): 31 Sind L R 170 (DB). (Person paying money for arranging his marriage can claim refund when marriage is not performed.) & (Vol 31) 1944 Nag 159 (160): ILR (1944) Nag 535 (DB). (Do.) & (Vol 24) 1937 Pat 330 (330, 331). (Two kinds of marriage brokerage agreements (immoral and those that are not immoral, but unenforceable) explained.) & (Vol 21) 1934 Pesh 22 (22) & ('09) 32 Mad 185 (190) (SB).

[36] (i) An agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy, and cannot be enforced. (ii) An agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy. Where the parents of the bride are not seeking her welfare, but give her to a husband otherwise ineligible, in consideration of a benefit secured to themselves, the agreement by which such benefit is secured is opposed to public policy and ought not to be enforced. (iii) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is, under the circumstances of the case, neither immoral nor opposed to public policy, it will be enforced, and damages also will be awarded for breach of it. (iv) A suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken. (v) Although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom, on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid, pursuant to the agreement, if the contract is broken and the marriage does not take place. ('05) 1 Cal L Jour 261 (268, 269).

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[37] Breach of marriage contract — Refund of consideration can be given, as on failure of consideration. (Vol 4) 1917 Bom 61 (62) : 42 Bom 499.

Illegality known to parties.—[38] Section 65 does not apply where the object of the agreement was illegal to the knowledge of both parties at the time it was made; and both parties are in *pari delicto*. ('11) 15 Cal W N 408 (409) (DB) * (Vol 28) 1941 Pat 510 (511) * (Vol 27) 1940 Mad 719 (722) * (Vol 27) 1940 Oudh 119 (119) : 15 Luck 265 (DB). (Contract with minor.) * (Vol 24) 1937 Oudh 521 (523). (Do.) * ('04) 1904 Pun Re No. 33 p. 116. (Do.) * (Vol 23) 1938 Bom 54 (61) (DB). (Agreement creating false evidence and purporting to compound non-compoundable case.) * (Vol 3) 1916 Cal 74 (74, 75) : 42 Cal 286 (DB). (Do.) * (Vol 25) 1938 Oudh 24 (25, 26) * (Vol 16) 1929 Lah 68 (68) * (Vol 13) 1926 Lah 159 (159) (DB) * (Vol 13) 1926 Oudh 119 (120) * ('21) 61 Ind Cas 604 (604) (Lah) * (Vol 7) 1920 Bom 192 (201) : 44 Bom 631 (DB) * (Vol 7) 1920 Nag 157 (159) * (Vol 2) 1915 Lah 480 (481) * ('98) 1893 Pun Re No. 62, p. 279 (288) (DB). (Both parties aware of condition against alienability — Contract fully carried into effect—Alienor found without title—Principle of *caveat emptor* applied.) * ('88) 1888 Pun Re No. 23, p. 64 (66) (DB).

3. Contract by person under disability. — *Contract with minor.*—[1] Section 65 has no application to the case of a minor contracting party where there never was and never could have been any contract. (Vol 8) 1921 Bom 147 (147) : 45 Bom 225 (DB) * (Vol 27) 1940 Nag 327 (328) : LLR (1940) Nag 632. (No cash payment is recoverable.) * (Vol 23) 1936 Nag 15 (16) : 31 Nag L R (Sup) 62 (DB). (Case of Government ward.) * (Vol 6) 1919 Nag 76(78) : 15 Nag L R 149. (A minor cannot in equity be forced to restore the amount of a loan taken by him on a void contract—A difference lies between a case where a particular specific property passes and is capable of recovery and a case where money passes) * (Vol 14) 1927 Nag 116 (116) : 23 Nag L R 8. (Do.) * ('11) 8 All L Jour 1058 (1058, 1059) (DB) * ('04) 26 All 342 (343) (DB).

[2] Lease executed by minor set aside. Lessee in possession will not be turned out unless the sum actually paid as consideration for the lease is refunded. (Vol 15) 1928 All 286 (287) (DB).

[But see (Vol 11) 1924 Lah 294 (295). (Minor repudiating a sale effected during his minority is not bound to refund under S. 65).]

[3] Vendee, who was minor at the date of purchase, can recover consideration money, if he is subsequently dispossessed of the property purchased. (1913) 35 All 370 (373) (DB).

[4] Mortgage by minor—Minor must repay so much of consideration money as has been applied to minor's estate before possession can be delivered to him. ('88) 1888 Pun Re No. 96, p. 258 (261) (DB).

[5] Section 65 applies where the plaintiff is under a mistake of fact as to the defendant's minority, which is not discovered till after the institution of the suit. (Vol. 13) 1926 Nag 108 (109).

[6] Minor on attaining majority paying off debt incurred by him during minority — He cannot subsequently bring suit for refund. (Vol 27) 1940 All 12 (14, 15) (DB).

Party aware of minority. — [7] One who has knowingly dealt with the minor is not entitled to claim from him equity, whilst compelled to restore matters to the 'status quo.' ('04) 1904 Pun Re No. 33, p. 114 (116) * (Vol 27) 1940 Oudh 119 (119) : 15 Luck 265 (DB) * (Vol 24) 1937 Oudh 521 (523).

Misrepresentation by minor.—[8] Minor fraudulently representing himself to be major cannot recover the

property sold by him unless he refunds the consideration. (Vol 17) 1930 Mad 945 (951, 954) : 54 Mad 112 (DB) * (Vol 20) 1938 All 371 (372) * (1921) 3 U P L R 94 (97) (Lah). (Minor not bound to return benefit unless guilty of fraud.) * (Vol 4) 1917 Bom 221 (222) : 41 Bom 480 (DB). (Minor guilty of fraud may be deprived of plea of minority.) * ('10) 1910 Pun L R No. 98, page 279 (281) : 1910 Pun Re No. 76 (DB).

[But see (Vol 28) 1941 Pesh 38 (40) (DB) * (Vol 24) 1937 All 610 (618, 616, 617, 618) : I L R (1937) All 860 (FB). (Fraudulent concealment of fact of minority — Property transferred to minor not traceable—Money decree against him as compensation cannot be passed.) * (Vol 9) 1922 Oudh 30 (31) : 24 Oudh Cas 348 * (Vol 6) 1919 All 453 (453) : 40 All 558 (DB). (A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.) * (Vol 6) 1919 Mad 224 (225) (DB). (Minor cannot be held liable to refund the mortgage money even if he misrepresented his age.)]

[9] Suit on bond executed by minor, on fraudulent representation of having attained majority, in satisfaction of debt due on old bonds executed on his behalf by his guardian— Old debts found to be for legal necessity — Creditor is not entitled to claim return of the old bonds in satisfaction of which the new bond was given by the minor nor to a return of minor's ornaments, pledged as security in respect of the old debts and returned to the minor when he executed the new bond in suit. (Vol 16) 1929 Nag 156 (160) : 25 Nag L R 85.

[10] Party alleging fraud must prove that he was thereby deceived into action. Minor not knowing the extension of his minority by law commits no fraud or misrepresentation and is not bound to refund consideration. (Vol 22) 1935 Cal 198 (199) : 61 Cal 1075.

Contract with persons of unsound mind. — [11] Section 65 cannot bind a party for a contract with a person of unsound mind. Such contract being void no refund of money paid to unsound person can be claimed. ('12) 1912 Pun L R No. 149, p. 450 (453) : 1912 Pun Re No. 41 (DB) * (Vol 4) 1917 Cal 566 (567) (DB).

[But see (1904) 1 All L Jour 43 (43 and 44). (Money lent by a lunatic to another can be recovered in a suit on his behalf by his next friend under S. 65 even though the contract under which it was lent was void in law.)]

4. "Becomes void." — [1] 'Becoming void' presupposes enforceability. What is not enforceable cannot become void. (Vol 7) 1920 Nag 183 (184).

[2] The words "when contract becomes void" are wide enough to cover the case of avoidable contract which has been avoided. (Vol 19) 1932 P C 89 (91) : 59 Ind App 147 : 7 Luck 64 (PC).

[3] It is wrong to say that when a contract has become unenforceable by reason of the fact that the claim to enforce the contract had become barred by limitation, it becomes void so as to attract the provisions of S. 65, Contract Act. (Vol 32) 1945 Mad 171 (172).

[4] Tenant surrendering holding to landlord—Lease by landlord — Landlord making profit — Tenant's mother moving revenue authorities to be placed in possession on ground that the whole transaction was sale in contravention of S. 12, C. P. Tenancy Act — Lessee losing held possession entitled to refund of consideration. ('42) 1942 Nag L Jour 324 (324, 325).

[5] Document containing the terms of a contract between plaintiff and defendant materially altered by plaintiff without knowledge of defendant—Payment of advance acknowledged on same piece of paper by defendant — On breach of contract by defendant plaintiff was entitled to recover advance under S. 65. (Vol 7) 1920 Mad 64 (65) : 43 Mad 703 (DB).

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[See also (Vol 12) 1925 Nag 243 (245).]

[6] A party paying money for transfers of occupancy and ordinary tenant rights under C. P. Tenancy Act is entitled to a refund on failure of consideration. (Vol 12) 1925 Nag 375 (375).

[7] Lease of sir land in perpetuity for a premium over Rs. 100 requires registration — In absence of a registered lease, the lessee becomes a tenant from year to year, and if the landlord desires to eject him he must return the premium amount. (Vol 14) 1927 Nag 353 (353).

[8] Contract to purchase land in Native State—Efforts made to get sanction—Condition that purchaser should stay permanently in State — Purchaser declining to accept is entitled to a refund and agreed interest. (Vol 21) 1934 Nag 248 (249).

[9] When a contract to sell is rescinded the seller must restore the benefits received under it, under S. 64, if he had rescinded it himself; and under S. 65 if the purchaser rescinds it. (Vol 14) 1927 Nag 168 (169) & (Vol 2) 1915 Mad 1059 (1059) (DB). (Case of mortgage.)

[10] Plaintiff taking lease of shop — Lease money paid in advance — Shop burnt — Contract became void and refund of lease money must be made. (Vol 22) 1935 Nag 208 (209) : 31 Nag L R 368.

[11] Dismissal of suit under O. 21, R. 63, Civil P. C. — Suit for recovery of amount paid is maintainable under S. 65. (Vol 23) 1936 Nag 268 (269) : ILR (1937) Nag 94.

[12] Where a covenant by a vendor to sell land became impossible of performance owing to the passing of Punjab Act XIII of 1900, the vendee was entitled to compensation under S. 65. (Vol 2) 1915 Lah 310 (311) (DB).

[13] Where a purchaser of occupancy rights redeems two mortgagees and one of them being landlord evicts the purchaser, the latter can claim a refund of the redemption money paid to the landlord under S. 65. (Vol 8) 1921 Lah 299 (300) (DB).

[14] Where a payment is not alleged to have been made under circumstances which go to make a contract voidable but all that is contended is that the amount was paid under a mistaken notion of law that the condition as to the payment of interest on the date of the bond was penal, when the payment is made voluntarily, the defendant is not entitled to claim a refund of it. (Vol 20) 1938 Lah 523 (524).

[15] Mortgage of insolvent's property by Receiver set aside and adjudication annulled — Mortgagee was entitled to possession until he was repaid the sum advanced. (Vol 22) 1935 Lah 112 (113).

[16] Certain lay out scheme sanctioned by Municipality—Plaintiff agreeing to purchase plot from defendant owner of property—Earnest money paid—Basis of agreement being permission to build small house — Sanction suspended by Deputy Commissioner — Defendant must refund earnest money. (Vol 24) 1937 Lah 781 (782).

[17] A shipowner may refuse to ship goods on a reasonable apprehension of "restraints of princes" although no restraint is actually in existence at the time. The impossibility of performance of a contract makes it void. (Vol 4) 1917 Sind 53 (56, 57) : 10 Sind L R 100.

[18] When a lease is void on the ground of the term of the lease exceeding the statutory term, there is no actual illegal purpose carried into effect and S. 65 applies. Maxim *in pari delicto potior est conditio possidentis* will not apply. On lease becoming void after expiry of statutory period, lessor is entitled to get back possession on payment of compensation to the lessee. (Vol 22) 1935 Nag 58 (59) : 31 Nag L R 208.

[19] Neither S. 64 nor S. 65 applies to a case in which a policy of insurance becomes void by reason of a breach of warranty on the part of the assured. (Vol 31) 1944 Mad 231 (233) : I L R (1944) Mad 842 (DB).

[20] On sale becoming void for want of title in seller of which vendee has knowledge, vendee can claim return of earnest money but neither interest nor damages. (Vol 11) 1924 Lah 476 (478, 479) (DB).

[21] Contract by a grantee of Government land to concede a portion of the land to another on condition of his helping him to comply with the stipulations on which the grant was made to him becomes void if the Government cancels the grant and the grantee can sue for declaration that the contract is void irrespective of the promisee's right to damages. (11) 1911 Pun W R No. 16, p. 40 (41).

[22] Where after a sale in execution of defendants' property, plaintiff purchased it with an agreement for return of the purchase-money if the plaintiff did not get possession and plaintiff's application to set aside the sale was dismissed. *Held*, the contract between the parties was not against public policy, but was a good and valid contract and gave the plaintiff a right to sue for his money as on failure of consideration. (Vol 6) 1919 All 72 (74) : 42 All 7 (DB).

[23] Where by reason of the acquisition under the Land Acquisition Act the plaintiff lessee was deprived of the garden and the contract having become impossible of performance the plaintiff had under S. 65 a right to be compensated by the defendant for the loss. (Vol 9) 1922 All 6 (7) : 44 All 229.

[24] Sale deed—Mutual mistake as to essential fact : *Held*, that the plaintiff was entitled to recover the sale consideration, but not any damages or interest. (Vol 17) 1930 All 252 (254) (DB).

[25] Agreement is "void" when its terms, being ascertained, have no legal effect. An agreement, which is inadmissible for want of registration, does not become "void" within S. 65 of the Act. (1909) 33 Bom 610 (624) (DB).

[26] Section 65 does not apply to mortgages which are valid up to the mortgagor's life time; therefore the mortgagee cannot recover the mortgage money when, after the mortgagor's death, the mortgage becomes void under S. 28, Broach and Kaira Encumbered Estates Act. (Vol 3) 1916 Bom 65 (65, 66) : 41 Bom 546 (DB).

[27] Contract with ship company—Performance made impossible by Government prohibition—Company asked charterer to deposit freight charges for unloading, etc. — *Held*, that plaintiffs were entitled to recover with interest freight amount and defendants were entitled to charge reasonable expense for unloading. (Vol 8) 1918 Bom 265 (268) : 40 Bom 529 & (Vol 13) 1926 Mad 175 (177) : 49 Mad 200 (DB) & (Vol 12) 1925 Mad 727 (729) : 48 Mad 459 (DB). (Ship is destroyed before commencing voyage.)

[But see (Vol 17) 1930 Sind 282 (283) (DB). (Advance freight paid for fulfilment of contract need not be returned if contract becomes impossible for no fault of the party. (Vol 12) 1925 Mad 727 : 48 Mad 459 and (Vol 3) 1916 Bom 265 : 40 Bom 529, Distinguished.)]

[28] Money spent to recover inheritance by vendee of an heir must be refunded when sale-deed is set aside on grounds of undue influence. (Vol 14) 1927 Oudh 92 (93) : 1 Luck 144 (DB).

Contract by manager of joint Hindu family. —

[29] Section 65 has no application to a mortgage becoming unenforceable for want of legal necessity and benefit to the family. (Vol 7) 1920 Pat 441 (445) : 5 Pat L Jour 622 (DB) & (Vol 16) 1929 All 387 (388). (A coparcener avoiding an alienation by the *karta* for want of legal necessity is not bound to refund the consideration.)

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[30] Hindu law—Mortgage by *harta* without necessity is void from its inception and not merely voidable—Mortgagor is bound to repay loan as soon as it is discovered void—Voidability is presumed to be known to the parties—Mortgagee alleging that he discovered it to be void must rebut the presumption. (Vol 14) 1927 Oudh 177 (178, 179) (DB).

[31] Money obtained by some members of joint Hindu family including father, by sale of joint family property applied to pay off simple money debt and partly for payment of an antecedent debt under usufructuary mortgage—Sale if challenged, purchaser is entitled for return of consideration paid on behalf of mortgage debt only. (Vol 16) 1929 All 659 (661) (DB).

Contract by co-sharer.—[32] A joint occupancy tenant cannot repudiate the mortgage made by his co-sharers without paying the mortgage-money realised by the latter from the mortgagee. (Vol 11) 1924 All 746 (747).

Void in part.—[33] Purchasers cannot claim a refund for a partial deprivation of the property purchased under an unenforceable deed. (Vol 14) 1927 Sind 62 (66).

[34] A simple mortgage providing for possession in case of default is not wholly void in view of S. 8 (2), Punjab Alienation of Land Act and S. 21, Contract Act—S. 65 does not apply to such case. (Vol 19) 1932 Lah 630 (632) : 13 Lah 508 (D B).

5. "Received any advantage."—[1] Questions of refund for failure of a contract must be decided with reference to provisions of Contract Act and not English law. (Vol 12) 1925 Nag 109 (110) : 20 Nag L R 192.

[2] Sections 64 and 65 do not refer, by the words "benefit" and "advantage," to any question of 'profit' or 'clear profit' nor does it matter what the party, receiving the money, may have done with it. (Vol 30) 1943 P C 34 (40) : I L R (1943) 2 Cal 213 : 70 Ind App 35 : I L R (1943) Kar P C 30 (P C).

[3] Refund of benefit can be claimed either under S. 65 or on the principle of *quantum meruit* even for a contract invalid under statute. (Vol 20) 1933 Mad 145 (146) * (Vol 20) 1933 Mad 344 (344). (Relief on *quantum meruit* cannot be granted unless asked for.)

[4] Party to the contract is liable to return benefit derived under a contract which becomes impossible of performance. (Vol 31) 1944 Mad 239 (243) : I L R (1944) Mad 124.

[5] Where the benefit was received after the contract had become void, S. 65 does not apply. (Vol 33) 1946 Cal 245 (248).

[6] So long as an unlawful or void agreement remains unperformed, any money paid under it may be recovered back to the use of the person who so paid it. (Vol 13) 1926 Lah 159 (160) (D B).

[7] Hindu son is bound to discharge liability of father to make restitution under S. 65. (Vol 14) 1927 Oudh 177 (180) (D B).

[8] Consideration failing, vendor must refund money received by him under sale of mortgage rights. (Vol 25) 1938 Lah 566 (567).

[9] Surrender deed by occupancy tenant in respect of field in favour of co-sharer in village—Transaction amounting to transfer of occupancy rights—Lambardar getting it set aside under S. 13, C. P. Tenancy Act and taking possession of field—The transferee has no remedy against the lambardar who has exercised his right and has not derived any benefit under it. (Vol 25) 1938 Nag 451 (452, 453).

[10] Mortgage of property of minor by A without any authority—Lease of the mortgaged property in favour of minor—Default in payment of rent—Suit by mortgagee to recover rent—*Held*, if the minor had tried

to set aside the mortgage, he would have been asked to return the benefit received under the mortgage. But the minor here was defendant. The claim on the lease stood or fell on the validity or otherwise of the mortgage. That being void the suit must be dismissed. (*Quere*—Whether mortgagee could succeed in another suit in obtaining restitution or compensation.) (1866) 13 All 373 (375) (D B).

[11] Sections 65, 73—Contract—R ejecting D under S. 79, Agra Tenancy Act, 1926 and admitting A and taking from him nazrana as consideration for conferring occupancy right—A building masonry well—A ejected and original tenant restored under new U. P. Tenancy Act of 1939—A is not entitled to refund of nazrana and costs of well since R did everything required of him to do and there was no guarantee against Act of Legislature or covenant for quiet enjoyment. (Vol 30) 1943 All 327 (327, 328) : I L R (1943) All 745.

[12] Void transfer forbidden by law—Transferor accepting benefit from transferee and putting him in possession—Transferor cannot oust transferee without repaying money received from latter. (Vol 23) 1936 All 215 (216).

[13] A minor entered into a contract of sale and paid certain sum to the other party for purchasing a stamp. The stamp was purchased and was put on record. In the case for specific performance of the contract, by the minor : *Held* that the other party derived no benefit from the stamp and so was not liable to refund. (Vol 16) 1929 All 332 (333).

[14] Mortgagee of a void usufructuary mortgage cannot recover money from mortgagor if he is not put in possession. (1910) 32 All 383 (388, 389).

[15] Plaintiff cannot be said to have received advantage when he has applied money to meet losses arising from carrying on instructions of defendant. (Vol 25) 1938 P C 4 (6) : 32 Sind L R 235 (P C).

[16] In a suit by vendee for specific performance of agreement of sale, the Court, while refusing specific performance, terms of contract being uncertain, can grant the alternative prayer of the plaintiff for the refund of purchase money paid in furtherance of the contract. The contract being declared void by the very judgment, the question of limitation does not arise. (1903) 25 All 618 (627) (D B).

[17] Where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it must either return it or make compensation. (Vol 3) 1916 Cal 136 (149) : 43 Cal 790 (D B).

[18] Manager of plaintiff's shop entering into contract with defendant purporting to act as agent of plaintiff and paying earnest money—Manager not having authority to make such contract—Defendant having no reason to suppose that he had such authority—Plaintiff can recover earnest money—Principle of S. 65 applies. (Vol 26) 1939 Cal 14 (15).

[19] Under S. 73 the promisee can recover compensation for any loss or damage caused to him by the breach of marriage contract. Under S. 65 he can get the refund of money, ornaments, etc., given by him as consideration for the promise or compensation as on a failure of consideration. (Vol 4) 1917 Bom 61 (62) : 42 Bom 499 * (1909) 39 Bom 411 (416, 417) (D B). (Marriage brokerage agreement.) * (1905) 1 Cal L Jour 261 (268, 269).

[20] Plaintiff giving ornaments to niece of defendant in consideration of promise of his son's marriage with her—Plaintiff breaking contract—Girl marrying some one else—Defendant not getting any advantage from ornaments—Suit for return of same is not maintainable. (Vol 24) 1937 Oudh 10 (12) : 12 Luck 476 (D B).

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[21] Association illegal for want of necessary registration — Members are entitled to refund of subscription. (Vol 17) 1930 Rang 21 (27) : 7 Rang 540 (D B).

[22] A settlement regarding payment of quit rent for the village is void so far as "wanta" lands are concerned under Bombay Summary Settlement Act; therefore, quit rent paid in respect of these "wanta" lands is liable to be returned under S. 65. (1898) 17 Bom 407 (418) (D B).

[23] A malguzar receiving consideration from a transferee for waiver of his objections to a transfer by his tenant is not bound to refund this consideration because the transferee is dispossessed by the tenant. Agreement to refund will not be implied in such a case. (Vol 3) 1916 Nag 51 (72) : 13 Nag L R 114.

[24] In a suit for damages for non-publication of an almanac, for which plaintiff had paid an advance, and for recovery of advance. *Held*, that as the defendant had carried out his agreement of printing the plaintiff's advertisement in the specified number of copies of his almanac and had put them on the market and as the confiscation by the Government was due to causes over which he had no control, S. 65 was inapplicable in the absence of any express provision and the principle 'that the loss must lie where it has fallen,' should be followed and consequently plaintiff's claim must fail. The plaintiff could not recover the advance. (Vol 6) 1919 Lah 142 (144) : 1919 Pun Re No. 42.

[25] Sajadanashin entering into agreement to lease property of khanka and receiving nazrana — Agreement void — Subsequent appointment of Receiver — Nazrana must be returned by the Receiver — Privity of contract not necessary. (Vol 27) 1940 Pat 81 (85, 86, 87) : 18 Pat 654 (DB).

[26] Mortgagees fraudulently purchasing property mortgaged after death of mortgagor from guardian of minor sons — Sale set aside — Suit by mortgagees on mortgage on the ground of revival — Plaintiff having abandoned mortgage security is not entitled to enforce it — Plaintiff can recover only the specific sum lost by the sale being set aside. (Vol 29) 1942 Pat 247 (249) (DB).

[27] When the agreement for purchase of land is declared to be ineffective in a suit for specific performance of the same, the intending vendor is bound to restore the consideration money received by him. (1889) 11 All 47 (56) : 15 Ind App 211 (PO).

[28] Where by the award of arbitrators the debts of the debtor are compounded and his property is assigned to his creditors and the debtor is directed to dispose of such property for their benefit and that in case of any misappropriation the debtor was made personally responsible for loss sustained by creditors the award is a new agreement between the debtor and the creditors who had signed it substituted for the original ones. The fact that some of the creditors have not signed the award does not make it void. Nor the fact that there was misappropriation by servant of the debtor, makes it so. The creditor who has received some dividends under the award, which is signed by him, cannot, therefore, take plea under S. 65 and sue for the balance of his debt. His suit is not maintainable. (1880) 2 All 173 (179, 181) (DB).

Contract on behalf of minor. — [29] Sale of minor's property by mother who is not her legal or *de facto* guardian and its purchase by legal guardian are void — The purchaser is not entitled to be paid the amount spent by him to relieve the burden on the estate. (Vol 16) 1929 Mad 110 (113) (DB).

[30] Sale by father on behalf of minor son — Indemnity bond by third party — Purchaser's possession disturbed by decree of Court — Indemnifier held liable to indemnify for the whole amount agreed — Father, held,

liable under S. 65 to return consideration received (Vol 31) 1944 Mad 211 (216, 218) : ILR (1944) Mad 663 (DB).

[31] Minor seeking to set aside mortgage by guardian as being void under S. 13 of Act XL of 1858 is bound to make restitution to the extent of moneys advanced to him on mortgage and which had enured to benefit of minor or his estate. (1887) 9 All 340 (347) (DB).

[32] Sale of ancestral property in Mahomedan minor's hands by his guardian for satisfying father's debts is not for minor's benefit and no equitable relief by way of refund can be granted to the vendee. (Vol 16) 1929 Lah 331 (332).

[33] When money is not used for minor's benefit, minor cannot be compelled to refund any money received by next friend by compromise effected on behalf of but not binding on minor. (Vol 16) 1929 Lah 279 (281) (DB).

[34] If it is proved in a suit by minor for possession of properties alienated by guardian, that a substantial part of the money was not required for minor's benefit the whole sale is void and the minor shall have to pay the remaining portion to the purchaser but if a substantial portion is spent for his benefit, the sale would be upheld. (Vol 3) 1916 Mad 239 (240) (DB).

[35] Family, consisting also of minor members, carrying on business — Mortgage deed — Money not applied to minor's benefit — No relief is claimable against minor under S. 65. (Vol 23) 1936 Mad 595 (597) (DB).

[36] A contract effected on behalf of the minor by a person disqualified by personal law to represent the minor is void and the minor is not required to refund the consideration. (Vol 14) 1927 Nag 290 (293).

[37] Where the step-mother of a minor sold property, belonging to the minor, in order to pay off a mortgage executed by his father and to meet the marriage expenses of the minor: *Held*, that the sale could be set aside at the instance of the minor, but the minor was bound to refund the consideration money. (Vol 12) 1925 Bom 499 (499, 500) : 49 Bom 576 (DB).

[38] Sale deed executed on behalf of minor — Subsequently deed found invalid and not affecting minor's interest — Minor nevertheless must be compelled to restore and benefit received under it, not only under Ss. 64 and 65 but also under considerations of equity. (1908) 11 Oudh Cas 1 (13) (DB).

Collateral contracts. — [39] Where the uralars of a devasam borrowed a sum of money to discharge the devasam debts, but used it to discharge their own tarwad debts instead, and assigned their urayama right to the creditor on lease, so that he may repay himself by demising the devasam lands on kanom, such a transfer, being a transfer of a trust, is invalid in law. Assuming that S. 65 is not intended to vary the rule, that a mistake of law is no ground on which a party can be relieved from his own contract, the creditor is still entitled to recover back the amount advanced, on the ground that the collateral agreement which provided for its repayment failed. An agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract. (1886) 9 Mad 441 (444) (DB).

[40] A valatdan patta (mortgage) of an unrecognised portion of a Bhag was held void, but a personal covenant to compensate if possession of the mortgagee were disturbed could be enforced. (Vol 1) 1914 Bom 102 (103) : 38 Bom 249 (DB).

[41] Where covenant to compensate was collateral and not merely dependent upon the mortgage, then, though main contract was wholly null and void, the

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plaintiff was entitled to claim under the covenant. (Vol 2) 1915 Bom 102 (105) : 39 Bom 358 (DB).

[42] *MR* contracted with *N* and *HL* for the purchase of two houses from them and agreed to pay Rs. 500 as earnest money. Instead of paying the earnest money, he made over halves of currency notes for Rs. 500, retaining the other halves himself. Subsequently, *MR* brought a suit for specific performance of his contract; but his suit was dismissed, and the decree dismissing suit was ultimately affirmed by the High Court. After this *MR* sued *N* and *HL* for recovery of the half currency notes which he had made over to them. *Held*, that the suit was not barred either by S. 13 or by S. 43 of the Code of Civil Procedure; and on a finding by the lower appellate Court that the half notes had in fact been made use of by the defendants in lending money, that the defendants had received an advantage within the meaning of S. 65. ('94) 1894 All W N 157 (157, 158) (DB).

[43] Agreement void *ab initio* as contravening provisions of S. 28 of the Legal Practitioners' Act—A client is bound to make compensation to the vakil for the advantage received. (Vol 17) 1930 Mad 132 (135) : 53 Mad 309 (DB).

[44] Compensation should be made by a person who received unlawful advantage under an agreement which is void *ab initio*. An unlawful agreement does not render the agreement for restitution unlawful. (1909) 11 Bom L R 693 (698) (DB).

6. Compensation. — [1] Right to compensation does not depend upon the possibility of apportionment. (1899) 23 Bom 15 (21).

[2] Contractor can claim compensation under Ss. 65 and 70, for the work done, though the contract violates S. 96 (1) (b), U. P. Municipalities Act. (Vol 23) 1936 All 723 (728, 729, 730) : 58 All 1069 (DB).

[3] Vendee unable to restore goods under S. 65 must make compensation under S. 65 or S. 70. (Vol 26) 1939 Mad 957 (960, 961, 962) : I L R (1939) Mad 928 (DB).

[4] Relief contemplated by S. 65 is that the party prejudiced by the mistake should be relieved from the consequences thereof. He is entitled to be placed in the same position as he would be if there had been no mistake and also to be compensated for any loss which may have necessarily resulted from the mistake. Where the debt which was released by mistake was, on the date of discovery of the mistake, not barred by limitation, the party entitled to relief on the ground of mistake could claim no compensation, as no loss was sustained. He can only be entitled to a declaration that the release is void and should be cancelled if in writing. If, however, the plaintiff's remedy had become barred at the date of the discovery of the mistake, there is a loss which is the necessary result of the mistake when relief against the mistake will comprise not only a cancellation of the release but also compensation for the loss. (1904) 14 Mad L Jour 443 (459) (DB).

[5] Where property of a lunatic is mortgaged without authority of Court, it is void; but mortgagee, who had spent money in causing a previously subsisting attachment to be raised, is entitled to be compensated for the money thus spent. (1913) 14 Mad L Tim 489 (490, 491) (DB).

[6] The section does not impose on party any obligation to make compensation in respect of that of which he has not enjoyed the benefit. (1905) 27 All 592 (602) (DB) (Vol 27) 1940 All 840 (841, 842). (Case of lease not binding on lessee).

[7] The second part of S. 65, namely, "or to make compensation for it," only comes into play when the advantage cannot be restored. Interest on sum paid

under void contract would only be payable after the advantage has been refused to be restored. Where a contract of sale is found to be void and the amount paid under it is repaid by the vendor to the vendee, the vendee is not entitled to any interest on the amount from the date of its payment to the date of the institution of the suit for damages by the vendor for breach of contract if it is not proved that the amount had earned any interest in the hands of the vendor. (Vol 26) 1939 Lah 564 (565) (DB).

[8] In the absence of any contract there is no liability to pay any interest on compensation granted under S. 65. (Vol 26) 1939 Mad 957 (963) : I L R (1939) Mad 928 (DB).

[9] Mortgage decree containing no provision as to interest—Defendant taking several adjournments to pay the decretal amount—Plaintiff including interest in the amount — Subsequently defendant contending that he was not liable to pay interest — *Held* that though the contract of the defendant created a contractual obligation to pay interest, such an agreement was void for mistake of fact. (Interest was awarded as compensation for the benefit obtained under a void agreement.) (1904) 28 Bom 393 (399) (DB).

7. Limitation.—[1] In the absence of special circumstances the time at which an agreement is discovered to be void under S. 65, is the date of the agreement. (Vol 20) 1933 P C 63 (65) : 60 Ind App 13 : 54 All 1067 (PC) (Vol 29) 1942 All 409 (410) : I L R (1942) All 817 (DB). (Parties must be deemed to have had information of provisions of statute and it must be assumed that they knew that the agreement was void when they entered into it.) (Vol 26) 1939 Nag 27 (31) : I L R (1940) Nag 553 (DB) (Vol 24) 1937 Oudh 87 (97) : 12 Luck 435 (DB). (In special circumstances it may be later.) (Vol 18) 1926 Nag 241 (243). (Cause of action does not arise on date on which agreement is found impossible of performance.) (Vol 12) 1925 Oudh 737 (737).

[2] After deciding that an agreement is void, Court has no power to regard decision as a new ground of action for granting relief in the same suit — Cause of action must arise prior to institution of suit. (Vol 14) 1927 Oudh 177 (180) (DB).

[3] Where a party has been deprived of the satisfaction originally obtained, a fresh cause of action accrues when the act agreed upon becomes impossible. (1926) 96 Ind Cas 909 (910) (Mad).

[4] No question of limitation arises where the restitution is granted by the same decree which has declared the contract of sale void. (1903) 25 All 618 (627) (DB).

[5] Dispossession of lessee by previous lessee — Suit for damages for return of nazrana — Time runs when the subsequent lessee was actually dispossessed—Article 116, Limitation Act, applies. (Vol 27) 1940 Pat 81 (84) : 18 Pat 654 (DB).

[6] Where the lease is void, lessee is entitled to return of money—Article 116, Limitation Act, applies. (Vol 23) 1936 Pat 462 (465) (DB).

[7] Suit for refund of advance paid under void agreement should be brought within three years of discovering agreement to be void. When the agreement is one forbidden by law, ordinarily plaintiff must be deemed to have been aware of the fact when he entered into it. (Vol 12) 1925 Mad 885 (886).

[8] Limitation starts only from date of failure of consideration. Article 97 applies. (Vol 13) 1926 Rang 7 (9) (DB).

[9] A claim for money paid under a contract, which becomes void, is governed by Art. 97 of the Limitation Act; and it must be preferred within three years from the time the contract becomes void. (Vol 15) 1928 All 860 (863) (DB).

Mode of communicating or revoking rescission of voidable contract.

[a] See Ss. 3 and 5.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.^a

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

1. contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

68. If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.^a

Claim for necessities supplied to person incapable of contracting or on his account.

Illustrations.

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

[a] The property of a Government ward in the C. P. is not liable under this section. See the C. P. Court of Wards Act, 1899 [24 [XXIV] of 1899], S. 31 (1).

SECTION 67 — Note 1.

[1] Where one party shows clear renunciation or absolute refusal to perform the contract, the other party will be justified in regarding himself as discharged from all continued liability under the contract. (Vol 3) 1916 Cal 136 (147) : 43 Cal 790 (DB).

[2] In a contract for delivery of goods, failure by the vendee to procure necessary certificate for transport, absolves the vendor from performing his part of the contract. (1928) 10 Lah L Jour 211 (215) (DB).

[3] Where a legal practitioner is ready and willing to conduct in Court the legal business of his client but is prevented from doing so, by an act or omission of his client (e g. compromising the case and refusing to pay court-fee required for the power-of-attorney), the latter is not entitled to claim refund of the fee from the former on account of his not appearing in the case. (1907) 1907 Pun L R No. 42 page 136 (157).

[4] Where the defendants had repudiated the terms of the contract, it is sufficient for the plaintiffs to show their readiness to pay the money. (Vol 10) 1923 Lah 36 (57) (DB).

SECTION 68 — Synopsis

1. Scope and applicability.
2. Necessaries.
3. Interest on value of necessaries.
4. Proof of necessity.
5. Alienation by guardian for necessaries.

1. **Scope and applicability.**—[1] Chapter V of the Contract Act does not deal with obligations arising from contracts. (1910) 34 Bom 583 (588) (DB).

[2] A minor falls within the class of persons referred to in S. 68 and so, though he is not liable even for "necessaries" and no demand in respect thereof is enforceable as against him by law, a statutory claim is created thereby against his property, enforceable by the person who has furnished such supplies. (1908) 80 Cal 589 (539, 540, 541) : 80 Ind App 114 (PC).

[3] Section 68 and not S. 70 deals exhaustively with

liability for things supplied or delivered to a minor. (Vol 8) 1921 Nag 103 (106) : 17 Nag L R 20.

[4] The relief which is contemplated under S. 68, Contract Act, is not dependent on any contract but is quite independent of it. The section does not create any personal liability, but on the other hand creates a statutory claim against the property of the person who is incapable of entering into a contract and has been supplied with necessaries suited to his condition in life. Two things are necessary under S. 68, Contract Act, namely (1) that the person against whom the suit is brought is incapable of entering into a contract, and (2) another person (the plaintiff) has supplied him or any one whom he (the person incapable of entering into a contract) is legally bound to support with necessaries suited to his condition in life. (Vol 23) 1936 All 819 (820).

[5] Under S. 68, Contract Act, it must not only be shown that moneys advanced were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to infant's actual requirements at the time of sale and delivery as any one who supplied necessaries to an infant is in the position of a legal creditor; so any one who advances money to an infant for the purpose of procuring necessities is entitled to stand in the position of legal creditor. (Vol 25) 1938 Rang 359 (360) (DB).

[6] A creditor is entitled to recover monies advanced to a minor for his necessaries, by invoking the principle laid down in S. 68, Contract Act, the minor's estate being liable therefor. (Vol 23) 1936 All 172 (175) (DB).

[7] The general rule is that a contract by a minor is absolutely void and unenforceable. It cannot even be made valid by confirmation or ratification on his attaining majority. Section 68 of the Contract Act is an exception to the general rule and the minor's estate is liable for the necessities supplied to him. (Vol 9) 1922 Nag 247 (248) : 18 Nag L R 119.

[8] In a suit on a pro-note, where the defendant establishes his plea of minority at the date of the exe-

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cution of the pro-note, the plaintiff cannot be allowed at the revisional stage to invoke S. 68, Contract Act, so as to alter the whole character of the suit. (Vol 28) 1941 Mad 569 (571).

[9] Sections 68 and 70 of the Contract Act only apply where the money was advanced to the minor or to his guardian as such and not to a third party even though the minor was benefited by such advances. (Vol 8) 1921 Oudh 14 (21) (DB)

[10] Where the share of T was attached, while he was separate from his mother and where T had minor sons but T's brother and mother representing themselves to be owners and to be persons in possession of T's share, mortgaged that share and with the mortgage money satisfied the decree against T's estate. Held, that the mortgagors having never purported to act on behalf of minor sons of T and having totally ignored their existence, the mortgage could not be enforced against either T's descendants or T's property and that S. 68 of the Contract Act did not apply to the case. (Vol 12) 1925 All 218 (213, 214) (DB).

[11] As S. 68 of Contract Act is not controlled by S. 81 of C. P. Court of Wards Act (1899), estate of Government ward is not exempt from liability for necessities supplied to ward. ('04) 17 C P L R 57 (58).

[12] Subsequent to coming into force of C. P. Court of Wards Act (I of 1915) a suit against a minor based on S. 68 of the Contract Act is not maintainable. (Vol 8) 1921 Nag 105 (105) : 17 Nag L R 20.

[13] Sections 68 and 11 — S. 37 of the U. P. Court of Wards Act (1912) has to be read with Ss 11 and 68 of the Contract Act. That section is no bar to a claim under S. 68 of Contract Act. (Vol 30) 1943 Oudh 119 (121) : 18 Luck 318.

[14] Promissory-note executed by a ward of Court for his necessities is not enforceable. He cannot get advantage of S. 68. (Vol 22) 1935 Lah 764 (765) : 16 Lah 932. ((Vol 14) 1927 Lah 414, Overruled.)

2. Necessaries. — [1] Necessaries mean goods suited to the condition in life of the infant and to his actual requirements. So things purchased with which the infant is plentifully supplied are not necessities. ('09) 36 Cal 768 (777)

[2] Word 'necessaries' in S. 68 cannot be restricted to what is necessary for elementary requirements of minor such as food and clothing. (Vol 17) 1930 All 128 (129) : 52 All 381 (DB).

[3] The term 'necessaries' is not confined to goods. It can include other things such as good teaching and instructions whereby the minor may profit himself afterwards; and also money to enable him to obtain these necessities. (Vol 25) 1938 Nag 65 (68) : I L R (1939) Nag 592.

[4] Cloth supplied to a minor and cash lent to him to effect necessary repairs in his house are 'necessaries' within the meaning of S. 68. (Vol 23) 1936 Nag 12 (13).

[5] A creditor advancing money to save the property of a minor from being sold for revenue is entitled to be reimbursed from the property of minor. (Vol 17) 1930 All 128 (129) : 52 All 381 (DB) & (Vol 12) 1925 Nag 33 (33).

[6] Where the guardian of a minor borrows money for the payment of rent due to lambardar, which the minor was bound to pay, the minor is liable under the transaction, as the guardian can do, what the minor himself would do. (Vol 25) 1938 Nag 65 (67) : I L R (1939) Nag 592.

[7] Minor is bound in respect of loans supplied to him for necessities. Agricultural operations and payment of creditors may, in suitable circumstances, be necessary purposes. (Vol 24) 1937 Nag 390 (391) : I L R (1937) Nag 458.

[8] Money advanced to a minor required for defence in certain criminal proceedings pending against him, and used for that purpose—Leader suing to get it back — Plea of minority at the time of contracting. Held, that the minor was liable as the money was paid for 'necessaries' the minor's liberty being in jeopardy. ('94) 21 Cal 72 (80) (DB).

[See also (99) 22 Mad 314 (317) (DB)]

[9] An infant's estate is liable for all the costs and expenses, properly incurred by the guardian in proceedings properly taken to preserve the infant from complete ruin and destitution. ('81) 7 Cal 140 (143, 144)

[10] Money spent on the obsequies of the father of the minor cannot be deemed to be necessities supplied to the minor within the meaning of S. 68. (Vol 20) 1933 Oudh 132 (133) (DB).

[11] Money borrowed by a guardian of a Hindu minor for Diwali expenses is not a loan incurred for 'necessaries' and the minor's estate is not liable. (Vol 25) 1938 Nag 65 (68) : I L R (1939) Nag 592.

[12] Moneys paid to a minor for the discharge of his father's decretal debts, for the recovery of which nothing was done, cannot be called necessities but moneys borrowed by him for the necessary costs of a Civil or Criminal proceeding are held as necessities within S. 68 of the Contract Act. (Vol 9) 1922 Nag 247 (248) : 18 Nag L R 119.

[13] During the lifetime of his father, money borrowed by a person incapable of entering into a contract to pay for the *Sradh* of his mother, is not a necessity under S. 68. (Vol 4) 1917 Cal 485 (486) (DB).

[14] The question whether bulls are or are not necessities depends on the evidence led in by the parties in each particular case. (Vol 13) 1926 Mad 592 (592).

[15] By general principles of Hindu law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage ceremonies of his sister in a manner suitable to the social position of the family and its pecuniary sources: (32 All. 325 Foll) Such provision is "necessary" and one which the minor is 'legally bound' to make within S. 68. (Vol 8) 1921 Oudh 14 (17) (DB) & (Vol 27) 1940 Nag 327 (329, 330) : I L R (1940) Nag 632 & (Vol 20) 1933 Nag 285 (287) & ('10) 32 All 325 (334) (SB) (21 Cal 892 : 23 Mad 512, Ref.)

[16] Advancing of funds to a male Hindu minor for meeting his own marriage expenses is not supplying him with necessities suited to his condition in life within the meaning of S. 68 of the Contract Act, and a person advancing such funds is not entitled to be reimbursed from the property of such a minor. The Hindu law does not enjoin the marriage of a Hindu male before the age of majority. (Vol 27) 1940 Nag 327 (329, 330) : I L R (1940) Nag 632.

[See (Vol 28) 1941 Mad 387 (389)]

[But see (Vol 4) 1917 Pat 332 (333) : 2 Pat L J 907 (DB).]

[17] The money spent over an object which an infant is legally bound to perform cannot be recovered unless it constitutes a 'debt' and is not a bounteous gift. (Vol 8) 1921 Oudh 14 (19) (DB).

[18] Unregistered sale deed — One of the vendors minor—Vendee suing to recover amount alleged to have been paid to some mortgagees in discharge of mortgage on the property in question and some more amount advanced to vendors — Held, that plaintiff acquired no interest in the property, as the mortgage was by a minor and they were not entitled to recover the money paid to discharge the mortgage nor to get the amount advanced to vendors, which was not for necessities. (1910) 32 All 25 (27) (DB).

[19] Debt incurred by guardian for improving or developing minor's estate is not binding on such estate.

Re-imbursement of person paying money due by another, in payment of which he is interested.

69. A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other:

Illustration.

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

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Money borrowed for its upkeep or its preservation binds the estate (Vol 26) 1939 Mad 414 (419 420) (DB).

3 Interest on value of necessities. — [1] No interest on the value of necessities can be allowed by way of damages. (Vol 14) 1927 Lah 414 (415).

[See (Vol 27) 1940 Mad 106 (109) : I L R (1940) Mad 27 (DB).]

[But see (Vol 23) 1936 Nag 12 (13).]

4. Proof of necessity. — [1] In the case of necessities supplied to an infant the onus of proof lies on the creditor. (Vol 25) 1938 Nag 65 (67) : I L R (1939) Nag 592.

[2] It is not sufficient to plead that money was advanced and spent for the minor, but it must also be shown that it was necessary. (1907) 10 Oudh Cas 38 (39, 40) (DB).

[3] In a case where a creditor seeks to make the estate of the minor liable for advances made for necessities mere *bona fide* enquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice, but at the same time the creditor need not prove the actual application of the money. To require this is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate the absence of any other source from which the necessity could be met at the time of the transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. If these are established and the creditor has advanced money for meeting such necessities after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. The burden will, in such circumstances, shift on the defendants to prove that the guardian, instead of using the money for the minor as required, used it for his own purposes. (Vol 25) 1938 Nag 68 (71, 72) (DB).

[4] A plaintiff is not debarred from proving that the goods were necessary if no enquiry had been made at the time the goods were supplied as to the necessity. (Vol 14) 1927 Lah 414 (415).

[5] A money lender, advancing money to a minor alleging that it was for necessities must draw the bond so as to bind the minor's estate. (Vol 1) 1914 Mad 648 (651) : 37 Mad 38 (DB).

[6] Mere statement in a bond executed by a person borrowing money in his personal capacity that the amount was to meet certain necessary expenses of the minor will neither bind the minor nor will afford sufficient proof of the amount having been spent for the necessities of the minor. (Vol 17) 1930 Oudh 299 (299).

[7] Pronote by the guardian — Failure to mention that the loan was for the minor — Minor's estate is still liable for the debt if it is proved to be for minor's benefit or is otherwise binding on him. (39) 1939 Mad W N 909 (909).

5. Alienation by guardian for necessities. — [1] Section 68, Contract Act, refers to a person who supplies a minor with necessities suited to his condition in life; S. 68 does not show that a guardian can execute a

valid mortgage of the ward's properties. (Vol 20) 1935 Rang 83 (84) : 11 Rang 193.

[2] A sale by the administrator of the estate of the deceased of property of his minor heirs is void and cannot be supported under S. 68, nor can the sale be ratified by minor subsequently. (Vol 6) 1919 Low Bur 53 (53) : 9 Low Bur Rul 186 (DB).

[3] In a contract of loan made by a mother of a minor, he is liable only for such sums as are spent for procuring necessities for him. (Vol 14) 1927 Nag 196 (196) * (Vol 20) 1933 Nag 285 (287).

[4] A decree can be enforced against the minor's property if the debt was contracted for purposes necessary within the meaning of S. 68. (Vol 13) 1926 Pat 399 (399).

SECTION 69 — Synopsis.

1. Applicability and scope.
2. Suits for contribution.
3. "Interested."
4. Purchaser of property.
5. Landlord and tenant.
6. Reversioners.
7. Co-sharers.
8. Decree-holder.
9. Payment made to raise wrongful attachment.
10. Joint liability.
11. Money paid to save mortgaged property.
12. Persons in wrongful possession.
13. Other cases.
14. Bona fide payments.
15. Voluntary payments.
16. "Bound by law."
17. "Paying."
18. Limitation.

1. Applicability and scope. — [1] Sections 69 and 70 — The sections are not exhaustive of the principle contained therein (Vol 13) 1926 Cal 657 (658) (DB).

[2] Sections 69 and 70 are distinct — Where one applies the other does not. (Vol 33) 1946 Cal 63 (64).

[3] Sections 69 and 70 deal not with contribution but reimbursement. (Vol 33) 1946 Cal 63 (64)

[4] The section converts the natural obligation into a legal obligation to pay on the part of the person who has received benefit of the payment by another person of what he was bound to pay. (1881) 3 All 66 (72) (FB).

[5] The section applies where a person pays money which another is bound by law to pay. The obligation to repay money which another has paid and on which a person has benefited does not arise in every case excepting those which fall under this section and S. 70. (Vol 33) 1946 Nag 21 (23) : I L R (1945) Nag 820 * (1921) 19 All L Jour 78 (75) (DB) * (Vol 6) 1919 Mad 105 (106) (DB). (Suit by son for recovery of properties bequeathed to him by his brother sold by his mother alleging exclusive title in herself — Out of the purchase money mother alleged to have discharged certain debts binding on property — *Held*, that though purchaser acted *bona fide* he could not ask to be reimbursed by the true owner.) * (Vol 5) 1918 All 379 (379) (DB). (Sale of properties subject to mortgage — Purchaser retaining money due to mortgagee — Pre-emptor suing

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obtaining decree with direction to deposit the full purchase money—Defendant's predecessor-in-title withdrawing full amount and failing to discharge mortgage—Pre-emptor compelled to discharge it—*Held* that he could not recover it as the case did not come within the scope of this section.)

[6] Personal liabilities as well as liabilities imposed upon the land are within the section. (Vol 13) 1926 Cal 765 (767) (DB) & (Vol 13) 1926 Cal 657 (658) (DB).

[But see (Vol 1) 1914 Mad 371 (373) (DB). (The section contemplated only a personal liability.) & (1903) 6 Oudh Cas 212 (214). (Plaintiff redeeming mortgage suing reversionary heir for reimbursement—S. 69 did not apply as reversioner was not personally liable under the mortgage.)

[7] No contract or privity of contract between the obligor and obligee is necessary to make a claim for reimbursement under this section. (1910) 6 Nag L R 27 (31).

[But see (Vol 25) 1938 Cal 413 (414). (Suit for contribution by co-tenant—Impleading two of the landlords and transferee from one of the co-tenants on the ground that the transferee wrongly paid the rent to the landlord and claiming refund—*Held*, that the claim for reimbursement is not maintainable in the suit for contribution and that the case did not come under this section as there is no mutuality between the landlords on the one hand and the plaintiff and other co-tenants on the other.) & (Vol 24) 1937 Lah 607 (608). (Contract between agent and principal that agent will pay for goods sold where purchaser fails to pay—Agent paying in a transaction where the order was not placed through him but the purchaser led him to believe that he would pay him—*Held*, that the agent to get the benefit of this section must have privity of contract with the purchaser.) & (Vol 23) 1936 Cal 663 (667, 671, 672) : 63 Cal 1172 (DB). (Stranger to contract can sue only if trust is created in his favour.)]

[8] If there is direct contractual relation between the parties, there will be no occasion to rely upon S. 69 at all. (Vol 21) 1934 Mad 628 (629).

[9] A obtaining Rs. 1000 from Government as *tagai* loan and making it charge over land No. 1 and offering lands Nos. 2, 3 and 4 as collateral security—Lands Nos. 2, 3 subsequently mortgaged to B and Nos. 1 and 4 sold to P—Rs. 1000 out of purchase price left with P for paying *tagai* loan—Few days before the said sale C attaching land No. 1 in execution of his decree and purchasing it at execution sale—Suit by P claiming charge over lands Nos. 1, 2 and 3 and for recovery of amount paid by him to Government from A, B and C—S. 69 did not apply. (Vol 28) 1941 Bom 153 (155) (DB).

[10] Sections 69 and 70, Contract Act, contemplate persons who not being themselves bound to pay the money or to do the act, do it under circumstances which give them a right to recover from the defendant who is benefited by it. (Vol 7) 1920 Nag 119 (121) & (1912) 16 Cal L Jour 148 (153) (DB) & (1905) 32 Cal 643 (645) (DB).

[See however (Vol 25) 1938 Nag 459 (460) : I L R (1939) Nag 246. (Section 69 can be invoked by a person where there was an initial liability to pay by another which he also was interested in making notwithstanding the fact that he was also legally liable to pay.)]

[11] The right that a person has under this section and S. 70 can be kept separate from his right of subrogation under S. 92, T. P. Act. (Vol 21) 1934 Nag 84 (86) : 30 Nag L R 148 (DB).

[12] Jurisdiction of civil Court to entertain a suit under this section in respect of cases falling under Ss. 183 and 233 of United Provinces Land Revenue

Act, 1901, is not ousted by these sections. (1906) 28 All 563 (568) (DB).

[13] Sections 69 and 70 do not apply to remedies against wrong doer. (1913) 40 Cal 598 (613) : 40 Ind App 56 (P O).

[14] Person owning one of two lands forced to pay whole revenue assessed jointly on both can claim contribution—*Semble* that neither this section nor S. 70 applies to the case. (Vol 3) 1916 Mad 668 (669) (DB).

[15] Purchaser of property retaining money to pay off decree against vendor compelled to pay both the decree-holder and vendor—*Semble* that case falls within this section. (1883) 5 All 400 (404, 405).

[16] Defendants under a rent decree are not bound by law to pay and get the sale under that decree set aside—Mortgagee decree-holder paying and getting sale set aside—He can recover the money under S. 70 though the case is not covered by this section. (1912) 16 Cal L Jour 156 (160) (DB).

[17] Purchaser paying arrears of land revenue—Sale deed silent as to who was to pay—*Held*, that no relation existed between purchaser and vendor creating an obligation of the nature contemplated under Ss. 69 or 70. (1884) 6 All 67 (67, 68) (DB).

[18] Cases under S. 69 are cognizable by a Court of small causes. (1898) 15 Cal 652 (656) (FB) & (1882) 1 All 152 (153).

[But see (1896) 23 Cal 189 (191) (DB). (Clause 41 of Sch. II, Small Cause Courts Act, excludes a suit for contribution from its jurisdiction.) & (1883) 9 Cal 395 (396) (DB). (Joint decree—Money paid under—Suit for contribution—Small Cause Court cannot entertain it.)]

2. Suits for contribution.—(1) The right and duty of contribution is founded on doctrines of equity and does not depend upon contract. (Vol 25) 1938 P O 169 (174) : 65 Ind App 219 : 13 Luck 494 : 32 Sind J. R 772 (P C) & (Vol 26) 1939 Mad 531 (538) : I L R (1939) Mad 776 (DB).

[2] This section does not apply to contribution suits. (Vol 26) 1939 Cal 643 (646) : I L R (1939) 2 Cal 226 (DB).

[3] Section applies to suits for contribution where both plaintiff and defendant were liable for money paid by the plaintiff. (Vol 21) 1934 Cal 709 (710) : 61 Cal 864 (DB).

[But see (1907) 10 Oudh Cas 108 (108).]

[4] Sections 69 and 70 of the Contract Act do not apply to claims for contribution under S. 82 of the T. P. Act. (Vol 5) 1918 Mad 1012 (1013) (DB).

[5] Though the creditor's remedy against some of the persons jointly and severally liable to him might have been barred by limitation the right of the person who pays off the debt to claim reimbursement is not affected. (Vol 14) 1927 Cal 665 (667) (DB).

3. "Interested."—(1) Interests in S. 69 are restricted to those arising in course of law or through mistake or in virtue of existing relation with person on whose behalf payment is made. (Vol 4) 1917 Mad 83 (85) : 39 Mad 965 (DB) & (Vol 3) 1916 Cal 497 (499) (DB) & (Vol 8) 1921 Oudh 14 (19) (DB).

[2] Interest referred to in S. 69 is pecuniary one. (1912) 35 Mad 728 (737) (DB).

[3] The interest must be in order to avert some loss or to protect some interest which would otherwise be lost to the person making the payment. (Vol 33) 1946 Nag 21 (23) : I L R (1945) Nag 820 & (Vol 17) 1930 Oudh 266 (268) (DB). (Transferee of property subject to charge is person interested in the payment of the debt within S. 69.) & (1911) 8 All L Jour 622 (624). (Property sold under a money decree against plaintiff and defendant—Plaintiff depositing money and getting sale set aside—He is a person interested in paying the amount.) & ('82) 1882 All W N 210 (210). (Mortgage ex-

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cutted pending attachment which was subsequently lifted — Subsequent attachment and sale under that — *Held*, mortgagee was not a person interested as his rights were not affected by the sale.) * (1879-80) 4 Bom 643 (652) (DB). (Lands belonging to plaintiff situated in defendant's inam village held by him independently rent and cess-free of the defendant—Defendant paying local cess levied by Government in respect of the village claiming proportionate share from plaintiff—*Held*, that as the plaintiff owed an independent duty to pay to the Government even his lands were assessable to the cess. The defendant was not a person interested in making the payment for he had no interest to protect in respect of plaintiff's holding.)

[4] Mere apprehension founded upon an impression that one's interest will be adversely affected is sufficient. (Vol 9) 1922 Pat 337 (338) * (Vol 27) 1910 All 416 (419) : I L R (1940) All 580 (DB) * (Vol 24) 1937 Rang 350 (350) * (Vol 15) 1928 Cal 389 (391) * (Vol 13) 1926 Cal 385 (391) : 52 Cal 914 (DB). (Interest which may not be enough in common law to found a claim is sufficient.)

[5] A person who is bound by law to make a payment is a person who is interested in the payment within the meaning of S. 69, Contract Act. Consequently, a person who is compelled under a decree to pay money which another was ultimately liable to pay is entitled to recover it from such other person under S. 69, Contract Act. (Vol 24) 1937 Nag 132 (154) : I L R (1940) Nag 437. * (Vol 13) 1926 Cal 657 (658) (DB). (Though he may be liable for or bound to pay only a part of the money.)

[But see (Vol 9) 1922 Nag 50 (51, 52). (The words 'bound by law to pay' include all persons legally bound to pay whether under contract or otherwise.) * (Vol 3) 1916 Mad 980 (983) : 89 Mad 795 (DB).]

[6] Section 69 contemplates only an existing interest which the payment is intended to protect and not interest which is created by the payment itself or forming part of the same transaction as the payment itself or is only a security for the payment. (1918) 25 Mad L Jour 312 (314) * (Vol 32) 1945 Bom 187 (197) (DB). (Party making the payment must have a contract to pay or interest present, future or contingent.) * (Vol 4) 1917 Pat 159 (160) : 2 Pat L Jour 876 (DB). (Mere expectation to acquire title not an interest.) * (1913) 19 Ind Cas 614, (615, 616) (Cal). (Plaintiff alleging to be mortgagee paying off rent decree — Subsequent decision that he was not a mortgagee—*Held*, he was not interested in the payment.) * (1889) 11 All 234 (242) (DB).

4. Purchaser of property. — [1] Purchaser of portion of property made to pay whole amount can sue for contribution. (Vol 24) 1937 Oudh 420 (423) : 13 Luck 35 (DB) * (Vol 12) 1925 Mad 1041 (1042). (Vendee to discharge encumbrance—Co-vendee paying to save property can recover.) * (Vol 1) 1914 Mad 26 (28) (DB). (Two properties mortgaged for the same debt subsequently sold to two persons one free of the encumbrance and the other subject to the mortgage — Purchaser of latter property refusing to pay the whole amount paid by the purchaser of former property—He can recover it from the defaulting purchaser.)

[2] Sale deed with covenant for title free of any charge or incumbrance—Purchaser having to pay a mortgage on the property is entitled to be recouped by the vendor. (Vol 15) 1928 P C 98 (98) : 55 Ind App 135 : 50 All 871 (P C) * (Vol 33) 1946 Mad 244 (245) (DB) * (Vol 9) 1922 All 508 (509) (DB).

[3] Vendee entering into possession on the date of contract of sale—Vendor paying the charges on the property since that date to the date of execution of sale

deed is entitled to recover it from vendee. (Vol 14) 1927 Mad 1060 (1062).

[4] Where property sold to plaintiff by defendant is attached before judgment in a suit by the latter's creditor, and the plaintiff paid the amount and got it released, he can recover from the defendant the amount so paid. (1910) 33 Mad 232 (233, 234) (DB) * (Vol 5) 1918 Cal 636 (637) (DB). (Decree against *patnidars* by landlord—*Darpatndar* depositing amount of decree to avoid sale—*Patndar* liable under Ss. 69 and 70.) * (Vol 2) 1915 Cal 278 (279, 280) (DB). (Plaintiffs purchasing the tenancy of defendant under two of co-sharer landlords compelled to pay off decree for arrears of rent obtained by other landlords — *Held*, they could claim to be reimbursed by the defendants as they paid to protect their interests which in the circumstances of the case was threatened.) * (Vol 1) 1914 Cal 529 (530) (DB). (Purchaser paying off rent decree obtained before the purchaser.) * (1875) 7 N W P H C R 336 (DB). (Encumbrance not disclosed — Purchaser paying off decree obtained on the encumbrance is entitled to be re-imbursed.)

[See (Vol 28) 1941 Mad 635 (636) (DB). (Person compelled to make deposit under O. 21, R. 89, Civil P. C., to save his property by getting the sale set aside can sue to recover consideration for sale under S. 72.)]

[5] Auction sale subject to charge—Purchaser is bound to pay as the principle that the buyer should pay the incumbrances subject to which property is sold is applicable also to court sales. (1907) 30 Mad 461 (463) (DB) * (Vol 9) 1922 Pat 337 (338). (Dues under rent decree.) * (Vol 8) 1921 All 312 (313) : 43 All 268 (DB). (Subsequent mortgage.) * (Vol 3) 1916 Cal 954 (956) (DB). (Rent dues.) * (1897) 1 Cal WN 458 (462) (DB). (Do.)

[6] If purchaser of the equity of redemption pays off at the time of redemption the amount of a bond not charged on the property, he cannot recover it from the mortgagor under S. 69. (Vol 2) 1915 Mad 870 (871).

[7] Transfer set aside as one made with intent to defraud creditors and the property attached and sold — Transferee who has paid an attaching creditor has got a right to proceed against transferor for the payment made on his behalf. (Vol 1) 1914 Low Bur 262 (263) : 8 Low Bur Rul 233.

[8] Registered proprietor transferring tenure — Transferee's name not registered—Person paying arrears of revenue accruing after date of transfer cannot recover same under S. 69. (Vol 19) 1932 Cal 205 (205).

5. Landlord and tenant. — [1] Landlord cannot under S. 69 or S. 70 recover from his tenant the cost of sweepers and *Bhistis* employed under an order of the Municipal Board to keep the premises clean. (Vol 1) 1914 All 322 (323).

[2] Sub-tenure holder paying off decree against the landlord to save his tenure from being sold can recover the amount and accidental expenses. He cannot recover interest on it. (Vol 12) 1925 Pat 737 (739) (DB).

[3] Three years summary settlement amount recovered from plaintiff — Defendant who owned lands in the *jaghir* village of plaintiff found not liable to pay proportionate amount on his land under Bombay Act VII of 1863 either to the Government or to the *Jaghirdar*—*Held* the plaintiff could not recover either under this section or S. 70. (1881-82) 6 Bom 244 (250) (DB).

[4] Amounts wrongly collected from landlord instead of the ryot for irregular irrigation of the latter's land—The amount so paid held could be recovered from the ryot under S. 3 (11) of the Madras Estates Land Act (I of 1908)—Doubtful whether the claim is for merely compensation falling under S. 69 or 70 of this Act. (Vol 26) 1939 Mad 918 (919, 920).

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[5] Landlord collected water cess from plaintiffs at penal rate and paid it to Government. He is not liable to be sued by plaintiffs for recovery of the water cess so paid by them. Section 69 held not applicable as landlord was not bound to pay water cess. (Vol 3) 1916 Mad 157 (159, 161 and 165) (DB).

6. Reversioners. — [1] Hindu reversioner who pays off a mortgage decree against the estate in the hands of the widow is entitled under S. 69 to be reimbursed by the widow in respect of the money which she was bound to pay. (1913) 36 Mad 426 (435, 436) (DB) * (Vol 12) 1925 Mad 95 (105, 106) (DB).

[2] As the next reversioner of a Hindu widow is interested in the payment of revenue in respect of her estate within S. 69, he can recover the amount of revenue paid by him. (1909) 19 Mad L Jour 331 (331).

[3] Reversioner depositing the sale amount under S. 310-A of Civil Procedure Code (now O. 21, R. 89) and getting sale aside is entitled to recover it from the widow. (Vol 1) 1914 Cal 338 (340) (DB).

[4] Widow entitled to maintenance and residence continuing in possession after the death of last male holder but not as heir—Any sums spent by her for purposes binding upon reversioners can be recovered by her. (Vol 15) 1928 Mad 820 (822) : 51 Mad 815 (DB).

7 Co-sharers. — [1] He who chooses without the permission of his co-sharer to spend money on the joint property has no right to implead the payment of any share of such expenses upon such joint owner unless they fall within Ss. 69 and 70. (1890) 1890 All WN 121 (122)* (Vol 7) 1920 Pat 155 (156). (Co-sharer not bound by law to pay rent decrees in favour of landlord — Contribution cannot be levied from him).

[2] Suit by lambardar co-sharer against other co-sharers to recover land revenue paid by him on their behalf falls under S. 69. (Vol 26) 1939 Pat 497 (499) (DB).

[3] Registered holder of village paying water cess leviable under Act, VII of 1865 — Defendant entitled to share in village bound to pay either to plaintiff or the Government direct and therefore, his share can be recovered by the plaintiff who paid the whole amount by invoking this section. (1910) 33 Mad 189 (191, 192, 195 196) (DB).

[4] Co-sharer paying rent due on land is entitled to contribution. (Vol 3) 1916 Cal 954 (956) (DB) * (1912) Ind Cas 457 (458) (Cal) (DB). (Co-sharer paying off entire rent decree) * (Vol 1) 1914 Cal 672 (673) (DB). (One of the two owners of a non-transferable holding transferring his share — Transfer not recognised by landlord — Decree for rent paid by the other owner — Held, he could recover it from the transferee of his co-sharer).

[5] One of the co-sharers paying off the decretal amount due from all can recover it from the other co-sharers. (Vol 22) 1935 Lah 981 (982) * (Vol 1) 1914 Cal 873 (874) (DB). (Patni put up for sale in execution free of encumbrance — Co-sharer in *darosat taluk Patni* paying amount to stop sale to protect his interest is entitled to be paid by the Patnidar under S. 69).

8. Decree-holder. — [1] Decree-holder withheld from possession pending appeal and second appeal paying list for the land can recover the amount paid under this section. (1904) 27 Mad 338 (339).

[2] A decree-holder who has purchased the zamindari shares of the judgment-debtor in execution, paying arrears of revenue is not entitled to be reimbursed by the judgment-debtor. (Vol 21) 1934 All 712 (712).

[3] Holder of money decree with an attachment before judgment paying dues under rent decree to save the property from sale in execution of the latter decree can claim under this section to be reimbursed. (Vol 15) 1928 All 553 (553) * (Vol 13) 1926 All 745 (746) (DB).

9. Payment made to raise wrongful attachment. — [1] Money paid to avoid attachment of his property in execution of a decree against another can be recovered from the judgment-debtor under Ss. 69 and 70. (11) 1911 Pun W R No. 32 page 82 (93) (DB).

[2] Crops of land possessed by tenants attached by Government for rent for another plot in same *patta* — Tenant paying off dues is entitled to be reimbursed though attachment illegal. (Vol 3) 1916 Mad 1167 (1167) (DB).

10. Joint liability. — [1] One of several joint judgment-debtors paying off the entire decree is entitled to recover contribution from his co-debtors by a suit which will fall under this section. (Vol 29) 1942 Pat 204 (208) : 20 Pat 811 (D B) * (Vol 18) 1931 Pat 394 (400) : 10 Pat 528 (D B). (A judgment-debtor along with B under a mortgage depositing money under O. 21, R. 89 C. P. C., and getting sale set-aside — Held suit brought by him to recover half of the amount paid by him from B was competent under this section) * (Vol 14) 1927 Mad 98 (99) * (Vol 13) 1926 Cal 951 (952) (DB) * (Vol 1) 1914 Cal 218 (209) (DB). (One of several judgment-debtors buying the decree cannot execute it against the others.) * (1908) 11 Oudh Cas 279 (282) (DB).

[2] Decree for rent against joint lessees — One of them paying can recover from the other in the absence of funds available with him out of the usufruct to pay it off. (Vol 18) 1931 Pat 234 (235) : 10 Pat 168 (DB).

[3] One of co-sureties paying more than his proportionate share can enforce contribution from the others under this section. (1910) 13 Oudh Cas 23 (25) * (Vol 8) 1921 Mad 530 (531). (Contra, *Per Ramesam J.* — Section 140 is applicable).

[4] Surety given to remove attachment of property before judgment — Subsequent proceedings resulting in the attached properties being declared not attachable under S. 60, C. P. C. — Decree-holder taking coercive measures against the surety and recovering the dues under decree — Held though it was subsequently found that the surety was not liable to pay, he could sue the debtor for reimbursement under this section. (Vol 31) 1944 Nag 282 (283) : ILR 1944 Nag 638.

[5] Co-tenant paying decretal amount to save tenancy is entitled to contribution. (Vol 17) 1930 Cal 344 (345) (DB) * (Vol 13) 1926 Cal 1031 (1032) (DB).

[6] Property jointly owned — Plaintiff paying arrears of assessment can recover same from defendant joint-owner. (1899) 12 Mad. 349 (351) (D B) * (1898) 11 Mad 452 (459) (DB).

[7] A person who owns one of two lands on both of which the Government revenue was jointly assessed and pays the whole revenue is entitled to claim contribution for the proportionate sum due from other land. (Vol 3) 1916 Mad 668 (669) (DB).

[8] Decree for costs — Decretal amount paid by one of the defendants — Person paying is entitled to contribution from other defendant (Vol 17) 1930 Bom 506 (507) : 55 Bom 94 * (75) 1875 Pun Re No. 90 page 212 (213) (DB).

[9] Assignee of decree for rent applying for execution of decree — Assignee though not in a position to apply for execution, Court issuing execution — Plaintiff paying under compulsion of such execution — Held, that the case is covered by S. 69 and the money recoverable from the other judgment debtor. (Vol 2) 1915 Cal 310 (312) (DB).

11. Money paid to save mortgaged property. — [1] Mortgage of property charged with maintenance by decree impleaded — When he pays off the decree which other defendants are bound to satisfy, he gets the right under this section to be reimbursed. (Vol 21) 1934 Nag. 84 (85) : 30 Nag L R 148 (DB).

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[2] Second mortgagee paying off the amount under the decree obtained by the first mortgagee to save the mortgaged property from sale—He can bring a suit under S. 69, Contract Act, to realize the amount so paid. (Vol 14) 1927 Cal 393 (394) : 54 Cal 424 (DB) * (Vol 9) 1922 All 153 (154) : 44 All 67 (DB).

[See however (Vol 27) 1940 All 104 (105) : I L R (1940) All 71 (DB). (Puisne mortgagee purchasing property in execution of his own decree and paying off prior encumbrance cannot recover from the mortgagor).]

[3] Section 69 does not apply to a suit by one of mortgagees for contribution against co-mortgagees who has paid off his share due under a sub-mortgage but the entire right has been sold away due to default of others. (Vol 20) 1933 Oudh 478 (480) (DB).

[4] Usufructuary mortgagee paying to have the sale of the property set aside is entitled to reimbursement by the mortgagor. (Vol 10) 1923 All 127 (127.)

[5] Mortgagor of an under-proprietary plots is not a person who is bound under law to pay arrears of rent as the usufructuary mortgagee thereof is primarily responsible for the rent under S. 76, Transfer of Property Act. (Vol 5) 1918 Oudh 286 (287.)

[6] Purchaser at a private sale from the mortgagor is bound to pay arrears of rent due under a decree obtained by the landlord prior to his purchase. If the mortgagee paid off the same to save the property from sale he can bring a simple money suit to recover it even though he has given up the mortgage lien. (Vol 13) 1926 Cal 765 (767.)

[7] Rent of ante-alienation holding paid by mortgagee of the same—Mortgagee can sue original ante-alienation tenant for recovery of amount due which the tenant should have but did not pay. (Vol 34) 1947 Nag 43 (44) : I L R (1946) Nag 469 (DB).

[8] Holding brought to sale under Madras Rent Recovery Act (VIII of 1866), for arrears of rent—Mortgagee from tenant paying amount and averting sale—Mortgagee cannot recover under S. 69 but can do so under S. 70. (1909) 2 Ind Cas 435 (436) (Mad.)

[9] Darpadnidar advancing arrears put in possession of putni—Darpadnidar subsequently defaulting—Property brought to sale and purchased by mortgagee—Darpadnidar suing for recovery of money paid by him in respect of arrears and while he was in possession—Held the section did not apply as mortgagee was not bound to pay the rent. (1911) 15 Cal W N 404 (407) (DB).

[10] Mortgagee auction purchaser paying off rent decrees held by landlord against the mortgagor tenant cannot recover the amount. (Vol 11) 1924 Pat 235 (236) : 2 Pat 890 (DB).

[11] Purchaser of mortgaged property cannot plead he was only benamidar for the mortgagor in an action brought against him to recover the putni rent paid by the mortgagee to save property. (1907) 34 Cal 52 (96) (DB).

[12] Mortgagee is entitled under this section to be reimbursed by mortgagor for money paid by him in respect of revenue and land taxes to save property from sale (Vol 23) 1936 Rang 47 (48) * (Vol 33) 1946 Nag 226 (227) : I L R (1946) Nag 297. (Mortgagee paying land revenue payable by the purchaser of the property in execution of a money decree against the mortgagor is entitled to recover it from the purchaser.) * (Vol 28) 1941 Mad 800 (802.) (Collusive decree against tenants in favour of landlord for cess—Mortgagee decree-holder paying can recover from the tenants.) * (Vol 27) 1940 Nag 285 (286.) (Mortgagee obtaining possession of property under compromise decree paying revenue dues defaulted by mortgagor—He can recover it under this section.) * (Vol 20) 1933 Rang 112 (112).

[13] A mortgagee from a co-sharer paying the entire

revenue payable by all the co-sharers is entitled to be reimbursed by the other co-sharers. (Vol 17) 1930 All 516 (517) (DB).

[See however (1910) 33 Mad 41 (45) (SB). (Mortgagee of shares of certain defendants paying the whole revenue—One of the sharers not bound to pay—He cannot be made to pay under this section.)]

[14] Mortgagee decree-holder who purchased the property in execution paying land revenue could not recover it from the mortgagor on the sale being subsequently set aside. (Vol 15) 1928 Pat 552 (554) (DB).

[15] Subsequent mortgagee lent with money at the time of mortgage to pay off prior mortgage—Larger amount paid due to his own delay—He cannot recover the excess from the mortgagor. (Vol 8) 1921 Oudh 55 (56).

[16] A mortgagor paying rent which ought to be paid by the mortgagee can bring a separate suit based on S. 69, Contract Act. (Vol 14) 1927 All 713 (713)

[17] Where in default of payment of Government revenue by the mortgagee in possession, the mortgagor pays the same, he can recover the same with interest. (Vol 14) 1927 Mad 59 (59).

[18] Co-mortgagor getting sale set aside by consent by paying debt cannot claim contribution from the other mortgagors under this section. But he gets an equitable right to claim. (1910) 14 Cal W N 361 (363) (DB) * (Vol 11) 1924 Nag 238 (239). (No personal liability to contribute and S. 69 does not apply).

[19] Representatives of mortgagee paying the usufructuary mortgagee of the original mortgagee to get the property can recover the amount from the representatives of the original mortgagee. (Vol 19) 1932 Oudh 222 (223) : 8 Luck 79 (DB).

[20] Property subject to three successive mortgages sold under a decree for sale on the first mortgage—Auction-purchaser agreeing to hand over the property back to mortgagor if money was paid before a certain date—Third party advancing money to mortgagor on the understanding that the property will be sold to him—Held, the third party did not get any lien under S. 69 or S. 70. (Vol 16) 1929 Mad 890 (896) (DB).

12. Persons in wrongful possession.—[1] No cause of action arises against the trespassers for reimbursement under S. 69 for dues paid to zamindar on their behalf. (Vol 13) 1926 Mad 152 (152).

[2] A person in wrongful possession of property paying rent to Government cannot recover it from the true owner who dispossesses him subsequently. (1885) 7 All 660 (661) (DB).

[3] A kept wrongfully out of possession by B, his co-sharer—B cannot call A to contribute to the rent paid by B during A's dispossession. (1902) 6 Cal W N 903 (904) (DB).

13. Other cases.—[1] Gift of family property to family deity—Plaintiff divesting himself of all rights—Defendant appointed manager—Plaintiff spending over purchases of ghee, matches, cloth and so forth and paying salaries of *Pujari* and *Dhimar*—Plaintiff held could not be reimbursed. (Vol. 33) 1946 Nag 21 (23) : I L R (1945) Nag 820.

[2] Court of Wards paying off creditors of deceased Muhammadan from his pensions and *jagirs*—Partition suit by some of deceased's heirs not entitled to pensions and *jagirs*—Heirs bound to reimburse Court of Wards to extent of amount paid. (Vol 28) 1941 Lah 84 (89, 90.)

[3] A charge-holder is a person interested in the property on which the charge exists and is entitled to recover payments made by him to save it. (Vol 32) 1945 Nag 179 (180, 181) : I L R (1945) Nag 247.

[4] Dis-solution of partnership—One partner undertaking to pay creditor—Other actually paying is entitled to indemnity. (Vol 23) 1936 Mad 865 (867).

Section 69 (*contd.*)

[5] Trustee of temple borrowing money for the temple has a right to be indemnified but his claim to such indemnity is not covered by this section. (1911) 12 Ind Cas 335 (336) (DB) (Mad).

[6] A lessee paying off land revenue that had fallen in arrears which the lessor was bound to pay can recover it from the lessor. (Vol 14) 1927 Oudh 609 (609) * (Vol 21) 1934 Mad 658 (661).

[7] Mortgage decree — Sale in execution — Stranger depositing decree amount on behalf of some reversioner can be reimbursed under S. 69. (1913) 36 Mad 426 (436) (DB).

[8] Co-sharers taking farming lease of estate from another co-sharer specially agreeing to pay the revenue thereon leasing to another in dur-i-jara-lease—Dur-i-jardar paying revenue to save property could recover it from his lessors. (1876) 25 Suth W R 885 (886) (DB).

[9] Agent of firm ordering goods for the firm — Bill of lading drawn in the name of agent—Agent pawning the goods and handing over the bill to the consignors—Consignors paying the freight and claiming to take delivery — Firm intervening taking delivery of goods : *Held*, they are bound to reimburse the consignors with the amount of freight paid by them. (*82) 1882 Pun Re No. 199, page (581) (DB).

14. *Bona fide* payments. — [1] To support a claim for contribution under S. 69, it is an indispensable condition that the claimant must have made the payment in good faith believing in his title to the property. (Vol 19) 1932 Mad 71 (78) (DB) * (Vol 19) 1932 All 332 (333) : 54 All 140 (DB) * (Vol 14) 1927 Mad 459 (460) * (Vol 12) 1925 Cal 1097 (1099) (DB) * (Vol 12) 1925 Pat 201 (207) (DB) * (Vol 10) 1923 Nag 801 (803, 804) * (Vol 5) 1918 Cal 446 (447) : 45 Cal 691 (DB) * (1913) 11 All L Jour 179 (188) * (1904) 7 Oudh Cas 146 (150, 151).

[2] Where the payment was made by a person not actuated by the motive of protecting his interest it is not *bona fide*. (1856) 12 Cal 213 (216) (DB).

[3] Proprietor in good faith, pending litigation, paying Government revenue—Estate afterwards adjudged to opponent — Former could recover the money paid minus his receipts from the property. (1894) 21 Cal 142 (148) : 20 Ind App 160 (PC) * (Vol 28) 1941 Mad 847 (850) (DB) * (1906) 3 All L Jour 665 (667) (DB).

[4] Where the plaintiff fails to establish his *bona fides* the mere fact that the debt discharged is a mortgage debt or debt secured by a decree does not make any difference. (Vol 18) 1931 Mad 207 (210) : 53 Mad 952 (DB).

[5] Contract to supply goods *f. o. r.*—Goods actually sent with freight “to pay”—Consignee paying freight—No right to recover from consignee. (Vol 15) 1928 Mad 198 (198).

[6] Suit for reimbursement by person who obtained probate of a will after its revocation in respect of an amount paid by him in execution under a decree against the assets of the deceased on his admission of the claim — *Held*, in the absence of any movable property with him he ought to have waited till there was actual attachment and therefore the payment was not genuinely made. (Vol 8) 1921 Nag 128 (128).

[7] In determining the question of good faith in a proceeding to be reimbursed for payments the age of the party making the payment is material for inferring knowledge and intention. (Vol 18) 1931 Mad 207 (210) : 53 Mad 952 (DB).

15. *Voluntary* payments. — [1] If plaintiffs, as mere volunteers, choose to pay a sum of money not for defendants, but for themselves, they cannot claim benefit of the section. (1889) 11 All 234 (243) (DB) * (Vol 8) 1916 Oudh 151 (152). (Defendant in a suit for

foreclosure paying the full decretal amount pays it in his own interest—He cannot recover it from transferees in possession not parties to suit.) * (1899) 1 Bom L R 371 (372) (DB).

[2] Payment, by surviving partner in a firm, of super-tax charged on him in respect of the profits of the deceased partner is a voluntary payment which cannot be recovered. (Vol 14) 1927 Cal 518 (520).

[3] Vendee of minor's property from a person who he knew was not the guardian spending money for the estate—He has no title to the property and the money, though it benefited the estate, was only a voluntary payment which could not be recovered. (Vol 18) 1929 Mad 110 (114) (DB).

[4] Payment of the Government revenue by a lambardar is not a voluntary payment disentitling him to recover it under this section. (Vol 17) 1930 All 517 (518) (DB).

[5] Mortgagee paying to prevent sale of certain property for arrears of rent—Such payment is not voluntary payment but constitutes a charge on property. (1879) 4 Cal 539 (542) (DB).

[6] Payment by a charge-holder for dower to the decree-holder is not a voluntary payment. (1867-69) 12 Moo Ind App 65 (79) (PC).

[7] Testator bequeathing certain properties to his foster son—Foster son discharging encumbrances on properties not bequeathed to him is not a volunteer and was entitled to be reimbursed. (Vol 12) 1925 Mad 1175 (1178).

[8] Person whose claim to a property under a sale has been decided to be fictitious in a suit his payment to save the property from sale is only a voluntary payment which he cannot recover from the vendors. (1908) 30 All 167 (169) (DB).

[9] Purchaser of tenure in execution under rent decree paying the landlords—Defaulting tenants having the sale set aside on the ground of irregularities in the sale — *Held* purchaser was not a person interested in paying what the tenants were bound to pay but paid the money in his own behalf. (1907) 5 Cal L Jour 59 (61) (DB).

16. “Bound by law.”—[1] The expression “bound by law to pay” in S. 69 means a legal liability. (Vol 5) 1918 Mad 1012 (1015) (DB) * (1910) 33 Mad 15 (19, 20, 21) (DB). (Widow whose property has already been sold without objection is not bound by law to pay the debt. Hence a reversioner who was in possession of the property paying the debt and getting the sale set aside cannot recover it from her.)

[2] “Bound by law” does not mean “bound by law to the plaintiff” but that the defendant at the suit of any person might be compelled to pay. (Vol 12) 1925 Mad 1041 (1042) * (Vol 25) 1938 Cal 413 (414). (Plaintiff along with defendants sued for arrears of rent — Suit not impleading transferee from one of the defendants—Plaintiff compelled to pay off the decree to save his property from sale — *Held* plaintiff could not claim contribution from transferee whose *jama* was separately recognised by landlord and that she was not bound by law to pay that which she had already paid.) * (Vol 14) 1927 All 713 (713) * (Vol 4) 1917 Bom 55 (56) : 42 Bom 93 (DB).

[3] A person “bound by law to pay” includes not only a person who is personally liable for the payment but also a person who is indirectly liable in the sense that his property is liable. (Vol 31) 1944 Cal 272 (278) (DB) * (Vol 7) 1920 Mad 890 (892) (DB). (Expenses incurred in respect of the bangle ceremony or *sreemantham* though not recoverable under this section the expenses of nuptials of the daughter are recoverable.) * (1908) 26 Mad 497 (499) (DB). (Expenses incurred for the marriage of the daughter of the undivided brother by his widow can be recovered from the surviving

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.^a

Illustrations.

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

[a] As to suits by minors under S. 70 in Presidency Small Cause Courts, see the Presidency Small Cause Courts Act, 1882 (15 [XV] of 1882), S. 32.

Section 69 (contd.)

brother.) *('01) 1901 All W N 37 (38) (DB). (Revenue-paying property taken under direct management by Collector as revenue was in arrears—While under such management property bought in execution of a decree of civil Court and sale confirmed—In between confirmation of sale and actual possession auction-purchaser compelled to pay arrears of revenue: Held the amount could be recovered from the original owners of the property.)

[4] The liability for which payment may be made under this section need not be statutory but may be contractual also. (Vol 5) 1913 Cal 75 (76) (DB) * (Vol 27) 1940 All 214 (216) (DB) * (Vol 9) 1922 Nag 50 (51, 52). (B, under contract with A, to pay C whom he owes money — A paying the money can recover it from B under this section.) * (1879) 4 Cal 369 (373) (DB). (Intermediate lessee bound under covenant to pay rent to superior landlord—Sub-lessee paying it can recover from them.)

[5] The obligation of the person to pay must have been in existence at the date when payment was made by the other in respect of which the suit is laid. (Vol 33) 1946 Nag 21 (23): I L R (1945) Nag 820 * (1913) 17 Cal L Jour 179 (182) (DB). (Decree against defendant as recorded tenant — He is bound by law to pay the same though he has parted with his interest under the lease.)

[6] The mere fact that benefit of payment by another is enjoyed by a person is not enough to bring a suit for reimbursement against him but he should also be bound by law to repay it. (Vol 10) 1923 Nag 219 (221) (DB).

[7] One person in possession of bulk of the income from the property paying — He pays what he himself is bound to pay and cannot compel the other to contribute. (Vol 22) 1935 All 758 (759). (Only one of two mutualis in possession of bulk of the income — Payment to beneficiaries cannot be recovered under S. 69.) * (1907) 30 Mad 35 (38). (Land in plaintiff's name but in possession of defendant—The defendant was not "bound" to pay revenue.)

[8] Guardian *ad litem* filing unnecessary and unsuccessful appeal — Estate of the lunatic is not bound by law to pay the costs. (1910) 34 Bom 374 (377) (DB).

[9] Inamdar losing his right of levying assessment on occupancy tenants cannot recover the sum paid as jodi from them, as the tenants are not bound by law to pay jodi. (Vol 8) 1921 Bom 175 (176): 45 Bom 638 (DB).

[10] Rent due for a period when mortgagors and their purchasers were in possession — Plaintiffs as first mortgagees paying rent to superior landlord—Plaintiffs were not bound by law to pay the money within S. 69. (1907) 11 Cal W N 403 (412) (DB).

[11] The money paid by the under-tenant after the sale was not money which the tenant was "bound by law to pay." (1902) 6 Cal W N 336 (337) (DB).

17. "Paying." — [1] Payment in law means payment to another. So Government which held land under a landlord and paid assessment of the lands to

prevent the sale thereof for arrears of revenue is not entitled to recover it from the landholder. (1907) 30 Mad 375 (377) (DB).

[2] Right to contribution does not arise unless the money has been paid in respect of which the right is claimed. (1936) 64 Cal L Jour 55 (57).

[3] Mere giving of renewal of security by one of judgment-debtors liable for cost does not amount to payment—The person executing the deed is not actually out of pocket and does nothing more than to convert his former liability into another liability. (Vol 23) 1936 Oudh 253 (255, 256): 12 Luck 45 (DB).

[4] Mere undertaking to pay is not actual payment and does not afford a cause of action for the suits contemplated by this section. ('04) 1904 Pun Re No. 31 Page 109 (111) (DB).

18. Limitation. — [1] The right to reimbursement arising under S. 69 is governed by three years limitation from the date on which the money was paid. (Vol 24) 1937 Nag 402 (406) * (Vol 32) 1945 Mad 500 (502). (A person who becomes subrogee of a mortgagee by redeeming the mortgage has a right to be reimbursed by the mortgagor — His claim is governed by Art. 61 of the Limitation Act.) * (Vol 10) 1923 Mad 392 (396) (DB). (Payment of mortgage and claim for reimbursement—Art. 132 of Limitation Act does not apply.) * (Vol 9) 1922 Pat 499 (501): 1 Pat 780 (DB). (Reimbursement in respect of mortgage paid off.) * ('04) 1904 Pun Re No. 31, page 109 (111) (DB).

[2] Vendee entering into possession on the date of the contract for sale — Vendee paying charges on the property since that time to the execution of sale deed—Time runs from the date of such payment and Art. 61, Limitation Act, governs his suit for recovery of the money from the vendee. (Vol 14) 1927 Mad 1080 (1084).

[3] Pronote by R and N in favour of J and M — J alone realizing the whole amount — Subsequent suit by J and M on the pronote — Decree for M only for his half share — Suit by R to recover from J the amount paid to M — Suit is governed by Art. 61 or Art. 12 but not Art. 96, Limitation Act. (Vol 25) 1938 Lah 99 (101): I L R (1937) Lah 623 (DB).

SECTION 70 — Synopsis

1. Scope and applicability.
2. "Lawfully does anything."
3. "For another."
4. "Not intending to do so gratuitously."
5. "Enjoys the benefit."
6. Compensation.
7. Quantum meruit — Compensation for services rendered.

1. Scope and applicability. — [1] The section is not exhaustive of the principle contained therein. (Vol 13) 1926 Cal 657 (658) (DB).

[2] Section 70 must be interpreted according to its clear and explicit terms and not in reference to the provisions of the English law relating to the matter. (Vol 17) 1930 Lah 364 (369): 11 Lah 375 (DB).

Section 70 (contd.)

[3] Courts in India ought to be guided more by justice, equity and good conscience than by English precedents and should not cut down the beneficial provisions of S. 70, Contract Act, which are intended to apply to all cases of benefit *bona fide* conferred by one person on another and which benefit is enjoyed by the other person. (Vol 2) 1915 Mad 95 (98) : 38 Mad 235 (DB).

[4] The terms of S. 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. But it is incumbent on final Court of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious. (1911) 88 Cal 1 (7) (DB) * (Vol 4) 1917 Bom 141 (145) : 42 Bom 556 * (Vol 15) 1928 Cal 389 (391).

[5] Where there is an express contract, S. 70, Contract Act, has no application. (1935) 62 Cal 612 (623) (DB) * (Vol 3) 1916 Low Bur 56 (56).

[6] For an applicability of S. 70, Contract Act, law will presume a contract, but where there could not have been a contract the law will not presume one. (Vol 24) 1937 Nag 390 (393) : I L R (1937) Nag 111.

[7] Contract Act, S. 70, does not apply to the case of a minor. (Vol 18) 1931 Lah 344 (346) (DB) * (Vol 27) 1940 Pat 324 (326) : 19 Pat 789 (FB).

[But see (Vol 15) 1928 Mad 317 (320) (DB).]

[8] An obligation to repay money which another has paid and by which a person is benefited does not arise in every case. In India, the matter is regulated by Ss. 69 and 70, Contract Act. (Vol 33) 1946 Nag 21 (23) : I L R (1945) Nag 820 * (Vol 32) 1945 All 428 (429).

[9] It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. (Vol 32) 1945 P C 23 (30) : 72 Ind App 89 : I L R (1945) Kar P C 73 (P C) * (Vol 21) 1934 Oudh 307 (311) : 9 Luck 701 (DB).

[10] Section 70 must be read so as to justify the officious interference of one man with the affairs or property of another or to impose obligation in respect of services which the person sought to be charged did not wish to have rendered. (Vol 33) 1946 Nag 21 (23) : I L R (1945) Nag 820.

[11] Under S. 70 plaintiff must prove (1) that he was doing something lawful when he was making the payment; (2) that he did not intend to pay gratuitously; (3) that what he did was done for the defendant and (4) that the defendant did enjoy the benefit. (Vol 2) 1915 Mad 95 (97) : 38 Mad 235 (DB) * (Vol 15) 1928 Cal 389 (391).

[12] Section 70, Contract Act, applies to a case when the "person" for whose benefit the payment is made is a large caste. (Vol 4) 1917 Bom 141 (147) : 42 Bom 556.

[13] If there is special Act settling the relation of parties the general Act is inoperative. House Accommodation Act ousts the jurisdiction of Civil Court to decide the question of necessity for repairs and its costs. Under S. 70, Contract Act, Civil Courts must take the amount arrived at by the Special Court as it is. (1910) 8 Ind Cas 1158 (1159) : 1910 Pun Re No. 103 (DB).

[14] Section 70, Contract Act does not contemplate the case of payment of money. (Vol 30) 1943 All 220 (232) : I L R (1943) All 610 (FB).

[But see (Vol 12) 1925 Cal 1097 (1102, 1103) (DB). ("Does" includes payment of money.)]

[15] An undertaking to pay is not actual payment and does not afford a cause of action for the suit con-

templated by Ss. 69 and 70 of the Contract Act until the money or its equivalent is actually paid. (1904) 1904 Pun Re No. 31, p. 109 (111) (DB).

[16] The provisions of S. 70 can be applied even when one of the parties concerned is a corporation or other public body. (Vol 19) 1932 Rang 176 (178) : 10 Rang 522.

[17] Section 70 is not repealed or altered by Ss. 48 and 49, Bombay Municipal Boroughs Act. (Vol 24) 1937 Bom 417 (419, 420) : I L R (1937) Bom 782 (DB).

[18] Out of the two sections, namely, Ss. 65 and 70, the latter section covers a wider ground and should not be invoked in the case of a benefit received under a contract. (Vol 13) 1926 Oudh 388 (391) : 1 Luck 444 (DB).

2. "Lawfully does anything."— [1] The meaning of the word "lawfully", in S. 70 is merely "*bona fide*". (Vol 15) 1928 Mad 317 (318) (DB).

[2] Section 70 applies when a person lawfully does something for another; the word "lawful" cannot be ignored. (Vol 33) 1946 Nag 21 (23) : I L R (1945) Nag 820.

[3] In ascertaining whether an act is "lawfully" done for another, the test to be applied should be, whether the person so acting held such a position to the other as either directly to create or by implication reasonably to justify the inference that by the act done for the other person he was entitled to look for compensation for it to the person for whom it was done. (Vol 16) 1929 Bom 89 (91) : 53 Bom 309 (DB). * (89) 11 All 234 (243) (DB). [But see (Vol 24) 1937 Bom 417 (420) : I L R (1937) Bom 782 (DB).]

[4] All that the Court has to do in arriving at a decision whether the payment was made lawfully or not is to see whether the person making the payment had any lawful interest in making it at the time when payment was made. (Vol 32) 1945 Nag 179 (181) : I L R (1945) Nag 247 * (Vol 12) 1925 Cal 1097 (1102, 1103) (DB) * (Vol 8) 1921 Oudh 14 (21) (DB) * (1910) 14 Cal W N 699 (703) (DB).

[5] Whether an act is lawfully done or not depends on the relative position of the parties so as reasonably to justify liability. (Vol 18) 1931 Bom 39 (39, 40).

[6] A *bona fide* claimant, on defeat, is entitled to get back from his opponent what he paid for preserving the estate. (Vol 12) 1925 Pat 201 (208) (DB). * (Vol 12) 1925 Cal 1097 (1102, 1103) (DB) * (1895) 22 Cal 28 (31) (DB) * (82) 1882 Pun Re No. 199, p. 577 (584) (DB) * (1881) 3 All 66 (72) (FB).

[7] Purchaser on cancellation of his sale is entitled to get back amounts paid in discharge of encumbrances. (Vol 12) 1925 Mad 95 (102, 103, 104, 105) (DB) * (Vol 11) 1924 Oudh 302 (303) : 27 Oudh Cas 56 (DB).

[8] Plaintiff holding tenure of defendant — Tenure sold in execution of rent decree against defendant by superior landlord — Deposit by plaintiff to avoid sale — Plaintiff's right of contribution from defendant was enforceable. (Vol 21) 1934 Cal 667 (667).

[See also (Vol 4) 1917 Bom 141 (145, 147) : 42 Bom 556.]

[9] When a judgment-debtor is lawfully in possession after the sale of property, in execution of a decree, and has paid Government revenue, he is entitled to get back revenue paid. (1909) 6 All L Jour 327 (331, 332) (DB).

[10] Where consignee had to pay the freight which was to be paid by the defendant, the payment is lawful and was for the benefit of the latter and is recoverable under S. 70. (Vol 16) 1929 Lah 787 (789).

[11] Where on setting aside a decree, the liability to restore sale proceeds has been discharged by another person, he is entitled to compensation from those so liable. (Vol 16) 1929 All 854 (856) (DB).

Section 70 (*contd.*)

[12] It is a lawful payment for a purchaser from a mortgagor to redeem the mortgage and recover the amount from the vendor. (Vol 18) 1931 Bom 39 (40).

[13] Purchaser of property paying amount of decree against his vendor to save property from execution sale is entitled to recover amount paid under S. 70. (1883) 5 All 400 (405) (DB) (Vol 83) 1946 Mad 244 (245) (DB) (1911) 11 Ind Cas 155 (159) (DB) (Cal).

[14] Plaintiff doing work—Defendant deriving benefit but informing before the work that he did not want the work to be done—Work is not done “lawfully”. (Vol 15) 1928 Mad 320 (325) (DB) (Vol 6) 1919 Mad 526 (527) (Vol 8) 1916 Cal 497 (499) (DB) (‘10) 20 Mad L Jour 722 (724) (DB).

[15] Person making payment fraudulently in order to create title must be deemed to be making it voluntarily and not lawfully and so S. 70 would not apply. (‘11) 13 Cal L Jour 646 (647, 648) (DB) (1904) 7 Oudh Cas 146 (147, 151) (1880) 4 Bom 643 (653) (DB).

[16] Plaintiff making payment of cess for defendant—It did not appear that any emergency had arisen or was to arise—Section 70 held to have no application for it could not be said that the plaintiff had lawfully made payment. (1902) 26 Bom 504 (514) (DB).

[17] Where the plaintiff pays the revenue of certain lands not knowing that he was making payment for lands which belonged to the defendant nor was the defendant bound to pay the revenue, as he was not the pattadar. *Held*, S. 70 did not apply. (‘10) 7 Mad L Tim 200 (200) (DB).

[18] Where plaintiff alleging himself to be a mortgagor paid the amount of rent decree against his mortgagor and it was afterwards decided that he was not mortgagor, it was held, that deposit was not lawful. (1911) 9 Ind Cas 615 (616) (Cal).

[19] Lawful payment does not include payment of arrears of revenue by a reversioner as his interest is a mere expectancy. (Vol 9) 1922 Cal 353 (355) : 49 Cal 470 (DB).

[20] Where a mortgage by a widow is binding on her husband's heirs, the latter are bound to reimburse the mortgagee. (‘74) 1674 Pun Re No. 69, page 320 (323) (DB).

[21] A payment of arrears of rent made by a co-sharer in fraud of the other co-sharers is not made lawfully. (Vol 14) 1927 Cal 56 (57) (DB).

[22] Plaintiff gaining possession of property under a forged bill knowing it to be so — Plaintiff making payments of debts due on estate — Payment is not in good faith and plaintiff is not entitled to reimbursement. (Vol 18) 1931 Mad 207 (210) : 53 Mad 952 (DB).

[23] Plaintiffs alleged themselves to be purchasers of the mortgagee's right in certain land — Decree against mortgagee—To save the property from sale in execution of the decree plaintiffs paid the amount of the decree—It was already found in another suit that sale to plaintiff was fictitious and inoperative — Plaintiffs filing suit to recover the money paid towards satisfaction of the decree : *Held*, that S. 70 had no application and the suit for recovery of the money was not maintainable. (1908) 30 All 167 (169) (DB).

[24] Person taking wrongful possession of property and paying revenue is not entitled to recover back revenue paid. (1885) 7 All 660 (661) (DB).

[25] In the Madras Presidency the purchaser of mortgaged property subsequent to the Court sale cannot properly apply under O. 21, R. 89 of the Civil P. C., to have the sale set aside upon payment of the decretal amount; such application is not lawful and the mere fact that the Court entertained it does not make a payment made thereunder a “lawful payment”. (Vol 17) 1930 Mad 644 (645, 646).

[26] Where vendees discharged encumbrances on

property not sold to them they could not recover anything from vendors. (Vol 5) 1915 All 319 (320) : 40 All 555 (DB).

[27] Where Village Sanitation Panchayat having control over the conservancy of the local area renders latrine services to a person at his request, the services rendered to him are services lawfully rendered and the Panchayat is entitled to recover under S. 70, Contract Act, the amount charged by it as latrine cess. (Vol 22) 1935 Nag 242 (243) : 31 Nag L R (Supp) 108.

[28] The respondents entered into contract with the appellant for the supply of a certain quantity of coal free on rails at Rajahmundry. Two consignments of coal were received under freight system under which the consignee was to pay the freight. The appellant paid the freight and sued respondents for its recovery : *Held*, that it was open for the appellant to have rejected the coal, for his right extended only to rejecting the coal and not to claim any charges that he chose to pay to the railway and that S. 70 did not apply as it could be said that plaintiff did anything lawfully for the defendant and the defendant had the benefit of it. (Vol 15) 1928 Mad 198 (198).

3. “For another”. — [1] Doing anything “for another” person means in some way taking his place as the doer. That is the first meaning of “for”. There is no justification for importing into S. 70 looser senses of “for” and the phrase “does anything for another person not intending to do so gratuitously” in S. 70 means that when a person has proved that he did the thing for another person as explained above, he must then prove that he did not intend to do it gratuitously. Until a person has succeeded in proving that he acted for another, the question whether he acted gratuitously or not does not arise. (Vol 15) 1928 Mad 320 (321, 322) (DB).

[2] Where the sole or dominant motive for the payment is not to save another man's property, the payment cannot be said to have been made for such other man. (Vol 17) 1930 Mad 644 (645) (1903) 6 Oudh Cas 212 (214, 215).

[3] Section 70 is not applicable to a case where a person does some act for his own benefit which unavoidably benefits his neighbours or any other person. (Vol 6) 1919 Mad 1145 (1147) (DB).

[4] If the plaintiff pays to Government certain charges, which the defendant is liable to pay, with the notice and consent of defendant, he can recover the money from defendant under S. 69 or S. 70. (‘10) 33 Mad 189 (193) (DB).

[5] If an agent spends money from his own pocket for his principal he can recover them under S. 70. (1911) 34 Mad 167 (172) (DB).

[6] Where a person is assessed to income-tax and the tax is recovered from him, such person cannot under S. 69 or S. 70 of the Contract Act, recover the amount so paid from another person on the ground that such other person was in actual receipt of the income. Section 70 does not apply as the person paying the tax did so on his own account and not on behalf of another. (1908) 31 Mad 35 (36) (DB).

[7] Mere benefit to another without an express or implied liability to repay does not confer any right. (Vol 18) 1931 Bom 39 (39).

[8] Where a railway, in pursuance of the Government orders under S. 11 (3) (b), Railways Act, widens a culvert to take out the overflowing water of a tank situated in a municipal area, at its own cost, a suit by the Railway against the Municipality for the recovery of the cost is not maintainable. Section 70 of the Contract Act does not apply because the work was done under the Government orders for the benefit of private owners of property in the neighbourhood and not for

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the benefit of the Municipality. (Vol 32) 1945 Mad 427 (429, 430) : ILR (1946) Mad 333 (DB).

[9] It is a question of fact whether what has been done is or is not for another person. (Vol 18) 1931 Mad 51 (52).

[10] Where a person making payment for another is interested in making the payment, he cannot be presumed, in the absence of evidence, to show that he intended to act for the other party also, to have acted for such other party. (1910) 33 Mad 15 (21) (DB).

[11] Person, primarily liable, but absolutely ignorant of the expenditure being incurred on his behalf, need not repay. (Vol 4) 1917 Mad 83 (85) : 39 Mad 965 (DB).

[12] A mortgagee-purchaser who pays assesment of the land after the pattadar—Mortgagor has relinquished the patta cannot recover the amount from subsequent pattadar. (1912) 12 Mad L Tim 261 (262) (DB).

[13] Plaintiff paying amount for which he was personally liable—Defendant benefiting by the payment—Plaintiff cannot be said to have paid on behalf of defendant. (Vol 26) 1939 Cal 645 (647) : I L R (1939) 2 Cal 226 (DB).

[14] Where a co-owner defends a suit brought against him and other co-owners, if incidentally and without any special effort on his part, the other co-owners derive an advantage from the defence, he cannot be said to have done something for the other co-owners for which the latter would be bound in law or equity to recompense him. (Vol 20) 1933 Lah 95 (96) (DB).

4. "Not intending to do so gratuitously."—[1] It is well-settled that there is no obligation to repay in the case of a voluntary payment. (Vol 32) 1945 P C 23 (30) : 72 Ind App 39 : ILR (1945) Kar PC 73 (PC).

[2] A payment by volunteer of mortgage amount or money debt does not render debtor liable. (Vol 15) 1928 Mad 541 (542).

[3] Devisee discharging encumbrances on properties other than those bequeathed to him, but which he expects to inherit, is entitled to be reimbursed, as he is not a volunteer. (Vol 12) 1925 Mad 1175 (1178).

[4] The value of payment under protest is to safeguard the position of the person who makes the payment and to ensure that it cannot be said that the payment he made was a voluntary one. (Vol 16) 1929 Mad 409 (410) : 52 Mad 207 (DB).

[5] Co-sharer who has incurred expenditure on repair or improvements of common property can claim a rateable contribution if he did not intend to benefit them gratuitously and if they are really benefited. (1911) 7 Nag L R 11 (13) : (Vol 30) 1943 Mad 85 (86) : ILR (1943) Mad 158 (FB) : (Vol 24) 1937 Pat 103 (103) : (Vol 21) 1934 Pat 346 (349) : (Vol 14) 1927 Mad 122 (122) : (Vol 8) 1921 Cal 93 (94) (DB) : (1905) 32 Cal 374 (376) (DB).

[6] Government repaired certain tank from which were irrigated lands in the zamindari of defendant. Defendant knew that the repairs were necessary for the preservation of the tank. The Government had carried out the repairs not intending to do them gratuitously for defendant and the defendant enjoyed the benefit of the work done. There was no request either express or implied on the part of the zamindar to the Government to execute the repairs : *Held*, in the suit by Government against defendant, that the plaintiff was entitled under Contract Act, S. 70, to recover from defendant part of the costs incurred, estimated with reference to the irrigable area of the villages owned by the plaintiff and defendant respectively. (195) 18 Mad 88 (93, 94) (DB).

[7] When several persons hold a tenancy jointly and where one of these persons pays the whole rent, he can sue the others for contribution under S. 70 and is

entitled to a decree. (Vol 2) 1915 Cal 157 (158) : (Vol 18) 1931 Pat 234 (235) : 10 Pat 168 (DB) : (Vol 17) 1930 Cal 344 (345) (DB). (Transferee from one co-tenant of a holding not transferable is liable to contribution.) : (Vol 7) 1920 Cal 657 (658) (DB) : (11) 38 Cal 1 (6, 7) (DB) : (1910) 14 Cal W N 699 (703) (Joint Decree).

[See also (Vol 22) 1935 Lah 981 (981, 982)]

[8] Part owner of an estate paying revenue due on the whole estate to save his own interests : *Held* that under Ss. 69 and 70 of the Contract Act he was entitled for contribution. (1888) 11 Mad 452 (459) (DB) : (Vol 23) 1936 Mad 752 (759, 760) : (Vol 12) 1925 Oudh 625 (626) : (1883) 1883 Pun Re No. 42, p. 127 (129) (DB)

[See also (Vol 5) 1918 Cal 56 (57) (DB).]

[9] Mortgagor is entitled to contribution from his co-mortgagors of amount paid by him in Court to set aside sale in execution of mortgage decree but cannot claim statutory compensation. (Vol 18) 1931 Pat 394 (400) : 10 Pat 528 (DB) : (Vol 32) 1945 Mad 500 (502).

[10] A co-plaintiff is entitled to be reimbursed his expenses in full. (Vol 3) 1916 Pat 273 (274) : 1 Pat L Jour 201 (DB).

[11] Litigation against A and B—A incurring costs unauthorised by B to prosecute it up to the highest Court cannot recover a share of it from B, even though the litigation has ended successfully. (1894) 21 Cal 496 (504) : 21 Ind App 26 (PC) : (Vol 1) 1914 Lah 384 (385) : 1914 Pun Re No. 461 (DB).

[12] Inamdar within a zamindari taking for his benefit Government water and the zamindar made to pay the water cess : *Held*, that the zamindar is entitled to recover the amount of cess so paid under S. 70 of the Contract Act. (1907) 30 Mad 277 (278) (DB).

[13] Mortgagee paying rent or revenue is entitled to recover from mortgagor. (Vol 20) 1933 Rang 112 (112) : (12) 16 Cal L Jour 156 (161) : (1909) 2 Ind Cas 435 (436) (Mad) : (1903) 30 Cal 794 (800).

[14] Mortgagee of a tenure becoming also its purchaser is not entitled to be reimbursed the amounts of arrears he had paid prior to his purchase for he was himself liable. (Vol 11) 1924 Pat 235 (236) : 2 Pat 890 (DB).

[15] The payment made by sadar lambardar of land revenue allotted to the pattidar after the imperfect partition under S. 188 (1), C. P. Land Revenue Act, is a payment lawfully made and not one intended to be made gratuitously of which the benefit is enjoyed by the defaulting pattidar, and the sadar lambardar is entitled to be reimbursed under S. 70, Contract Act. (Vol 33) 1946 Nag 134 (134, 135) : ILR (1946) Nag 226 (DB).

[16] Person continuing to be recorded as lambardar even after he sold his holding is entitled to recover from his vendee the rent paid by him. (Vol 17) 1930 All 302 (303) : 51 All 897.

[17] Principal and agent—Principal benefiting by money received through unauthorised act of agent—He is liable jointly and severally with agent to restore it. (Vol 24) 1937 Lah 570 (571) : (Vol 14) 1927 All 161 (162) : 49 All 520 (DB).

[18] Execution against members of joint Hindu family—Property in the possession of one member attached—That member depositing decree amount to avoid sale—He is entitled to refund of deposit on proof that his self acquisitions were attached and not family property. (Vol 7) 1920 Mad 241 (242).

[19] Lease of bazar legally defective—Lessee entering into possession and constructing tin-shed and chabutra—No notice given to lessor nor his consent obtained under S. 108 (f) and (p), T. P. Act—Section 70 held inapplicable—Lessee held not entitled to costs of

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construction. (Vol 29) 1942 Oudh 231 (237) : 17 Luck 530 (DB).

[20] A borrowed money from B, for the use of C and paid to C. B sued A, and recovered the amount. Then A sued C—*Held* that payment by A to B was not gratuitous and he could recover it from C. (1907) 29 All 627 (632) (DB).

[21] Purchaser from a widow is not entitled, as against purchasers from heir of the last owner, to claim the amount paid by such purchaser to a decree-holder who had sought to execute against such property. He did not intend to confer any benefit on the plaintiffs. (Vol 10) 1923 All 404 (405).

[22] Mortgage debt paid with the money of the plaintiff—Defendants are bound to compensate the plaintiff by re-payment of the principal and reasonable interest. (Vol 21) 1934 All 390 (392).

[23] The heir on re-marriage of the widow is bound to pay the amount advanced at her request for the discharge of an encumbrance out of the estate. (Vol 12) 1925 Nag. 19 (20).

[24] A standing surety for D's liquor shop and depositing cash security with Government—B taking C as partner—Default in payment of licence fees—Recovery by Government from cash deposited by A without his consent—Suit by A for recovery of that amount against B and C—B and C held liable. (Vol 25) 1938 All 206 (207).

[25] R and N borrowed certain amount on a promissory note from J and M. J alone realised the amount. Subsequently J and M brought a suit against R and N on the basis of the promissory note. As J had no authority to receive payment on behalf of M, the suit was dismissed to the extent of half the claim but was decreed in favour of M to the extent of half the claim. Thereupon, R brought a suit against J to recover the amount paid to M on the ground that he had been compelled to pay it twice: *Held* that the suit fell under S. 70, Contract Act. (Vol 25) 1938 Lah 99 (101) : I L R (1937) Lah 623 (DB).

[26] One of the several judgment-debtors paying off decree is entitled to recover compensation under S. 70 because his payment is not gratuitous. (Vol 6) 1919 Pat 10 (12).

5. "Enjoys the benefit." — [1] Section 70, Contract Act, contemplates a case in which a certain benefit is done to another and is not intended to be done gratuitously, and the man to whom benefit is done enjoys the benefit voluntarily, that is to say, he should have an option of refusing to enjoy the benefit. It does not mean that the benefit should be thrust upon him without his having the option of refusing it. Nobody has a right to force a benefit upon another. (Vol 23) 1936 Pat 194 (197, 198) (DB) (Vol 19) 1932 Mad 151 (152) (Vol 18) 1931 Mad 51 (54) (Vol 9) 1922 Pat 337 (338, 339) (Vol 2) 1915 Mad 870 (871) (Vol 2) 1915 Mad 428 (430, 432, 433) (DB) (1910) 22 Mad 15 (20) (DB).

[But see (Vol 14) 1927 Mad 459 (460) (Vol 10) 1923 Mad 64 (66) (DB) (Vol 2) 1915 Mad 1081 (1082) (DB) (Vol 2) 1915 Mad 85 (98, 99) : 38 Mad 235 (DB) (1912) 16 Cal L Jour 156 (161) (DB)]

[2] Benefit meant in S. 70 is the direct and natural benefit of what has been done. (Vol 23) 1936 Mad 930 (934, 936) (DB).

[3] A person who pays money due to certain person, not on behalf of or for the benefit of another, cannot recover the money from the other person who has not been benefited by the payment. (Vol 18) 1931 Oudh 242 (248) (DB) (1899) 22 Mad 314 (316) (DB).

[4] Even illegal payments to which defendant con-

sented for his own benefit must be repaid. (Vol 15) 1928 Mad 476 (476).

[5] Plaintiff claiming compensation must prove that defendant actually derived benefit from the act. It is not sufficient that he would derive a benefit if he (defendant) would do some more acts. (1912) 1912 Mad W N 956 (957) (DB).

[6] Payment neither beneficial nor known or consented to confers no right. (Vol 3) 1916 Bom 302 (304) : 40 Bom 646 (DB).

[7] Where a tenant used Government water without permission and the landlord paid water rate and sued for the recovery of the same, it was held that the only consequence of non-payment of water rate would be sale of proprietary estate of landlord and that as tenant was not benefited by such payment, he would not be liable. (Vol 1) 1914 Mad 20 (21).

6. Compensation.—[1] The basis of the compensation under S. 70 would be in proportion to the benefit enjoyed. (Vol 24) 1937 Bom 417 (421) : I L R (1937) Bom 782 (DB).

[2] Plaintiffs must prove the extent of benefit derived by defendant. (Vol 3) 1916 Mad 157 (159, 161, 165) (DB).

[3] Plaintiff entitled to contribution can claim interest. (Vol 23) 1936 Mad 910 (912) : I L R (1937) Mad 35 (Vol 18) 1931 Lah 457 (463) (DB).

[But see (Vol 17) 1930 Lah 364 (371) : 11 Lah 375 (DB).]

[4] Part owner of darpatni depositing decretal amount and statutory compensation and getting sale set aside—He has against his co-sharers, under S. 70, right to contribution for decretal amount and compensation. (Vol 7) 1920 Cal 1002 (1003) (DB).

7. Quantum meruit—Compensation for services rendered. — [1] The principle of *quantum meruit* is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed by which the person for whom the work is to be done contracts to pay the person who does work reasonably for the work done. (Vol 28) 1941 Mad 887 (887, 888).

[2] Where in a suit for compensation based on an express agreement the plaintiff does not ask any relief under S. 70, the Court cannot grant a decree on the principles of S. 70. (Vol 25) 1938 Lah 71 (71) : I L R (1938) Lah 511 (Vol 20) 1933 Mad 344 (344).

[3] Where the claim on a promissory note fails on the ground of undue influence, it does not involve the dismissal of the alternative claim set up by the plaintiff, as for instance, to recover remuneration of services rendered by him. Where it appears that he undertook various duties for the defendants and performed them with assiduity and care and they proved beneficial to the defendants and he did this under the impression that he would receive remuneration for the services, his claim to a reasonable compensation must be held to be established. (Vol 24) 1937 P C 50 (51, 53) (PC) (Vol 14) 1927 Nag 241 (242).

[4] Where a contract is invalid so far as one party is concerned, it cannot bind the other party also. Decree can be passed on "*quantum meruit*" basis against a party enjoying benefit under this contract. (Vol 20) 1933 Pesh 16 (18) (Vol 24) 1937 Bom 417 (422) : I L R (1937) Bom 782 (DB) (1936) 38 Pun L R 618 (619) (Vol 20) 1933 Lah 15 (17) : 13 Lah 561 (DB) (Vol 19) 1932 Rang 176 (178) : 10 Rang 522 (Vol 17) 1930 Lah 364 (369) : 11 Lah 395 (DB) (Vol 14) 1927 Cal 465 (472) : 54 Cal 189 (DB).

[5] When the plaintiff has really done some work under contract but failed to prove the alleged contract, reasonable compensation should be given to plaintiff for the work done. (Vol 2) 1915 Oudh 12 (13).

Responsibility of finder of goods.

[a] See Ss. 151 and 152.

Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.

71. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.^a

72. A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Illustrations.

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

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[6] Suit, on a hundi inadmissible, can still proceed on basis of recovery of money had and received or for compensation. (Vol 16) 1929 All 254 (257) : 51 All 530 (DB).

[7] Where one has expressly or impliedly requested another to render him a service without specifying any remuneration but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay, i.e., so much as the party doing the service has deserved or as is normally said a reasonable sum. (Vol 22) 1935 Cal 347 (352, 353) : 62 Cal 175 (DB).

[8] If there is an agreement which is invalid under S. 28 of the Legal Practitioners' Act or no agreement at all, the pleader can sue under S. 70 of the Contract Act, and he can get whatever is a fair and just remuneration for the services he has actually rendered. (Vol 8) 1921 Nag 122 (125) : 17 Nag L R 84 (Vol 1) 1914 Cal 166 (166) (DB) * (1886) 9 Mad 375 (376) (DB).

[But see (Vol 14) 1927 Pat 178 (181) : 6 Pat 614 (DB).]

[9] Section 28 of Legal Practitioners Act prohibits the recovery of any money under an agreement not recorded in a particular manner. It no doubt supersedes those provisions of the Contract Act under which agreement can be enforced generally. But it does not touch S. 70 which has no relation to express agreement at all, but which is intended specially to deal with cases where remuneration can be claimed in the absence of an agreement. ('88) 1888 Pun Re No. 160 page 426 (426) (DB) * ('93) 1893 Pun Re No. 186 page 528 (533) (DB).

[10] In absence of an express agreement medical man is entitled to reasonable remuneration to be fixed by Court. (Vol 1) 1914 Upp Bur 12 (14) : 2 Upp Bur 19.

[11] J agreed to repair an organ belonging to S for Rs. 100 but he did not do the full repairs to the organ according to agreement. J claimed to be entitled to retain the organ until he is paid for the work done : *Held* that as there was an express contract it must be performed in its entirety or nothing can be claimed under it. (1884) 6 All 139 (142) (DB) * (1913) 19 Ind Cas 48 (51) (Low Bur).

[12] Void lease—Compensation for use and occupation can be recovered under S. 70. (Vol 27) 1940 Sind 129 (130) : 1 I L R (1940) Kar 200 (DB).

SECTION 72 — Synopsis

1. Scope and applicability.
2. Mistake of fact.
3. Mistake of law.
4. Coercion.

1. Scope and applicability.—[1] Section applies only where money was not really due to the defendant. (Vol 8) 1921 All 81 (84) : 43 All 272 (DB).

[2] Section 72 which specifically deals with the

question as to whom money must be repaid or a thing returned, must be regarded as exhaustive, apart from other specific provisions of the law. ('11) 1911 Pun W R No. 32 p 82 (90) (DB).

[3] Section has no application where property is neither delivered by mistake nor under coercion. (1905) 27 All 592 (602) (DB).

2. Mistake of fact.—[1] A payment under a mistake of fact cannot be regarded as a voluntary payment and is recoverable under Section 72. (Vol 27) 1940 Mad 660 (662).

[See (1912) 15 Ind Cas 361 (362) (Low Bur). (. . . Voluntary payment made with full knowledge of fact, cannot be recovered under Section 72.) * ('71) 8 Bom H C R (A C) 102 (105, 106). (. . . Money paid under mistake induced by fraud—Payment is not voluntary—Money can be recovered.)]

[2] The rule governing the recovery of money paid under a mistake of fact is that the person paying under a mistake of fact, however ignorant he may be and however forgetful he may have been is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered his position by parting with the money. (Vol 21) 1934 Rang 66 (70) : 12 Rang 25. * (Vol 27) 1940 Mad 660 (662).

[But see (Vol 17) 1930 Lah 852 (854) : 11 Lah 667 (DB). (Bank making payment in respect of cheque for getting that it was countermanded by drawer is not entitled to refund of amount from payee.) * (Vol 13) 1926 Bom 66 (68) : 50 Bom 49 (DB). (Where drawee paid to wrong person, and kept quiet for a long time he is not entitled to recover it though he had paid by mistake.)]

[3] Where money is paid or goods delivered to a man by mistake, it can be recovered so long as his *status quo* is maintained, i. e., so long as he can be equitably regarded as still having the benefit of that which was paid or delivered to him. The doctrine involved in the cases is the doctrine of equitable restitution. (Vol 10) 1923 Mad 17 (18, 19) (DB). (. . . A making excess delivery to B by mistake — B transferring to others under same mistake—A cannot thereafter claim from B for excess delivery.)

[But see (Vol 12) 1925 Mad 1255 (1257) : 48 Mad 925 (DB). (Party who received money by mistake should refund though he himself had also paid by mistake to his vendor who had become insolvent)]

[4] To establish a cause of action to recover money as money paid by mistake, the mistake should be as to some fact causing a liability to pay. (Vol 20) 1933 P C 78 (82) (P O). (Cash handed over under voluntary contract hardly comes within that description.)

[5] It is not necessary that the mistaken payment must be of a such a nature that if such payment were not rectified the liability would be created against the person paying. (Vol 27) 1940 Mad 660 (662, 663).

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[But see (Vol 21) 1934 Rang 66 (70) : 12 Rang 25.]

[6] The payment need not arise out of contractual relation between the parties. (Vol 27) 1940 Mad 660 661) * (Vol 29) 1942 Mad 590 (592) : I L R (1942) Mad 369 (DB) * (Vol 33) 1946 Cal 245 (249).

[See (Vol 15) 1928 All 500 (504) : 50 All 818 (DB). (Money paid under a forged document may be recovered with interest.)]

[7] Where money is paid to another under the influence of a mistake, that is upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back. (Vol 29) 1942 Mad 590 (591) : I L R (1942) Mad 669 (DB). (G falsely representing that he was M and mortgaging M's property to A—Subsequent mortgage by G of same property to R—R paying amount to A as first mortgagee as agreed under influence of mistake that G was M—R held entitled to return of amount paid to A.) * (Vol 33) 1946 Mad 150 (151) : I L R (1946) Mad 531 (DB). (Purchaser in execution paying off mortgage on property under bona fide mistake that it was valid mortgage—Recovery of amount so paid can be made.)

[8] Where a person seeks to recover a payment under a mistake of a fact, he must prove not only that he was mistaken as to the facts but he is also bound to show that it was such a mistake which caused him to pay. (Vol 30) 1943 Pat 327 (327) : 22 Pat 220 (DB).

[See also (1912) 15 Ind Cas 361 (361, 362) (Low Bur.).]

[9] Money paid under mistake of both parties can be recovered as money had and received. (Vol 15) 1928 P C 261 (262) (P C). * (Vol 9) 1922 Cal 1 (2) (DB). * (Vol 8) 1921 Bom 93 (102).

[10] Money paid under a mistake of fact with which payee had nothing to do cannot be recovered. (Vol 13) 1926 Rang 14 (16) : 3 Rang 477 (DB).

[11] Money paid under a mistake induced by fraud of third party may be recovered. (1877) 1 All 79 (81, 82) (DB).

[12] Payment made cannot be split up and a part only treated as having been paid under mistake. (Vol 38) 1946 Cal 245 (249).

[13] Tenant holding over under A induced after latter's death to take lease of same property from A's widow—Tenant to pay rent regularly to widow—A's executors obtaining decree for rent due since A's death—Tenant claiming refund of sums paid to widow—Suit dismissed on ground of express agreement to make such reference—*Held*, that in face of S. 72 it was not necessary that there should be such agreement and that tenant was entitled to claim refund. (1906) 1906 Pun Re No. 131, P. 491 (492).

[14] Person paying tax to Panchayat Board under mistaken notion that property for which tax was paid lay within jurisdiction of Board—Payment is under mistake of fact and can be recovered under S. 72 as money had and received for payer's use. (Vol 27) 1940 Mad 660 (661).

[15] Money paid to wrong person by plaintiff's broker contrary to plaintiff's instructions can be recovered from the person under S. 72 as money paid by mistake. (Vol 12) 1925 Sind 93 (94) : 13 Sind L R 65 (DB).

[16] Official Assignee declaring dividend and paying it to creditors who had proved their debts—Applicant decree-holder submitting his claim in time but through oversight his name not included in list of creditors and notice of dividend not issued to him—Applicant held entitled to be admitted as creditor and to have refund of any excess dividend that had been paid in error to the other creditors. (1927) 29 Bom L R 1167 (1177).

[17] Suit for recovery of money over-paid to creditor by mistake falls within S. 72. (1880) 2 All 671 (675) (DB).

[18] Plaintiff *bona fide* believing to be owner of estate paying revenue of that share—Share decided not to belong to him—Defendant entitled to entire estate paying revenue of remainder of estate—Plaintiff held was entitled to recover money paid by him. (1881) 7 Cal 573 (576, 577) (DB).

[19] Debt paid to insolvent's nominee, but again paid to Official Referee can be recovered from the former. (Vol 9) 1922 Lah 103 (104) (DB).

[20] When a consumer of electricity gives an amount of money to an electricity company claiming it under the rules framed by it, under the mistake that the company had made the rules after necessary legal preliminaries had been gone through, the case is one of mistake of fact and is covered by S. 72. (Vol 26) 1939 Pesh 8 (9).

[21] Plaintiff can recover the money which has not been credited towards payment of his real debt by his mistake in referring to a wrong date of the promote though no suit has been filed by endorsee of the genuine promote executed by him. (Vol 12) 1925 Mad 762 (763).

[22] Defendants, plaintiff's landing agents—Defendants receiving money when goods were landed, later on sending plaintiff bill for amount of their charges—Defendants are accountable for money and plaintiff can sue to recover overcharges. (Vol 8) 1921 Mad 609 (609) (DB).

[23] Money paid under decree which is afterwards found not to be due cannot be recovered as money had and received, in fresh suit, unless decree is set aside or superseded by some ulterior proceeding. (Vol 5) 1918 Pat 494 (495) * (Vol 27) 1940 Pat 1 (3) (DB) * (Vol 24) 1937 Rang 234 (236, 237). (Money paid under order of Court—Order not set aside—Subsequent discovery that money is not due—Money cannot be recovered back.) * (Vol 19) 1932 Bom 386 (388, 389) : 53 Bom 501 (DB) * (Vol 2) 1915 Cal 579 (582) (DB). (Moneys paid by compulsion of legal proceedings cannot be recovered even if paid within limitation period.) * (1912) 16 Cal L Jour 437 (439) (DB).

[See however (Vol 15) 1928 Cal 865 (867) (DB). (Relief on the ground of mistake in execution sale can be granted.)]

[24] Money paid under compulsion of legal process cannot be recovered unless fraud, mistake or unconscionable dealing is alleged. (Vol 5) 1918 Pat 185 (189) : 3 Pat L Jour 465 (DB).

[See also (1912) 14 Bom L R 854 (860, 861) (DB). (Principle will not bar suit by other party if party enforcing payment acts unconscionably and knows he has no right to money.)]

[25] Rule that no suit lies for recovery of money recovered under legal process of Court though subsequently found to be not due does not apply to case where money is ordered to be deposited pending adjudication but paid out without decision. (Vol 3) 1916 Cal 241 (242, 243) : 43 Cal 269 (DB).

[26] A sold a house to B reserving a certain sum of money to be paid to C and B paid a portion of it to C. A was adjudged insolvent and the sale was declared fraudulent and was set aside. B sued A and C for recovery of moneys paid to C : *Held*, that B was not entitled to obtain a decree against C as the amount cannot be regarded as having been paid under a mistake of fact, and there was no privity between B and C. (Vol 20) 1933 Lah 658 (658).

[27] P firm contracting to purchase goods from D at Rs. 77 per cent. on 16th September 1943—Goods delivered to railway on 27th December 1943, D being com-

Section 72 (contd.)

signee — Government order fixing price at Rs. 48 per cent. as from 1st January 1944 — *P* company taking delivery and making payment at contract rate on 3rd January 1944—Suit by *P* to recover difference between two prices — *P* held could not recover under S. 72 as difference between two prices could not be regarded as payment made by *P* under mistake. (Vol 33) 1946 Cal 245 (249).

[28] Plaintiff purchased property and discharged a debt for which the property was hypothecated believing that certain persons were liable to contribute, of whom one was subsequently declared not to be liable to contribute — *Held*, that this was not such a payment by mistake as to give him a right of suit. (1871) 3 N W P H C R 136 (138, 137) (DB).

[29] Money paid, not to principal, but to agent cannot be recovered if the latter has changed his position as by settling accounts with principal. (Vol 4) 1917 Bom 119 (121, 122, 123) : 42 Bom 16 (DB).

[30] Surplus sale proceeds of revenue sale paid to defendant who was recorded proprietor under S. 31, Bengal Land Revenue Sales Act, 1859 — Plaintiff purchasing property before date of sale — Suit by plaintiff for recovery of surplus proceeds — Section 72 held did not apply to facts of this case. (Vol 28) 1936 Pat 370 (371) : 15 Pat 433 (DB).

[31] Purchaser of tenure under decree for rent paying off rent to landlords—Sale subsequently set aside at the instance of defaulting tenants—*Held*, the payment was made under mistake and could be recovered from the landlords. (1907) 5 Cal L Jour 59 (62) (DB).

[32] Payment of whole mortgage debt to one of his joint mortgagees in spite of notice to the contrary from other—Mortgagor compelled to pay to other mortgagee —He cannot claim refund from the former whom he has already paid. (Vol 1) 1914 All 450 (451) (DB).

3. Mistake of law. — [1] Where a mistake is a pure mistake of law in British India and not a mistake bearing upon the private or special right of the person and where such mistake results in the payment by one person to another making it inequitable that the payee should retain the money, such a mistake is no ground of relief within S. 72. (Vol 16) 1929 Mad 177 (178) (DB)* (Vol 30) 1943 Pat 327 (338) : 22 Pat 220 (DB)* (Vol 27) 1940 Mad 956 (957) * (Vol 24) 1937 Rang 234 (237)* (Vol 16) 1929 Mad 179 (181) : 52 Mad 12 (DB)* (1912) 15 Ind Cas 361 (362) (Low Bur).

[But see (Vol 33) 1946 Cal 245 (249).]

[2] A person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error. (Vol 27) 1940 Mad 956 (957).

[3] The construction of a contract is clearly a matter of law, and if money is paid in consequence of a mistake as to the true construction of a contract, it is paid under a mistake of law and is irrecoverable. (Vol 30) 1943 Pat 327 (338, 341) : 22 Pat 220 (DB). (Lessee under mining lease making over payments in respect of royalty payable by him under mistaken construction of lease.)

[4] Debtor making extra payments voluntarily under mistake of law cannot claim refund. (Vol 20) 1933 Lah 523 (524).

[5] Contracts with enemy firm — Subsequently liquidator under Enemy Trading Act, 1916, entering into contracts for realising pledged goods — Payments made under such contracts held could not be recovered under S. 72. (Vol 7) 1920 Bom 192 (200) : 44 Bom 631 (DB).

4. Coercion. — [1] The word "coercion" used in S. 72 is used in its general and ordinary sense and its

meaning is not controlled by definition in S. 15. (1913) 40 Cal 598 (612) : 40 Ind App 56 (PC) * (Vol 28) 1941 Mad 635 (636) (DB) * (Vol 15) 1928 Rang 55 (57) : 5 Rang 653* (1922) 65 Ind Cas 517 (518) (DB) (Cal).

[2] Where property of one person is wrongfully attached in execution of a decree against another and the real owner pays off the decree amount under protest to save the property from seizure, the owner is entitled to demand repayment of that sum from the decree-holder as being an involuntary payment made under coercion. (1913) 40 Cal 598 (609, 613) : 40 Ind App 56 (PC)* (Vol 26) 1939 All 873 (374, 375)* (Vol 25) 1938 Nag 225 (230) : I L R (1938) Nag 382 (DB)* (Vol 15) 1928 All 668 (670) (DB) * (Vol 15) 1928 Rang 55 (57) : 5 Rang 653 * (Vol 10) 1923 P C 114 (116, 117) : 50 Ind App 162 : 4 Lah 284 (P C).

[But see (11) 1911 Pun W R No. 32, p. 82 (92, 93, 94) (DB).]

[3] Properties brought to sale in execution of decree though decree had been satisfied — Money paid to prevent such sale is involuntary payment — Suit will lie to recover same. (1881) 7 Cal 648 (653) : 8 Ind App 93 (PC) * (Vol 21) 1934 Pat 605 (607, 608)* (Vol 20) 1933 All 953 (953, 954) * (Vol 20) 1933 Bom 239 (241) : 57 Bom 601 (DB)* (1888) 15 Cal 656 (662, 663) (DB).

[4] A person who is compelled to make a payment under O. 21, R. 89, Civil P. C., in order to save his property being sold, does not make the payment voluntarily but is subject to coercion within the meaning of S. 72, Contract Act, and consequently is entitled to recover the consideration for the sale. (Vol 28) 1941 Mad 635 (636) (DB)* (Vol 30) 1943 All 267 (269, 270) : I L R (1943) All 510. (Payment made by judgment-debtor under a time-barred decree to set aside sale under O. 21, R. 89)* (Vol 27) 1940 Mad 725 (726, 727, 730)* (Vol 25) 1938 Mad 493 (494, 495) (DB). ((Vol 22) 1935 Mad 961, Reversed.)* (Vol 18) 1931 Mad 753 (755) (DB).

[But see (Vol 20) 1933 Bom 239 (241) : 57 Bom 601 (DB)* (1908) 12 Cal W N 151 (152, 153) (DB).]

[5] The right to recover money paid to raise an attachment or set aside a sale does not depend upon any conditions annexed to such payments when made but arises out of the compulsion of law involved in such cases. It is a statutory right under S. 72, Contract Act. (Vol 27) 1940 Mad 725 (726, 727, 728, 730)* (Vol 25) 1938 Mad 493 (494, 495) (DB).

[6] Payment of Municipal tax in pursuance of usual demand notice without objection — Party discovering subsequently that he was entitled to resist claim of tax under law — Simply because that notice contains warning that legal process will be put into force for realization does not make payments made involuntary and as such they cannot be recovered back. (Vol 21) 1934 Mad 420 (422).

[7] A payment of water cess made under fear of coercive process is not voluntary payment. (Vol 1) 1914 Mad 534 (536) : 37 Mad 322 (DB).

[8] Where a consumer of electricity pays money to the electric company under protest on being threatened with disconnection in case of default, the case is one of coercion within S. 72. (Vol 26) 1939 Pesh 8 (9).

[9] Excess payment to electric company made by consumer claiming commercial rate during period during which consumer's claim was under consideration is payment made under protest and not voluntary payment. (Vol 28) 1941 Mad 439 (440).

[10] Money paid by person under arrest can be recovered if parties stand in *pari delicto*, even if it was really due to defendant. (Vol 4) 1917 Mad 607 (608, 610) : 40 Mad 285 (DB).

[11] If seller refuses to deliver unless a certain amount to which buyer demurs is paid then there is

CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract has been incurred, and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it, and had broken his contract.

Explanation.— In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

(a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price, to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract-price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the first of January, a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A* by way of compensation, the amount, if any, by which the contract-price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

(d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract-price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market-price at the time when it actually arrived.

(f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the costs of making the repairs conform to the contract.

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duress. (Vol 11) 1924 Mad 286 (239) : 47 Mad 222 (DB).

[12] A talukdar who deposits full amount claimed to stop a sale under S. 14, Bengal Patni Regulation 1819, can sue for its recovery in ordinary suit. (Vol 5) 1918 P C 41 (43) : 46 Cal 1 : 45 Ind App 103 (PC).

[18] Property exempt from assessment included in Income-tax return—Assessment thereon — Payment of such assessment is not under 'duress'. (Vol 16) 1929 Mad 179 (181) : 52 Mad 12 (DB).

[14] A voluntary payment by an agent towards interest due under a mortgage bond could not be recovered from the party receiving it. (Vol 17) 1930 Bom 430 (430) (DB).

[15] Money paid voluntarily for the compounding of a non-compoundable offence is not paid under coercion. (Vol 15) 1928 Rang 173 (175) : 6 Rang 288.

[16] Where co-tenant deposits entire rent he cannot sue for its recovery as he has not paid under mistake or coercion. (Vol 6) 1919 Cal 13 (14) (DB).

SECTION 73 — Synopsis

1. Scope and applicability of the section.
2. Breach of contract.
3. Anticipatory breach of contract.
4. Measure of damages.
5. Sale of goods—Measure of damages.
6. Sale of immovable property—Defect in vendor's title.
7. Nominal damages.
8. Special damages.
9. Interest as damages—Illustration (n).
10. Interest on damages.
11. Earnest money—Recovery of—See S. 74.
12. Breach of promise of marriage.
13. Contract of service.
14. Compromise decree.
15. Contract of lease.
16. Contingent contract.

(g) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freight rises, and on the first of January the hire obtainable for the ship is higher than the contract-price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract-price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract-price of the iron and the sum for which *A* could have obtained and delivered it.

(i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) *A*, having contracted with *B* to supply *B* with 1000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A*, 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

(k) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract-price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) *A*, a builder, contracts to erect and finish a house by the first of January in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.

(m) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

Section 73 (cont'd.)

17. Transfer of property—Covenant by transferee to pay off transferor's creditors.

18. Quantum Meruit.

19. "Which naturally arose . . . likely to result from the breach of it."

20. Default of plaintiff.

21. Proof of damages.

22. Date when damages become due.

23. Suit for specific performance.

24. Defences to suit for damages.

25. "Obligation resembling those created by contract."

26. Plaintiff's duty to mitigate loss—Explanation.

1. Scope and applicability of the section.—[1] Section 73 applies to all contracts, including those in respect of lands. (Vol 14) 1927 Sind 120 (122) : 19 Sind L R 337. (Hence Indian Courts not to apply foreign rules of law or equity.) * (Vol 12) 1925 Rang 261 (262) (DB) * (Vol 6) 1919 Oudh 386 (396) * (Vol 5) 1918 Mad 1315 (1318) : 40 Mad 338 (FB).

[2] Section 73 is inapplicable to breach of warranty. (Vol 17) 1930 Lah 843 (848) (DB).

[3] Section 73 does not supersede Hindu law in respect of liability of son for father's debts. (1909) 1909 Pun Re No. 24, page 60 (60).

[4] Section 73 relates to breaches of contract and not to torts. (1913) 11 All L Jour 335 (338, 339) * (Vol 14) 1927 Nag 75 (75). (Claim on breach of contract comes under S. 73 and not tort.)

[5] In a suit for damages arising out of a wrongful attachment, an amount which will be as near as can be estimated to that by which the plaintiff is the worse for the defendant's wrong-doing is to be awarded, provided that the harm suffered by plaintiff is a natural and

probable consequence of the defendant's wrong-doing. (1910) 8 Ind Cas 1206 (1207, 1208) : 5 Bur L Tim 115.

[6] The expression compensation is not ordinarily used as an equivalent to damages, although compensation may, often, have to be measured by the same rule as damages in an action for a breach. The term compensation signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another. Its primary signification is equivalence, and the secondary, and more common meaning is, something given or obtained as an equivalent. (Vol 10) 1923 Cal 507 (511, 512) (DB).

[7] The remedy of a suit for damages for breach of a contract need not be one of the terms of the contract but becomes available under the law in case of a breach of a contract. The ordinary remedy of a suit for damages in case of breach is not excluded merely because certain other remedies in case of breach are mentioned in the contract. (Vol 29) 1942 Pat 269 (270).

[8] Illustrations to S. 73, Contract Act, are not more than general rules. (Vol 28) 1941 Sind 146 (150).

[9] A right to indemnity is given by the original contract whereas a right to damages arises in consequence of the breach of that contract. (Vol 15) 1928 Mad 43 (44).

2. Breach of contract.—[1] In a suit to enforce a contract it is necessary to ascertain its exact terms, so as to determine the breach thereof. (Vol 19) 1932 Lah 148 (149) (DB).

[2] Damages cannot be granted for breach of an incomplete agreement. (Vol 14) 1927 All 337 (338) (DB).

[3] Where the buyer uses ambiguous terms in his

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market-price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market-price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and D, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract-price of the cloth and its market-price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does sail on the 1st of January, and B after being, in consequence, detained in Calcutta for sometime, and thereby put to some expense, proceeds to Sydney in another vessel and in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Section 73 (contd.)

order, and such terms are misinterpreted by seller and such misinterpretation is acted upon by the buyers, it is not open to the buyer to contend that he did not make the offer as understood by the seller, and if the buyer refuses to make payment for the goods supplied as per terms as understood by the seller, the buyer commits a breach of the contract. (Vol 15) 1928 Mad 873 (878) (DB).

[4] Where out of three contracts for supply of flour, plaintiff fulfilled only one, and on refusal of the same, sued for damages for the breach of that contract, he cannot succeed unless the parties intended to treat each contract separately. (1937) 1937 All L Jour 1250 (1251).

[5] Notice of repudiation by vendor — Buyer may treat the notice as inoperative — Then contract continues for the benefit of vendor as well — Vendor may elect to complete contract in spite of previous repudiation. (Vol 10) 1923 Bom 118 (116).

[6] Where a party has not qualified obligation under a contract he is liable to make compensation in damages for non-performance, although the performance has been rendered impracticable by some unforeseen cause beyond his control. (Vol 28) 1941 Pat 429 (429, 430).

[7] Person to be responsible for loss of money not due to act of God or King's enemies — Loss due to robbery — Person held responsible. (Vol 29) 1942 Pesh 33 (35) (DB).

[8] Injunction issued prohibiting vendee to import certain goods — Vendee cancelling his contract to purchase, though vendor willing to keep contract open — Injunction shortly dissolved — Vendee not cancelling cancellation — Cancellation, held, to be voluntary — Person, obtaining injunction, held, not liable. (Vol 16) 1929 P C 222 (224) (P C).

[9] Purchase by N of license for pawnshop auctioned by municipality — Terms of sale reduced to document, which recited that N was licensed for three years, subject to certain conditions, but contained no guarantee as to validity of license — Grant, subsequently, set aside by Commissioner under powers given him by Burma Municipal Act — License again auctioned and again brought by N for much higher sum — N suing committee in damages for breach of contract basing his claim on difference between two bids. The municipality were not in a position to guarantee what the action of the Com-

missioner would be, nor could it be presumed that they ever intended to give any guarantee in the matter and that there was no breach of contract on their part and so they were not liable in damages. (Vol 17) 1930 Rang 16 (17) : 7 Rang 441 (DB).

[10] Consignment of 200 bundles of steel rods through Railway — Nine bundles found to have been changed — Refusal to take delivery — Offer of Railway Company for delivery of 191 bundles — Refusal to accept — Suit for damages — Railway liable only for nine bundles. (Vol 20) 1933 All 595 (596) (DB).

[11] Employer entitled to close work for definite and indefinite period for causes stated in contract — Power of closing for definite period exceeded but acquiesced in by employee — Subsequent indefinite closing legal — Employees cannot get damages. (Vol 21) 1934 Bom 126 (129) : 58 Bom 262 (DB).

[12] Goods of inferior quality delivered — Contract is broken on due date, and not when inferiority of quality is discovered, in the absence of a contract that, the due date shall be postponed until it is ascertained whether the goods are of the contract quality or not. (Vol 8) 1921 Bom 208 (208, 205) : 45 Bom 129 (DB).

[13] Where there was a duty on the part of the vendor to give notice to the vendee of the arrival of the goods and it was not done, it amounts to a breach of contract. (1924) 19 Mad L Jour 654 (658) (DB).

[14] Defendant contracting to supply 1,000 maunds of husks to plaintiff — 589½ maunds supplied — The balance mixed with sand — Plaintiff refusing delivery — Defendants liable for breach. (Vol 18) 1931 Cal 163 (164).

[15] Agreement to lend money on mortgage delayed — New agreement stipulating payment of interest from a given date — Defendant finally refusing to execute deed with added clause to which he had agreed — Plaintiff, held, was entitled to compensation. (1938) 17 Bom 457 (465) (DB).

[16] Mortgagee agreeing to pay creditors of mortgagor — Failure to pay — Mortgagor cannot recover the sum as a debt — Remedy of mortgagor is by way of damages only. (Vol 22) 1935 Nag 135 (136) : 31 Nag L R 235.

[17] A executed a bond in favour of B for Rs. 1300, on B's assurance on oath that he would pay the debt of A, amounting to Rs. 1100, and pay cash of 200. B failed to perform his contract within a reasonable time — Held, that the contract became voidable, entitling A to

Section 73 (*contd.*)

sue B further for cancellation or for damages under S. 73 ('82) 1882 Pun Re No. 186, page 542 (548) (DB).

[18] Defendants contracted to transfer their business including stock in trade and outstandings to the plaintiffs and to pay them Rs. 1650 in consideration of the plaintiffs discharging the debts of the firm. Defendants resiled from their contract. *Held* that plaintiffs could sue them for damages in terms of S. 73. Damage arose as plaintiffs were prevented from making profit out of the concern. ('89) 1889 Pun Re No. 20, page 64 (68) (DB).

[19] The true basis of the claim for damages by anybody injured by an improper execution proceeding after receiving satisfaction by decree-holder can only be that it is a breach of an implied agreement not to execute the decrees any further. (Vol 22) 1935 Mad 961 (964).

[20] A paper was signed by the defendant to the effect that he and plaintiff had entered into a partnership for 2½ years and that amount of brokerage, earned by each partner separately, was to be divided equally among all. No counter agreement was given by plaintiffs and nothing further was done. Defendants, having refused to settle account, denied partnership. The plaintiffs sued for their share of profits. *Held*, on the facts, that the transaction amounted to an agreement to enter into partnership, and that plaintiffs were entitled to damages for breach, on the basis of the profit that would have been made during the 2½ years. ('67) 1867 Pun Re No. 68, page 130 (132) (DB).

[21] Surety representing principal to be major, and agreeing to compensate plaintiff, if representation proved false—Principal found to be minor—Surety must compensate the plaintiff. (Vol 27) 1940 Nag 327 (331) : I L R (1940) Nag 632.

[22] Where defendant sold goods to plaintiff, receiving part of the consideration and agreed to receive the balance by instalments, and deliver the goods on demand and the plaintiff brought a suit for damages as the defendant had failed to deliver; *held*, that the defendant was liable. ('11) 1911 Pun L R No. 207, page 801 (802).

[23] Sale—Direction to vendee to pay off creditor—Creditor who was not paid obtaining decree against vendor—Suit by vendor against vendee could lie. (Vol 18) 1931 All 754 (755, 756) : 53 All 946 (DB).

[24] A Municipal Board accepted plaintiff's tender subject to certain conditions one of which provided that the contract was subject to the approval of the Engineer. The contract further provided that the contractor was bound to carry out changes made in the work, design, plan, etc., by the Engineer and that such alterations would not invalidate the contract. The Engineer asked the work to be stopped until further orders. After some correspondence between the parties, a new specification was resolved upon but the Council invited fresh tenders and gave the work to a new tenderer. The Board had committed a breach of contract. ('29) 1929 All L Jour 735 (740).

[25] Where a defendant failed to perform his part of the contract by delivering the goods by a certain date but kept on saying after expiry of the date that he would deliver them as soon as he received them from his vendor, without requesting the plaintiff to extend the time for delivery, and ultimately the plaintiff repudiated the contract, the breach occurred on the date by which the defendant was bound to perform his part of the contract. (Vol 33) 1946 Bom 1 (7) (DB).

[26] Sale of goods—Portion ready for delivery—Balance to be delivered on particular date—Failure to deliver—Date of breach for ready goods, the date of contract; for other goods, the date, fixed for delivery. (Vol 9) 1922 Bom 208 (204, 205).

[27] Contract of agency—Undertaking by agent not to work for other mills—The mere fact that he was buying and selling cloths from other mills and merchants, was not a violation of the contract. (Vol 8) 1921 Mad 664 (665) (DB).

[28] Where price is to be paid on receipt of railway receipt, failure to take delivery, on mere intimation of arrival of a portion of the goods, does not amount to breach of contract. (Vol 17) 1930 Lah 193 (195) (DB).

[29] Loss in revenue of toll-collector by discontinuance of traffic owing to plague regulations—Toll-collector cannot get damages from Government for breach of contract. (1902) 4 Bom L R 874 (876) (DB).

[30] The defendant purchased from the plaintiff a cargo of Watson's Harry steam coal *per Grecian*, at Rs. 21 per ton. On the arrival of the coal in Calcutta, the defendant was called on to take delivery, which, after inspection, he refused to do on the ground that, the coal had not the usual certificate from Watson. On the same day, the plaintiffs themselves, and three days after, their attorneys, wrote to the defendant that, unless he took delivery, the coal would be sold on his account and risk. The defendant refused to take delivery and the very next day without any proper advertisement, the plaintiffs sold the coal to M. & Co., for Rs. 13 per ton. But it was found that the real purchasers were the plaintiffs themselves. *Held*, that the sale was not a valid sale and that the plaintiffs were not entitled to recover any damages under the circumstances of the case. (1875) 15 Beng L R 276 (269, 290, 291, 292).

[31] Mutual obligations—Plaintiff has to prove that he was ready and willing to perform his part of the bargain. It is not necessary to prove that he made an actual tender of the money. (Vol 10) 1923 All 220 (224) (DB).

[32] To make decree for damages for the breach of a contract which is not the subject-matter of the litigation would be to assume that there has been a breach of the contract which has never been attempted to be specifically enforced. (Vol 3) 1916 Cal 774 (775) (DB).

[33] If the documents relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of a further contract is a condition of term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored. In such cases refusal to execute a formal contract cannot give rise in any case to an action for breach of contract. (Vol 20) 1933 P C 29 (31) : 60 Ind App 297 : 60 Cal 980 (PC).

[34] In a suit for breach of an executory contract, it is open for the defendant to show that it is not binding upon him inasmuch as it is not binding on the plaintiff. (1903) 27 Bom 618 (621) (DB).

[35] The plaintiff, a tailor, sued a Railway company for damages because of an undue delay in transit due to the fault of their servants. He had entrusted to the company his sewing machine to be carried to a place where car festival was to be held, with the object of making special profit. He had not intimated this object to the company, nor did he inform them that the machine was wanted within a fixed time. *Held*, that he was precluded from maintaining the suit by one of the conditions on the back of the forwarding note signed by him to the effect that defendants are not responsible for any loss of or damage to goods by reason of acci-

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dental or unavoidable delay in transit or otherwise. (1898) 21 Mad 172 (174, 175, 178) (DB).

3. Anticipatory breach of contract. — [1] If one party to a contract repudiates it, the other party may either treat the repudiation as inoperative, or he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, but he cannot both sue upon the breach and also keep the contract open. (Vol 13) 1926 Mad 118 (119).

[2] A repudiation of contract, before the time for performance arrives, which is not accepted by the other party, the contract being kept alive, cannot be treated as an anticipatory breach of the contract. (Vol 15) 1928 Sind 103 (103) : 23 Sind L R 370 & (Vol 24) 1937 Nag 289 (293) : I L R (1938) Nag 81.

[3] When a party to a contract is entitled to cancel the contract by reason of the breach by the other, notice of cancellation should be given to the other party — If no notice is given then the breach is condoned and the contract is allowed to continue. (Vol 15) 1928 Mad 211 (211).

[4] A breach of contract may take place before the time fixed for performance of the contract has arrived, where the promisor had repudiated the contract — In such an event, the promisee may elect to sue him for breach of the contract without waiting for the time fixed for performance. The exact measure of damages upon anticipatory breach is in the ordinary case precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought suit, after the time of performance, for non-performance at the time set i. e., though the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time and place of the breach but at the time and place set for performance. (Vol 8) 1921 Cal 185 (187, 189) : 48 Cal 427 (DB) & (Vol 8) 1921 Low Bur 78 (80, 81) : 11 Low Bur Rul 182 (DB). (Breach — Repudiation — Other party may sue at once or wait till the due date—Measure of damages is the same in both cases, the difference between the contract rate and the market rate on the due date.) & (Vol 4) 1917 P C 255 (257) (PC). (Jury will take into account what the plaintiff has or could have or ought to have done in mitigation of his loss.) & (11) 21 Mad L Jour 182 (193, 194) (DB) & (06) 1906 Pun Re No. 137, p. 502 (504).

[5] Lease of dry dock.—Dry dock lost through lessee's negligence before end of term—Covenant enabling lessor to sue for re-delivery on breach of certain obligations—Such breach having taken place, lessor can sue before end of term, for damages for loss of the dock and for breach of the covenants — But rent cannot be claimed for period subsequent to commencement of action. (Vol 6) 1919 P C 85 (89) (PC).

[6] A seller is not to be defeated merely by its being shown that after repudiation by the buyer he had not the goods to implement the contract actually in his physical possession.—He can show that he could supply the goods contracted for either from the open market or from any other source and he would be entitled to maintain a suit for damages for wrongful repudiation. (Vol 13) 1926 Mad 410 (410) (DB).

[7] Contract to place a part of a ginning factory at plaintiff's disposal for a certain period at a fixed rate—Anticipatory breach committed — Estimate of profits is the measure of plaintiff's loss — Plaintiff need not cut down the loss by actually getting his cotton ginned in another factory. (Vol 15) 1928 P C 200 (202) : 55 Ind App 299 : 55 Cal 1048 : 24 Nag L R 154 (PC).

[8] Contract for manufacture of goods according to specifications for sale in particular market— Such mar-

ket lost — Order cancelled — Manufacturer ceasing to manufacture goods and claiming damages for breach of contract at 15 per cent. of contract price which he could have earned as profits — Such method of calculation, held proper—Damages awarded at 7½ per cent. on net value of goods. (Vol 32) 1945 Mad 291 (293, 294) : ILR (1946) Mad 192 (DB).

4. Measure of damages. — [1] It is the general intention of the law, that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed. The rule, which prescribes as a measure of damage the difference in market prices at the respective times, is merely designed to apply this principle and it generally secures a complete indemnity to the purchaser. (Vol 34) 1947 Sind 22 (24) (DB) & (Vol 28) 1941 Sind 146 (150) & (Vol 9) 1922 Pat 79 (82) (DB).

[2] Under the terms of S. 73 the compensation is only for the loss actually suffered and such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach of the contract — The section does not give any cause of action unless and until the damage is actually suffered. (Vol 83) 1946 Pat 283 (267) (DB) & (Vol 23) 1936 Pat 393 (394, 395) : 15 Pat 394 (DB).

[3] Under this section damages are to be awarded as compensation for any loss or damage arising naturally in the usual course of things from the breach of contract. (Vol 24) 1937 Nag 243 (245) : ILR (1938) Nag 283 (DB).

[4] On breach of contract the party guilty of the breach must pay the injured person such damages as may accrue within a reasonable time. (Vol 4) 1917 Pat 178 (181) (DB).

[5] In awarding damages it is an ordinary rule that change of circumstances may be taken into consideration. (Vol 15) 1928 Bom 427 (430) : 52 Bom 883 (DB).

[6] Where the parties have themselves fixed the value of their right, that amount is a proper measure of damages sustained by a party. (Vol 2) 1915 All 40 (41).

[7] The mortgagee is entitled to damages on account of failure of the debtor to pay the debt at the stipulated time, and that the measure of damages *prima facie* should be the same as the rate of interest agreed upon, though the Court has discretion to reduce this rate if it is found to be unusual. (Vol 9) 1922 Lah 254 (257) : 3 Lah 200 (FB) & (29) 115 Ind Cas 26 (29) (DB) (Lah).

[8] The amount due on a debt or for damages for breach of contract or in tort, is to be determined according to the rate, prevailing at the date when the cause of action arises. Where, therefore, no time for repayment of a grain loan is fixed in the bond, the debt is payable on demand and the grain must be valued at the rate prevailing on date of bond. (Vol 15) 1928 Lah 949 (951) (DB).

[9] The rate of exchange prevailing on the date of judgment is not the rate applicable in a suit for damages. (Vol 8) 1921 Cal 239 (240) : 48 Cal 886.

[10] On the breach of a contract by defendants to transfer their business, including stock and outstandings, plaintiffs would be entitled to recover compensation under this section for loss or damage which resulted to them from their having been prevented from making profit which would have accrued to them if defendants had fulfilled their promise and plaintiffs had fulfilled theirs. (189) 1889 Pun Re No. 20, p. 64 (67) (DB).

[11] Promise of a share in partnership — Breach — Measure of damages is the difference between value of plaintiff's estate after breach of promise and its value if there had been no breach. (Vol 2) 1915 Lah 243 (244) : 1915 Pun Re No. 64 (DB).

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[12] Where the suit is one for damages for breach of a partnership contract the death of one partner subsequent to suit does not affect the measure of damages. (Vol 8) 1916 Mad 926 (927) (DB).

[13] Building contract — Contractor contracting to build up building according to plan and of particular kind — Building owner appointing supervising engineer — Collusion between contractor and engineer — Building, when nearly complete found very defective as to necessitate its pulling down — Passing of running bills by engineer, does not preclude owner from challenging work done — Measure of damages is amount that would be required for constructing the building agreed for. (Vol 28) 1941 Nag 111 (112, 113, 114, 116) (DB).

[14] Contract for sale of shares — Breach — Seller holding on to the shares after breach cannot recover difference below market price from purchaser. (Vol 2) 1915 P C 48 (49) : 43 Ind App 6 : 43 Cal 493 : 8 Low Bur Rul 348 (PC).

[15] In cases, where the elements of fraud, oppression, malice or the like are found, the law does not confine its remedy to the payment of compensation merely proportionate to any pecuniary loss actually suffered by the injured person — It can grant vindictive or exemplary damages by way of punishment to the wrong-doer. (Vol 29) 1942 Cal 493 (495) (DB) & (Vol 20) 1933 Cal 706 (708) : 60 Cal 918. (Charge of fraud against businessman — Exemplary damages may be allowed.)

[16] A contract of hiring of machinery gave the right to the owners of the machinery even after the hiring has been terminated to claim damages in addition to the arrears of rent due on the date of the termination of the hiring for breach of the agreement. The plaintiff, the owner, claimed rent up to the date of the plaint and thereafter up to date of decree : Held that, the agreement between the parties was a hiring agreement with an option to purchase and that the proper basis for the assessment of damages for use of the machinery not delivered up to the owner in pursuance of a demand was the amount of the hire agreed upon in the agreement. (Vol 22) 1935 Mad 603 (605) (DB).

5. Sale of goods — Measure of damages. — [1] The law as to damages on forward contracts may be summed up as follows : (1) Damages to be assessed with reference to the date fixed for delivery. (2) If that date is in future, the Court must estimate rate as best it can and it matters not that the estimate is to the great extent speculative. (3) If the plaintiff has rescinded the contract and the defendant proves that after rescission plaintiff has made fresh contract at better rates or that acting reasonably and as prudent man, he might have made such contract, this will be considered ground for abatement of damages. (4) If plaintiff after rescission makes fresh contract, he does so at his own risk and if he gets worse rate, he cannot make use of that for purpose of enhancing his damages. (12) 6 Sind L R 187 (191).

[2] In an action for non-delivery or non-acceptance of goods under a contract of sale, the law does not take into account in estimating damages anything that is accidental as between the plaintiff and the defendant; as for instance, an intermediate contract entered into with a third party for the purchase or sale of goods. (Vol 9) 1922 P C 178 (180) : 48 Ind App 175 : 43 All 257 (PC) & (Vol 8) 1921 Sind 98 (98, 99) : 15 Sind L R 214. (Loss sustained by either party through his breach of contract with a third party cannot be recovered unless the other party is aware of it.) & (Vol 4) 1917 Low Bur 161 (162). (Profits which the plaintiff would have made out of another contract if the defendant had fulfilled his contract, can be recovered only if the defendant knew about it at the time of making the contract.)

[3] Where in the case of a C. I. F. contract, the buyer fails to accept the drafts and cannot be made to pay the price the sellers are only entitled to the difference between the contract price and the price of the goods on the date of the breach. (Vol 19) 1932 Sind 9 (15) : 26 Sind L R 167 & (Vol 8) 1921 Low Bur 75 (78) : 11 Low Bur Rul 141 (DB).

[4] Goods sold under a C.I.F. contract, pass to buyer on shipment by seller and the latter is not liable for subsequent damage. (Vol 4) 1917 Sind 36 (37) : 10 Sind L R 118.

[5] The principle, by which Courts are guided in awarding damages is *restitutio in integrum*, and exact cost of effecting a complete *restitutio in integrum* is difference between original contract rate and that at which vendor can sell to fresh purchaser goods of same quantity and quality and of same shipment. Election to take advantage of repudiation of a contract goes only to question of breach. Damages must be estimated by difference between contract price and market price at day or days appointed for performance, and not at time of breach. (Vol 1) 1914 Sind 53 (58) : 8 Sind L R 95 (DB).

[6] Where the property has not passed in the goods, the seller's only remedy for a breach of contract to accept and pay for the goods is as a general rule, a suit for damages, and the measure of damages for such breach is the difference between the contract price and the market price when the contract is broken, that is, on the due date which is the last day on which the delivery can be made. (1924) 6 Lah L Jour 415 (416, 417) (DB) & (Vol 31) 1944 Nag 279 (279) : ILR (1944) Nag 749 & (Vol 30) 1943 Nag 210 (210) : I L R (1943) Nag 772 & (Vol 23) 1936 All 514 (516) & (Vol 15) 1928 Lah 834 (837) (DB) & (Vol 14) 1927 Sind 49 (52) : 19 Sind L R 41 & (Vol 13) 1926 Mad 1021 (1023) (D B) & (Vol 11) 1924 Bom 390 (391) (DB) & (Vol 10) 1923 Bom 75 (76, 77) & (Vol 4) 1917 Low Bur 103 (104) & (Vol 2) 1915 Sind 17 (20) & (Vol 1) 1914 Mad 573 (574, 576) : 37 Mad 412 (DB) & (10) 1910 Pun L R No. 2, page 4 (6) & (1876) 1 Cal 264 (273) (DB).

[7] In assessing damages for breach of contract for sale of goods, price ruling on the date on which contract was finally cancelled is the criterion and not that prevailing on any previous date. (Vol 3) 1916 Mad 830 (832) (DB) & (Vol 26) 1939 Rang 139 (141) : 1939 Rang L R 622 & (Vol 22) 1935 Nag 111 (112) : 31 Nag L R 250.

[8] Damages for breach of contract to sell, calculated at market rate prevailing on date of breach — No date for delivery is fixed — Notice of non-acceptance is given after certain date — Difference between market rate prevailing on that date and contract rate is the amount of damages. (Vol 4) 1917 All 433 (433, 434).

[9] Goods refused by buyer — Resale after notice — Seller is entitled to contract price minus resale price. (Vol 14) 1927 Mad 880 (882) & (Vol 4) 1917 Bom 234 (235) (DB).

[10] Where the buyer takes the delivery not on the day fixed for delivery but on a subsequent day and there is shortage in delivery, the seller is liable in damages for the difference between contract rate and market rate on the day fixed for delivery and not on the market rate on a day other than the day fixed for delivery. (Vol 9) 1922 Low Bur 1 (1).

[11] Breach of contract to purchase property — Damages though fixed by parties may be awarded according to difference between contract price and value of property. (Vol 6) 1919 Mad 411 (412) (DB).

[12] The measure of damages for breach of contract to sell goods is the sum by which the contract price falls short of the price at which the purchasers might have obtained goods of like quality at the time and place that they should have been delivered. (Vol 14) 1927 Lah

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909 (911) * (Vol 10) 1923 Lah 117 (119) (D B) * (Vol 6) 1919 Mad 1058 (1055) : 41 Mad 709 (D B) * (1909) 5 Mad L Tim 215 (215, 216).

[18] Proper basis for calculating damages sustained by breach of warranty of quality of unascertained goods would be difference between value of goods as supplied and the market value of goods of guaranteed quality on date of breach and vendor will not be liable beyond this for any special damages incurred by vendee by a breach of his contract with a third person, of which the vendor had no notice. Section 73 Ill. (m) does not apply where sale is of unascertained goods and where contract between A and B in the illustration (m) is not made on same occasion as that between B and C and where basis of damages in both is consequently different. (Vol 1) 1914 Mad 633 (633, 634) (DB).

[14] When goods delivered under contract of sale of goods by sample were all not equal to sample, measure of damages recoverable by purchaser is difference between market rates of goods delivered and those contracted to be delivered on date of delivery. (13) 1918 Mad W N 772 (773, 774) * (1908) 2 Sind L R 7 (10) (DB).

[15] A asked for rates of goods of firm D. B. supplied A with rates, whereupon A orders for despatch of goods. B again sent to A list of same rates but on next day B sent telegram quoting different rates. A sued B for damages. Held, that contract was complete when A accepted rates and gave orders for goods, measure of damages being price prevailing in A's city on the day of delivery and the contract rate plus cost of freight. (Vol 7) 1920 Cal 426 (428) (DB).

[16] Agent selling his own goods to principal—Profit made by such act of the agent—Measure of damages is difference between contract rate and market rate at time of delivery. (Vol 21) 1934 Bom 86 (87, 88) (DB).

[17] Vendor informs the debtor beforehand of his inability to give delivery at the time fixed by contract — The purchaser does not rescind the contract — The measure of damages is the difference between the contract price and the higher price the goods bear on the last day appointed for fulfilment of the contract. (1903) 30 Cal 477 (480) * (Vol 20) 1933 Rang 25 (26).

[18] Contract of affreightment—Demand by shipper for space under terms of contract, shipper having no goods to ship and attempting to take advantage of rise in freight — Facts, can be considered in assessing damages, but do not entitle ship-owner to repudiate contract. (Vol 28) 1941 Sind 146 (150).

[19] Contract — Damages — Plaintiff, asking defendant, their agent to reship goods delivered for sale in foreign country — Defendant not carrying out his instructions—Plaintiff's remedy is relief by way of damages according to market rate in that country on date of refusal. (Vol 20) 1933 Sind 247 (250) (DB).

[20] Where customs duty is payable by the buyer it should be added to the contract price in assessing damages even when goods are not delivered. (Vol 11) 1924 Sind 38 (40) : 17 Sind L R 236 (DB).

[21] Method of assessing damages in case of a breach of contract to supply future goods is to ascertain the quantity, to ascertain the price at which the same might have been fairly sold in the market during the season to which the contract relates, deducting from such price the ordinary charges of producing and selling the goods in question and in no case the amount awarded should exceed the amount of liquidated damages fixed by the parties. (Vol 10) 1923 All 199 (201).

[22] A contracts to sell goods to M—M contracts to sell them to C—Subsequent agreement that A shall deliver to C direct—Failure to take delivery—Measure of damages is the difference between the price to be paid

to M and that to be paid to A. (Vol 7) 1920 Bom 346 (347) (DB).

[23] The usual practice in produce markets is that where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation from the measure of the damages to be recovered all along the chain. (Vol 12) 1925 PC 161 (163) : 49 Mad 1 (PC).

[24] In ascertaining market value on a particular day for assessing damages value created for special purposes is irrelevant and it is for this reason that prices created by Bulls and Bears are of no use. (1902) 26 Bom 235 (239) (DB).

[25] When a contract of sale does not provide a penalty, the right of the seller to damages, on the failure of the buyer to complete payment, will arise under S. 73 or S. 75, Contract Act, and is something quite independent of the amount of any part payment made. (Vol 29) 1942 Sind 37 (39) : ILR (1941) Kar 495 (DB).

[26] Where a purchaser delays to take delivery of goods resulting in the deterioration of goods even though the property in the goods did not pass to him, he has to compensate the seller under S. 73 for any loss occasioned by the delay. (Vol 3) 1916 Sind 86 (91) : 10 Sind L R 14.

[27] On breach by purchaser, resale must be held within reasonable time. Measure of damages is difference between contract price and realization on resale with costs and expenses. This criterion is not applicable when resale is unduly delayed, in which case basis is difference between contract price and price on day of breach. (Vol 22) 1935 Lah 593 (595) : 16 Lah 553 (DB) * (Vol 32) 1945 Lah 85 (42) : 1 L R (1944) Lah 573 (D B). (But if purchaser agrees to harsh terms Court cannot relieve him on equitable grounds.)

[28] Goods not appropriated — Resale, power of, in contract—Measure of damages—Held, that, as the goods had not been ascertained or even appropriated for purposes of agreement they did not come within the power of re-sale as framed, and the re-sale was inoperative as a method of measuring damages. (1912) 39 Cal 568 (579, 580, 581) (DB).

[29] Goods sold—Time for delivery not fixed—Buyer notifying seller that he would not accept delivery after a certain date—Held, contract must be deemed to have subsisted till that date and the damages are to be calculated at the difference in the market rates of that date and the date of contract. (Vol 4) 1917 All 433 (433, 434).

[30] Contract providing penalty for failure to accept draft or making payment at maturity and not for failure to take delivery of goods — Failure to take delivery of goods on intimation of arrival—Seller can claim difference between contract price and that on date of default. (Vol 15) 1928 Lah 317 (318) (DB) * (Vol 17) 1930 Lah 339 (391) (DB).

[31] Sale of goods—Price paid at time of purchase—Failure by vendor to deliver goods, entitles purchaser to recover purchase money with interest from the date it was paid and also to usual damages. (Vol 31) 1944 Bom 21 (23).

[32] Time extended for delivery but not fixed—Vendors must deliver only within reasonable time—In that case vendees cannot refuse to take delivery — Vendors cannot sue for price but can claim damages represented by market rates. (Vol 11) 1924 Bom 325 (326, 329) : 48 Bom 374 (DB).

[33] Merchant buying goods in Japan, and desirous of paying in rupees, entering into contract with Bank — Purchases of yen to be during specified periods at fixed rate — Bank covering itself by yen purchased

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against yen sold — Importer failing to pay bills by purchase of yen commits breach — Measure of damages is difference between contract rate and buying rate of yen to be purchased against yen sold. (Vol 28) 1936 Rang 269 (271) (DB).

[34] Contract to deliver goods by instalments—Seller repudiating before due date—Damages are the difference between contract price and market price at dates of delivery though last date has not elapsed at the time of action but the seller can show in mitigation that in the interval the buyer could have obtained a new contract on better terms. (Vol 4) 1917 Cal 721 (724) : 43 Cal 305 (F B).

[35] Contract for sale of goods—Goods to be delivered on arrival — Damages for non-delivery will be with regard to dates of actual arrival of goods and not the date when the goods were expected. (Vol 14) 1927 Lah 648 (649) (DB).

[36] Where the goods are specially made to order but are not marketable the measure of damages is the price of the goods. (Vol 18) 1931 Lah 742 (744) : 13 Lah 886 (DB).

[37] In the case of breach of contract of sale of goods if there was an available market for the goods at the date of breach, the damages must be based on the difference between that market price and the contract price; a contract of re-sale becomes immaterial, because if there was a market, the law presumes that the buyer can minimise his damages by procuring substituted goods in the market so that he is thus in the same position, apart from the difference in price, as if the seller had not made default. (Vol 19) 1932 P C 196 (197) : 59 Ind App 398 : 11 Pat 600 (P C).

[38] Defendant contracting to deliver goods at a particular place and not aware that goods were delivered by defendant's agent to railway for transit — Contract cannot be avoided for common mistake — Defendant refusing to hand over railway receipt but selling the goods—Damages should be calculated as on the date of refusal to hand over railway receipt. (Vol 14) 1927 Bom 514 (515, 516) (DB).

[39] Where the term of the plaintiffs' contract, with defendants, regarding delivery, was subsequently varied and there was to be no delivery to defendants, there could not be a breach of contract on part of defendants by reason of their not taking delivery. Correct measure of damages would be such as would put plaintiffs in same position as if their contract with defendants as varied had been carried out. (Vol 7) 1920 Bom 346 (347) (DB).

[40] Plaintiff ordering goods through defendants but failing to pay the draft on due date—Defendants doing so and taking delivery of goods—Plaintiff on tendering value entitled to goods — Refusal by defendants — The plaintiff was entitled to damages, namely the difference between the market value of the goods on the day on which he sent the cheque and the amount due by him on the draft. (1921) 23 Bom L R 1108.

[41] Where property contracted to be sold to plaintiff is sold by owner to another, the measure of damages in a suit for damages on breach of contract is the difference between actual price and contracted price. (Vol 14) 1927 Lah 252 (255) (DB).

[42] Credit and debit entries in buyer's accounts, as goods were left with seller—Subsequent pledge by buyer — Buyer's suit for account — The contract being unenforceable both entries cancel each other — If debit entry represents damages for conversion, value of goods is value at time of conversion. (Vol 14) 1927 Mad 340 (342) (DB).

[43] In cases where conversion has occurred, the profit obtained by conversion is usually held to be the

best evidence of the measure of damages; but the measure of damages will still be the loss sustained, by not having the property delivered at the price agreed on. A man cannot by merely changing the form of action entitle himself to recover damages greater than the amounts to which he is in law entitled according to the true facts of the case and the real nature of the transaction. The usual rule in damages is that damages should be calculated from the date of the breach. (Vol 30) 1943 Nag 141 (143) : 1 L R (1943) Nag 272.

6. Sale of immovable property—Defect in vendor's title.—[1] The rule of English law not permitting a purchaser to recover damages for breach of a contract of sale relating to immovable property is not applicable in India in view of the express provisions of S. 73 which are comprehensive enough to apply to breaches of contracts arising from the sale of movable as well as immovable property. A vendor is, therefore, entitled to recover damages for breach of a contract of sale relating to immovable property. (Vol 5) 1918 Mad 1315 (1318) : 40 Mad 338 (FB)* (Vol 27) 1940 Rang 146 (147, 148)* (Vol 23) 1936 Nag 4 (7) : 31 Nag L R (Sup.) 101* (Vol 20) 1933 Nag 263 (264)* (Vol 14) 1927 Sind 49 (51) : 19 Sind L R 41* (Vol 12) 1925 Lah 262 (264) : 5 Lah 527 (DB)* (Vol 11) 1924 Lah 709 (711) (DB)* (Vol 8) 1921 Upp Bur 16 (17, 18) : 4 Upp Bur Rul 41* (1908) 32 Bom 165 (171).

[2] In cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way unless it can be shown that the parties to the contract expressly or impliedly contended that this should not render the vendor liable for damages. (1908) 32 Bom 165 (171)* (Vol 14) 1927 Sind 49 (51) : 19 Sind L R 41* (Vol 12) 1925 Lah 262 (264) : 5 Lah 527 (DB).

[3] Knowledge of the purchaser of the defect of title in his vendor does not affect his right to recover damages. (Vol 5) 1918 Mad 1315 (1320) : 40 Mad 338 (F B).

[4] Where a purchaser of immovable property is dispossessed owing to lack of title in the vendor, he can claim as damages not only the actual price paid by him, but according to the enhanced value at the time of his eviction. (Vol 17) 1930 Mad 748 (750)* (Vol 27) 1940 Rang 146 (147, 148)* (Vol 16) 1929 Lah 416 (417, 418) (DB)* (Vol 14) 1927 Lah 252 (255) (DB)* (Vol 14) 1927 Lah 176 (177) : 8 Lah 198 (DB)* (Vol 11) 1924 All 167 (168, 169) (DB)* (Vol 11) 1924 Bom 478 (478) : 49 Bom 1 (DB)* (Vol 11) 1924 Lah 709 (711) (DB)* (Vol 8) 1921 Bom 334 (334, 335) (DB)* (Vol 8) 1921 Lah 357 (360) (DB)* (Vol 8) 1921 Upp Bur 16 (17, 18) : 4 Upp Bur Rul 41.

[5] In case of breach of contract of sale of immovable property which had been acquired by Government plaintiff is entitled to difference between contract price and price fixed in land acquisition proceedings apart from statutory allowance. (1911) 38 Cal 458 (466, 467).

[6] No hard and fast rule can be laid down for assessment of damages for breach of contracts to sell. The circumstances of each case have to be considered in deciding what is reasonable and proper compensation for the damage caused by a breach of contract. Under S. 73 the Court is not bound in every case to award damages on the basis of a difference between the price at the date of the contract and the market price at the date of the breach. If circumstances require so, no damages need be awarded for breach of contract to sell real property where the vendor is not guilty of fraud. (Vol 11) 1924 Bom 478 (478) : 49 Bom 1 (DB)* (Vol 14) 1927 Nag 370 (372, 373). (The rule that the measure of damages is the value of the land at the

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date of eviction cannot be accepted as a hard and fast rule. The circumstances of each contract must be examined and the intention of the parties determined.) * (Vol 11) 1924 Nag 257 (257) : 20 Nag L R 55.

[7] Where the vendors undertook to be responsible in case the vendors or their heirs or anybody else made claim of any kind to the property sold, the damages should be measured by the value of the land at the time of sale and not by that at the time of eviction. (Vol 11) 1924 Nag 257 (257) : 20 Nag L R 55.

[8] Where sale was made with an indemnity for title by the vendor but not for improvements made by the vendee, the vendee would not be entitled to compensation for any improvements made by him. (Vol 14) 1927 Nag 870 (872, 873).

[9] In the indemnity contract against loss of possession the measure of damages would be the necessary expenses required for the plaintiff to cure the defect or loss of title. (Vol 4) 1917 Mad 874 (875, 876) (DB).

[See also (Vol 8) 1921 Mad 544 (545) : 43 Mad 898 (DB).]

[10] Suit for refund of purchase money — Defect in title—Land in possession of plaintiff purchaser—Purchaser entitled to such compensation as will compensate him for the defect in title—The amount will vary with the circumstances of each case. (Vol 15) 1928 Bom 427 (431) : 52 Bom 888 (DB).

[11] In suit for damages by dispossessed vendee against the vendor, and not for recovery of original price on the ground of failure of consideration, measure of damages is loss suffered by vendee. (Vol 17) 1930 All 771 (777) : 52 All 604 (DB).

[12] Vendor failing to make good title — No fault or fraud on his part — Bargain will be off and vendor would have only to pay purchaser's cost of agreement and inspection of title deeds. (Vol 8) 1921 Bom 334 (334, 335) (DB).

[13] Contract of sale—Date of performance postponed — In such cases damages are to be calculated with reference to the last date, if any, to which the contract was intended or to the date on which the contract was finally broken. (Vol 14) 1927 Lah 176 (177) : 8 Lah 198 (DB).

[14] A selling property to B, who sold it to C. — C unable to obtain possession of half owing to defect in A's title — Measure of damages is half the value of the share estimated by him in his original transfer to B. (Vol 16) 1929 Bom 361 (365).

[15] Where a coparcener sells specific items of family property and in a subsequent partition other items are allotted to his share and the alienee is deprived of the items sold, he is entitled to damages from the vendor and he can claim the full market value of the lands at the time when he is deprived of them. (Vol 8) 1921 Mad 384 (385) : 44 Mad 167 (DB).

[16] A manager of a joint Hindu family, who has agreed to sell immovable property belonging to himself and the minor members of the family, is individually liable for damages for failure to perform the contract if it is found that it is not binding on the minors, though both the contracting parties believed that there was necessity and acted in good faith. (Vol 5) 1918 Mad 1315 (1319) : 40 Mad 338 (FB).

[See also (Vol 14) 1927 Lah 252 (254) (DB).]

[17] One cosharer contracting to sell entire land with undertaking to obtain consent of other cosharers — Failure of contract due to refusal of others—Suit for specific performance and alternatively for damages — Vendee is entitled to damages. (Vol 27) 1940 Lah 159 (161).

[18] Contract on behalf of lady to sell certain property—Purchaser believing that she had full proprietary

right—Purchaser subsequently finding that there was cloud over her title and refusing to purchase property—Vendor cannot recover damages. (Vol 15) 1925 Oudh 475 (477, 478) (DB).

[19] Vendee purchasing land from vendor with defective title — Suit by person having superior title—Decree—Vendee still in possession—Suit for compensation : *Held*, as there was no dispossession, there was no cause of action and suit was premature. (Vol 23) 1936 Oudh 141 (142, 143) : 11 Luck 725 (DB).

[20] Vendor and purchaser knowing they were dealing with property of infant who had not power of sale—Suit for damages does not lie. (1872) 18 Suth W R 230 (232) (PC).

7. Nominal damages.—[1] Where the defendant has committed a technical breach of contract and the plaintiff himself had no intention of performing his terms of the contract, nominal damages are awardable. (Vol 8) 1921 Lah 316 (317) (DB).

[2] Covenant by lessee to insure against marine risk — Breach of covenant — Loss due not to marine risk, but to inherent defect in subject-matter of lease — Measure of damages is nominal only. (Vol 6) 1919 P C 85 (91).

[3] When contract to deliver goods is broken, proper measure of damages is the difference between contract price and market price of goods at the time of breach. If difference between two prices is not proved nominal damages should be awarded. (Vol 24) 1937 Nag 345 (352, 353) : 1 L R (1938) Nag 308 (DB).

8. Special damages.—[1] Where the party who has broken the contract entered into it, in contemplation of special circumstances which would affect the consequences of a breach, he is liable for any special loss which may have resulted. (Vol 8) 1921 Cal 315 (319, 320) : 47 Cal 1027 (DB).

[2] If a person knowing he has no title to immovable property agrees to sell it, he is liable for special damages which purchaser suffers by reason of vendor's failure to perform contract. (Vol 1) 1914 Cal 499 (500) (DB).

[3] In the absence of a guarantee by the railway that the goods should reach before any particular date, and of notice of the consignor at the time of consignment that the goods were required in connection with festival, the consignor was held not entitled to special damages but he was entitled to ordinary damages for the non-delivery of goods within reasonable time. (Vol 9) 1922 All 324 (328) : 45 All 623 (DB).

[4] Plaintiff claiming special damages must prove it. (Vol 13) 1926 Mad 1021 (1023) (DB).

9. Interest as damages— Illustration (n).—[1] Section 73 is merely declaratory of the common law as to damages, interest cannot be allowed at common law by way of damages for wrongful detention of debt. (Vol 25) 1938 P C 67 (70) : 65 Ind App 66 : 1 L R (1938) 2 Cal 72 : 32 Sind L R 374 (PC) * (Vol 38) 1946 All 12 (14) : ILR (1946) All 56 (DB) * (Vol 29) 1942 Sind 165 (166) : 1 L R (1942) Kar 346 (DB) * (Vol 28) 1941 All 43 (48) : 1 L R (1940) All 789 (DB) * (Vol 27) 1940 Oudh 308 (310) * (Vol 21) 1934 Nag 78 (80) : 30 Nag L R 213 * (Vol 20) 1933 Mad 729 (734) : 57 Mad 205 (DB) * (Vol 20) 1933 Pat 196 (200) : 12 Pat 216 (DB) * (Vol 7) 1920 Cal 912 (913) (DB) * (1899) 26 Cal 955 (964) (DB). *The following cases are no longer good law* : — (Vol 21) 1934 All 160 (161) * (Vol 17) 1930 All 132 (136) : 52 All 238 (DB) * (1896) 18 All 240 (241) (DB) * (Vol 15) 1928 All 500 (504) : 50 All 818 (DB) * (Vol 20) 1933 All 455 (456) (DB). (Security for damages and costs, if title of defendants be found defective — Stranger found entitled to part of property — Plaintiffs compromising with stranger on payment of money —

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Suit on security bond by plaintiffs — Claim to amount and interest—Maintainability of suit. (Vol 19) 1932 All 505 (506) (DB) * (Vol 13) 1926 Cal 1117 (1117) * (Vol 22) 1935 Cal 347 (354, 355) : 62 Cal 175 (DB) * (Vol 14) 1927 Mad 47 (48) * (Vol 13) 1926 Cal 755 (756) (DB) * (Vol 16) 1929 Mad 504 (505) (DB) * (Vol 23) 1936 Mad 486 (487, 488) * (Vol 14) 1927 Nag 18 (18) : 22 Nag L R 160 * (Vol 13) 1926 Oudh 514 (517) (DB).

[2] Illustration (n) to S. 73 does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law. (Vol 25) 1938 P C 67 (70) : 65 Ind App 66 : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (PC) * (Vol 29) 1942 Mad 429 (431) : I L R (1942) Mad 464 (DB).

[3] Interest can be awarded only if it is payable by custom or if there is an agreement either express or implied to pay interest or under the provisions of any substantive law entitling the plaintiff to recover the same. (Vol 29) 1942 Mad 429 (431) : I L R (1942) Mad 464 (DB) * (Vol 30) 1943 Sind 185 (186) : I L R (1943) Kar 242 (DB) * (Vol 11) 1924 All 881 (884) : 46 All 897 (DB). (Interest by way of damages can only be claimed under S. 73.) * (Vol 6) 1919 All 214 (215) : 41 All 254 (DB). (A principal is not entitled to interest on moneys received by an agent from customers in the absence of a contract to the contrary.) * (Vol 5) 1918 Mad 297 (300) (DB) * ('18) 1913 Pun L R No. 263, page 886 (888) : 1913 Pun Re No. 39 * (1897) 20 Mad 481 (483) (DB). (Suit for money due under an oral contract with interest — No agreement or usage giving right to interest alleged — Neither notice given nor written demand made under Interest Act—Interest not allowable.)

[See also (Vol 23) 1936 Nag 225 (228) (DB). (Inadmissible pronote — Agreement to pay interest contained in pronote—Oral evidence to pay interest cannot be adduced — Interest can at best be allowed under S. 73.)]

[4] Interest for the period prior to the date of the suit may be awarded if there is an agreement for the payment of interest at a fixed rate or it is payable by the usage of trade having the force of law, or under the provisions of any substantive law entitling the plaintiff to recover interest. (Vol 25) 1938 P C 67 (70) : 65 Ind App 66 : I L R (1938) 2 Cal 72 : 32 Sind L R 374 (PC) * (Vol 30) 1943 Pat 327 (328) : 22 Pat 220 (DB) * (Vol 29) 1942 Oudh 311 (313) (DB) * (Vol 27) 1940 Oudh 308 (309, 310). (Pronote embodying terms of interest inadmissible—No demand in writing—Interest prior to suit cannot be allowed.) * (1900) 27 Cal 814 (818) (DB). (Suit on an oral claim for money—No notice of demand—Interest cannot be charged before suit.)

[5] Interest not allowable under Interest Act, 1839—Plaintiff cannot claim it by way of damages under S. 73, because this section is not intended to override provisions of Interest Act. (1907) 1 Sind L R 179 (181) (DB) * (Vol 12) 1925 Nag 451 (451) : 21 Nag L R 16. (There is no conflict between the Interest Act and S. 73.)

[6] Where under an improvement lease it was provided that the lessee was to pay rent when the land was assessed by Government and the lessor, later on, instituted a suit to recover the arrears of rent with interest : *Heid*, that interest could not be allowed under S. 73, illus. (n) of the Act because there was no agreement or usage to support the claim. (Vol 17) 1930 Mad 727 (730, 736) : 53 Mad 549 (DB).

[7] Interest on sum claimed for use and occupation cannot be allowed under S. 73 for there is no contract at all in such a case. (1911) 9 Ind Cas 221 (221) (Oudh).

[8] Suit under S. 108 (15), Oudh Rent Act—Lambar-

dar's liability for interest on profits claimed by cosharer cannot be founded on S. 73. (Vol 11) 1924 Oudh 319 (319) * (1903) 6 Oudh Cas 89 (90).

[But see (Vol 14) 1927 Oudh 158 (159) (DB).]

[9] Suit by proprietor against under-proprietor for arrears of rent — Interest is not payable on arrears of rent found due—Neither S. 73 nor Interest Act is applicable. (1904) 7 Oudh Cas 116 (119) : 31 Ind App 116 : 26 All 299 (PC).

[But see (1909) 12 Oudh Cas 140 (143) (DB) * (1913) 21 Ind Cas 82 (82) (Oudh).]

[10] Interest can be allowed by way of damages for breach of a contract. (Vol 33) 1946 All 12 (14) : I L R (1946) All 56 (DB) * (Vol 10) 1923 Rang 265 (268) : 1 Rang 339 (DB).

[11] Sale of property — Failure of vendor to give possession to vendee—Suit for recovery of amount paid and damages — Interest by way of damages can be allowed. (Vol 20) 1933 Lah 556 (557) (DB).

[12] Where defendant receives plaintiff's money under a contract and dishonestly refuses to carry it out, he is liable not only to return the money, but also to pay damages for breach of contract on the basis of interest at the market rate. (Vol 14) 1927 Lah 333 (335) : 8 Lah 310 (DB).

[13] When contract is broken by one party, the other party is entitled to interest on price by way of damages. (Vol 16) 1929 All 801 (803) (DB).

[14] Decree-holder assigning his decree and out of consideration leaving certain sum with assignee to be paid to assignor's creditor after realization of decree—Assignee refusing to pay—Suit by creditor of assignee to recover amount payable to him is suit for compensation for breach of contract—Interest on amount payable can be granted. (Vol 27) 1940 Pat 155 (157) (DB).

[15] No date fixed for repayment of principal — No stipulation to pay interest — Principal paid without demand — There being no breach of contract interest, held, could not be recovered under S. 73. (Vol 14) 1927 All 444 (445) (DB).

[16] The interest which is awarded by S. 73 is entirely at the discretion of the Court. (Vol 25) 1938 Nag 119 (121) : I L R (1938) Nag 482 * (Vol 23) 1936 Rang 141 (144) (DB).

[17] The damages for breach of contract for payment of money is the rate of interest that the person to whom it ought to have been paid would have got on it, if it had been paid as per terms of the contract. (Vol 13) 1926 Nag 363 (364).

[18] Interest at a reasonable rate should be allowed in case of special damages, where mere repayment would not be adequate compensation. (Vol 20) 1933 Mad 729 (734) : 57 Mad 205 (DB).

[19] A rate of 6 per cent. per annum may, in some cases, be appropriate rate of interest to allow as damages. (Vol 13) 1926 Nag 363 (364).

[20] Whether after expiry of mortgage, contractual rate of interest is to continue depends on terms and circumstances of each mortgage deed. And if Court thinks that such rate cannot be allowed, but interest must be given by way of damages, it can decide what rate would be proper. (Vol 16) 1929 Lah 385 (385) (DB).

10. Interest on damages. — [1] Ordinarily no interest is allowed on amount of damages arising out of breach of contract. But interest may be allowed if there is an agreement for payment of interest at a fixed rate or is payable by usage of trade having the force of law or under the provisions of any substantive law entitling the plaintiff to recover interest. (Vol 32) 1945 Lah 35 (42, 43) : I L R (1944) Lah 578 (DB) * (Vol 18) 1931 Bom 386 (387, 388) (DB) * (Vol 24) 1937 Nag 345 (354) : I L R (1938) Nag 308 (DB) * (1900) 24 Bom 510 (526) (DB). (Interest on contract price and on charges on in-

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voice cannot be legally demanded in absence of contract to that effect.)

[But see (Vol 10) 1923 Nag 121 (124). (To say that interest cannot be allowed on damages because interest can itself only be allowed as damages is incorrect.)]

[2] Pakka Adatia, who sues, relying upon his character, not as agent, but as principal, can demand interest upon amount which he claims as ordinary damages for breach of contract from person who employed him. (Vol 6) 1919 Bom 137 (137, 138) (DB).

[3] In the absence of special circumstances, interest cannot be allowed on damages for breach of contract for sale of goods. ('88) 40 Pun L R 581 (582).

[4] Expiry of date of performance of contract—Defendant still failing to fulfil his agreement—Interest on damages from the date of suit can be allowed. (Vol 33) 1946 Bom 1 (7) (DB).

[5] Interest does not run on unliquidated damages. ('10) 12 Bom L R 831 (836) (DB). (Contract to pay rent in kind on certain day—Rent not paid—Suit to recover money value of rent in kind—Suit is to recover unliquidated damages.) ('13) 1913 MWN 874 (875) (DB) (Vol 17) 1930 Lah 874 (878) (DB).

[6] Contract of sale—Vendee to pay off mortgage to which property was subject—Vendor executing sale deed in favour of mortgagee—Suit by vendee for specific performance—Vendee not found entitled to specific performance—Vendee held not entitled to interest on amount which he was to pay to mortgagee. (Vol 29) 1942 Pat 366 (368) (DB).

[7] Interest can only be allowed on damages from date of written demand for interest. ('13) 1913 M W N 874 (875) (DB).

11. Earnest money—Recovery of—See S. 74.

12. Breach of promise of marriage—[1] Breach of contract of betrothal gives rise to a cause of action to the party aggrieved, to maintain a suit for damages, or compensation against the party who has broken it, or has brought about the breach thereof. (Vol 21) 1934 Lah 544 (544).

[2] Even if marriage contract is broken for good reasons, yet party making breach has to pay expenses incurred for betrothal. (Vol 7) 1920 Bom 225 (225) : 44 Bom 446 (DB).

[3] Breach of marriage contract—Damages—Elements to be considered, in assessing damages, are annoyance caused and also possible loss of reputation and injury that may result from breach. (Vol 1) 1914 Lah 83 (84) (DB).

[4] The general measure of damages prescribed by S. 73 must be applied to breach of promise of marriage. Damages can be awarded for out of pocket expenses and loss of credit and reputation, but not on account of increased expenditure for plaintiff's daughter's subsequent marriage; these were held to be too remote. ('37) 1937 M W N 1274 (1279).

[5] Contract by R to marry his sister to B who paid Rs. 300 in cash and Rs. 300 were to be paid at the time of marriage—Breach of contract by R—Suit for damages by B : Held, B entitled to a refund of Rs. 300 and Rs. 500 as damages for loss of reputation. ('12) 1912 Pun L R No. 181, page 574 (577).

[6] Contract of betrothal effected by head of the family on behalf of an adult member binds the family and when broken gives rise to two kinds of damages, pecuniary loss and injury to the feelings and prospects to the bride and bridegroom personally, and secondly, the pecuniary loss and loss to the credit and reputation to the family of the injured party. ('37) 1937 M W N 1274 (1278).

[7] Contract of marriage of minor daughter entered into by her mother with major boy—Daughter can

sue for damages for breach of contract.—Girl's marriage is *prima facie* for her benefit. (Vol 28) 1941 Bom 129 (136) : 1 L R (1941) Bom 211 (DB).

[8] Under the Mohamedan law in a suit by a plaintiff for damages for breach by the defendant to give his daughter in marriage to the plaintiff, the latter would be entitled only to receive compensation under S. 73 of the Contract Act for any loss or damages caused to him by the breach, which the parties knew would be likely to result from the breach of it. (Vol 10) 1923 Lah 679 (680).

[See also (Vol 4) 1917 Bom 61 (61) : 42 Bom 499.]

[9] Mahomedan girl after attaining majority breaking contract of betrothal made by her guardian during her minority—Guardian is not liable for damages on account of breach. (Vol 2) 1915 Lah 308 (308).

[10] Where a Burmese girl under 18 years has been promised by a person to accept her in marriage, the breach of the promise cannot be the basis of an action for damages for breach of promise. (Vol 26) 1939 Rang 86 (87, 88) : 1938 Rang L R 667.

[11] Where syphilis is contracted prior to but was not known to exist at the time the contract to marry was entered into, or where such disease was contracted subsequent to the making of the contract to marry, but through no wrongful act of the defendant, its existence furnishes a good defence to an action for breach of promise. (Vol 8) 1921 Cal 459 (461) : 48 Cal 283 (DB).

[12] A suit for the recovery of money advanced by one party to another, in connexion with marriage which subsequently fell through, is not one for the mere recovery of a loan or refund of money advanced, but is in essence one for damages in respect of the breach of contract of marriage and so is not cognizable in the Court of Small Causes. (Vol 15) 1928 Nag 89 (90) : 24 Nag L R 66 (89) 1889 Pun Re No. 132, page 160 (461) (DB).

13. Contract of service.—[1] Person engaged as teacher by month—No provision for notice to leave—Contract can be terminated by reasonable notice—One month's notice is reasonable. (Vol 16) 1929 Rang 167 (168) : 7 Rang 303 (DB).

[2] A school master absenting himself from service without notice, forfeits his pay for the whole month, as his service is held to be by month and not daily rates, in the absence of special custom or particular contract. The District Council, engaging his services, is entitled to damages for extra labour. (Vol 9) 1922 Mad 102 (103, 104).

[3] Servant leaving service without notice is not entitled to pay for service after the last periodical payment—Master can claim compensation for breach of the contract of service. (Vol 18) 1931 Lah 133 (2) (134).

[4] Master and servant—Illness and consequent absence from work—Four days leave granted—Servant, however, resuming work after 11 days and continuing to work for about a week—Servant again falling ill and applying for leave—Master not granting leave but dispensing with his services—In the absence of contract, servant held guilty of wrongful conduct, and not entitled to one month's notice or pay. (Vol 22) 1935 All 908 (908).

[5] Contract of service for definite period—Before completion of period, employer terminating employment, and employing another servant at a lower salary—Discharged servant is entitled to salary for full period, unless employer can show that he had opportunity of other employment which he refused. (Vol 25) 1938 Mad 672 (674) (DB).

[6] Suit for damages for wrongful dismissal from service—Defiance of orders of superiors—Neglect to obey order of transfer—Dismissal justifiable and damages cannot be claimed. (Vol 21) 1934 Lah 769 (771).

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[7] Contract by mother and minor daughter with company that the minor daughter would do certain service to the company failing which they were to compensate company for loss—Minor daughter failing to fulfil contract : *Held*, that the mother was liable on her covenant to pay to the company any loss which they suffered in consequence. This was not a contract of indemnity by the mother. Her failure to earn the sum paid caused a loss to the company of the moneys advanced, and this was, thus, the measure of their damages, and the amount of compensation payable by the mother. (Vol 25) 1938 Rang 359 (359) (DB).

[8] Measure of damages for breach of contract of service is obtained by considering what is usual rate of wages for employment contracted for, and what time would be lost before a similar employment could be obtained. (Vol 17) 1980 Mad 654 (657) (DB).

14. Compromise decree.—[1] Compromise decree providing for injunction preventing sellers, defendants, from selling goods to third parties and providing for damages in case of breach—Defendants making breach and paying damages as per compromise—This did not enable judgment-debtors to render nugatory all their obligations under the prior part of the contract whenever it suited their pockets to do so. It provided that they shall pay at the specified rate, if they fail to perform the contract in any respect, but it did not say that such payment was to be a full and exclusive satisfaction of all obligations under the contract. The payment into Court did not make the decree a satisfied decree. It provided a mode of enforcing such payment but it did not say that the other terms would not be enforced by execution of the decree, namely, by applying to the Court to enforce the injunction. (Vol 15) 1928 P C 27 (28, 29, 30) : 55 Ind App 58 : 55 Cal 238 : 24 Nag L R 17 (PC).

[2] Where obligation of under-proprietor to pay rent was derived from his status which was established by compromise decree, and not from agreement previous thereto, suit for arrears of rent against him would not be suit for breach of contract under S. 73 of Contract Act; contract, if any, having merged in decree. (Vol 4) 26 All 299 (308, 309) : 31 Ind App 116 : 7 Oudh Cas 116 (PC).

15. Contract of lease.—[1] In a lease, where there is a covenant not to assign, and the tenant assigns without leave, then clearly the landlord suffers damage, because he is deprived of the liability of the original lessee under the terms of the lease. Again, if there is a covenant not to sub-let and the tenant sub-lets, without leave, to a careless person, whereby the premises are damaged, then clearly the landlord would be entitled to recover damages against the tenant for sub-letting without leave. But the mere fact that the sub-letting results in a profit to the tenant would not cause damage to the landlord. Therefore, in such case, in the absence of proof that the landlord has suffered any damage owing to the tenant recovering a higher rent from the sub-tenant, he will not be entitled to damages. (Vol 8) 1921 Bom 27 (27) : 45 Bom 1197 (DB).

[2] In an action for damages for breach of contract to give lease, plaintiff is entitled to profit he would have made had he cultivated the lands in husbandlike manner with interest at six per cent. per annum. Opportunity which plaintiff had of renting other lands and thereby remedying inconvenience should also be taken into account. (Vol 7) 1920 Mad 867 (869) (DB).

[3] Lessee was turned out of the land by the lessor, who cancelled the lease, and agreed to pay damages—Measure of damages is the money paid by the lessee to the lessor, the money spent by lessee over the property, and interest on the whole from the dates on which the

payment and expenditure were made. (Vol 15) 1928 Nag 287 (287).

[4] A tenant rented a shop from a landlord for one year for Rs. 220 and paid Rs. 110 in advance, in part payment of the rent. The landlord deliberately broke the contract, and did not give possession of the shop to the tenant who, in a suit for damages, was granted by the lower Court Rs. 110, actually paid by the plaintiff to the defendant, and Rs. 220 as damages : *Held*, that damages could not be so calculated because the tenant in such cases is entitled to compensation calculated on the actual loss suffered or likely to be suffered by him by the breach of the contract by the landlord, and in calculating such damages, the Court has to bear in mind the means that existed for the plaintiff to reduce the amount of damages. (1928) 109 Ind Cas 335 (335) (Lah).

16. Contingent contract.—[1] The fact that a contract is a contingent contract does not affect the measure of damages. In case of breach of such contract, damages should be measured in the usual manner. (Vol 9) 1922 Nag 192 (192).

17. Transfer of property—Covenant by transferee to pay off transferees' creditors.—[1] Where A transferred certain property to B in consideration of the latter applying a portion of purchase money to the payment of a debt due by A and on default by B, A's brother paid the same A was entitled to sue and recover the amount which B had agreed to pay. He was not bound to show he had suffered any damage by failure of B to pay the sums left with him. (Vol 17) 1930 Pat 46 (48) : 8 Pat 860 (DB).

[2] Contract of sale—Part of purchase money left with vendee for payment to prior mortgagee—Failure of vendee to pay mortgage as a result of which vendor was dispossessed in execution of a decree for sale on the mortgage—Vendor, held, entitled to compensation for loss occasioned by vendee's breach, (Vol 33) 1946 Pat 263 (267) (DB). (Decree for foreclosure.) (Vol 15) 1928 Oudh 148 (151) (DB).

[3] Where mortgagor left money with mortgagee to pay off prior incumbrance, which mortgagee did not pay off, mortgagor is entitled in law to recover damages from the mortgagee. (1912) 15 Ind Cas 526 (527) (Oudh).

[4] Where money has been left with a vendee or mortgagee in order to discharge some earlier mortgage and such vendee or mortgagee fails to discharge the liability, a cause of action for damages arises immediately and the vendor or mortgagor need not wait until the property is actually sold or until he is sued or a decree is passed against him before bringing a suit for damages. (Vol 23) 1936 All 598 (599) (DB).

[5] Decree assigned—Part consideration left with assignee to be paid to assignor's creditor after decree is realized—Assignee refusing to pay—Suit by creditor of assignor against assignee for his amount is one for compensation for breach of contract and governed by Art. 116. (Vol 27) 1940 Pat 155 (157) (DB).

18. Quantum meruit.—[1] A plaintiff cannot claim on *quantum meruit* if he has chosen to tie himself down with the express terms of an agreement, for a liability by implication is excluded by the contract being express. (Vol 17) 1930 All 545 (549) : 52 All 688 (DB).

[2] If a contract is to do work for a lump sum, nothing can be recovered by way of *quantum meruit* if part only of the work is done. (1911) 19 Ind Cas 48 (51) (Lah).

19. "Which naturally arose . . . likely to result from the breach of it."—[1] The principles for assessment of damages are : where a party sustains a loss by

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reason of a breach, he is, so far as money can do it, to be placed in the same situation as if the contract had been performed. This leads to two rules, (1) the damages must be such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things from the breach and (2) the damages must fairly be such as could have been in contemplation of both parties at the time they made the contract and cannot include compensation for remote or indirect loss or damage. (1907) 6 Cal L Jour 393 (401) (DB).

[2] For awarding damages under S. 73, Contract Act, the loss or damage must arise in the usual course of things from the breach of contract. The law does not regard collateral or consequential damage arising from delay in the receipt of money. (Vol 31) 1944 Cal 106 (109) : 1 L R (1943) 1 Cal 578 (DB).

[3] In order that the latter part of S. 73 of the Contract Act may apply, it has to be proved that not only the plaintiff but the defendant also knew, when the contract was made, that such loss was likely to result from the breach. (Vol 10) 1923 Mad 103 (107) (DB).

[4] Under S. 73, promisee can recover compensation for any loss or damage caused to him by breach or which parties know as possible result of breach. (Vol 4) 1917 Bom 61 (62) : 42 Bom 499.

[5] Marine insurance—"Ware house to ware house" clause—Goods landed at port of destination—Removal to uncleared ware house—Destruction of goods by fire : *Held*, that it could not be reasonably contended that the destruction of the goods by fire happened in the usual course of things as a result of the negligence or that parties knew that it was likely to result from it. (1909) 3 Sind L R 191 (194).

[6] Defendant, who had covenanted with lessee of mine to reserve barrier between his mine and another one, on breach of covenant was held to be liable for damages which actually accrued to plaintiff and not the loss to which plaintiff might put himself to prevent loss. (Vol 7) 1920 Pat 639 (641) (DB).

[7] Where the plaintiff's case was that the father of the defendant did not build the wall which he agreed to build in 15 days, the portion of his house adjoining that wall had been affected adversely by the elements, and that it, therefore, cost him the sum to put his building right : *Held*, that plaintiff's claim to damages could not be allowed as it was not based on what the damage was within a reasonable period of the breach of the contract and was remote and indirect. (1928) 108 Ind Cas 433 (434) (Nag).

[8] A lessee is not liable for remote damages suffered by his lessor owing to former's default in paying rent to superior landlord and by consequent sale of tenure and loss to lessor because lessor himself might have saved himself from loss by paying rent. (1908) 35 Cal 683 (689).

[9] The law cannot recognize any loss, not naturally following from breach of contract. Where a vendor directed vendee to pay creditor within fixed date in order that vendor might get promised remission, but vendee failed to do so, vendor is not entitled to claim amount as damages. (1913) 18 Ind Cas 449 (450) (DB) (All).

[10] The seller's travelling charges to place of breach for resale of goods are too remote and cannot be recovered as damages under S. 73. (Vol 4) 1917 Sind 36 (37) : 10 Sind L R 118.

[11] For failure to pay debt, plaintiff was sued upon and debt was recovered from him with costs : *Held*, defendant was not liable for costs of suit as law does not recognize consequential damage by late payment. (Vol 2) 1915 Mad 942 (944).

[12] Contract for sale of land—Vendor in breach of contract bringing suit against vendee on ground of title — Costs of such suit incurred by vendee cannot be included in damages to which vendee is entitled. (Vol 27) 1940 Rang 146 (148).

[13] A agreed to collect debts and pay out of collection certain debt. On failure to discharge the debt after collection A held liable for loss caused. (Vol 2) 1914 Mad 942 (943).

[14] The words "which naturally arose in the usual course of things from such breach", in S. 73, Contract Act do not mean that general rules, such as those given in the illustrations to the section, must be followed irrespective of the facts, but only impose a limitation upon the damages which can be allowed. That the damages must not be remote. No doubt, ordinarily, loss or damage will be presumed when a contract at a lower rate of freight than the market rate is broken by the shipowner, but there is nothing in the wording of S. 73 which precludes the rebuttal of such a presumption. (Vol 28) 1941 Sind 146 (150, 151).

[15] Where the liability arising out of breach of contract is merely contingent, S. 73 would give no cause of action in respect thereof, unless and until the damage is actually suffered. (Vol 33) 1946 Pat 263 (267) (DB).

[16] The plaintiff sued a railway company for damage caused by non-delivery of a sewing machine at the festival time when he expected to make special profit. The suit was for damages on account of loss of estimated profits, the travelling expenses of himself and his assistants at the place of delivery and expenses for food and lodging : *Held*, that the damages claimed were too remote. (1898) 21 Mad 172 (176, 177, 178) (DB).

20. Default of plaintiff.—[1] Sections 73 and 74 are meant for benefit of party willing to perform contract and not for defaulting party. (1910) 33 Mad 375 (379) (DB).

[2] A plaintiff, who has failed to perform his part of contract and proved no damages, cannot succeed in a suit for damages for breach of the contract. (Vol 6) 1919 Cal 1000 (1000) (DB).

[3] Party to be entitled to compensation must have done something to his own prejudice in performance of his part of the contract. (Vol 21) 1934 Nag 129 (132).

[4] A party to a contract cannot be in a better position by reason of his own default than if he had fulfilled his obligations. (Vol 29) 1942 Cal 382 (384).

[5] Plaintiff's plea to benefit by his own breach of contract and enforce it against defendants cannot be allowed. (Vol 21) 1934 Lah 84 (84) (Vol 21) 1934 Lah 845 (846) : 36 Cr L Jour 737.

[6] Vendor having no goods to deliver is not entitled to compensation for vendee's refusal to take delivery. (Vol 21) 1934 Nag 129 (132).

[7] To maintain a suit for damages for alleged breach of contract, the plaintiff should have performed his part of the contract, taken possession of the land, put forward any accounts of the alleged loss and claim damages on that basis alone. It is the duty of plaintiff in such circumstances to mitigate the damages. (Vol 26) 1939 Lah 118 (122) (DB).

[8] Mere fact that party has committed breach of term of contract with reference to first instalment, in which goods are to be delivered, does not in itself entitle the other to treat the contract as at an end. But where breach has been such as goes to the root of the contract, the party in default cannot insist on remainder being carried out. (Vol 17) 1930 Cal 382 (384) (DB).

[9] A agreed to give B reasonable time to fulfil order placed with him, having regard to exigencies of B's business. The order was however given too late. B not liable to pay damages for not carrying out terms of contract. (1911) 12 Ind Cas 339 (340, 345) (Oudh).

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[10] Where the plaintiff was guilty of unjustifiable conduct in not co-operating with the railway in tracing out the lost bale by helping them to identify the same etc., when requested by the railway so to do: *Held*, that the last day of which the market value should be taken into calculation ought to be the day on which the plaintiff would in ordinary course have received the goods if he had complied with the request of the railway and co-operated with them in tracing out the lost bale. (Vol 12) 1925 Cal 737 (739) (DB).

[11] Plaintiff agreeing to construct house for defendant according to estimated cost less certain rebate—Defendant stopping work and settling dues at certain amount—Suit by plaintiff for work actually done —Defendant cannot claim rebate proportionate to rebate upon original estimate. (Vol 25) 1938 Cal 538 (538) : 1 L R (1938) 2 Cal 320 (DB).

[12] The doctrine of frustration only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract : "interference leaving a considerable part capable of performance, will not be an excuse." (Vol 27) 1940 Pat 204 (238) : 19 Pat 1.

21. Proof of damages.—[1] Section 73 makes it compulsory for the plaintiff to prove that he has suffered damage and the extent to which he has suffered before a Court can award him damages for breach of contract, and if he does not give the best evidence, every presumption should be made against him, but this does not relieve the Court altogether of the duty of assessing the damages, as best it can, on evidence and materials actually before it. (Vol 14) 1927 Sind 49 (52) : 19 Sind L R 41 (Vol 5) 1918 P C 149 (150) (PC) (Vol 2) 1915 All 295 (297).

[2] In a suit for damages for a breach of contract, the defendant is entitled to know exactly what case he has to meet and he must be afforded an opportunity to investigate the details of the claim so that he can call evidence about it if he can, and so he can attack the plaintiff's estimate of damages, as well as the basis on which it is grounded. The plaintiff must consequently furnish the necessary particulars. (Vol 25) 1938 Nag 530 (531).

[3] The rule, that in a suit for work done by a contractor against his employer, it is for the plaintiff to prove his claim and if the evidence he has produced is not reliable, he can get nothing beyond what the defendant has admitted, can hardly be applied to a case where the defendant is a railway company and the defendant's measurements were not properly made and the defendant has not been able to produce all relevant materials in connection with the measurements that the defendant made. (Vol 20) 1933 Cal 165 (167) (DB).

[4] The amount of damages must be established with reasonable certainty. But this does not mean that absolute certainty is required nor, in all cases, is there a necessity for direct evidence as to the amount. Where the defendant has, by his wrong, put it out of the plaintiff's power to prove the quantum of damage exactly, the presumption is against the defendant and the burden is upon him to reduce the amount from the highest possible estimate. Only such approximation to certainty is required as would satisfy the mind of a prudent and impartial person. Where there has undoubtedly been an infringement of a right, nominal damages are recoverable even though no actual damage can be proved. (Vol 10) 1923 Cal 49 (50, 51, 52) (DB).

[5] In a breach of contract to sell immovable property, the market value of the land is what it will fetch in the open market. In such a case earlier sales of the same property or comparison with other similar plots

in the locality will also help in ascertaining the value. (Vol 8) 1921 Sind 197 (199) : 15 Sind L R 21.

[6] It is open to the Judge of the Small Cause Court to assess the damages for bailee's negligence, even in the absence of more definite evidence as to the extent of the negligence which he has found to be proved. (Vol 11) 1924 Rang 356 (358).

[7] Contract for delivery at a place — Plaintiff producing no evidence to show market rate at the place — Plaintiff is not entitled to damages. (Vol 21) 1934 Lah 59 (60).

22. Date when damages become due. —

[1] Damages for breach of contract become due on the date when the contract is broken. (Vol 8) 1921 Lah 39 (41).

[2] If contract was to do work for lump sum, price could not be recovered until work was completed. (1913) 19 Ind Cas 48 (51) (Low Bur).

[3] Where, even after the date originally fixed for delivery, the seller continued to supply and the purchaser to receive the contracted goods: *Held*, that on evidence that there was an extension of time granted, and as delivery was going on, it was not open to the seller to fall back upon the date originally fixed for delivery as the date for assessing damages. (Vol 17) 1930 Mad 624 (625) (DB).

[4] Where a term in a contract provided that the delivery of the goods should be given as and when they arrived at A and the goods arrived at A on December 2, 1942 and the buyers demanded delivery on December 9, 1942 and the demand was not complied with : *Held*, that the contract was broken on December 2, 1942, when the delivery should have been made, and that it was the date to be taken for the assessment of damages. (Vol 31) 1944 Mad 418 (418, 419) : 1 L R (1945) Mad 180 (DB).

[5] Where a contract is made by defendant that certain goods shall be delivered at a certain place to the plaintiff, but the time of delivery is not given in the contract, the plaintiff cannot extend the time for delivery beyond a reasonable period so as to suit his own convenience while calculating the amount of damages for breach. But if goods are delivered and accepted after long delay, it is open to the plaintiff to say that he would put an end to the contract on a particular date so as to calculate damages from that date. (Vol 15) 1928 Mad 1232 (1234).

[6] Where a contract is made in English currency the date for calculation of damages is the date of the breach, and the date on which the rate of exchange is to be taken for conversion is the date on which the money was to be paid and that the rate of interest is that fixed in the contract. (Vol 10) 1923 Rang 265 (267, 268) : 1 Rang 339 (DB).

[7] There can be no action for breach of contract unless damage has actually been suffered. Action by the judgment-debtor therefore commenced before the judgment-debtor has paid the amount due by him to the decree-holder twice over is not maintainable. (Vol 20) 1933 All 511 (512).

[8] The section does not give any cause of action unless and until the damage is actually suffered. (Vol 33) 1946 Pat 263 (267) (DB) (1908) 10 Bom L R 1113 (1123, 1124, 1125).

23. Suit for specific performance. — [1] Where a plaintiff claiming specific performance prays in the alternative for the return of moneys expended by him and for other proper relief, the prayer is wide enough to include a claim for compensation for breach of contract in substitution for its performance. (91) 1891 Pun Re No. 83, page 408 (413) (DB). (Sale-deed not registered— Suit for specific performance — Although proof of contract is excluded, compensation for breach may be given.)

74. ^a[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for.]

Explanation. — A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception. — When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or, under the provisions of any law or under the orders of the ^b[Central Government] or of any ^c[Provincial Government], gives any bond for the performance of any

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[2] Specific performance not granted for special reasons to party entitled—Party is entitled to damages in lieu thereof. (Vol 11) 1924 Lah 163 (165).

24. Defences to suit for damages.—[1] Where the buyer wrongfully cancels the contract without justification, he cannot set up any defence which he might otherwise have done to any action for damages. (Vol 7) 1920 Bom 181 (182).

[2] A party, who by his conduct makes a performance of the contract impossible, is deprived of his rights to recover anything by way of damages from the other party. (Vol 12) 1925 Nag 119 (120).

[3] Where there is a contract subject to condition that the plaintiff may, upon a breach of it, treat it as cancelled and not ask for damages, the defendants are bound to justify their refusal to perform the contract since they cannot themselves bring about the state of affairs which would avoid the contract. (Vol 13) 1926 Nag 435 (442) * (Vol 9) 1922 Bom 44 (44, 45) : 46 Bom 806 (DB).

25. "Obligation resembling those created by contract." — [1] I, under-proprietor of entire village, selling some land to defendants—Subsequently J mortgaging all his interest in village to plaintiff—Mortgagor to pay revenue then payable and any amount by which it might be enhanced at any future settlement—Settlement officer, subsequently, enhancing amount of rent payable to superior proprietor by defendants—Plaintiff being required to pay whole of under-proprietary rent to superior proprietor, claiming against defendants amount of enhanced rent—Defendants, held, were under "obligation resembling those created by contract" within S. 73 and were, therefore, liable as in action for damages for breach of express contract. (1903) 6 Oudh Cas 346 (350).

26. Plaintiff's duty to mitigate loss — Explanation. — [1] Implementing of contract is a part of the general law and is also recognised by the explanation to S. 73 of the Act. (Vol 10) 1923 Rang 84 (85) : 11 Low Bur Rul 326 (DB).

[2] The explanation to S. 73 casts a burden upon the person complaining of the breach of contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. (Vol 30) 1943 Oudh 17 (22). 18 Luck 327 (DB).

[3] There is a duty cast upon the plaintiff to minimise the damage, if he could, but the burden of proving that the plaintiff had the means available, and did not take steps to avail himself of the means would lie heavily on the defendant. (Vol 12) 1925 Rang 261 (262, 263) (DB).

[4] Tenant agreeing to pay Government revenue and cess failing to pay it — Landlord having notice of intended sale, but taking no steps to avoid it by paying necessary dues — Sale taking place — Landlord is entitled to damages for breach of contract. (Vol 27) 1940 Pat 88 (89) (DB) * (Vol 15) 1928 All 481 (490) : 50 All

695 (D B) * (Vol 2) 1915 P C 48 (49) : 8 Low Bur Rul 343 : 45 Cal 493 : 43 Ind App 6 (P C) * (1911) 9 Ind Cas 470 (471, 472) (Low Bur).

[5] Party is not entitled to damages for breach of contract if he might have avoided loss by the use of reasonable precautions. (Vol 2) 1915 Cal 601 (605) (DB).

[6] A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. (Vol 12) 1925 Bom 28 (30, 31) : 49 Bom 25 (DB).

[7] The duty to minimise damages arises where breach has occurred. (Vol 11) 1924 Cal 427 (432) (DB).

[8] Where plaintiffs could have taken delivery earlier and avoided deterioration of goods, it was held that they had failed to do what they might have done to "remedy the inconvenience." (1911) 9 Ind Cas 470 (471) (Low Bur.)

[9] If at the date of breach plaintiff could do something to mitigate damage, defendant is entitled to benefit of it. But the fact that by reason of loss of contract which defendant has failed to perform plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract. (Vol 2) 1915 P C 48 (49, 50); 43 Cal 493 : 8 Low Bur Rul 343 : 43 Ind App 6 (P C).

[10] Principle on which damages for breach of contract are assessed is laid down in S. 73, and explanation to that section shows that means which existed for remedying the inconvenience caused should be taken into consideration. (1902) 1 Low Bur Rul 21 (22) * (1928) 109 Ind Cas 335 (335, 336) (Lah).

SECTION 74 — Synopsis

1. Scope and applicability.
2. Enhanced rate of interest.
3. Explanation.
4. Compound interest.
5. Interest payable, if principal not duly repaid.
6. Reduced rate of interest on punctual payment.
7. Where the rate of interest is exorbitant.
8. "Reasonable compensation."
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10. Instalments—Illustrations (f) and (g).
11. Hire-purchase agreements.
12. Deposit—Forfeiture of.
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14. Breach of promise of marriage.
15. Pledge.
16. Compromise-decree.
17. Chit fund.
18. Landlord and tenant.
19. Penal stipulations—Illustrative cases.

1. Scope and applicability.—*Penalty and liquidated damages : General.*—[1] (Case from Palestine)—A penal stipulation cannot be enforced. Liquidated

public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested.

Illustrations.

(a) A contracts with B to pay B, Rs. 1000 if he fails to pay B, Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B, Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

[a] Substituted by the Indian Contract Act (Amendment Act), 1899 (6 [VI] of 1899), S. 4, for the first para of S. 74. [b] Substituted by A. O. for "Government of India." [c] Substituted by A. O. for "Local Government". [d] Illustrations (d) to (g) were inserted by the Indian Contract Act (Amendment Act), 1899 (6 [VI] of 1899), S. 4 (2).

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damages must be the result of a "genuine pre-estimate of damages." They do not include a sum fixed *in terrorem*. (Vol 28) 1941 PC 101 (103) (PC).

[2] The distinction between penalty and liquidated damages has been abolished by the Indian Contract Act and now in every case (except bail bonds or where the bond is given for the performance of any public duty or act in which the public are interested, in which a sum is named as damages to be paid in case of breach of contract), the Court, which tries the suit, is not bound to award more than 'reasonable compensation' not exceeding the amount so named. (83) 1883 Pun Re No. 150, page 452 (453) (FB) & (Vol 21) 1934 Cal 285 (287: 60 Cal 1879 & (Vol 16) 1929 PC 179 (180) (PC). (The effect of S. 74 is to disentitle the plaintiffs to recover *simpliciter* the sum named in the contract as due and payable as on breach, whether penalty or liquidated damages.) & (Vol 5) 1918 Cal 557 (568) (D B) & (Vol 2) 1915 Mad 896 (906) : 38 Mad 178 (F B) & (94) 1894 Pun Re No. 99, page 864 (369) (DB) & (1858) 5 All 238 (241, 242) (DB) & (1883) 9 Cal 689 (692) (DB) & (1881) 3 Mad 224 (228) (DB).

[3] The addition of the words "or if the contract contains any other stipulation by way of penalty" to S. 74, by Amendment Act in 1899 has considerably enlarged the scope of the section and has the effect of getting rid of all subtle technicalities on the application of the equitable principle regulating the duty of the Court to relieve against penalties. (Vol 4) 1917 Mad 5 (6) (DB).

[4] There cannot be a stipulation by way of penalty unless there is another antecedent promise. For a sum to be treated as a penalty it must be an amount to be paid in case of a breach of an antecedent promise. (Vol 5) 1918 Mad 574 (576) (DB). (Contract to pay heavy rate of interest is not by itself a stipulation by way of penalty and cannot be relieved against under S. 74 : see also note "where rate of interest is exorbitant.")

[5] Penalty in S. 74 means only a separate payment—Re-taking of chattel and retention of moneys already paid under seizure clause in hire-purchase agreement is not separate and extraneous payment and does not amount to a penalty within the meaning of S. 74. (Vol 17) 1930 Rang 193 (196) : 8 Rang 236 (DB).

[6] The word 'penal' implies that there is a main contract and a subsidiary contract, providing for some more drastic consequences (e. g., liability to pay something more than the debtor would be liable to pay under the primary contract) in the event of the breach of the original and main contract. (Vol 6) 1919 Mad 200 (201) & (Vol 21) 1934 Mad 31 (36) (D B) & (Vol 20) 1933 Oudh 291 (295) : 8 Luck 707 (D B). (Case of condition subsequent—To constitute the existence of penalty, it is only necessary to establish the element of punishment, however well deserved or temperate such punishment might be.) & (Vol 17) 1930 Bom 306 (315) : 54 Bom 381. (The Court may, however, carry out the terms of the secondary contract, if such a contract is just and reasonable but is not bound to.) & (Vol 8) 1921 Mad 378 (379, 380) (D B) & (Vol 2) 1915 Oudh 31 (42) (DB).

[See also (Vol 24) 1937 Mad 234 (235).]

[7] Where a contract is for payment of a larger sum with a concession enabling a smaller sum to be paid in a particular way in full satisfaction, the law relating to penalties and S. 74 do not apply. (Vol 21) 1934 Bom 370 (372) : 58 Bom 610 & (Vol 30) 1943 Pat 403 (405) (DB) & (Vol 24) 1937 Mad 234 (235) & (1909) 2 Ind Cas 850 (851) (DB) (Mad).

[See also (Vol 16) 1929 All 558 (559) (DB). (The term penalty cannot be properly applied where all that is agreed between the parties is that they shall revert to situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement.)]

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[8] Whatever may be the expression used in a contract in describing the payment to be made in case of a breach, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant, and one which no Court ought to allow to be enforced. (1912) 16 Cal W N 697 (700) (PC). (Case from Ceylon.) * (Vol 12) 1925 Mad 177 (179). (Where reasonable compensation for breach is provided, there is no penalty; but where it is *in terrorem*, it is penalty.) * (Vol 2) 1915 Cal 796 (799) : 42 Cal 652 (DB) * (1909) 14 C P L R 49 (52). (One of the best tests, in practice being to see whether the stipulation would be wholly unreasonable, if regarded as an integral part of the contract.)

[9] Questions as to unconscionable bargains must be decided on the provisions of the Contract Act, as amended in 1899 and on these alone. Principles of the English Courts of equity are entirely inapplicable. (Vol 5) 1918 P C 249 (250, 251) : 1918 Pun Re No. 124 (P C).

[10] It is impossible to lay down any abstract rule as to what may or may not be extravagant, or unconscionable. It must be decided with reference to the particular facts and circumstances, which are established in each individual case. (1912) 23 Mad L Jour 177 (179) (P C) * (Vol 4) 1917 Cal 502 (507) : 44 Cal 162 (DB).

[11] Where the rights and liabilities of the parties are regulated by contract, the terms of which could not be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract, but which the parties have omitted to provide for. (Vol 23) 1936 Pat 341 (343, 344) : 15 Pat 594 (S B).

[12] Whether particular bargain is unconscionable or not and whether particular stipulation constitutes penalty or not are questions of fact rather than of law. (Vol 5) 1918 Nag 82 (83) : 14 Nag L R 21 * (Vol 11) 1924 Rang 46 (46) : 1 Rang 460 (DB) * (1905) 1 Nag L R 9 (13, 14).

[But see (Vol 8) 1921 Lah 212 (213) * ('79) 1879 Pun Re No. 51 page 135 (136) (DE).]

[13] Penalty clause does not deprive creditor of right to reasonable compensation. (Vol 10) 1923 Nag 98 (99).

[14] An agreement which carries a penal clause, such as may be covered by S. 74 of Contract Act, is not in any sense of the term 'unlawful.' (Vol 13) 1926 All 278 (280) (DB).

[15] Section 74 does not only speak of all agreements that are unreasonable but speaks of all agreements in which the damages to be paid for breach of contract are stated as a certain sum of money or are otherwise specified. (Vol 18) 1926 Nag 473 (474).

[See also (Vol 7) 1920 Oudh 180 (182) : 23 Oudh Cas 118 (DB). (Section 74 is not restricted to money, increased interest or the like. It can include any other stipulation by way of penalty, for instance, a stipulation to convey certain property, on default of payment of a debt on a fixed date.) * (Vol 4) 1917 Mad 405 (406) (DB).]

[But see (1908) 6 Oudh Cas 167 (170). (Section 74 was applicable only to cases in which pecuniary compensation was sought for breach of contract.)]

2. Enhanced rate of interest.—[1] The stipulation for enhanced interest, on default from the date of contract, is always by way of penalty against which relief can be granted. (Vol 16) 1929 Lah 515 (516) (DB). (Stipulation for increased interest from date of bond is penal — Whether it is penal or not depends on the intention of parties.) * (Vol 18) 1926 Nag 173 (174) * (Vol 13) 1926 Nag 31 (31) : 24 Nag L R 54 * (Vol 9)

1922 Oudh 123 (124). (Usufructuary mortgage for less than Rs. 100 — Rents and profits in lieu of interest — Stipulation to pay additional interest in case mortgagor failed to have mortgage deed registered, held, penal.) * (Vol 3) 1916 All 160 (160) * (1911) 10 Ind Cas 572 (573) (DB) (All). (Such interest would not be wholly disallowed—Reasonable portion may be allowed by way of compensation.) * (1909) 4 Ind Cas 820 (820, 821) : 1909 Upp Bur Rul 17 * (1908) 4 Nag L R 187 (188) * (1908) 25 All 169 (173) (DB) * (1895) 8 C P L R 77 (78) * (1893) 17 Bom 106 (113) (FB) * (1892) 19 Cal 392 (397) (FB) * (1884) 1884 All W N 280 (281) (DB) * ('83) 1883 Pun Re No. 150 page 452 (456) (FB). (1887 Pun Re No. 5 and 1879 Pun Re No. 25, Overruled.) * (1881) 3 Mad 224 (228) (DB).

[But see (1894) 17 Mad 62 (65, 66) (DB).]

[2] Before the introduction of the Explanation in 1899, it was held, in the following cases, that when the higher rate of interest was payable as from the date of default (and not as from date of contract) the contract rate was enforceable—S. 74 did not apply, since no sum was named : (Vol 10) 1923 Pat 231 (236) : 2 Pat 296 (DB). (Stipulation for higher rate of interest from date of default contained in mortgage bond executed in 1897 — Default—Suit on mortgage brought in 1918—Law as it stood in 1897 applied, and contract rate of interest, held, enforceable.) * (1900) 27 Cal 421 (424) (DB) * (1883) 9 Cal 689 (692, 693, 694) (DB).

[But see (1900) 3 Oudh Cas 168 (169, 170). (Agreement to pay interest, at the enhanced rate, in case of default, was in the nature of a penalty, and that the plaintiff-respondent was entitled only to reasonable compensation.) * (1895) 8 C P L R 54 (57).]

[3] In the undermentioned case to which the Amendment Act of 1899 did not apply it was held that the Courts were competent to grant equitable relief against a stipulation for enhanced interest from the date of default if it amounted to a penalty. (1903) 30 Cal 15 (19) (DB) * (1899) 26 Cal 300 (310) (DB) * (1893) 17 Bom 106 (113, 114) (DB).

[4] After the addition of Explanation in 1899 a stipulation for enhanced interest from the date of default may or may not be a stipulation by way of penalty. (Vol 16) 1929 Lah 515 (516) (DB) * (Vol 27) 1940 Sind 68 (73) (DB). (Provision in mortgage bond for enhanced interest at 18 per cent. per annum, in case of default is not necessarily penal.) * (1908) 4 Nag L R 187 (188).

[5] Stipulation for enhanced interest from default cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties. (1893) 17 Bom 106 (113) (FB).

[6] Whether a stipulation for enhanced interest from the date of default is penal or not, depends upon the facts and circumstances of each case. (Vol 20) 1933 Oudh 81 (82) (DB) * (1911) 9 Ind Cas 406 (410) (DB) (Oudh).

[7] Question whether an agreement to pay enhanced interest, from date of default, is penalty or not is one of fact. (12) 13 Ind Cas 624 (625) (Oudh).

[8] In the following cases, it was held that the stipulation for higher interest from the date of default was penal and therefore could be relieved against: (Vol 30) 1943 Mad 109 (110) * (Vol 26) 1939 Pat 457 (459) (DB) * (Vol 24) 1937 Cal 654 (655) : 1 L R (1937) 1 Cal 300 * (Vol 22) 1935 Lah 456 (458) (DB) (Mortgage for Rs. 400 — Interest at As. 12 per cent. per mensem payable—In case of default, interest to be paid at Re. 1-9-0 per cent. per mensem with compound interest — Clause held penal — Compensation at original rate, held, not unreasonable.) * (Vol 18) 1931 Mad 137 (138) (DB) * (Vol 18) 1931 Oudh 83 (34) : 6 Luck 321 (DB). (Stipulation for increased interest from date of

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default is penal only if it be introduced *in terrorum*.)* (Vol 10) 1923 Rang 61 (64) : 11 Low Bur Rul 356 (DB). (An increase of the rate of interest from 24 per cent. to 36 per cent. from the date of default is penal.) * (Vol 9) 1922 Lah 268 (268). (Enhanced interest at double the original rate : But see 13 I C 624 (Oudh) and 13 I C 473 (Oudh). * (Vol 5) 1918 Lah 129 (130) (DB) * (1912) 36 Bom 164 (166, 167, 168) (DB).

[9] In the following cases, enhanced rate of interest from date of default was held not penal. (1935) 18 Nag L Jour 267 (272). (Debt repayable in four instalments with simple interest at one per cent per mensem — Defaulted instalments were to carry interest at 2% p. m. — On default of two instalments whole amount was recoverable with interest at 2% p. m. — Held that the rate was not *per se* in the nature of a penalty.) * (Vol 18) 1931 Lah 120 (121) : 11 Lah 635 (DB). (Enhancement from 12 p. c. to 15 p. c. held not penal.) * (Vol 16) 1929 Lah 515 (516) (DB) * (Vol 13) 1926 Mad 785 (787). (Person, on ceasing to be a share-holder of fund, to repay the whole debt and pay interest at 12½ per cent. instead of at 6½ per cent. The fund being for the benefit of only its members, the above stipulations are not penal.) * (Vol 13) 1926 Oudh 502 (503). (Provision for payment of *Deorha* is not penal.) * (Vol 11) 1924 Oudh 103 (108) * (Vol 11) 1924 Rang 46 (46) : 1 Rang 460 (DB). (Where, on default, interest was raised from Re. 1-12 0 to Rs. 2 per cent. per mensem.) * (Vol 10) 1923 Oudh 153 (158) : 26 Oudh Cas 352. (Interest at 8 annas per cent. per mensem payable half yearly, and in case of default, at 12 annas per mensem from the date of default.) * (Vol 6) 1919 Mad 231 (231) : 42 Mad 465 (DB). (12 per cent. from date of default, where original rate was only 9 per cent.) * (1913) 20 Ind Cas 949 (950) (DB) (All). (Stipulation that on default of due payment of interest at 9 per cent. per annum on a bond, every half-year, interest at 24 per cent. per annum was payable on the unpaid balance of interest, is not unconscionable and can be enforced.) * (1912) 13 Ind Cas 624 (625) (Oudh). (Interest at 10 annas p. c. p. m. to be paid annually. On default, interest or compound interest recoverable at Re. 1-4-0 p. c. p. m., held not penal.) * (1912) 13 Ind Cas 473 (474) (Oudh). (Interest at 12 p. c. p. a. to be paid half-yearly — Stipulation that if interest of any year was not punctually paid, interest charged would be double for that year. Held it is not penal : But see (Vol 9) 1922 Lah 268 * (1911) 9 Ind Cas 406 (410) (DB) (Oudh). (Original rate 5¼ p. c. p. a. — Enhanced rate 12 p. c. p. a.)

3. Explanation. — [1] The Explanation appears to have been introduced to meet the decisions to the effect that when a higher rate of interest is payable as from the date of default and not as from the date of contract the contract rate is enforceable. (1906) 29 Mad 491 (496) (DB). (25 Mad 348, Followed.)

[2] Although the explanation was introduced only by the amending Act of 1899, yet inasmuch as it only explains and illustrates the section as it had already been, so as to remove the doubt entertained in quarters, it is applicable to contracts entered into before 1899. (Vol 12) 1925 Pat 64 (65) (DB). * (Vol 5) 1918 Cal 557 (568) (DB) * (1906) 29 Mad 491 (495, 496) (DB) * (1908) 25 All 169 (173) (DB) * (1902) 25 Mad 343 (347, 348) (DB).

[But see (Vol 10) 1923 Pat 231 (236) : 2 Pat 296 (DB) * (1903) 26 Mad 445 (447) (DB).]

4. Compound interest. — [1] Stipulation of enhanced rate of compound interest from the date of contract — Held, always penal. (Vol 5) 1918 P C 249 (250, 251) : 1918 Pun Re No. 124 (PC) * (1907) 34 Cal 150 (157) : 34 Ind App 9 (PC).

[2] The Courts do not lean towards compound

interest, they do not avoid it in the absence of stipulation ; but, where there is clear agreement for its payment, it is in the absence of disentitling circumstances allowed. (Vol 11) 1924 Bom 264 (268).

[3] Compound interest, at the same rate as the original rate of simple interest, from the date of default, is not penal (Vol 26) 1939 Pat 360 (361) (DB) * (Vol 22) 1935 Lah 38 (39) (DB) * (Vol 21) 1934 All 152 (154) : 56 All 496 (DB) * (Vol 21) 1934 Lah 321 (322) * (Vol 21) 1934 Mad 31 (36) (FB) * (33) 1933 Mad W N 408 (409) (DB) * (Vol 18) 1931 Nag 91 (92) * (Vol 15) 1928 Lah 601 (603) (DB) * (1928) 10 Lah L Jour 48 (51) * (Vol 14) 1927 Mad 1143 (1143) (DB) * (Vol 14) 1927 Nag 338 (338, 339) * (1922) 64 Ind Cas 247 (248) (DB) (Pat) * (Vol 8) 1921 Mad 378 (379) * (Vol 7) 1920 Lah 238 (239) (DB) * (Vol 6) 1919 Oudh 326 (328) : 22 Oudh Cas 194 (DB) * (Vol 5) 1918 P C 48 (49) : 1918 Pun Re No. 101 (P O). (No relief can be given on the ground that the transaction is hard.) * (Vol 5) 1918 Oudh 10 (12) : 20 Oudh Cas 318 * (Vol 4) 1917 Pat 594 (594) : 2 Pat L Jour 283 (DB) * (Vol 2) 1915 Mad 1054 (1054) (DB) * (Vol 2) 1915 Oudh 31 (43) (DB) * (Vol 1) 1914 Lah 363 (365) : 1914 Pun Re No. 82 (DB) * (1913) 9 Nag L R 78 (81) * (1908) 4 Nag L R 187 (188) * (1907) 34 Cal 150 (158) : 34 Ind App 9 (PC) * (1904) 1904 Pun Re No. 58, p. 170 (171) (DB) * (1903) 25 All 26 (26) (DB) * (1903) 26 Mad 111 (112) (DB).

[See also (Vol 14) 1927 Lah 445 (446, 447) : 8 Lah 721 (DB). (Agreement to pay compound interest at same rate of simple interest is not penal, though in the deed there is to be found a further unenforceable condition that on default of payment of interest for 2 successive half years' interest, compound interest would be chargeable at an enhanced rate.)]

[4] Compound interest at enhanced rate from the date of default is generally held to be penal. (Vol 23) 1936 P C 233 (235) (PC) * (1935) 18 Nag L Jour 220 (226). (Mortgage-deed — Provision for payment of simple interest at 1 per cent. annually — On default interest enhanced to 1½ per cent. compound interest.) * (Vol 21) 1934 Mad 31 (36) (FB) * (Vol 19) 1932 Nag 169 (170) : 28 Nag L R 149 (DB). (Creditor is sufficiently compensated if he is allowed compound interest at original rate or simple interest at enhanced rate.) * (Vol 13) 1931 All 203 (205) (DB) * (Vol 15) 1928 Nag 120 (122) * (Vol 15) 1928 Nag 74 (74, 75) * (Vol 14) 1927 All 315 (315) (DB) * (Vol 14) 1927 Nag 284 (286) * (Vol 12) 1925 All 78 (78). (Stipulation to pay compound interest at Re. 1-8-0 p. c. p. m. in case of default to pay simple interest at Re. 1 p. c. p. m. is a penalty — It was reduced to Re. 1 p. c. p. m. compound interest.) * (Vol 8) 1921 Mad 183 (185) : 44 Mad 301 (DB) * (Vol 7) 1920 Nag 99 (102) (DB) * (Vol 6) 1919 Mad 1117 (1122) (DB) * (Vol 2) 1915 Mad 1054 (1054) (DB) * (Vol 2) 1915 Oudh 31 (43) (DB) * (1913) 20 Ind Cas 667 (669) (Oudh) * (1910) 6 Nag L R 109 (113). (Either it should be reduced to simple interest at enhanced rate, or compound interest at the original rate.) * (1909) 2 Ind Cas 111 (113) (Cal) * (1909) 6 Mad L Tim 156 (156) (DB) * (1907) 34 Cal 150 (157) : 34 Ind App 9 (PC).

[See also (Vol 10) 1923 Oudh 162 (163).]

[5] In the following cases, compound interest at enhanced rate from the date of default was held not penal. (Vol 23) 1936 Mad 871 (876) (DB) * (Vol 12) 1925 Mad 302 (303) * (Vol 11) 1924 Bom 264 (269) * (1912) 1912 Pun L R No. 192, p. 608 (611) (DB).

[See also (1912) 1912 Mad W N 512 (513). (Rate same but half yearly rests instead of yearly.)]

[6] In awarding compensation, no rule of law can be laid down that in particular cases compound interest, at the original rate, should be allowed. What the Court should give depends upon the circumstances of each case. The matter is in the discretion of the Court and

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the discretion ought to be judicially exercised. (Vol 21) 1934 Mad 31 (36) (FB).

[7] The Court sometimes may award to the plaintiff the rate of compound interest, which is higher than the original rate in case of default according to the secondary stipulation as a reasonable compensation. But it is not so bound to give. (Vol 21) 1934 Mad 31 (36) (FD).

[8] Stipulation for capitalization of interest and adding to principal and for payment of a higher rate of interest than the contract rate, held, penal. (Vol 26) 1939 Mad 481 (481, 482) (DB) (Vol 20) 1933 Oudh 190 (190) (DB) (Vol 5) 1918 P C 249 (250, 251) : 1918 Pun Re No. 124 (PC) (Vol 4) 1917 All 315 (315) (DB) (Vol 1) 1914 Mad 210 (210) (DB) (1979) 1979 Pun Re No. 51, page 135 (136) (DB).

[See however (Vol 14) 1927 Mad 894 (597).]

[9] Interest at 24 per cent. per annum and after due date capitalization of interest on arrears is not necessarily penal. (Vol 6) 1919 Cal 467 (468) (DB).

5. Interest payable, if principal not duly repaid.

—[1] Mortgage deed—No interest till redemption, which was to be within four years—Stipulation for payment of simple interest, in case of default—Section 74, Explanation, does not apply. (Vol 8) 1921 Lah 212 (212). (The interest is payable, not on the breach of any agreement, but, in pursuance of the original contract.) (11) 1911 Mad W N 134 (134) (1909) 19 Mad L Jour 630 (631) (1908) 26 Mad 445 (447) (DB).

[2] Where no interest is payable originally, and some interest becomes payable only on default, agreement is penal. (Vol 15) 1928 All 255 (257) (DB).

[3] Payment by instalments without interest—Upon default of any instalment, stipulation for payment of interest on the whole amount from the date of the bond — *Held*, penal. (Vol 1) 1914 Mad 157 (158). (Vol 22) 1935 Lah 873 (874) (DB) (1906) 10 Cal W N 1020 (1023) (DB) (1903) 27 Bom 21 (22) (DB).

[4] Exorbitant interest from date of default may be a penalty within S. 74 even though no interest is payable until default. Act XXVIII of 1855 does not apply to secondary contracts providing for breaches of original contracts and does not intend to cut down equitable powers of Courts. (1913) 36 Mad 229 (238, 249, 251, 273) (FD) (25 Mad 343, 26 Mad 445 and 14 Mad L Jour 136, Overruled.) (Vol 19) 1932 Cal 53 (57, 59) : 39 Cal 613 (DB) (Vol 2) 1915 Cal 796 (800) : 42 Cal 652 (DB).

[5] Rs. 10,000 to be payable in 10 annual instalments—In the case of default interest at 1 per cent. p. a. on the entire amount from the date of default until realization—*Held* not penal. (Vol 15) 1928 Lah 857 (858) (DB).

[6] Debt—Payment on a fixed date—Upon default to carry interest at exorbitant rate on the entire sum from date of contract — *Held* penal. (Vol 14) 1927 Lah 113 (114) (Vol 12) 1925 Oudh 231 (233) : 25 Oudh Cas 51 (DB) (Vol 12) 1925 Oudh 72 (72) (Vol 6) 1919 Oudh 69 (70) (1912) 22 Mad L Jour 354 (354) (DB) (1896) 2 Upp Bur Rul 300 (35) 1885 Pun Re No. 55, page 116 (117) (DB).

[7] Payment of a debt at a fixed date — On default stipulation for payment of interest on the entire amount from the date of default at a low rate is not penal. (10) 1910 Mad W N 616 (616) (DB). (Rate at 1½ p. c. p. m.) (91) 1891 Pun Re No. 99, page 471 (472, 473) (DB). (Interest at rate of 2½ per cent.)

6. Reduced rate of interest on punctual payment.

—[1] Covenant to accept interest at a reduced rate if interest is paid punctually does not make the original rate of interest a penalty. On default, creditor can recover at original rate. (Vol 5) 1921 Cal 103 (110);

48 Cal 1036 (DB) (Vol 21) 1934 Bom 270 (372) : 58 Bom 610 (Vol 20) 1933 Lah 523 (524) (Vol 15) 1928 Rang 19 (20) : 5 Rang 573 (DD) (Vol 10) 1923 Lah 348 (351) : 4 Lah 258 (DB) (Vol 9) 1922 Nag 263 (264) (Vol 8) 1921 P C 118 (121) : 47 Ind App 265 (PC) (Vol 5) 1918 Cal 557 (565) (DB) (Vol 1) 1914 Mad 145 (148) (DB) (1910) 32 All 446 (449) (DB) (1908) 4 Nag L R 187 (198, 190) (1906) 10 Cal W N 640 (642).

7. Where the rate of interest is exorbitant.

[1] There cannot be stipulation by way of penalty unless there is another antecedent promise. What S. 74 means is that for a sum to be treated as a penalty it must be payable in case of a breach of an antecedent promise. A heavy rate of interest is not itself penal and cannot be relieved against. (Vol 5) 1918 Mad 574 (577) (DB).

[2] Where the transaction was, undoubtedly, improvident, but there is no evidence to show that the money-lender had unduly taken advantage of his position it is difficult for Court of Justice to give relief on grounds of hardship. (Vol 5) 1918 P C 48 (49) : 1918 Pun Re No. 101 (P C) (Vol 22) 1935 Lah 38 (39) (DB) (Vol 21) 1934 Cal 511 (512) (DB) (Vol 14) 1927 Mad 620 (620, 621) : 50 Mad 614 (DD) (Vol 13) 1926 Cal 690 (690) (DB) (Vol 13) 1926 Oudh 408 (409) : 1 Luck 354 : 29 Oudh Cas 258 (Vol 18) 1926 Oudh 278 (275) : 1 Luck 160 (DB) (Vol 12) 1925 Cal 1193 (1194) (DB) (Vol 12) 1925 Lah 580 (580) (Vol 11) 1924 Lah 21 (24) : 4 Lah 76 (DB) (Vol 10) 1923 Cal 268 (268) (DB) (Vol 10) 1923 Cal 166 (166) : 49 Cal 1040 (DB) (1922) 35 Cal L Jour 209 (211) (DB) (Vol 9) 1922 Pat 491 (492) : 1 Pat 263 (DB) (Vol 8) 1921 Lah 53 (53) (DB) (Vol 7) 1920 Cal 829 (829) (DB) (Vol 7) 1920 Pat 678 (681) : 5 Pat L Jour 147 (DB) (Vol 6) 1919 Cal 413 (414) (DB) (Vol 6) 1919 Cal 278 (281) (DB) (Vol 6) 1919 Cal 258 (258) (DB) (Vol 6) 1919 Oudh 254 (255) (DB) (Vol 6) 1919 Pat 293 (297) : 4 Pat L Jour 565 (DB) (Vol 5) 1918 Cal 552 (553) (DB) (Vol 5) 1918 Cal 473 (474) (DB) (Vol 4) 1917 Pat 689 (690) (DB) (Vol 1) 1914 Mad 157 (158) (1913) 11 All L Jour 155 (156) (13) 1913 Pun L R No. 235, page 784 (788) (DB).

[See also (Vol 9) 1922 P C 347 (349) (PC) (1874) 21 Suth W R 352 (355) (DB). (Loan with interest at 18 per cent.—*Ijara* for ten years to be given as security for the loan — On failure to give the security and pay the interest principal with interest at 75 per cent. to become payable. *Held*, that in the absence of undue influence etc., the contract could not be deemed unreasonable or oppressive.)]

[3] That interest is compound or excessive or amounts to a large sum is no reason for interference. Debtor should show why his contract should not be enforced. (Vol 17) 1930 Cal 207 (208) : 56 Cal 960 (DB) (Vol 14) 1927 All 538 (538) (DB) (Vol 14) 1927 Lah 755 (755) (DB).

[4] Contract for payment of interest at exorbitant rate though not within S. 74 may amount to penalty. (Vol 5) 1918 Cal 334 (334) (DB) (Vol 4) 1917 Cal 630 (632) : 43 Cal 632 (DB) (Vol 4) 1917 Cal 502 (504) : 44 Cal 162 (DD) (Vol 3) 1916 Cal 771 (773) (DB).

[5] Original bond hard and unconscionable providing high rate of interest — On default, further interest at same rate as original from date of default— Stipulation applicable after default, held not penal. (1901) 1901 Pun Re No. 96, page 324 (326, 327).

[6] An agreement to pay interest at the rate of Rs. 12-12-0 per cent. per annum is not unconscionable nor can such an agreement become so, merely because there is stipulation to pay compound interest, at the same rate, in the event of there being a default in the payment of the simple interest agreed upon. (Vol 7) 1920 Lah 238 (239) (DB).

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[7] Where a bond was executed and the actual money advanced was less than half, while the balance was made up of interest, calculated in advance at an enormous rate and a provision was made in the bond for payment of enhanced rate of interest if default was made in the payment of instalments. *Held*, that the addition of interest in advance and the stipulation for enhanced rate of interest was penal and hence unenforceable. (1912) 36 Bom 164 (167, 168) (DB).

[See also under Note "Enhanced rate of interest."]

[8] Where the necessity for borrowing by a manager of a joint Hindu family is proved but necessity of a very high rate of interest or other onerous terms is not proved, then only ordinary commercial rate of interest and conditions should be allowed. (Vol 6) 1919 P C 12 (13) : 41 All 571 : 46 Ind App 145 (PC).

[9] Where the interest amounts, in 5 years, to a sum equal to the principal, it is not excessive. (1911) 9 Ind Cas 927 (928) (DB) (Lah).

[10] The circumstances in which a loan is incurred must be considered to determine whether a provision for compound interest agreed to be paid by a Hindu widow is reasonable or not — Borrowing of money at 12 per cent. compound interest by a widow for necessity held not unreasonable. (1911) 34 Mad 188 (196) (DB).

[11] Interest at As-12- per cent. on mortgage bond stipulated to be increased to 1 per cent. in case of default in payment of interest for any three months. Enhanced interest is not excessive. (Vol 12) 1925 Sind 164 (165) : 19 Sind L R 287.

8. "Reasonable compensation." — [1] S. 74 recognises the right to reasonable compensation on breach of contract, which must mean same sort of compensation however small. (Vol 24) 1937 Nag 205 (208) : ILR (1937) Nag 367.

[2] Whatever the distinction between liquidated damages and penalty may be, S. 74 is broad enough to include both classes of cases and the section gives wide discretion to the Court, in the assessment of damages, even in cases, where the parties to the contract have, in anticipation of the breach, expressly determined by agreement the sum payable as damages for the breach. Court is not bound to award the entire amount agreed upon and at the same time cannot decree damages exceeding the amount previously agreed upon by the parties. There is no specific limitation for the reduction of amount payable as damages, though the words "reasonable compensation" necessarily imply that the discretion must be exercised with care, caution and on sound principles. (1888) 5 All 238 (241, 242) (DB) * (Vol 18) 1931 Mad 137 (138) (DB) * (Vol 17) 1930 Mad 428 (428) (DB) * (Vol 15) 1928 Nag 74 (74) * (1921) 62 Ind Cas 759 (760) (DB) (Cal) * (75) 1875 Pun Re No. 3, page 7 (8, 9) (DB).

[3] The damages awarded cannot exceed the sum of money specified in the contract, but can exceed the actual damage or loss proved. (Vol 13) 1926 Nag 473 (474).

[4] Higher rate of interest from date of default is penal — In awarding compensation on breach, Court's discretion is not restricted to contract rate. (Vol 26) 1939 Pat 457 (459) (DB).

[5] If other evidence and circumstances indicate that the damage equals or is likely to exceed the amount named, then the Court will abide by the amount named. (Vol 21) 1934 Cal 285 (287) : 60 Cal 1379 * (Vol 34) 1947 Lah 112 (116) : 1946 48 Pun L R 243 (249) (DB) * (Vol 18) 1931 Oudh 33 (34) : 6 Luck 321 (DB) * (Vol 16) 1929 Lah 249 (252) (DB) * (Vol 12) 1925 Pat 64 (65) : 3 Pat 657 (DB) * (Vol 2) 1915 All 40 (41) * (1913) 18 Ind Cas 183 (185) (Low Bur).

[6] If a Court finds the terms of the bond penal and the obligee only entitled to reasonable compensation and if the parties proceed to substitute what in their opinion would be the most reasonable compensation likely to be awarded by Court, such substituted amount would be the amount due. (Vol 16) 1929 Mad 794 (796) : 53 Mad 127 (DB).

[7] Under S. 74 the plaintiff must prove his damage in the general sense. (Vol 21) 1934 Cal 285 (287) : 60 Cal 1379.

[8] Where the other evidence in the case shows that the amount named in the contract as payable on breach thereof is excessive and unreasonable, the plaintiff will have to prove his damages irrespective of the figure. (Vol 21) 1934 Cal 285 (287) : 60 Cal 1379 * (Vol 22) 1935 Pesh 57 (58) * (Vol 16) 1929 P C 179 (180) (PC).

[9] The contract made by the parties is in itself evidence and if there is no other evidence of damage this evidence alone will be considered sufficient. (Vol 21) 1934 Cal 285 (287) : 60 Cal 1379 * (Vol 27) 1940 Sind 1 (10) (DB) * (37) 1937 All L Jour 1385 (1386) * (1912) 13 Ind Cas 46 (47) (DB) (All) * (10) 1910 Pun L R No. 148, page 404 (406).

[10] The sum named in the contract is not conclusive evidence of damages, and if there is other evidence or circumstances showing that it was excessive, the Court will not consider itself bound by it. (Vol 21) 1934 Cal 285 (287) : 60 Cal 1379.

[11] Damages which are not direct result of defendant's action, or which are not contemplated cannot be recovered. (Vol 21) 1934 All 525 (526) (DB).

[12] As a general principle, the damages decreed must be commensurate with the injury sustained, when the injury consists of the breach of contract. Court acting upon the above principle would assess damages with a view to restore to the plaintiff such advantage as he might reasonably be expected to have derived from the contract had the breach never occurred. (1883) 5 All 238 (242) (DB).

[13] Enhanced rate from date of default — *Held*, reasonable compensation, not exceeding the penal rate, should not be less than the original rate. (Vol 10) 1923 Oudh 162 (162).

[14] A penal rate of interest on a mortgage bond may be reduced but should not be wholly disallowed. (Vol 6) 1919 Cal 860 (860) (DB).

[15] The fact that under S. 74 the Court is given power to reduce the rate of interest fixed in a mortgage bond does not make the interest awarded at the reduced rate any less a claim under the bond and the charge created by the bond will be available also for the interest so awarded. (Vol 21) 1934 Mad 695 (696) : 53 Mad 266 (DB).

[16] Loan on mortgage payable by yearly instalments with interest — Defaulted instalment to bear compound interest at higher rate — On default of three instalments whole sum to become exigible — Default made — Only simple interest on exigible sum could be awarded. (Vol 15) 1928 Nag 67 (67) : 23 Nag L R 168.

[17] Where a mortgage-deed stipulated interest of twelve annas per cent. per mensem, and in case of default in payment of interest annually, the mortgagor made himself liable to pay interest at the rate of two per cent. per mensem on the unpaid interest till the payment of the entire mortgage money : *Held*, that the provision for interest on interest was intended only as compensation to the mortgagee in the event of default on the part of the mortgagor, and that if the provision was considered penal, the plaintiff could reasonably claim compensation at the rate charged by him. (Vol 20) 1935 Oudh 81 (82) (DB).

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[13] In order to determine the reasonableness of a particular rate of interest, the whole conditions and the terms of lending must be considered together. (Vol 19) 1982 Mad 97 (99) (DB) (Vol 22) 1985 Mad 1072 (1073).

[19] Where the provisions as to interest are penal, it is the duty of the Court to decide what reasonable compensation should be awarded to a creditor, when a default is made by the debtor in the payment as stipulated, and the mere fact that the creditor has himself deemed it advisable to only claim compound interest at a lesser rate than the one provided in mortgage-deed does not necessarily preclude the Court from granting even a lower rate than that. (Vol 15) 1928 Nag 120 (122).

[20] Interest—Agreed rate not proved—25 per cent. compound interest claimed—Considerable part of debt made up of previous interest at 25 per cent.—Award of 6 per cent. is not too low. (Vol 12) 1925 Lah 450 (451).

[21] Where the plaintiff failed to prove that 24 per cent. per annum with yearly rests was the market rate of interest on the transaction in suit. *Held*, that the market rate of 12 per cent. per annum, with yearly rests, should be awarded. (Vol 11) 1924 Pat 580 (582) : 3 Pat 465 (DB).

[22] Court is not compelled to allow rate of interest, not reserved in contract, but claimed in suit. (Vol 25) 1988 Nag 112 (113) : 1 L R (1988) Nag 91 (DB).

[28] Where a penal rate is a common rate of interest in every day transactions, e. g., a rise from 10½ per cent. per mensem to 12 per cent. per mensem, compound interest, in default, it can be allowed as compensation under S. 74. (Vol 2) 1915 Mad 529 (530) (DB).

[24] Under S. 74 a Court cannot enforce a contract by which, if the principal with interest at 12 per cent. is not paid, double the amount shall become payable, even if the interest is to be paid in paddy instead of in money. (1878) 1 Mad 349 (350, 351) (DB).

[25] Where a grain bond provided that on failure to repay at a certain date, the defendant would be liable to pay interest at 37½ per cent. per annum, and the plaintiff waited for six years before enforcing the bond by which time the original claim for Rs. 400 had risen to Rs. 1,700. *Held*, that the prayer of the plaintiff is not for the performance of the contract but for compensation for breach, and it is the Court's duty to grant compensation, having regard to all the circumstances of the case. (Vol 10) 1928 Lah 452 (453) (DB).

[26] Contract for purchase of property—Penalty in case of breach by vendee—Default by vendee—Default due to failure of vendor to carry out his part of contract — *Held*, vendor could not ask for enforcement of provision contained in penalty clause—Further even if vendor had not been in default, if no loss was made out by vendor, vendee was not entitled to any relief. (Vol 9) 1922 P C 339 (341) (PC).

[27] Where the contract of sale itself provided that in the event of a breach, Rs. 3,200 were to be paid as damages by the party failing to perform his part of the contract : *Held*, that in the absence of any equitable ground for interference, the stipulated sum should be decreed as damages. (Vol 12) 1925 Lah 284 (286) (DB).

[28] The right of resale, after the breach of contract to purchase, may be allowed as a means of ascertaining damages, subject to the rule of reasonable compensation contained in S. 74, and is not limited to cases where property has passed to the buyer. (Vol 2) 1915 Sind 46 (47) : 9 Sind L R 20.

[29] Certain goods worth Rs. X were contracted to be delivered annually—*Held*, Rs. X were not the maximum damages that could be paid by way of compensation on breach of agreement, the amount not being

liquidated damages but being only the price of goods. (1894) 4 Mad L Jour 201 (203) (DB).

[30] The suppliers of an oil plant entered into stringent guarantees with the purchaser in respect of (a) capacity, (b) efficiency and (c) economy, and by subsequent agreement named a figure as damages to be paid in case of non-fulfilment of the guarantees. On holding tests, the guarantee as to efficiency was not fulfilled. In a suit by the purchaser for damages : *Held*, that the amount was not excessive or unreasonable and being a genuine pre-estimate of damages, it was awarded. (Vol 21) 1934 Cal 285 (288) : 60 Cal 1879.

[31] Breach of warranty of petrol consumption of a car—Assessing damages at extra running costs for supposed life of motor is unreasonable. (Vol 21) 1934 All 392 (393) (DB).

[32] Reasonable compensation — Question of fact — Cannot be challenged in second appeal. (Vol 21) 1934 Pat 16 (18) (Vol 22) 1935 Mad 1072 (1073) (DB).

[33] Where the Courts have disregarded their duty to award only reasonable compensation not exceeding the amount specified, the mistake may be rectified, even though the point is first raised in second appeal. (1897-1900) 2 Upp Bur Rul 333.

9. Exception. — [1] Where a person enters into a bond with a District Board under Art. 498 of the Local Fund Code, which provides for forfeiture of the amount, deposited as earnest money or security for the due fulfilment of the contract, the contract falls within the exception to S. 74 of the Contract Act and the whole sum mentioned as penalty is payable. (10) 1910 Mad W N 686 (687) (DB).

[2] Bond given for the performance of public duty (right to collect market fees) but not under the provisions of any law — Bond held not within exception to S. 74, not being a bail bond or recognizance. (108) 31 Mad 54 (58).

[3] A bond in favour of the Secretary of State for India under which defendant was liable to pay Rs. 200 if he failed to perform his duties as hospital assistant and to pay Rs. 400 if he failed both to perform such duties and also to pay Rs. 200 is not a bond coming within exception to S. 74. (109) 3 Sind L R 122 (123, 124) (DB).

[4] Administration bond executed under S. 78 of the Probate and Administration Act in favour of a District Delegate in respect of the grant of letters to the estate is not within the exception to S. 74. (21) 64 Ind Cas 366 (368) (DB) (Cal).

[5] An administration bond executed under S. 256 of Succession Act does not fall within the exception to S. 74 of Contract Act and the assignee of such bond (under S. 257 of Succession Act) cannot recover more damages than he proves to have resulted to himself or those interested in the bond on which he relies. (1888) 10 All 29 (34, 35) (DB).

[6] A entering into contract with Municipality depositing Rs. 500 as security for due performance of contract and agreeing that security be forfeited on breach — *Held*, contract was not within the exception to S. 74, since the bond was not given under the provisions of any law. (193) 16 Mad 474 (475) (DB).

[7] Contract with Secretary of State to fell, remove and purchase timber and firewood — District Forest Officer having right to rescind the contract in case of breach of conditions and payment of sums named in contract as payable in case of breach of conditions—Breach of condition — *Held*, that the case did not fall within the exception to S. 74. (Vol 12) 1925 Bom 227 (230) : 49 Bom 194 (DB).

[8] Although the exception says that the person entering into the bond shall be liable upon breach of the bond to pay the whole sum mentioned therein, that

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does not mean that the Court is bound to exact the whole of the liability to the extent of the amount mentioned in the bond and to pass a decree for the whole amount. The Court's discretion is not entirely taken away and the Court can reduce the amount of the penalty according to the circumstances of the case. (Vol 8) 1921 Bom 447 (448) : 45 Bom 1213 (DB) ✕(Vol 18) 1926 Nag 435 (444).

10. Instalments — Illustrations (f) and (g). —

[1] The principle underlying illustration (f) is that the whole of the debt being payable immediately the creditor agrees with the debtor to allow him to pay the amount by instalments so long as he pays them regularly. But the principle underlying illust. (g) is that debtor by paying consideration gets the right to retain and use the amount of each instalment until the date of its becoming due and payable. If therefore in such a case the debtor commits breach and fails to pay one instalment, no doubt he becomes liable to pay to the creditor damages for breach but to be called upon to pay the whole of the balance in spite of the fact that he has given consideration for withholding the amounts of the other instalments till their respective due dates, would be in the nature of a penalty. (Vol 12) 1925 Mad 177 (180).

[2] An agreement to pay an amount by a given date with condition that on default a larger sum shall be paid is in the nature of a penalty. But if there is an agreement to pay a particular sum followed by a condition allowing to the debtor as for example, the payment of a lesser sum or payment by instalments by a particular date or dates, then the party seeking to avail of the concession must carry out strictly the conditions on which it was granted and there is no power in the Court to relieve him from this obligation. (Vol 30) 1943 Pat 403 (405) (DB) ✕(Vol 30) 1943 Sind 247 (251) : I L R (1943) Kar 245 (DB). (Consent decree — Amount admitted to be due Rs. 5,000 — Amount to be paid by instalments Rs. 3,200 — On failure to pay instalment, claim to admitted amount to revive — Stipulation not penal.) ✕(Vol 28) 1941 Sind 196 (198) : I L R (1941) Kar 389 (DB) ✕(Vol 22) 1935 Rang 341 (342) ✕(Vol 18) 1931 Lah 696 (701, 702) (DB). (Creditor agreeing to accept lesser amount.) ✕(Vol 18) 1931 Sind 42 (43) : 25 Sind L R 279 (DB). (Case of instalment-bond.) ✕(Vol 16) 1929 All 558 (559) (DB) ✕(Vol 14) 1927 Mad 965 (967) (DB) ✕(Vol 13) 1926 All 278 (280, 282) (DB). (Compromise decree—Concession of payment by instalments.) ✕(Vol 3) 1916 Cal 391 (392) (DB).

[See also (Vol 4) 1917 Mad 90 (93) (DB) ✕('11) 7 Nag L R 46 (47, 48).]

[3] Stipulation that on default the whole amount becomes due and should be paid with interest is not penal. (Vol 4) 1917 Pat 410 (411) (DB).

[4] Debt repayable in four instalments with simple interest at 1 per cent. per mensem — Defaulted instalments were to carry interest at 2 per cent. per mensem — On default of two instalments whole amount was recoverable with interest at 2 per cent. per mensem — *Held*, that the rate was not *per se* penal. ('35) 18 Nag L Jour 267 (272).

[5] Money payable by instalments — In case of default of any instalments, payments made till then to be forfeited — Term as to forfeiture is penal. (Vol 2) 1915 P C 94 (95) (PC) ✕(Vol 27) 1940 Oudh 257 (259) : 15 Luck 550 ✕(Vol 17) 1930 Bom 306 (315) : 54 Bom 381.

[6] Principal and interest consolidated to be paid in instalments — Further stipulation making the whole amount due on default of instalment is penal. (Vol 9) 1922 Nag 49 (50).

[7] Provision to pay interest on default of amount of chit or instalments remaining unpaid — Provision for payment of whole amount within a month of default of further instalment is penal as the subsequent instalment is payable only after that month. (Vol 15) 192^a Mad 245 (245, 246).

[8] Compromise decree—Instalments—Stipulation to pay whole amount on default of one instalment — Further clause that interest at 36 per cent. will be payable — Clause is penal. (Vol 3) 1916 Cal 391 (392) (DB).

[9] On default whole amount payable with enhanced interest—Stipulation is penal and Court may cut down the enhanced interest. (Vol 16) 1929 Mad 432 (436) (DB) ✕(1887) 1887 Pun Re No. 106, page 239 (240) (DB).

[10] Compound interest to be paid on default of one instalment — On default of 3 successive instalments whole amount to become due — *Held*, that stipulation as to whole amount becoming due held penal. (Vol 13) 1926 Nag 90 (92) : 22 Nag L R 23 (DB) ✕(Vol 13) 1926 Nag 484 (485).

[11] A stipulation that future interest shall be paid in a lump sum on a default occurring in the payment of any instalment can be relieved against under S. 74. ('11) 7 Nag L R 46 (47, 48) ✕(1884) 1884 All W N 105 (105).

11. Hire-purchase agreements.—[1] The seizure clause in a hire-purchase agreement, however severe in its terms, is not a stipulation by way of penalty within the meaning of S. 74. (Vol 17) 1930 Rang 193 (195) : 8 Rang 236 ✕(Vol 21) 1934 Nag 151 (151, 152) : 30 Nag L R 843.

[But see (Vol 16) 1929 Rang 368 (371) : 7 Rang 431.]

[2] Contract of hire — Hirer to pay the value of the article if he failed to return it — S. 74 does not apply. (Vol 15) 1928 Cal 57 (59) (DB).

12. Deposit—Forfeiture of. — [1] The Contract Act makes no special provision for the recovery of earnest-money paid on failure of the other party to perform its part of the contract. The remedy is merely one under S. 73 for loss or damage caused to a person by another person who has broken a contract. (Vol 14) 1927 All 621 (622) : 50 All 82 (DB). (The right to sue for recovery of earnest money is not transferable.) ✕(Vol 4) 1917 Mad 161 (161) (DB). (The general right to damages remains unaffected by the forfeiture of any deposit although in estimating the damages, the amount may go towards mitigating the claim.)

[See also (Vol 13) 1926 Mad 410 (411) (DB). (Contract for sale of goods — Deposit by buyer — Breach of contract by buyer—*Held*, that seller was not entitled to keep the deposit irrespective of the damage suffered.)]

[2] Where a contract to sell is rescinded, the seller must restore the benefits he has received under it under S. 64 if he rescinds it himself, and under S. 65 if the purchaser rescinds it, that is to say, he must refund the earnest money. But when the seller rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under S. 73 and even if he has suffered none, he can be awarded a reasonable amount as compensation not exceeding the earnest money if there is the usual agreement of forfeiture in the contract under S. 74. Either sum awarded as damages can be set off against the amount of earnest money he has to refund. (Vol 14) 1927 Nag 168 (169).

[3] Stipulations providing for forfeiture of sums deposited or payment in advance as security for the performance — When transaction falls through by promisee's default, forfeiture will not be interfered with if deposit is a reasonable proportion of the amount payable under the contract. (Vol 29) 1942 Cal 382 (385). (S. 74 does not apply.) ✕(Vol 28) 1941 Mad 108 (109) ✕(Vol 22) 1935 Lah 192 (193) (DB) ✕(Vol 17) 1930

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Bom 218 (214) (DB) * (Vol 16) 1929 Nag 80 (82, 84): 24 Nag LR 159 (FB). ((Vol 12 1925 Nag 109: 20 Nag LR 192, Not approved.) * (Vol 14) 1927 Cal 964 (964, 965): 55 Cal 638 (DB) * (Vol 14) 1927 Lah 721 (721) (DB) * (Vol 14) 1927 Mad 328 (329) * (Vol 13) 1926 P C 1 (2) (PC) * (Vol 13) 1926 Cal 339 (343) (DB) * (Vol 10) 1923 Lah 363 (366) (DB) * (Vol 10) 1923 Rang 47 (48): 11 Low Bur Rul 420 * (Vol 9) 1922 Cal 104 (104): 55 Cal 642n (DB) * (Vol 9) 1922 Nag 104 (105): 19 Nag L R 131 * (Vol 7) 1920 Cal 931 (932) (DB) * (Vol 6) 1919 All 265 (267): 41 All 324 (DB) * (Vol 3) 1916 Cal 974 (975) (DB) * (Vol 3) 1916 Mad 584 (585). (S. 74 does not apply.) * (Vol 3) 1916 Sind 4 (7): 10 Sind L R 4 (DB). (Seller seeking further damages must give credit for the deposit.) * (Vol 2) 1915 Mad 896 (900): 38 Mad 178 (FB). (On appeal from 38 Mad 375—S. 74 does not apply.) * (Vol 2) 1915 Mad 546 (547) (DB) * (11) 38 All 166 (167) (DB) * (09) 36 Cal 960 (963) (DB) * (06) 29 Mad 118 (119) (DB).

[See also (Vol 13) 1926 All 469 (469). (Plea that improvement trust may acquire the property is no justification for rescission by purchaser.) * (Vol 29) 1942 Sind 37 (39): I L R (1941) Kar 495 (DB).]

[4] Where the Court finds that the amount of deposit or payment in advance is so great in comparison with the amount payable under the contract that the parties under the stipulation for forfeiture could not have intended it as merely a security for performance, but rather as a punishment for non-performance of the contract, the Court can grant relief against forfeiture. (Vol 31) 1944 Mad 526 (527): I L R (1945) Mad 269 (DB) * (Vol 24) 1937 Bom 417 (421): I L R (1937) Bom 782 (DB). (Contract between plaintiff and Municipality—Plaintiff undertaking erection of building within certain time—Amount deposited to be returned to plaintiff if work finished within time—Plaintiff completing work and demanding refund of deposit—Municipality contending deposit forfeited, work not having been finished within time—Deposit held was by way of penalty within S. 74, Contract Act.) * (Vol 24) 1937 Mad 681 (683, 684).

[5] An advance paid in respect of a contract of sale is not liable to forfeiture on default like earnest money. The question whether an amount paid is earnest money or part of the purchase money depends on the real intention of the parties. (Vol 18) 1931 Lah 205 (207): 11 Lah 699 (DB) * (Vol 13) 1926 Mad 117 (118) * (Vol 12) 1925 Sind 254 (256) (DB).

[6] There is distinction between the penalty for breach of contract and the forfeiture of a deposit of earnest money. When the latter is a payment actually made, the former is compensation for breach. Section 74 deals with compensation for breach. (Vol 17) 1930 Bom 213 (215) (DB).

[7] To come within the principles applicable to earnest money, a deposit must be paid at the time of entering upon the bargain. Those principles cannot be applied to any future payment to be made under the contract. An earnest is something paid or given at the time of the bargain to show that negotiation had been changed into a binding contract, and as a pledge for its due performance by the depositor to be forfeited in case of non-performance by his default. (Vol 3) 1916 Nag 104 (111): 12 Nag L R 177 (DB) * (Vol 16) 1929 Mad 817 (818): 53 Mad 141 (DB).

[8] The rule of law applicable to cases of sale which forfeits the deposit in case of contract equally applies to leases also, and there is no essential difference in the characteristics attached to each of these kinds of contracts. (Vol 3) 1916 Mad 584 (585, 586). (Where there is an express provision in the contract of lease which

stipulates that the deposit which is a part of the rent will be forfeited on the breach of any of the conditions of the lease deed the contract must be given effect to without reference to S. 74 of the Contract Act: 16 Mad 474, Overruled.) * (Vol 25) 1938 Lah 62 (63) (DB).

[9] *Per Walsh J.*—Where A pays B a sum of money in advance for the performance of a contract at a future date which becomes impossible, so that there is a failure of consideration, B is not entitled to keep A's money in his pocket and A is entitled to recover it under law of equity and good conscience—There is no express provision corresponding to this rule of equity in the Contract Act. (Vol 14) 1927 All 621 (622): 50 All 82 (DB) * (Vol 14) 1927 Sind 205 (205): 22 Sind L R 197 (DB) * (Vol 11) 1924 Bom 119 (127): 48 Bom 259 (DB) * (Vol 10) 1923 Mad 103 (107) (DB) * (1912) 15 Cal L Jour 410 (411) (DB). (Vendor failing to carry out his covenants.)

[See also (Vol 15) 1928 Lah 154 (154, 155, 156): 9 Lah 67 (DB). (Joint Hindu firm appointing trustees to realize assets and discharge debts—Sale of property by the trustees—Vendee depositing earnest money—Trustees agreeing to secure signatures of proprietors—If trustees fail to secure the consent of all the members of a joint family in spite of express agreement, the vendee is entitled to rescission of the contract and restitution.)]

[10] Where upon an agreement of sale vendee deposits a sum of money with the vendor, the deposit, unless paid on any special terms, is not merely part-payment but is an earnest. (Vol 7) 1920 Cal 679 (680) (DB)

[11] Plaintiff is entitled to a return of the earnest money if the contract gave him the option of withdrawing and if he was not satisfied as to the title of the defendant. (Vol 2) 1915 Lah 237 (237).

[12] In order to enable the vendor to forfeit the deposit, there must be acts, on the part of the purchaser, which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. (Vol 3) 1916 Sind 71 (72): 9 Sind L R 137.

[13] Smallness or largeness of deposit is one of the factors in determining whether there was deposit in reality, although it goes by that name in contract. (Vol 3) 1916 Mad 584 (586) * (Vol 20) 1933 Nag 223 (224).

[See however (Vol 32) 1945 All 70 (75, 76): I L R (1944) All 743 (DB). (Deposit of earnest money with vendor as guarantee for performance of contract to be forfeited on breach of vendee—Contract failing through purchaser's default—Vendee is not entitled to return of earnest money—Application of this principle does not depend upon the proportion of earnest money to the sale price.)]

[14] Evidence should decide what is "earnest money" in the absence of written agreement. (Vol 9) 1922 All 478 (478) (DB).

[15] Question whether sum of money paid is a deposit to be forfeited or penalty is question of fact to be determined on facts of each case. (Vol 3) 1916 Mad 584 (586).

[16] Where the vendor neither alleges nor proves that the advance is earnest money and it is merely treated as part payment of purchase money in the account books of the vendor it is not a deposit in the strict sense of the word. (Vol 15) 1928 Mad 326 (327) (DB).

[17] In a suit for damages upon a contract which provides for the forfeiture of the deposit money, where the plaintiff sues for more than the amount of deposit forfeited on the ground of insufficiency of the forfeited

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amount to cover the actual loss incurred, the plaintiff is entitled to claim only the difference between the loss incurred by him and the deposit money. (Vol 3) 1916 Mad 485 (485) : 38 Mad 801 (FB). (On appeal from 1913 M W N 1023.)

[18] In a suit to recover money advanced towards a contract for the supply of goods the party making the advance is not entitled to interest from the date of the advance on the ground that the contract was not performed, when the contract did not provide for it and when no demand was made before suit. (Vol 14) 1927 Mad 99 (100) : 50 Mad 94 (FB).

[19] The incidents of earnest-money have no application to a contract when money is advanced to supplier on the understanding that the original advance was to be adjusted immediately or in the final settlement. The purchaser is entitled to the balance remaining with the supplier. (Vol 14) 1927 Nag 281 (282 283).

[20] Agreement to purchase—Mere fact that deposit is demanded implies that if the contract is broken it should be forfeited. (Vol 25) 1938 Mad 246 (247).

[21] Where the conditions of sale of land by a Town Improvement Trust were that 10 per cent. of the purchase money was to be paid immediately and that on failure to pay the remainder in a fixed time, the property was to be re-sold : *Held*, that the trust was not entitled to the difference in price resultant on re-sale but only to the 10 per cent. deposit. (Vol 2) 1915 All 388 (389) : 38 All 52 (DB).

[22] Where a lease provides that the lessee shall be entitled to make alterations on the premises, subject to replacing them and, as security for replacing the alterations and rent, shall deposit certain amount which would be liable to be forfeited in case of non-observance of the terms, the clause relating to forfeiture does not amount to a stipulated penalty. In case of breach, in a suit by the other party for damages, credit for the amount forfeited must be given. Only the difference between the actual loss and the amount forfeited can be recovered. There is no difference between a suit for damages for breach of contract and a suit merely for value of damages caused. (Vol 24) 1937 Rang 357 (358).

[23] For recovery of earnest money, see also under S. 18 (d) of the Specific Relief Act.

13. Forfeiture of salary. — [1] A stipulation in a contract of service that a servant should pay by way of damages double his daily wages for absence without leave is a penalty. (Vol 6) 1919 Nag 95 (95) (DB).

[2] Where the plaintiff, a monthly hired workman in the service of the defendant Company, agreed that he should give 15 days' notice before leaving the company's service and in default, forfeit all arrears of wages, there was nothing illegal, nothing contrary to public policy in the stipulation. The plaintiff, by leaving the service without giving the required notice, forfeited all the wages that had not become payable though due to him. S. 74 had no application to the case. (1898) 2 Cal W N 687 (688, 689).

[3] Contract of service — Stipulation that employee shall pay £250 as liquidated damages in case he left service before a fixed period — Breach of contract by employee—Suit for damages—*Held* that the Court could award the full sum stipulated without proof of actual damage or loss and that the lower Court's assessment of damages at Rs. 900 was unreasonably small — Rs. 2000 awarded as the proper sum. (1885) 11 Cal 545 (550) (DB).

14. Breach of promise of marriage. — [1] Breach of promise of marriage — Parents promising to return double the value of the gifts given to the girl

at the betrothal—Courts should grant reasonable compensation only. (Vol 20) 1933 Rang 198 (198) : 11 Rang 143 (DB).

[2] It is doubtful whether the full amount named in the agreement should not be given. (Vol 3) 1916 Low Bur 45 (47) : 8 Low Bur 399 (DB).

15. Pledge. — [1] The agreement that the pledge should become irredeemable if not redeemed after three months is not a stipulation by way of penalty. Even if it were an unfair agreement that would not in itself constitute it an agreement by way of penalty unless perhaps it could be shown that the value of the thing pledged was so very much larger than the amount of the loan that it would become obvious that the clause is really inserted as a means of bringing pressure upon the pledger to repay the loan within the contracted time. (Vol 26) 1939 Rang 413 (415, 416).

16. Compromise decree. — [1] A compromise being an agreement is subject to S. 74 and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree. (Vol 24) 1937 Mad 234 (235) (Vol 30) 1943 Pesh 33 (36) (DB) (Vol 33) 1946 Sind 150 (151, 152) : ILR (1946) Kar 132 (Vol 33) 1943 Sind 247 (250) : ILR (1943) Kar 245 (DB) (Vol 25) 1938 Sind 185 (187) (DB) (Vol 24) 1937 Nag 413 (415) (Vol 20) 1933 All 252 (254) : 55 All 334 (FB). ((Vol 11) 1924 All 689 : 46 All 571, Overruled.) (Vol 13) 1926 All 278 (280) (DB) (Vol 12) 1925 Mad 264 (264) (Vol 5) 1918 Mad 1807 (1809) (DB) (Vol 1) 1914 Mad 18 (18) (DB).

[But see (Vol 13) 1926 Pat 122 (125) (DB).]

[2] The true test for deciding the question whether the provision relating to the payment of a larger amount than the amount decreed on compromise on default by the judgment-debtor to perform any of the conditions of the decree is or is not a penal clause depends on a determination of the question whether or not the larger amount was actually due to the decree-holder at the time of the compromise; in other words, whether the decree-holder is merely withdrawing a conditional concession granted by him to the judgment-debtor or whether he is attempting to recover an amount which was not actually due to him. (Vol 14) 1927 Lah 659 (662).

[3] Where a consent decree provides that in default of payment by the defendant on certain date of a certain smaller sum of money than is claimed to be due, the defendant shall pay to the plaintiff the larger sum claimed and which is really due plus the costs of the suit with interest at 9 per cent. per annum, time is not only the essence of such contract but it is also its whole consideration and such decree cannot amount to a penalty. (Vol 16) 1929 Sind 98 (100, 102) : 23 Sind LR 375 (DB).

[4] Compromise mortgage decree—Provision to pay by instalments—In default whole amount realisable by sale of property without getting final decree—Instalment due on a particular date not paid — Permission to deposit money within three days granted—Money accordingly deposited—Notice issued to decree-holder — *Held*, judgment-debtor could not derive benefit of O. 34, R. 4 (2), Civil P. C. — Further held that provision to sell property in case of default in payment of instalment, not being penal, could not be relieved against. (Vol 21) 1934 Oudh 44 (45) : 9 Luck 387 (DB).

[5] Where in execution of a consent decree, the executing Court decides that a certain clause in the decree is not penal and does not fall under S. 74 of the Contract Act, and there has been no appeal from the decision, the question cannot be gone into in subsequent execution, even though reliance is placed not on S. 74 of Contract Act but generally on S. 47 of Civil P. C. (Vol 33) 1946 Sind 150 (151, 152) : ILR (1946) Kar 132.

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17. Chit fund. — [1] Terms of a chit fund can be penal. (Vol 14) 1927 Mad 1105 (1107).

[2] In order to determine whether a clause in a bond by the bidder in the case of a chit fund transaction is a penalty or not, it is irrelevant to consider whether the amount of the chit that he buys and the amount of the instalments that he undertakes to pay are or are not the same. To hold that the obligation to pay the lump sum on failure to pay an instalment is a penalty would have the effect of relieving the purchaser of the chit fund from his obligation to carry out the contract that he has made and to pay the consideration that he has offered at the time of the auction. It can make no difference that the amount of the bond is larger than the amount of the chit fund. (Vol 22) 1935 Mad 385 (386) (DB).

[3] Chit fund—Subscriber buying the chit—Security bond in favour of stake-holder — Provision to pay all future instalments in lump on default to pay any, not penal. (Vol 20) 1933 Mad 657 (658) (DB) (Vol 20) 1933 Mad 252 (255).

[4] Where a chit agreement provided that in case the subscribers failed to pay their subscriptions regularly, they were not only to forfeit the dividend but were also to pay the whole amount on demand with interest thereon from the date of auction: *Held*, that the agreement was not penal. (Vol 9) 1922 Mad 67 (69) (DB) (Vol 20) 1933 Mad 725 (726).

18. Landlord and tenant. — [1] *Kabuliat* — Covenant to pay higher rent if the lessee continues in possession after the term provided by the *kabuliat* expires—Case does not come within the meaning of S. 74 because it is not an attempted enforcement of the payment of a sum of money on failure to perform an act which the party has contracted nor a penalty payable on the performance of an act forbidden by the contract. (Vol 15) 1928 Pat 62 (63) (Vol 21) 1934 All 115 (116, 117). (Owner notifying tenant of enhancement in rent—Tenant vacating premises after three months of being notified is liable to pay enhanced rent but not for damages for breach of contract, as he did not break any contract.) (Vol 16) 1929 Pat 717 (720) : 9 Pat 487 (DB) (Vol 13) 1926 Pat 122 (123, 124) (DB) (Vol 5) 1918 Pat 269 (269). (A provision in a lease for enhanced rate of rent if the tenant holds over after the expiry of the term is valid.) (1913) 17 Cal L Jour 590 (592) (DB).

[But see (Vol 9) 1922 Pat 240 (241) (DB) (Vol 6) 1919 Cal 230 (231) (DB) (Vol 1) 1914 Lah 186 (187) (DB) (1913) 18 Cal L Jour 95 (97) (DB) (1895) 22 Cal 658 (663) (DB). (Rampini, J. dissenting that the question was not for compensation for breach of contract, and did not come within the purview of S. 74, but for rent at a rate which the defendant had agreed to.)]

[2] Landlord and tenant — Increased rent reserved in case lessee commits breach of covenant in lease deed — Such increased rent is not penalty but is in nature of liquidated damages — Acceptance of original rent by lessor with knowledge of breach — He does not lose his right to recover higher rent subsequently, though he cannot recover for periods for which he has already received lower rent — Even if it is penalty, Courts cannot relieve against it. (Vol 22) 1935 Mad 335 (337) : 58 Mad 856.

[3] A stipulation for payment of interest on non-payment of rent within a certain time is not always penal. (Vol 12) 1925 Cal 722 (723) (DB).

[4] In absence of proof of coercion or undue influence a tenant is liable to pay the rent with the interest provided in the *kabuliat*. (Vol 6) 1919 Cal 332 (333).

[5] Where a clause in the lease provided that interest at a certain rate per month should be paid in default,

S. 74 does not apply. (1910) 13 Cal L Jour 593 (594) (DB) (Vol 18) 1931 Cal 772 (772). (Interest and damages payable on default — Stipulation even if penal will not be relieved against.) (Vol 8) 1921 Cal 199 (201) : 48 Cal 93 (DB) (Vol 7) 1920 Cal 898 (899) (DB). (A landlord is entitled to recover interest at the rate stipulated in the contract though the rate is penal, hard and unconscionable.)

[6] Although the Courts should not lightly interfere with contracts between landlords and tenants in case of permanent *mokarrari* leases, a stipulation to pay 75 per cent. interest besides full damages is an unconscionable one and should not be enforced. (Richardson J. dissenting :—Stipulation ought to be enforced according to its true construction. The mere fact that the interest is high is, in the circumstances, no ground for relief.) (Vol 3) 1916 Cal 166 (168) (DB) (Vol 7) 1920 Pat 97 (102) : 5 Pat L Jour 302 (DB). (Provision for excessive mesne profits on failure to surrender on expiration of lease can be relieved against.) (Vol 4) 1917 Cal 737 (740) (Vol 4) 1917 Mad 162 (166) : 40 Mad 603 (FB). (The provision for the payment by the tenant of any damages that may be fixed by the landlord for cutting trees on the holding or their value is penal.)

[7] Stipulation to forfeit 6 months' rent, held as deposit, on breach of terms held not penal as S. 74 does not apply to forfeiture of deposit. Unreasonableness of the amount is the test of penalty. (Vol 5) 1918 Mad 36 (37) (DB).

[8] Provision in *kabuliyat* for a certain rate of interest in case of single default and enhanced rate in the event of consecutive defaults is penal. (Vol 21) 1934 Pat 16 (17).

[9] Paddy rent payable by fixed time — Stipulation to pay half as much again in default is stipulation by way of penalty — Landlord will get only reasonable compensation. (Vol 18) 1931 Cal 111 (111) : 58 Cal 84 (DB).

[10] A covenant for re-entry on alienation by a lessee is not a penalty. (Vol 6) 1919 Mad 12 (13) : 42 Mad 654 (DB).

[11] Where there was a contract for the sale of a ryoti land with transferable and heritable rights and title was clear and the vendee resiled from the contract, the vendor was deemed entitled to receive reasonable compensation for the breach, irrespective of the fact whether he sustained any actual loss or not. (Vol 16) 1929 Mad 783 (784).

[12] Deposit in a lease contract interest on which is to be credited towards rent and the deposit to satisfy arrears of rent is no legal deposit where there was no recitation of forfeiture in the contract. (Vol 16) 1929 Mad 817 (818, 819) : 53 Mad 141 (DB).

19. Penal stipulations — Illustrative cases. —

[1] Where the agreement stated that "if I fail to pay agreeably to the condition written, then the remission made by you under the amicable settlement is not to hold good", it will be a stipulation by way of penalty. (1861) 8 Moo Ind App 239 (261) (PC).

[2] Usufructuary mortgage — No interest on principal—On default of mortgagor to deliver possession of a small part of property, simple interest on whole principal payable — On default of mortgagor to pay simple interest within one year, compound interest payable : *Held* that stipulation for payment of simple interest and compound interest on the entire sum advanced on mortgagor's failure to deliver only $\frac{1}{4}$ th property mortgaged, was unconscionable. (Vol 19) 1932 Lah 252 (253) : 13 Lah 542 (DB).

[3] Vendee agreeing that in case of default of payment to the prior mortgagees by the mentioned date, he would be liable to pay Rs. 15,000 as damages to the vendor : *Held* that the sum was in the nature of a penalty. (Vol 21) 1934 All 406 (422) : 56 All 766 (FB).

Party rightfully rescinding contract entitled to compensation.

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

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[4] Mortgage — Mortgagee in possession to appropriate rents and profits (net income of Rs. 250 per year) in lieu of interest — Stipulation that on default in payment of principal on due date, mortgagee would be entitled to usufruct plus interest at 1 p.c. p.m.—Stipulation held penal. (Vol 18) 1926 Nag 473 (474).

[5] Defendant agreeing to pay at Rs. 10 per month and at Rs. 15 on default for four consecutive months—Provision held penal. (Vol 8) 1921 Cal 175 (176) (DB).

[6] Contract to lend paddy — Interest in paddy and whole to be finally converted into money — Rate of paddy varying in different years — Contract is penal. (Vol 22) 1935 Mad 899 (902) (DB).

[7] Mining rights in land sold by its owner — Sale deed providing that vendor would pay land assessment, and in default, vendee by paying same would be absolute owner of property — Covenant was penal. (Vol 25) 1938 Mad 304 (305) (DB).

[8] Where a plaintiff borrowed money on a mortgage bond which stipulated that the debt was to be satisfied within a specified period, failing which the creditors were to take possession of the mortgaged land outright for Rs. 600 made up of Rs. 300 principal and Rs. 300 penalty for breach of contract, and in the absence of proof of conduct of the parties to favour the supposition that when they executed the document they really believed that the right of redemption would be extinguished on failure of the stipulated payment, held that an extortionate stipulation was a penalty. (1872-1892) 1872-92 Low Bur Rul 645.

[9] Agreement for the due maintenance of village irrigation — Samudyam land to be under management of main pattadar — Kists thereon to be paid by several pattadars proportionately — On default, double to be recovered from defaulters—Clause held penal. (Vol 30) 1943 Mad 593 (602).

[10] Compromise of doubtful rights — Agreement by defendants to pay Rs. 27,500 if they failed to pay Rs. 12,500 by certain date — Stipulation held in the nature of penalty. (1909) 3 Ind Cas 933 (934) (DB) (Mad).

[11] Defendants agreeing with plaintiff not to cut trees in a forest for 10 years—In case of default by any of them they agreed to pay a penalty of Rs. 500—*Held*, case fell under S. 74. (1899) 3 Cal W N 43 (45) (DB).

[12] Provision for surrender of possession of field in case default in the payment of yearly maintenance was made — Provision is penal. (Vol 18) 1931 Nag 60 (63) : 27 Nag L R 24.

[13] When one of the terms of the agreement amounts to a bonus to the seller on every broken contract, and it is accordingly an advantage to the seller to have every contract broken and to delay making a claim for the breach as long as the law of limitation will allow, such a term operates as a penalty for breach of contract within the meaning of S. 74. (1892-96) 1892-96 Upp Bur Rul 291.

[14] Compromise during execution — Decree-holder agreeing to accept smaller amount in full satisfaction if paid within two months or on default the decree-holder

to proceed with execution without any objection being raised by judgment-debtor — Time is the essence of the contract and the stipulation is not penalty — Court will not relieve against forfeiture on the judgment-debtor's default. (Vol 24) 1937 Pat 542 (544) : 16 Pat 395 (DB).

[15] Where a mortgagor voluntarily and in pursuance of a deliberate bargain, enters into an agreement to pay commission to the mortgagee and pays the amount, the mortgagor cannot avoid his liability for the commission paid. (Vol 2) 1915 Oudh 31 (39) (DB).

[16] Where it is mentioned in the compromise decree that a certain amount was due to the plaintiff and that it would be paid by the execution of a sale-deed in his favour, the agreement transferring the property for the payment of the decretal amount cannot be called a stipulation by way of penalty. (Vol 29) 1942 Oudh 1 (5) : 17 Luck 249 (DB).

[17] Right of re-sale stipulated under certain conditions—Not penal. (Vol 9) 1922 Oudh 265 (265) : 25 Oudh Cas 186.

[18] On partition a coparcener agreed to get an annuity on failure of which he was to resume his share : *Held* the provision was not penal. (Vol 12) 1925 Mad 84 (85).

[19] Adjustment of decrees providing that decree would be satisfied on payment of a smaller sum than originally claimed—Portion paid immediately—Balance to be paid within fixed date—Stipulation that on default decree-holder will realise it (decree) by execution — Default : *Held* that in absence of express stipulation that in case of non-payment amount remitted would not be allowed, whole amount of original decree could not be claimed in execution by way of penalty. ('37) 65 Cal L Jour 210 (211).

SECTION 75 — Note 1

[1] The damages are awarded as a pecuniary compensation for the injury which a party sustains as a result of a default by the other party — The party to be entitled to compensation must have done something to his own prejudice in the performance of his part of the contract — Where, therefore, the vendor had no goods to deliver, he suffered no injury by the breach of the vendee refusing to take delivery and was not entitled to any damages. (Vol 21) 1934 Nag 129 (132).

[2] When a contract for sale does not provide a penalty, the right of the seller to damages, on the failure of the buyer to complete payment, will arise under S. 73 or S. 74 and is something quite independent of the amount of any part payment made. (Vol 29) 1942 Sind 37 (39) : ILR (1941) Kar 495 (DB).

[3] Contract — Damages — Anticipatory breach — Injured party can either rescind it or elect to treat it as continuing—Damages are to be assessed not from date of breach but from date on which it was rescinded. (Vol 24) 1937 Nag 289 (293) : I L R (1938) Nag 81.

[4] Mahomedan marriage — Negotiations concluded by *pan rusum*—Subsequent discovery that bride suffered from epileptic fits—Bridegroom's father can rescind contract but on rescission cannot recover damages for *pan rusum* expenses as the damages arise out of rescission and not non-fulfilment. (Vol 24) 1937 Nag 270 (271, 273) : I L R (1937) Nag 299.

CHAPTER VII.—[SALE OF GOODS. SS. 76 TO 123]

Repealed by the Indian Sale of Goods Act, 1930 (3 [III] of 1930), S. 65

CHAPTER VIII.

OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration.

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Section 75 (contd.)

[5] If, after a voidable contract has been fulfilled, one of the parties discovers facts which if known earlier would entitle him to rescind the same without legal proceedings, he is not bound to sue for a formal rescission of the same before he can claim damages. ('82) 1882 Pun Re No. 60, p. 175 (176) (DB).

[SECTIONS 76 to 123 — Repealed.]

SECTION 124 — Synopsis

1. Scope.
2. Contract of indemnity.
3. Implied contract of indemnity.
4. Contract of indemnity—Effect.
5. Contract of indemnity—Suit on.
6. Contract of indemnity—Discharge of.
7. Limitation—See Limitation Act, Art. 83.

1. Scope.—[1] The expression 'contract of indemnity' in S. 124 has been used in a narrow sense and the general law about contracts of indemnity is much wider than the contract of indemnity as defined in the Contract Act. A contract of fire insurance or marine insurance is always a contract of indemnity though under the Contract Act, it would more properly come under S. 31 defining contingent contracts. (Vol 28) 1941 Lah 68 (69) (DB).

[2] Section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier. (Vol 29) 1942 Bom 302 (303) : ILR (1942) Bom 670 (Vol 27) 1940 Bom 315 (316) : I L R (1940) Bom 552 (DB).

[3] Right to indemnity given by original contract should always be distinguished from right to damages arising from breach thereof. (Vol 15) 1928 Mad 43 (44).

[4] In a contract of indemnity there is no privity of contract between surety and debtor while in the case of a contract of guarantee, surety, creditor and principal debtor are parties to the contract. (Vol 24) 1937 Oudh 19 (20) : 12 Luck 484 (DB).

[5] Forbearance to sue principal at the surety's request is sufficient consideration for promise by surety to pay the amount himself. ('11) 2 Mad W N 145 (145) (DB).

[6] Sections 124 and 125 which deal with the contract of indemnity lay down only the rights of the promisee; the rights of the promisor are not mentioned —

It is a well-known principle of law that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. This principle is based on natural equity and is of general application. It is an essential part of the law about indemnity and the Contract Act does not impair it. (1890) 14 Bom 299 (303) (DB).

2. Contract of indemnity. — [1] Where property is transferred by a vendor to a vendee with a direction to the vendee to pay off a third person, the transfer may amount to a contract of indemnity. (Vol 25) 1938 All 297 (298, 299) : I L R (1938) All 500 (F B) (Vol 26) 1939 Pat 194 (197) : 17 Pat 751 (DB). (Covenant to pay off prior mortgage debt by vendee.) (Vol 5) 1918 Mad 1185 (1186) (DB).

[2] Plaintiffs executing and registering ijara deed in favour of defendants — Defendants agreeing to pay off mortgages executed by plaintiffs — Ijara deed held to be a contract to pay off mortgages and not a contract of indemnity. (Vol 25) 1938 Pat 275 (277) : 17 Pat 538 (DB).

[3] An agreement between the seller and the purchaser whereby the consideration for the sale is to be paid by the purchaser to a creditor of the vendor amounts to a contract of indemnity. (Vol 22) 1935 Nag 147 (148).

[4] The clause in a registered sale-deed that, "If upon the objection of any one any damage or loss accrues to the vendee, the vendor will be liable" amounts to a contract of indemnity and is not a mere covenant for title and quiet possession. (Vol 16) 1929 Lah 388 (388).

[5] Mother and minor daughter entering into contract with firm company — Mother agreeing that minor should do service for company failing which, mother and daughter would compensate loss suffered by Company — Daughter failing to fulfil contract — Suit by Company to recover loss: *Held*, this was not a contract of indemnity by the mother. (Vol 25) 1938 Rang 359 (359) (DB).

[6] Surety's contract with creditor, if not collateral but creating original liability, is contract of indemnity. (Vol 5) 1918 Pat 345 (346) : 3 Pat L Jour 396 (DB).

[7] Contract between insurance company and its employee — Increment in salary to be proportionate to increase of business — Contract held could not be construed as contract of guarantee. (Vol 26) 1939 Lah 509 (510).

3. Implied contract of indemnity. — [1] A right to indemnify generally arises from contract, express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or equity there is an obligation upon the one party to indemnify the other. (Vol 33) 1946 Mad 472 (475) : ILR (1947) Mad 58 (DB).

*Rights of indemnity-
holder when sued.*

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Section 124 (contd.)

[2] It is a general principle of law that when an act is done by one person at the request of another which act in itself is not manifestly tortious to the knowledge of the person doing it and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. (Vol 25) 1935 P C 191 (192, 193) : I L R (1938) Bom 502 : 65 Ind App 286 : 32 Sind L R 786 (P C) & (Vol 33) 1946 Mad 472 (477) : I L R (1947) Mad 58 (DB).

[3] Purchaser buying properties subject to charge impliedly undertakes to indemnify owner against incumbrance. (Vol 21) 1934 Mad 1 (4) : 57 Mad 218 (DB).

4. Contract of indemnity — Effect.—[1] Indemnity clause in a mortgage deed gives a right to the mortgagee to proceed against the mortgagor. (1921) 63 Ind Cas 108 (108) (DB) (Lah).

[2] In a suit on the contract of indemnity the indemnifier must pay taxed costs and also actual costs and reasonable expenses of the litigation. (Vol 16) 1929 Lah 588 (389).

[3] Vendor undertaking to indemnify the vendee against litigation — Vendee can claim pleader's fees unless they are unreasonable. (Vol 8) 1921 Mad 544 (545) : 43 Mad 898 (DB).

[4] Manager of Hindu joint family cannot claim money, misapplied by him, from members of the family who had contracted to indemnify him for debts incurred for family expenses. (Vol 8) 1921 P C 109 (112) (PC).

[5] Appellant giving letter written on stamped paper to another person desiring him to join in the appeal as co-appellant and undertaking to indemnify him from costs — Letter in the handwriting of appellant and sealed with his seal, though not signed, exonerates co-appellant from demand of costs. (1859) 7 Moo Ind App 148 (159) (PC).

5. Contract of indemnity — Suit on. — [1] Indemnifier cannot sue debtor in his own name for want of privity of contract unless he gets assignment from promisee while surety can. (Vol 13) 1926 Mad 544 (551) : 49 Mad 156 (DB).

[2] Contract between A and B—B agreed to indemnify A—A's creditor cannot sue B. (Vol 23) 1936 Bom 344 (345) : 60 Bom 954.

[3] A creditor who is not a party to a compromise among the debtors, which contains a contract of indemnity, cannot institute a suit upon that contract. (Vol 19) 1932 Mad 457 (457) : 55 Mad 436 (DB).

[4] Cause of action for claim against promisor accrues to promisee when promisee is damaged. Suit before actual loss is premature. (Vol 27) 1940 Bom 161 (162, 163) (DB) & (Vol 22) 1935 Lah 974 (974). (Remote chance of being deprived of anything will not entitle person to realise damages from promisor or indemnifier.)

[5] Where under the terms of a sale-deed, the consideration is to be paid by the vendee to a creditor of the vendors, the agreement by the vendee is a contract of indemnity. The indemnifier cannot be called on to make good his promise until the indemnified has incurred actual loss. (Vol 22) 1935 Nag 147 (148).

[6] Suit for specific performance of a contract to sell — Property agreed to be sold mortgaged to a third person — Plaintiff who had agreed to purchase the property got a letter whereby the defendant agreed to indemnify the plaintiff against all claims by third person : Held that it is not necessary that actual damage should be caused before plaintiff can act. (Vol 13) 1926 Mad 597 (599).

[7] Where the defendant's promise to indemnify is absolute one, an action can be brought the moment there is failure of performance and a plea for *non damnificatus* would be bad. (Vol 1) 1914 Mad 555 (556) : 38 Mad 791 (DB).

[8] Mortgagor paying mortgage amount to mortgagee's alleged heir on indemnity by A can sue A if mortgagee's rightful heir obtains decree against property even before he pays decretal amount. (Vol 6) 1919 All 279 (280) : 41 All 395 (DB).

[9] Where in a suit under a contract or right of indemnity, the real sum due by defendant to plaintiff, for which the latter has obtained a decree, is less than the real loss incurred by defendant, defendant cannot ask for a decree on a third party for this latter sum and the case must proceed on the claim for indemnity as regards that first mentioned sum i. e., the sum for which a decree has been passed. (1921) 59 Ind Cas 16 (16) (Bom).

[10] Assignment of debt — Assignor agreeing to indemnify — Suit against the debtor by the assignee dismissed—He is entitled to be indemnified—Failure to examine a witness in the suit, no bar to the assignee's right of action on the indemnity. (Vol 6) 1918 Mad 353 (359).

6. Contract of indemnity — Discharge of. — [1] R indebted to B and B to H — R paying H with B's authority—H giving credit to B and letter of indemnity to R against losses—Letter is discharged by B obtaining credit from R for the money. (Vol 7) 1920 P C 121 (123) (P C).

7. Limitation. — See Limitation Act, Art. 83.

Section 125 — Note 1

[1] Section 125 is by no means exhaustive. The indemnity-holder has other rights besides those mentioned in S. 125, which deals only with his rights in the event of his being sued. (Vol 29) 1942 Bom 802 (803) : I L R (1942) Bom 670 & (Vol 33) 1946 Cal 159 (161) : I L R (1944) 2 Cal 318.

[2] If the indemnity-holder has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off. (Vol 29) 1942 Bom 302 (303) : I L R (1942) Bom 670.

126. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives "Contract of guarantee," "surety," "principal debtor," and "creditor." the guarantee is called the "surety;" the person in respect of whose default the guarantee is given is called "the principal debtor;" and the person to whom the guarantee is given is called the "creditor." A guarantee may be either oral or written.

Section 125 (contd.)

[3] Purchaser buying properties subject to charge impliedly undertakes to indemnify owner against incumbrance. (Vol 21) 1934 Mad 1 (4, 5) : 57 Mad 218 (DB).

[4] Part of purchase money left with vendee for paying vendor's creditors.—It is not covenant by way of indemnity.—On vendee's default, vendor can sue vendee without actual loss. (Vol 6) 1919 Mad 367 (368) (DB). (See also under S. 55 (5) (b), T. P. Act.) * (1918) 36 Mad 848 (352) (DD). (Do.)

[5] Indemnity or guarantee need not be in writing.—It may be inferred from conduct.—If person who guarantees on behalf of firm has no authority, he is personally liable. (Vol 24) 1937 Sind 50 (50, 51) (DB).

Compelled to pay.—[6] Amount which can be recovered under S. 125 is amount which has been paid, whether under compulsion of adjudication or under terms of proper compromise.—Measure of damages is extent to which promisee has been damaged. (Vol 6) 1919 Nag 126 (127, 128) : 15 Nag L R 78.

[7] Indemnifier can be asked to indemnify before person to be indemnified has incurred loss—"Compelled to pay" need not be construed as "already paid." (Vol 31) 1944 Pat 185 (187, 188) : 22 Pat 65 (DD). (See also under S. 55, T. P. Act.) * (Vol 30) 1943 Mad 360 (362). (Suit by plaintiffs in apprehension of damage, calling upon defendants to make good their liability and thus save plaintiffs from harm to their properties is maintainable even though plaintiffs had not suffered any damage.) * (Vol 4) 1917 Mad 871 (875) (DB). (Actual loss of possession is not necessary to sustain, when title is impaired, action for breach of contract of indemnity for loss of possession.) * (1912) 34 All 429 (433) (DB). (Vendee's covenanting to pay sum due on mortgage debt by vendors.—Covenant not fulfilled.—Mortgagee suing and obtaining decree.—Suit by vendors for breach of covenant.—It is not necessary to show real loss.)

[But see (Vol 6) 1919 Nag 126 (127) : 15 Nag L R 78. (Suit by surety on contract of indemnity before he has made payment and consequently before he is damaged, is premature.)]

Liability of promisee.—[8] Sum recovered by trustee in bankruptcy of a promisee from promisor in an indemnity contract should be applied exclusively to discharge claim agreed to be indemnified. (Vol 16) 1929 Cal 208 (209) : 56 Cal 262.

[9] Plaintiffs were owners of house and lands which were mortgaged. Lands alone were sold to defendant who agreed to indemnify against claims of mortgagees by paying off his mortgage. Plaintiffs also mortgaged house to defendant for sum required to pay off prior mortgage. Money was left with defendant. On failure of defendant to pay off prior mortgage, house and the lands were sold in execution of the mortgage decree. Lands were freed by defendant. But the house was sold and was purchased benami by defendant. Plaintiffs sued defendant for breach of contract to indemnify him: Held, that the defendant was bound to return house to plaintiffs if it was purchased by him benami or, if not purchased benami, he was bound in damages. Plaintiffs were also entitled as damages to all costs to which they were put. (Vol 10) 1923 Mad 492 (496).

[10] Assignment of mortgages to creditor in satisfaction of debts undertaking to make good loss in case of dispute.—Sealing down of decrees obtained on mortgages.—Debtor liable to pay difference between full amount of bond and amount realised. (Vol 32) 1945 Mad 98 (99) : I L R (1945) Mad 491 (DB).

Costs.—[11] Liability for costs is implied in contract of indemnity. (Vol 31) 1944 Mad 211 (213) : I L R (1944) Mad 663 (DD).

[12] Promisee can recover costs properly incurred in resisting or ascertaining claim to which indemnity relates. (Vol 13) 1926 Nag 109 (114) : 22 Nag L R 49.

Rights of promisor.—[13] In a contract to indemnify, the promisor cannot impeach decree passed against promisee. (Vol 13) 1926 Nag 109 (113) : 22 Nag L R 49.

Rights of assignee.—[14] Guardian of minor widow executing indemnity bond in favour of debtor on his own and his minor son's behalf, charging joint family property against claims by minor widow.—On attaining majority, widow suing debtor for money alleging that payment to her guardian was without leave of Court.—Suit compromised and indemnity bond assigned to widow.—Widow can enforce indemnity bond.—She can proceed against properties charged in hands of purchasers who had purchased them after the execution of bond.—Bond cannot however be enforced against the son's interest in property. (Vol 31) 1944 Mad 457 (460, 462) : I L R (1944) Mad 867 (DB).

Limitation.—[15] Cause of action for claim against promisor accrues to promisee when the latter is actually damaged. (Vol 27) 1940 Bom 161 (162) (DB).

[16] Vendee agreeing to discharge mortgage on property purchased.—Default.—Cause of action for suit by vendor arises on date fixed in covenant or when fulfilment demanded.—But suit for specific performance is premature in absence of action by mortgagee or damage suffered. (Vol 20) 1933 Cal 641 (643) : 60 Cal 761.

[17] Article 83, Limitation Act, applies to personal contracts of indemnity and not to case of indemnity arising under charge. (Vol 21) 1934 Mad 1 (7) : 57 Mad 218 (DB).

[18] Vendee's covenanting to pay vendors sum due on mortgage-debt by vendors.—Covenant not fulfilled.—Mortgagee suing and obtaining decree.—Suit by vendors for breach of covenant.—It is not necessary to show actual loss.—Limitation runs from date of execution of deed. (1912) 34 All 429 (433) (DB).

[19] Where case depends on interpretation of "may be compelled to pay", S. 125 must be read along with Art. 83, Limitation Act. Cause of action arises only after damage is suffered. (Vol 22) 1935 Lah 974 (974).

SECTION 126 — Synopsis.

1. Scope.
2. Contract of guarantee—Meaning.
3. Contract of guarantee—Illustrations.
4. "Oral or written."
5. Guarantee for honesty.
6. Surety becoming principal debtor.
7. Contract of guarantee—Proof.
8. Limitation.

1. Scope. — [1] A surety bond in favour of the Court does not literally fall under this section as a "contract of guarantee." But principles underlying Ss. 133 to 141 may be applied thereto. (Vol 31) 1944

Section 126 (contd.)

Lah 428 (481) (DB) (Vol 26) 1939 Bom 28 (25) : I L R (1938) Bom 794 (DB).

[2] A guarantee is a contract to indemnify upon a contingency and the Court is to determine what contingency the parties intended when they executed the contract. (Vol 17) 1980 Cal 17 (19) : 57 Cal 764 (DB).

[3] Suretyship agreement, though supplementary to principal contract (i. e. if principal contract falls agreement of suretyship also falls) is separate and distinct. (Vol 27) 1940 Sind 199 (200) : I L R (1940) Kar 347 (D B).

2. Contract of guarantee—Meaning.—[1] The primary idea of suretyship is an undertaking to indemnify if some other person does not fulfil his promise. (Vol 28) 1986 All 327 (332) : 58 All 804 (FB).

[2] A contract of guarantee involves three parties, the creditor, the surety and the principal debtor, and a contract to which those parties are privy. The foundation is the contract between principal debtor and the creditor. Then there must be a contract between the creditor and the surety, by which the surety guarantees the debt. But if those are the only contracts the case is one of indemnity. In order to constitute a contract of guarantee, there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. (Vol 27) 1940 Bom 815 (316, 317) : I L R (1940) Bom 562 (DB).

[But see (Vol 8) 1921 Mad 530 (531) (DB). (There need not be privity between principal debtor and surety.)]

[3] There can be no contract without a liability enforceable at law. (Vol 5) 1918 Bom 197 (199) : 42 Bom 444 (DB).

[4] A contract of guarantee presupposes the existence of a "principal debtor" and no such contract can be made as regards a broker before a sale has taken place when there is no principal debtor in existence in respect of whose default the guarantee can be given. (Vol 21) 1934 Nag 163 (164) : 30 Nag L R 205.

[5] Implied request to surety by principal debtor is sufficient for contract of guarantee. (Vol 24) 1937 Oudh 19 (20) : 12 Luck 484 (DB).

[6] There is no complete contract if the nature of security is not specified. (34) 1934 Mad W N 1388 (1930) (DB).

[7] Agreement to pay on failure of others to pay constitutes contract of guarantee. (Vol 19) 1932 Nag 62 (65) : 28 Nag L R 325 (DB).

3. Contract of guarantee — Illustrations — *Promissory note.* — [1] A writing to S, in presence of D, please lend Rs. 1200 to D. "There will be no trouble (Nuks) in the payment of your money. Be assured, if there be any trouble, I hold myself responsible"—Privity between these parties proved — This is contract of guarantee and not contract of indemnity—A is liable to S as surety to discharge liability in default by D, the principal debtor. (Vol 24) 1937 Oudh 19 (20) : 12 Luck 484 (DB).

[2] Father mortgaging his separate property and having benefit of whole mortgage loan—Son made party to mortgage deed as party of second part not described as surety, but joining at the request of the mortgagee—Son held in reality to be a surety and entitled to benefit of security to the extent of his contribution towards mortgage debt. (Vol 29) 1942 Mad 628 (629) : I L R (1942) Mad 851 (DB).

[3] Money given by A to B for investment on security of immovable property—B instead of doing so lending it to C on promissory note drawn by C in name of B—B endorsing it to A and informing him that he would come to him with borrowers and clear loan — B

held liable as endorser as well as guarantor of payment. (Vol 26) 1939 Mad 848 (849) (DB).

[4] A mere recommendation by C that A should buy goods of B will not entail on C the consequences that might flow from his guaranteeing that A will not suffer any loss if he takes up B's offer of sale. (Vol 14) 1927 Mad 62 (65, 66) (DB) (Vol 2) 1915 Mad 528 (528) (DB).

[5] Employment contract between insurance company and employee—Increment in salary to be proportionate to increase of business—Contract, held could not be construed as one of the guarantee and that securing of business was not condition precedent to accrual of salary. (Vol 26) 1939 Lah 509 (510).

[6] Trustee not undertaking any personal liability to creditors is not a surety. (1907) 30 Mad 285 (240) (DB).

[7] A person who writes to a creditor under his signature that he shall be responsible for the payment of the debt due to him from another person stands in a position of a principal debtor and not of a surety. (Vol 24) 1937 Pat 410 (411) : 16 Pat 27 (DB).

[8] Relative of judgment-debtor offering cheque to decree-holder in satisfaction of claim — Relative is not surety. (Vol 28) 1941 Pesh 6 (7) (DB).

[9] Person promising to pay extra rate of interest in consideration of creditor giving time to debtor, without any liability on part of debtor, is not surety. (Vol 17) 1930 All 548 (544) (DB).

[10] Persons who are jointly and severally liable on promissory notes are not sureties. One of two joint promisors paying whole debt cannot claim lien on shares of another held by creditor. (Vol 20) 1933 Mad 39 (42) : 55 Mad 949 (DB).

[11] Where on arrest of A by a decree-holder for realising decree-debt, B, relation of A, gives Government promissory notes as security for fulfilment of obligation under decree, there is neither contract of guarantee as contemplated by S. 126, nor any personal liability as surety under S. 145, C. P. C., (1908). This creates only equitable charge on G. P. Notes in favour of decree-holder to secure amount due under decree. (Vol 3) 1916 Cal 30 (30) (DB).

[12] Under a sub-brokerage contract, the sub-broker undertook to make good the loss arising out of the default of the constituents introduced by him. By a letter the sub-broker agreed to be liable for an ascertained amount due from the various constituents introduced by him and stipulated that the amount should be debited to his account:

Held that the contract embodied in the letter was neither a contract of indemnity nor a contract of guarantee. (Vol 27) 1940 Bom 815 (317) : I L R (1940) Bom 552 (DB).

[13] Where under the sub-brokerage contract the sub-broker was to get fifty per cent. broker's commission, to introduce constituents to the broker and to be answerable to the broker for the performance by the constituents introduced of their obligations, it was held that the contract was one of indemnity and not of guarantee and therefore the broker was under S. 135 entitled to compromise the amount due from the constituents without the consent of the sub-broker. (Vol 27) 1940 Bom 815 (317) : I L R (1940) Bom 552 (DB).

4. "Oral or written." — [1] A contract of guarantee need not necessarily be in writing. It may be expressed by word of mouth or it may be tacit or implied and may be inferred from the course of conduct of the parties. Chapter VIII is not exhaustive on the subject. (Vol 17) 1930 All 848 (849) (DB) & (Vol 24) 1937 Sind 50 (50) (DB).

5. Guarantee for honesty.—[1] There is a broad and substantial distinction between a surety for the payment of a debt and one for the honesty of a guardian and in order to find out whether a particular transaction

127. Anything done, or any promise made, for the benefit of the principal debtor, may be a *Consideration for guarantee.* sufficient consideration to the surety for giving the guarantee.

Illustrations.

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is *Surety's liability.* otherwise provided by the contract.

Illustration.

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

Section 126 (contd.)

belongs to the one class or the other, one will, in each case, have to refer to the terms of the bond itself and the circumstances of the case. (Vol 19) 1982 Pat 162 (164) : 10 Pat 94 (DB).

6. Surety becoming principal debtor. — [1] If on failure of principal debtor, the money is claimed from the surety and the surety executes a promissory note, he becomes a principal debtor. (Vol 32) 1945 All 233 (284, 285) : 1 L R (1945) All 117 (DB).

[2] Plaintiff and defendant originally creditor and surety — Subsequent agreement by which surety undertaking to pay sum unconditionally — Surety becomes principal debtor — Suit against him within three years of the agreement is maintainable even though the agreement has been entered into on failure of principal debtor to pay. ('35) 1935 All W R 492 (492, 493).

7. Contract of guarantee — Proof. — [1] Contract of guarantee as also the consideration for it must be strictly proved when they are relied upon. Due weight must be given to custom of merchants in drawing presumptions. (Vol 22) 1935 Pat 876 (879) (DB).

[2] Guarantor merely guaranteeing payment of debtor's debt is entitled to require debt to be proved against him — Debtor agreeing debt to be proved in particular way — Guarantor is bound by that mode of proof. (Vol 28) 1941 Bom 108 (119, 120) : 1 L R (1941) Bom 278 (DB).

8. Limitation. — [1] Section 128 of the Contract Act defines the liability of a surety but does not affect the statute of limitation. A payment by the principal debtor does not bind the surety for the purposes of limitation. (Vol 5) 1918 Cal 707 (710, 712) : 44 Cal 978 (DB).

[2] See also A I R Commentaries on the Limitation Act, 2nd (1942) Edition, Sch. I, Art. 65, Note 4.

SECTION 127 — Note 1

[1] The illustrations given in the Acts form no part of the Acts and are not absolutely binding on Courts (*Obiter* — Per Stuart G. J.) (1877) 1 All 487 (496) (DB).

[2] A contract of guarantee cannot be enforced unless there is some consideration for guarantee. (Vol 3) 1916 Oudh 284 (285).

[3] Consideration between debtor and creditor is good for guarantee — Not necessary that surety should receive consideration. (Vol 16) 1929 Lah 203 (204) * (Vol 16) 1929 All 72 (78) (DB).

[4] The word "done" in the section shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. (Vol 27) 1940 Oudh 346 (347) : 15 Luck 636 (DB).

[5] A binding promise to forbear is good consideration for a guarantee, though there be no contract by the

plaintiff to forbear. (1904) 81 Cal 242 (248) (DB)* ('79) 1879 Pun Re No. 120, p. 358 (359) (DB).

[6] Mere promise to release a claim against another is not a consideration for a guarantee of payment — But actual release of the claim is consideration. (Vol 3) 1916 Mad 1218 (1214) (DB).

[7] Suit for specific performance of a contract of lease to sell — Suit compromised and agreement entered into by the lessee for due observance of all conditions laid down in the lease one of which was for payment of purchase money by regular instalments — Subsequent to the registration of the agreement surety bond executed separately for the lessee properly discharging his liability : Held the surety bond was supported by consideration. (Vol 5) 1918 P C 226 (228) (P C).

[See however (1877) 1 All 487 (494) (DB). (Advance of money on hypothecation bond where the name of a person was mentioned as surety for the balance — Such person not a party to the bond but subsequently executing surety bond : Held there was no consideration for the surety bond under this section.)]

[8] Newly admitted partner acknowledging liability of partnership — There is consideration — Acknowledgment created new contract. (Vol 30) 1943 P C 147 (152) : 1 L R (1944) Kar (P C) 85 (P C). ((Vol 26) 1939 Pat 323, Reversed.)

[9] Arrest of certificate debtor under Bengal Public Demands Recovery Act III of 1913 — Release on surety bond provided by defendant : Held release of the certificate debtor was consideration for the surety bond. (Vol 24) 1937 Cal 625 (628) : 1 L R (1937) 2 Cal 698 (DB).

[10] Person embezzling money promising to repay the amount — Surety for the payment with the object of saving the former from prosecution though no specific understanding to that effect : Held the consideration was not illegal. (Vol 28) 1941 Oudh 598 (596, 597) (DB).

SECTION 128 — Synopsis

1. Scope.
2. Liability of surety.
3. Surety for minors.
4. Where the debt is unenforceable against the principal debtor.
5. Surety for a limited amount.
6. Joint family — Son's liability for father's surety debt.
7. Surety bond to Court.
8. Limitation upon liability provided by contract.
9. Suit against surety.
10. Burden of proof.
11. Limitation.

Section 128 (*contd.*)

1. Scope. — [1] The liability of a surety cannot form the subject-matter of a trust. (Vol 26) 1939 Bom 309 (311).

[2] A surety is not a necessary party to the suit against the debtor. (Vol 30) 1943 All 289 (291) : I L R (1943) All 598.

[3] The legislature which enacted the co-extensiveness of the liability of the surety with that of principal debtor may subsequently vary or modify that provision under a different Act. (1831) 5 Bom 647 (650) (DB). (S. 72, Dekkhan Agriculturists Relief Act XVII of 1879 — Extension of period of limitation in respect of agriculturists — No distinction between liability as principal and surety.)

2. Liability of surety. — [1] "Liability" means liability enforceable at law. (Vol 5) 1918 Bom 197 (199); 42 Bom 444 (DB).

[2] A surety who guarantees the performance of an agreement without consideration is not bound by his guarantee. (Vol 15) 1928 Bom 539 (545).

[3] Surety's liability is coextensive with that of principal debtor. ('42) I L R (1942) 1 Cal 11 (17) (DB) * (Vol 27) 1940 Bom 247 (249) : I L R (1940) Bom 387 (DB). (Liability is not alternative.) * (Vol 24) 1937 Rang 197 (198). (Surety guaranteeing payment and promising to execute new promote on failure — Failure to execute new promote — Surety is liable on old note.) * (Vol 21) 1934 All 525 (526) (DB) * (Vol 20) 1933 Lah 1024 (1026) (DB) * (Vol 20) 1933 Nag 237 (238). (Section 128 of Contract Act and S. 145, Civil P. C. should be read together.) * (Vol 16) 1929 Lah 393 (394). (Surety's liability is joint and several with principal debtor.) * (1903) 16 C P L R 76 (77) * (1879) 4 Cal L R 145 (147) (DB).

[4] Surety becomes liable only on contract of suretyship and not by mere fact of loan. He is liable for each loan as soon as it is made. (1911) 21 Mad L Jour 457 (460) (DB).

[5] The liabilities of principal and his surety though arising under the same transaction are distinct. (Vol 6) 1919 Cal 686 (687) (DB).

[6] A surety's liability depends upon the terms of his contract because his is a collateral obligation. (Vol 27) 1940 Cal 401 (402) : I L R (1940) 2 Cal 362 * (Vol 26) 1939 Bom 309 (312). (Entitled to insist on the strict adherence to the terms of his obligation.) * (Vol 18) 1931 Oudh. 430 (432) (D B) * (Vol 17) 1930 All 848 (851) (DB). (His liability cannot be enhanced beyond the proper meaning of his written engagement.) * (Vol 1) 1914 Sind 154 (157) : 8 Sind L R 112. (Guarantee-broker is not liable if seller suffers loss on account of his own unreasonable delay in re-selling goods.)

[7] Guarantee for advance made by the bank—Terms of guarantee wide enough to cover both discount advances as well as accommodation advances—Bank manager, as between whom and the bank, had no authority to grant accommodation advances, advancing such loans to principal debtor — Surety cannot plead that arrangement in defence. (Vol 17) 1930 P C 272 (273) (P C).

[8] Surety is liable not only for the principal but also for interest due under the contract. (Vol 22) 1935 Mad 748 (750) * (Vol 16) 1929 All 687 (688). (Liability of principal debtor for tort in regard to amount embezzled — Surety liable also for interest allowed thereon.) * (Vol 12) 1925 Sind 164 (166) : 19 Sind L R 287. (Surety for payment of interest—Not liable for post diem interest in a mortgage.)

[9] Death of principal debtor does not discharge the surety. (1923) 69 Ind Cas 557 (558) (Nag) * (Vol 11)

1924 Lah 428 (428) * (Vol 9) 1922 Nag 112 (112). (The decree need not specifically state the liability.)

[10] Surety for guardian of minor's properties is liable for his dealings with the entire properties even though some were not included in the petition for appointment. (1908) 12 Cal W N 481 (485) (D B).

[11] The liability of a surety for guardian of property is limited to the amount of his bond. (Vol 16) 1929 Pat 626 (629) (D B).

[12] Debtor giving security to surety—Creditor cannot derive the benefit thereof unless by direct interest by contract, trust, or bankruptcy of both debtor and surety or upon refusal by debtor to pay. (Vol 11) 1924 Cal 578 (582, 583) : 51 Cal 185 (D B).

[13] An oral guarantee by a person, not a party to the contract, of the performance by one of the parties to the contract is binding in Burma. (Vol 26) 1939 P C 110 (111) : 1939 Rang L R 358 : 66 Ind App 198 (P C).

[14] Composition between partners and some of the creditors of an insolvent firm—Partners executing security bond guaranteeing payment — Suit on failure : Held that any of the consenting creditor can sue on the surety bond as the facts proved that the debtor was separately and individually dealt with. (Vol 17) 1930 Lah 1029 (1033) (D B).

[15] Principal debtor allowed to withdraw from Court money deposited by a person who became liable to him under decree—Person getting rid of the liability in appeal seeking to recover from the principal debtor by attachment of properties — Stay of proceedings by Debt Settlement Board : Held that his execution against surety was not premature and that surety was liable. (Vol 27) 1940 Cal 224 (224).

[16] Surety cannot escape liability on ground that circumstances were such that principal debtor was entitled to avoid contract, when in fact contract was not avoided. (Vol 3) 1916 Mad 1066 (1067) (D B).

[17] Where lessor can, but does not, determine lease on first default, the lease continues as before and if default is subsequently made, sureties of lease under original security bond continue liable. (1910) 7 Mad L Tim 92 (93) (D B).

[18] Security deposited for faithful discharge of duties as khazanchi of a Bank — Khazanchi's duty stipulated to be bound to inform Bank of insolvent circumstances of customers — Khazanchi dealing fraudulently with Bank as customer—Security is liable to forfeiture for loss caused by such fraudulent dealings. (Vol 7) 1920 P C 35 (40) : 47 Ind App 164 : 10 Low Bur Rul 167 (P C).

[19] Guarantor undertaking to pay creditor certain sum if creditor would continue to deal with debtor — Creditor not continuing to deal — Guarantor is not bound to fulfil contract. (Vol 14) 1927 P C 272 (274) (P C).

3. Surety for minors. — [1] Bond by minor—Surety—Surety is liable irrespective of the validity of minor's contract. (1895) 19 Bom 697 (703) (D B).

[2] Contract by minor—Surety representing that he is a major and agreeing to compensate if representation proves false or if the contract was found defective in any other respect : Held he was liable to compensate. (Vol 27) 1940 Nag 327 (331) : I L R (1940) Nag 682.

4. Where the debt is unenforceable against the principal debtor. — [1] Where original agreement is void surety is liable as principal debtor. (Vol 8) 1921 Lah 79 (80) : 22 Or L Jour 662 : 2 Lah 204 * (Vol 6) 1919 Oudh 276 (277) : 22 Oudh Cas 109.

[See however (Vol 13) 1926 Nag 466 (468) (D B). (Original contract itself unenforceable — Liability of surety also cannot be enforced.)]

"Continuing guarantee."
called a "continuing guarantee."

129. A guarantee which extends to a series of transaction is

Illustrations.

(a.) *A*, in consideration that *B* will employ *C* in collecting the rents of *D*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

(b.) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may, from time to time, supply to *C*. *B* supplies *C* with tea to above the value of £100 and *C* pays *B* for it. Afterwards *B* supplies *C* with tea to the value of £200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100.

(c.) *A* guarantees payment to *B* of the price of five sacks of flour, to be delivered by *B* to *C*, and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Section 128 (contd.)

[2] Claim time-barred against principal debtor but not against surety — Plaintiff is entitled to a decree as against the surety only. (Vol 19) 1932 Rang 88 (89) : 16 Rang 398 * (Vol 5) 1918 Cal 707 (713) : 44 Cal 978 (D B).

[But see (Vol 5) 1918 Bom 197 (199) : 12 Bom 444 (D B).]

5. Surety for a limited amount. — [1] Surety bond guaranteeing payment upto a certain amount—Creditor is not prohibited from advancing more but the surety will be liable only to the extent of guarantee. (Vol 26) 1939 Nag 31 (32) : I L R (1941) Nag 415 * (Vol 24) 1937 Mad 360 (362).

[2] Surety promising to make good discrepancies up to an extent of Rs. 1000. Subsequent letter by him to the creditor asking him to entrust further business—Held, it did not convert the liability to an unlimited liability. (1918) 14 Mad L Tim 249 (256) (D B).

6. Joint family — Son's liability for father's surety debt. — [1] Son is liable for surety debt of father unless the debt is tainted with immorality. (Vol 18) 1931 All 631 (632) : 53 All. 695 (D B).

7. Surety bond to Court. — [1] Surety bond for payment of decree amount under O. 21, R. 40 (3) begins to operate only from the date of acceptance by the Court. (Vol 15) 1928 Mad 469 (470) : 51 Mad 161 (DB).

[2] Surety bond to Court for due appearance of judgment-debtor on date of hearing or as ordered by Court — Judgment-debtor appearing on some hearings and ordered to appear at the next hearing—The debtor absconding the surety was held liable. (Vol 26) 1939 Sind 270 (271) : I L R (1939) Kar 401 (D B).

[3] Surety for due appearance of accused let on bail—Accused absconding, the security under bail bond realised from accused's property — Held, that S. 128 did not apply to the case and that the surety could be asked to pay what he undertook to pay. (Vol 20) 1933 Sind 320 (321) : 35 Cr L Jour 315 (D B).

[4] Surety to administration bond — Letters of administration found to have been obtained by fraudulent misrepresentation to Court — Surety not aware of the same — Court cancelling letters of administration and transferring bond to the Administrator-General — Suit against surety by the Administrator-General to recover moneys realised by the administrator and mis-appropriated by him—Held, surety was liable. (1906) 35 Cal 955 (961) : 35 Ind App 109 (P C). ((1906) 33 Cal 713 (F B), Affirmed.)

8. Limitation upon liability provided by contract. — [1] The term "unless it is otherwise provided by the contract" cannot be ignored. (42) 1942 Nag L Jour 39 (41).

[2] Liability of surety can be limited or made contingent by special contract. (Vol 13) 1926 Nag 449 (450).

[3] Guarantee must be construed by circumstances.

(Vol 17) 1930 Cal 17 (19) : 57 Cal 761 (D B). (Guarantee for what may "ultimately" be found due from principal debtor — No liability until deficiency is found after taking steps against latter.) * (37) 1937 All L Jour 1265 (1271) (D B). (Contract restraining plaintiff's right to recover from surety until remedies are exhausted against principal — No cause of action arises till the condition is fulfilled.) * (1903) 16 C P L R 76 (77). (Surety under mortgage bond liable for deficiency after realising from property — Remedies against properties must be exhausted first.)

[4] Agreement to pay on failure of others to pay does not limit the liability of surety within the meaning of S. 128, Contract Act. (Vol 19) 1932 Nag 62 (64) : 28 Nag L R 325 (D B) * (Vol 28) 1941 Lah 16 (16) : I L R (1941) Lah 323 (D B). (Surety contract containing the term that the surety will be responsible if the person supplying goods was "unable to realise the price thereof from the firm." Held, that no condition that his liability would come into operation only if all remedies against principal debtor were exhausted could be read into these words).

9. Suit against surety. — [1] Concurrent suits against both the principal and surety are maintainable. (Vol 15) 1928 Mad 1262 (1263) (D B).

[2] Suit against surety only is maintainable. (Vol 6) 1919 Lah 450 (457) : 1918 Pun Re No. 91 (D B) * (Vol 6) 1919 Lah 355 (356) : 1919 Pun Re No. 93 * (Vol 6) 1919 Sind 103 (108) : 13 Sind L R 92 (D B).

[3] Execution can be taken against the surety alone. (Vol 21) 1934 Mad 186 (188, 189) : 57 Mad 688 (D B).

[4] Decree obtained against principal debtor under Co-operative Societies' Act where sureties could not be made parties — Held, suit to recover the same from the surety when the principal absconded was not barred. (Vol 21) 1934 Pat 52 (53).

10. Burden of proof. — [1] Onus of proof that liability is limited is on the surety. (Vol 22) 1935 Lah 729 (731) : 16 Lah 757 (D B).

11. Limitation. — [1] As against a surety limitation commences to run from the date of his own contract. (Vol 6) 1919 Cal 636 (637) (D B) * (Vol 27) 1940 All 116 (117) (D B).

[2] Payment by principal of interest does not extend limitation against surety even if payment is made with the surety's consent. (Vol 5) 1918 Cal 707 (710) : 44 Cal 978 (D B).

[3] Acknowledgment by principal debtor does not bind surety. (Vol 18) 1931 Lah 691 (694) : 13 Lah 240 (D B).

SECTION 129—Note 1

[1] Question of continuing guarantee is to be determined with reference to the whole instrument. Cases of ambiguity require consideration of nature of business, position of parties and surrounding circumstances. (Vol 17) 1930 All 730 (731) : 52 All 997 (DB).

Revocation of continuing guarantee.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations.

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Section 129 (contd.)

[2] In considering whether bond constitutes continuing guarantee surrounding circumstances must be considered unless wording of guarantee precludes it. Husband allowed to overdraw from Bank to extent of Rs. 18,000 on his wife's depositing with Bank title deeds of her house as security—Bank advancing Rs. 18,000—Husband wanting further finance—Wife executing legal mortgage in respect of house in favour of Bank for Rs. 25,000 to allow husband to overdraw to that extent—Banking account kept on the same basis—Security providing for total amount of Rs. 25,000 with interest or for any amount for time being owing and due to Bank from the wife "on footing of the bond" which specially referred to husband's overdraft: *Held*, that Court was not precluded from enquiring whether there was continuing guarantee; that the mortgage was a continuing guarantee for her husband's liability on his overdraft account limiting her liability to the amount stated in mortgage deed. (Vol 28) 1941 Mad 282 (283, 284) : ILR (1941) Mad 313 (DB).

[3] There is no analogy between a security bond executed by a surety under S. 55 (4), Civil P. C., and a continuing guarantee as defined under S. 129, Contract Act. In the former case there is no series of transactions giving rise to distinct liabilities which the guarantee is intended to cover but there is only a single transaction under which the surety undertakes responsibility for certain things to be done in future though on different occasions. (Vol 29) 1942 Mad 101 (102).

[4] Illustration (a) to S. 129 is wrong as statement of law. (Vol 17) 1930 Rang 173 (174) : 8 Rang 320 (DB).

[5] Guarantee for performance of definite, existing arrangement (lease)—Consideration not variable as result of future dealings—Contract is not one of continuing guarantee. (Vol 17) 1930 All 730 (731, 732) : 52 All 997 (DB).

[6] Contract of surety for the appearance of the judgment-debtor on each and every occasion when required is one of continuing guarantee and is revocable by notice to creditor. (Vol 18) 1931 All 243 (244) : 52 All 1014.

[7] Repayment of mortgage debt guaranteed by surety to extent of certain amount—Contract held, contract of continuing guarantee—Suit against guarantor held maintainable before suit on mortgage. (Vol 18) 1931 P C 224 (225) : 58 Ind App 806 : 59 Cal 320 (PC), (Vol 17) 1930 Cal 17 : 57 Cal 764 (DB), *Reversed*.)

[8] A request to advance money to another person up to a certain limit for his trade is continuing guarantee. Formal written acceptance is not necessary. (Vol 20) 1933 Mad 756 (758) : 57 Mad 398 (DB).

[9] Surety asking dealer to keep person's *khata* up to Rs. 200 gives continuing guarantee to the extent of Rs. 200. (Vol 26) 1939 Nag 31 (32) : I L R (1941) Nag 415.

[10] Guarantee for payment of rent for series of months is a continuing guarantee. (Vol 17) 1930 Sind 316 (318) : 25 Sind L R 262 (DB).

[11] Surety to be liable to extent of one year's rent on default by principal during period of lease—It is a

continuing guarantee for the whole period of lease—Surety continues to be liable even after death of principal during course of lease period and succession of his widow, in the absence of any personal element in the contract and in the absence of any revocation by him. (Vol 29) 1942 Oudh 325 (326, 327) : 17 Luck 712.

[12] Security by B for the due collection and payment by A of the rents to the extent of a certain sum—Contract is a continuing guarantee. (Vol 15) 1928 Cal 204 (206) : 55 Cal 154 (DB).

[13] When a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this cannot be said to be a continuing guarantee within the meaning of this section. (1909) 31 All 56 (57) (DB) & (Vol 19) 1932 All 262 (263) : 54 All 293 (DB). (Surety to administration bond cannot revoke guarantee at his will. But Court has power to relieve him of his liability to future transactions. But surety is liable for past mal-administration discovered later.) & (Vol 8) 1921 Upp Bur 25 (26) : 4 Upp Bur Rul 22 & (Vol 4) 1917 Low Bur 173 (174) (DB) & (1905) 28 Mad 161 (166) (DB).

[14] The guarantee of fidelity for a fixed period and of a permanent character is not a continuing guarantee and is not revoked by guarantor's death. Such guarantee continues till appointment is held. (Vol 7) 1920 P C 35 (37) : 47 Ind App 164 : 10 Low Bur Rul 167 (PC) & (Vol 17) 1930 Rang 173 (174) : 8 Rang 320 (DB). (Guarantee can be recalled on definite proof of servant's misconduct.)

[But see (1902) 15 C P L R 136 (139, 140). (Guarantee for fidelity of servant is continuing guarantee and in the absence of intention to contrary does not enure to the benefit of creditor after death of guarantor.)]

[15] Company employing a person—Certain persons entering into continuing guarantee for due performance of duties—Defalcations committed—Suit by company against guarantors—Burden of proof is on company to prove such lack of diligence and faithfulness as caused breach of agreement of guarantee. (Vol 24) 1937 Rang 37 (38).

[16] Security bond for due payment of instalments of license money is not a continuing guarantee and not revocable arbitrarily. (Vol 13) 1926 Bom 465 (466) (DB) & (Vol 12) 1925 Nag 7 (9) : 22 Nag L R 158 (DB). (Continuing guarantee must refer to a series of transactions of which some are unknown and definite or not certain to come into existence.)

[17] Suretyship under O. 41, R. 6, Civil P. C., is not continuing guarantee. (Vol 4) 1917 Cal 594 (595) (DB).

SECTION 130—Note I

[1] Continuing guarantee can be revoked by notice. (Vol 17) 1930 Sind 316 (318) : 25 Sind L R 262 (DB) & (Vol 5) 1918 P C 210 (211) (P C) & (1909) 81 All 56 (57) (DB). (Motive for revocation is immaterial.)

[2] When personal guarantee is not given, provision of Contract Act relating to revocation of security cannot be availed of to put an end to the security. (1896) 19 Mad 140 (143) (DB).

Revocation of continuing guarantee by surety's death.

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustrations.

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact, that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

Section 130 (contd.)

[3] Guarantee covering a definite case does not enable a surety to nullify the security by withdrawal, by mere notice to creditor. (Vol 4) 1917 Cal 699 (700) (DB).

[4] Agreement for production of judgment-debtor whenever required by Court is a continuing guarantee and may be revoked by surety with reference to any future date. (Vol 18) 1931 All 243 (244) : 52 All 1014* (Vol 21) 1934 Lah 962 (962) (DB).

[5] Where by the surety bond the surety is liable for one year's rent on default of the principal during period of lease, in the absence of any personal element in the contract and in the absence of any notice to the landlord revoking the guarantee, the surety is liable for the period of one year, even if the principal dies in the meanwhile and is succeeded by his widow. (Vol 29) 1942 Oudh 325 (326, 327) : 17 Luck 712.

[6] Pleading denial of liability in a suit is not a notice terminating continuing guarantee. (1903) 27 Bom 418 (424) (DB).

[7] The case of surety whose security is accepted by a Court cannot be treated as one falling under S. 129 or S. 130, Contract Act, so as to entitle him to put an end to the agreement at his will, yet the High Court to which the guarantee is given has power to exonerate the surety from all liability for future transactions. (Vol 19) 1932 All 262 (262) : 54 All 293 (DB).

[8] Surety for a Receiver is not discharged by his giving notice. He becomes a surety only on the Court accepting him and consent of Court is necessary for discharge. (Vol 13) 1926 P C 82 (83) (PC).

[9] There is no analogy between a security bond under S. 55 (4), Civil P. C., and a continuing guarantee as defined in S. 129, Contract Act. A surety in former case cannot be released at his pleasure and S. 130, Contract Act, does not apply. (Vol 29) 1942 Mad 101 (102).

[10] A suretyship under O. 41, R. 6 of the C. P. Code is not a continuing guarantee within S. 130, Contract Act. (Vol 4) 1917 Cal 594 (595) (DB).

[11] Section 130 does not apply to special contract of suretyship by surety to administration bond, irrespective of the grant of Letters of Administration. (Vol 4) 1917 Low Bur 178 (178) (DB) * (Vol 19) 1932 All 262 (263) : 54 All 293 (DB) * (Vol 8) 1921 Upp Bur 25 (26) : 4 Upp Bur Rul 22. (Administration bond under S. 78, Probate and Administration Act.) * (1905) 28 Mad 161 (166) (DB).

SECTION 131—Note 1

[1] Contract must be looked into to determine whether death operates as revocation. (Vol 15) 1928 Cal 204 (206) : 55 Cal 154 (DB).

[2] Death of person guaranteed does not operate as revocation of guarantee. (Vol 29) 1942 Oudh 325 (326) : 17 Luck 712.

[3] Guarantee of fidelity for fixed period and of per-

manent character is not a continuing guarantee and is not revoked by guarantor's death. Such guarantee continues till appointment is held. (Vol 7) 1920 P C 35 (37) : 10 Low Bur Rul 167 : 47 Ind App 164 (PC).

[But see (1902) 15 C P L R 136 (139, 140).]

[4] Lease granted on condition that rent for certain years was guaranteed by S — S guaranteeing on condition that G would reimburse S for rents paid under guarantee — Held, even if this be a case of confirming guarantee, G's liability was not determined on his death. (1888) 10 All 531 (538) (DB).

[5] Guarantee for securing an appointment is not a continuing guarantee and therefore is not revoked by the death of the guarantor. (Vol 7) 1920 P C 35 (37) : 10 Low Bur Rul 167 : 47 Ind App 164 (PC).

[6] Surety depositing securities with Bank for faithful performance by his son of duties of *Khasanchi*—Employment of son terminable by three months' notice on either side — Guarantee to continue so long as son continued to be employed : Held, that surety could not determine guarantee forthwith at any time. Since there was a contract that the guarantee was to continue till the employment of the son, it could not be determined by death of surety. (Vol 4) 1917 Low Bur 51 (53) (DB).

[7] Where surety bond binds the surety and his representatives for the due performance of his services by the principal and the bond contains a provision that the guarantee was terminable by six months' notice, surety's death does not free his representatives from liability for default of the principal subsequent to the death of surety. (Vol 8) 1921 All 287 (288) : 43 All 132 (DB).

Section 132 — Note 1

[1] A and B executing pro-note and making themselves jointly and severally liable — Mere knowledge by promisee that B was only surety for A cannot affect liability of promisors under pro-note. (Vol 29) 1942 Mad 134 (136) (DB) * (Vol 16) 1929 All 664 (665) (DB). (Person who executes pro-note cannot be held in law to have position of surety.) * (Vol 13) 1926 Sind 156 (157) : 20 Sind L R 106.

[2] Pro-note by A and B on joint and several liability for "security for overdraft" — A, real borrower and B merely guarantee—Liability of both held unaffected by any contract between them. (Vol 30) 1943 Mad 216 (217) (DB).

[3] A and B executing pro-note and making themselves jointly and severally liable — It is not open to B to let in parole evidence to vary terms of pro-note and whittle down his liability by reasons of any private arrangement with A to which promisee was not party. (Vol 29) 1942 Mad 134 (136) (DB).

[4] Where a bill does not declare in express terms the rights of the co-obligors *inter se*, there is nothing in law to prevent one of them to prove such terms by parole evidence, provided that he does not thereby in-

133. Any variance, made without the surety's consent, in the terms of the contract between the principal ^a[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of surety by variance in terms of contract.

Illustrations.

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him, and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards, B becomes embarrassed, and, without the knowledge of A, B, and C, contract that C shall continue to supply B with oil for ready money, and that the payment shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B, 5,000 rupees on the first March. A guarantees repayment. C pays the 5,000 rupees to B on the first January. A is discharged from his liability as the contract has been varied, inasmuch as C might sue B for the money before the first of March.

[a] *Inserted by the Repealing and Amending Act, 1917 (24 [XXIV] of 1917), S. 2 and Schedule I.*

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tend to affect the rights of the creditor to demand immediate payment from either or both of the co-obligors or joint promisors. (Vol 13) 1926 Sind 136 (157) : 20 Sind L R 106.

[5] Pro-note—Joint executants—Plea by one executant that he signed as surety for the other is not maintainable. (Vol 22) 1935 Mad 643 (645).

[6] The liability which is undertaken by the acceptor and the drawer of a bill is in no sense a joint liability. It is true that they each contract to pay the same sum of money, but they contract severally in different ways and subject to different conditions. Section 132 is not applicable to such a case. (1877-78) 3 Cal 174 (184) (DB).

SECTION 133 — Synopsis

1. Scope and applicability.
2. Variation operating as discharge.
3. Variation not operating as discharge.

1. **Scope and applicability.** — [1] The principle of the law on the discharge of sureties is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. (Vol 22) 1935 P C 21 (24) : 59 Bom 180 : 62 Ind App 23 (P C) * (Vol 28) 1941 Bom 108 (119, 120) : 1 L R (1941) Bom 273 (DB) * (Vol 25) 1938 Mad 585 (588) (DB) * (Vol 5) 1918 P C 210 (212) (PC).

[2] The application of this principle must always depend upon a correct analysis of the contract in fact made. Guarantees frequently relate to obligations without special reference to any specific contract between the creditor and the principal debtor. In such a case the doctrine referred to would have a very limited application. But when the contract between the creditor and the principal debtor is the basis of the surety bond

and has been shown to the sureties before the bond is executed and is referred to in the body of the judgment the principle will apply. (Vol 22) 1935 P C 21 (25) : 62 Ind App 23 : 59 Bom 180 (PC).

[3] A variation of conditions requires the consensus of all the principal parties. (Vol 16) 1929 Lah 203 (204).

[4] Consent by the surety to the variation necessarily implies that the surety has the knowledge of the nature of the variation. (Vol 8) 1921 Bom 164 (165) : 45 Bom 157 (DB).

[5] In determining the liability of a surety the terms of the bond must in every case be carefully studied ; and if there is any change in the position of the principal debtor as regards his creditor, it must materially affect the position of the surety, before the latter can be absolved from liability. A surety is bound according to the letter of the engagement and no further. (Vol 18) 1931 Oudh 426 (429) : 7 Luck 226 (DB) * (Vol 16) 1929 Lah 203 (204) * (1913) 14 Mad L Tim 249 (255) (DB).

[But see (Vol 23) 1936 Mad 576 (579) (DB). (Variation in small particular absolves surety.)]

[6] A appointed *gomasta* in Government treasury — B undertaking to make good any loss due to A's negligence or misconduct — Bond to ensure during A's service — B to remain responsible for defalcation discovered within one year of A's resignation or dismissal — Subsequently Government abolishing A's post — A continuing as treasurer's servant — Security bond held was wide enough to cover circumstances — Change in A's position held was not material so as to absolve B from liability. (Vol 18) 1931 Oudh 426 (429) : 7 Luck 226 (DB).

[7] If there is a substantial alteration in the contract even if there is no actual prejudice to the surety which can be shown to exist, the surety will be discharged as neither the Court nor the jury will go into the question whether there has been any actual prejudice or not. The surety is the sole judge as to whether he will continue to remain liable on the new contract or not. (Vol 19) 1932 Bom 168 (171) : 56 Bom 101 (DB).

[8] Surety bond in favour of Court guaranteeing performance of decree that may be passed against debtor in suit by creditor — Ss. 133 to 139 do not apply but the principles thereof do. (Vol 31) 1944 Mad 396 (396, 397) : 1 L R (1944) Mad 708 (D B) * (Vol 26) 1939 Bom 23 (25) : 1 L R (1938) Bom 794 (DB) * (Vol 22) 1935 Nag 258 (263, 264) : 31 Nag L R (Sup) 83 (DB).

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[9] Where the Court in whose favour the surety bond is executed is not responsible for any change in the situation of surety, he is not entitled to ask the Court to relieve him of his obligation under the bond on the ground that the decree-holder has arrived at certain arrangements with the principal judgment-debtor. (Vol 32) 1955 Nag 258 (263, 264) : 31 Nag L R (Sup) 83 (DB).

[10] Section 133 provides only for a particular case of variance, namely, where the contract of guarantee contemplates a series of transactions extending over a period of time. It does not apply to a variance made in the case of a contract consisting of a single transaction. (Vol 19) 1932 Bom 168 (174) : 36 Dom 101 (DB).

[11] Section 133 cannot operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor to his promise. (Vol 22) 1935 P C 21 (25) : 62 Ind App 38 : 59 Bom 180 (PC).

2. Variation operating as discharge.—[1] Surety for honesty of Municipal Tax Collector — Son of Tax Collector collecting taxes with consent of Municipal authorities without notice to surety—Surety is not liable for default by son. (Vol 25) 1938 Rang 126 (127).

[2] Security bonds were executed by sureties during pendency of a suit against their principal debtors. During pendency of execution proceedings the judgment-debtor went up in appeal and execution was stayed on offering fresh securities for the decretal amount. Held, that the old sureties were materially prejudiced and hence they were discharged. (Vol 26) 1939 Bom 23 (26) : ILR (1938) Bom 794 (DB).

[3] A executed surety bond at X — Case transferred to Y where another surety executed bond for same accused without A's knowledge or consent — A, held, was discharged. (Vol 21) 1934 Sind 152 (154) : 36 Cii L Jour 215 (DB).

[4] Plaintiff appointing defendant 1 as sub-agent to sell goods on certain terms—Defendant 2 standing as surety — Express waiver of all or any of his rights as surety which may be inconsistent at any time and guarantee not to be revoked at any time during the employment of the sub-agent—Variation of the terms without the knowledge of the surety — Surety is discharged as to transactions subsequent to variation. (Vol 3) 1921 Bom 164 (165) : 45 Bom 157 (DB).

[5] Surety for instalments on strength of property attached before judgment—Permission for private alienation given after decree is variance. (Vol 11) 1924 Lah 194 (194).

[6] Creditor corresponding with or granting time to debtor without surety's consent—Surety is relieved of liability. (Vol 81) 1944 Mad 396 (397) : I L R (1944) Mad 708 (DB).

[7] If a consent decree is passed without the knowledge and consent of surety, the surety is discharged. (Vol 13) 1926 Cal 818 (818).

[8] Surety for appearance of defendant in Court — Plaint returned for presentation to proper Court — Surety is discharged. (Vol 26) 1939 Mad 993 (994).

[9] Receiver appointed under consent order—Security bond—Default in carrying out duties of receiver as enjoined on him by consent order — Power to substitute another receiver on default — Giving time to defaulter—receiver absolves surety. (Vol 23) 1936 Mad 576 (580) (DB).

[10] Partners starting business on certain capital with a stipulation to dissolve partnership when loss occurs—Surety for one partner guaranteeing partner's

share in loss — When losses actually occurred, changes and additions made in business thus changing its character and constituting breaches and variations in contract of suretyship—Surety is not liable for losses in new business. (Vol 26) 1939 Lah 193 (194) (DB).

[11] Sub-agency—Change in terms as to remuneration of sub-agent in variance of contract — There is variation of contract with sub-agent (principal debtor). (Vol 8) 1921 Bom 164 (165) : 45 Bom 157 (DB).

3. Variation not operating as discharge. — [1] Agreement to buy a certain quantity of cotton at a certain rate and time — Defendant guaranteeing the performance of it — Subsequent agreement by plaintiff to sell same cotton at a higher rate — Suit by plaintiff against surety for recovery of difference between the two rates—Surety is not discharged as the first contract is not rescinded by the second. (Vol 7) 1920 Bom 78 (80).

[2] Compromise of a suit for a recovery of a debt the terms whereof are that the debt should be paid in instalments and attachment to continue till the terms had been complied with—A standing surety for defendant's performance of his part — Order of Court giving judgment-debtor liberty to sell attached property — This order is not a variation of the contract and the surety is not discharged. (Vol 11) 1921 Lah 211 (212) (DB).

[3] A breach of contract is not a variation and hence a breach of contract between the principal and the creditor does not in any way discharge the surety although the creditor has not enforced any remedy against the principal. (1909) 36 Cal 626 (627, 628) (DB).

[4] Contract of guarantee by defendant with plaintiff Bank to extent of Rs. 3,00,000 — Bank opening second account with principal debtor on deposit of Rs. 20,000 without consent and knowledge of defendant. Held, guarantee was not discharged. (Vol 4) 1917 Cal 587 (541, 544) (SB).

[5] Where a promissory note recited a consideration of Rs. 3,000 but only Rs. 1,000 were paid in cash, Rs. 1,700 being due on old dealing and Rs. 300 being set-off for interest in advance : Held that there was no variation of the contract which could exonerate the surety. (Vol 22) 1935 Mad 748 (750).

[6] Where a surety bond is given to the Court an alteration in the judgment-debtor's position by the act of third party does not render the bond unenforceable as S. 133 does not apply in such circumstances. (Vol 23) 1936 Lah 470 (471).

[7] A surety giving security under O. 38, B. 5, Civil P. C. for property to be attached before judgment continues to be liable though the suit is decreed by award of arbitrators. (Vo 5) 1918 Sind 53 (2) (54) : 11 Sind L R 122 (DB).

[8] A surety for due payment of instalments by the judgment-debtor is not discharged where the judgment-debtor offers to come to terms and the decree-holder does not accept them within the time fixed by the judgment-debtor. The belated acceptance by the decree-holder does not amount to a variance. (1904) 1 All L Jour 38 (39).

[9] Surety for securing stay of execution is not discharged from liability by the agreement entered into between the decree-holder and the judgment-debtor, without surety's consent, by which interest was increased and further time was granted to judgment-debtor. (Vol 12) 1925 Lah 552 (555).

[10] It cannot be laid down as broad proposition of law that the mere fact that a decree happens to be a consent decree it discharges from liability a surety who

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations.

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed, and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land, and to deliver it to B at a fixed rate and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

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had guaranteed payment by the defendant of the sum that might be decreed. (Vol 19) 1932 Cal 858 (861, 863): 59 Cal 1450 (DB).

[11] Charging interest higher than 7 per cent. by any bank rendered illegal — Without guarantor's permission bank charging interest at 8 per cent.—Indebtedness under guarantee in respect of principal is not affected. (Vol 5) 1918 P C 210 (212) (PC).

[12] The execution of a new surety bond in respect of the same accused executed at X does not of its own force discharge the bond which had previously been executed by another person at Y. (Vol 21) 1934 Sind 152 (153, 154) : 36 Cr L Jour 215 (DB).

[13] *Yadast* executed by principal promising to pay on certain date does not vary the liability of surety in respect of a promote payable on demand. (34) 1934 Mad W N 341 (344) (DB).

SECTION 134 — Synopsis

1. Scope of the section.
2. "Any act or omission of the creditor."
3. Omission to sue principal within limitation — Effect.

1. Scope of the section. — [1] Section 134, Contract Act, presupposes the existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor, are parties. The liability of the surety arises from an undertaking given by him to the creditor in consideration of something done by the latter. Where, therefore, there is no contract between the surety and creditor and a security bond is executed by the surety at the instance of the debtor and in pursuance of orders of the Court granting stay of execution, the creditors are not parties to the contract of guarantee, even if they are empowered under the bond to enforce it. In such circumstances, S. 134 does not apply. (Vol 23) 1936 All 549 (552) (DB).

[2] Relative of judgment-debtor offering cheque to decree-holder in satisfaction of his claim—Relative held not a surety for judgment-debtor — Relative stopping payment of cheque — Decree-holder held has an independent cause of action against relative—Relative, held cannot take advantage of S. 134, Contract Act. (Vol 28) 1941 Pesh 6 (7) (DB).

[3] When a surety executes a subsequent note in discharge of the first note, the principal debtor is discharged, and under S. 134 of the Contract Act, the co-sureties are also discharged from liability. The debt under the subsequent promissory note is quite a new transaction and a co-surety who is ignorant of it, cannot be made liable without his consent to make contribution. (Vol 9) 1922 Mad 119 (119) (DB).

[4] Decree passed against both surety and principal debtor by which rights and liabilities of surety were replaced by those created by decree — Before Debt Con-

ciliation Board creditor released principal — Surety not absolved—S. 134 does not apply. (39) 1939 Nag L Jour 402 (402, 403).

2. "Any act or omission of the creditor." — [1] Discharge of debtor without the consent of the surety destroys the liability of the surety though he had signed as a co-executant where the creditor knew that he was a surety. (Vol 11) 1924 Rang 360 (360).

[2] Section 134 discharges surety if legal consequence of creditor's act discharges debtor. (Vol 26) 1939 P C 110 (113, 114) : 66 Ind App 198 : 1939 Rang L R 358 (PC).

[3] Where in a suit against principal debtors and the surety, the names of the original debtors are struck out upon an application by the creditor, the only result is to preclude the bringing by the creditor of a fresh suit in respect of the subject-matter against them, and is not to release or discharge the principal debt. (Vol 26) 1933 P C 110 (111, 114) : 1939 Rang L R 358 : 66 Ind App 198 (PC). ((Vol 24) 1937 Rang 302, Reversed.)

[4] When a person institutes a suit against both the principal and his sureties, and subsequently waives his claim against the principal, the sureties are also discharged from their liabilities. (02) 1 Low Bur Rul 150 (150) & (Vol 4) 1917 Lah 194 (195) & (18) 20 Ind Cas 189 (190) (DB) (Low Bur). (Where forbearance contemplated in S. 134 does not extend to actual waiver which has the effect of discharging the principal, forbearance is something short of waiver.)

[5] Release of principal debtor expressly reserving rights against surety does not absolve surety. (Vol 20) 1933 Mad 809 (311) : 56 Mad 625 (DB) & (Vol 17) 1930 Lah 812 (813) & (Vol 7) 1920 Mad 216 (217) (DB).

[6] Creditor proceeding against surety first but not absolving principal debtor—Surety is not discharged as the principal is not discharged thereby. (Vol 13) 1926 Bom 465 (466) (DB).

[7] Failure of creditor to serve summons on debtor would enable Court to dismiss the suit against debtor; but that reason does not free the surety from his liability as such. (90) 14 Bom 267 (269) (DB) & (Vol 24) 1937 Rang 72 (73) : 14 Rang 594 & (Vol 1) 1914 Bom 242 (242) : 39 Bom 52 (DB) & (12) 8 Nag L R 188 (189).

[But see (Vol 5) 1918 Upp Bur 1 (2) : 3 Upp Bur Rul 62.]

[8] A suit may be maintained against the surety though the principal has not been sued. (Vol 6) 1919 Lah 450 (457) : 1918 Pun Re No. 91 (DB) & (Vol 12) 1925 Sind 164 (166) : 19 Sind L R 237. (But his liability to pay future interest merges in the preliminary decree.) & (Vol 6) 1919 Sind 103 (103) : 13 Sind L R 92 (DB).

[9] It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others does not bring the case within Ss. 134

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

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and 139 of the Contract Act. (Vol 14) 1927 Lah 396 (397).

[10] Abatement of suit as against principal debtor owing to his death during pendency of suit does not discharge surety. (Vol 19) 1932 Lah 419 (420) : 13 Lah 817 (DB).

[But see (Vol 15) 1928 Lah 246 (247).]

[11] The legal consequence of the creditor's act in taking over the debtor's estate is to discharge the principal debtor. (Vol 10) 1923 Mad 340 (341) (DB).

[12] Mortgage by A in favour of G — K standing surety — A adjudicated insolvent — Sale of mortgaged property by Receiver—Only part payment made to G — Receiver keeping balance as commission—Suit by G for balance against A and K—Claim against A given up — G can proceed against K — S. 134 does not apply. (Vol 22) 1935 Lah 906 (907).

[13] Where the original agreement is void, as in the case of a minor's contract, the surety is liable as principal debtor and is not discharged by the creditor withdrawing his claim against the debtor or his legal representative after his death. (Vol 3) 1916 Lah 376 (377) : 1916 Pun Re No. 54.

[14] Drawee of *hundi* relieved of obligation—Drawer is also relieved. (Vol 23) 1936 Nag 260 (262) : I L R (1939) Nag 601.

[15] Wife depositing shares as collateral security for liability of company in which husband was principal share-holder—Company going into liquidation—Creditor taking company's property in full satisfaction of his dues—Wife induced to sign a letter continuing shares to be security for advances—Wife subsequently induced to give fresh guarantee of indebtedness, misrepresenting that she was still liable as surety. *Held* that principal debt having been discharged the wife was absolved from all liability. (Vol 21) 1934 P C 210 (213) (P C).

[16] A surety is not discharged by the discharge of the principal debtor by operation of law. (Vol 29) 1942 Mad 145 (146) (DB). (Therefore, when a new statutory provision (e. g., Madras Agriculturists' Relief Act) has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability the remedy of the creditor against the guarantor will not be affected. Hence the relief as against the guarantor should not be restricted to the amount of the debt as scaled down in the Act.)

[17] Composition between principal and creditor discharging principal — Surety expressly contracting to remain liable even after the principal's discharge is not absolved. (Vol 27) 1940 Mad 437 (438) : I L R (1940) Mad 757 (DB).

[18] Decree against principal and surety passed — Surety becomes joint judgment-debtor—He cannot plead acts of creditor to discharge his liability as surety. (Vol 31) 1944 Mad 423 (423).

3. Omission to sue principal within limitation — Effect. — [1] Section 134, Contract Act, applies where there is either a release or a discharge of the principal debtor. The section intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part—The failure of the creditor to bring a suit within the period of limitation against the principal debtor is not an act or omission of the nature contemplated by that

section. (Vol 22) 1935 Lah 729 (732) : 16 Lah 757 (DB) * (Vol 19) 1932 All 610 (612) : 54 All 1007 (DB).

[2] Omission of creditor to sue the principal within the period of limitation does not discharge the surety. (1910) 33 Mad 308 (310) (DB) * ('41) 1941 Oudh W N 473 (474) * ('39) 1939 Nag L Jour 402 (403). (When a creditor expressly reserves a right against the surety to proceed for the debt, the surety cannot say that he is discharged on account of creditor's remedy being barred against the principal debtor.) * (1935) 1935 All W R 492 (493). (When a surety agrees with creditor to pay, unconditionally, the sum borrowed by the debtor, specially, he creates the relation of creditor and debtor between the creditor and himself, and when he is sued on that, the plea that creditor's remedy against the debtor is barred cannot absolve surety from liability.) * (Vol 16) 1929 Nag 145 (148) : 25 Nag L R 74 (DB). * (Vol 14) 1927 Lah 396 (397) * (Vol 11) 1924 Nag 411 (412) : 20 Nag L R 140 * (1883) 7 Bom 146 (148, 149) (DB). (Section 134 of the Contract Act is qualified by S. 137 of the Act.) * (1880-81) 5 Bom 647 (659) (DB).

[But see (Vol 23) 1936 Pesh 20 (22) (DB) * (Vol 17) 1930 All 380 (382) (DB) * ('30) 1930 All L Jour 1084 (1084, 1085) * (Vol 15) 1928 All 46 (49) : 50 All 211 (DB) * (1906) 2 Nag L R 42 (43, 44) * (1902) 24 All 304 (508, 509, 510) (DB) * ('96) 1896 Upp Bur Rul 308 (310) * (1889) 11 All 310 (311; 314) (DB).]

[3] As for S. 20, Limitation Act, the liabilities of the principal debtor and surety are distinct, though their liabilities arise out of the same transaction. If the surety has made certain payments and endorsements on the bond on which the suit is based, he is liable even if remedy against the debtor is barred by Limitation Act. (Vol 19) 1932 Rang 88 (88, 89) : 10 Rang 398.

SECTION 135 — Synopsis

1. Applicability.
2. Composition.
3. Extension of time.
4. Assent of surety.

1. Applicability.— [1] The principles underlying Ss. 133 to 141 apply to surety bonds executed in favour of Courts though the sections are not themselves applicable. (Vol 31) 1944 Lah 428 (431, 432) (DB) * (Vol 26) 1939 Bom 23 (25) : I L R (1938) Bom 794 (DB) * (Vol 20) 1933 Mad 309 (310) : 56 Mad 625 (DB). (Bond for restitution of execution.)

[But see (Vol 14) 1927 Lah 336 (336). (Section 135 has no application to surety bond executed under S. 55 (4), Civil P. C., such a bond being in favour of Court.) * (Vol 7) 1920 Mad 355 (356) : 43 Mad 272 (DB). (Section does not apply to surety under O. 38, R. 3, Civil P. C.)]

[2] Surety for appearance of judgment-debtor — Decree-holder giving time to judgment-debtor—Whether surety is discharged or not depends on discretion of Court, such a bond being in power of Court. (Vol 17) 1930 Lah 896 (897).

[See also (Vol 20) 1933 Cal 337 (338) (DB). (Surety executing bond for appearance of judgment-debtor—Judgment-debtor appearing and paying part of decree-debt—Acceptance by decree-holder's pleader—Surety's liability ceases on principle of S. 135.)]

[8] Auction-purchaser at execution allowed to withdraw deposit on furnishing security to re-deposit when asked—Surety bond executed—Auction-purchaser asked to re-deposit—Time asked — Decree-holder not objecting—Time granted, but order reviewed and surety asked

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to deposit amount—Surety held not absolved, the bond being in favour of the Court and the consent of decree-holder, therefore, being immaterial. (Vol 25) 1938 Lah 472 (473).

[4] Sub-brokerage contract on behalf of broker to introduce constituents is not contract of guarantee but one of indemnity—Broker can compromise without sub-broker's consent. (Vol 27) 1940 Bom 315 (317) : 1 L R (1940) Bom 552 (DB).

[5] Person executing a promissory note jointly with another binding himself jointly and severally, cannot plead that he was surety for the other and take advantage of S. 135 unless he brings himself under the definition of surety given in S. 126 and is a party to contract of guarantee. (Vol 30) 1943 Mad 216 (217) (DB).

2. Composition.—[1] Sections 134 and 135 apply to private composition behind back of surety—Principle of these sections does not apply to composition after notice to surety and accepted by Court—In such case, it becomes act of the Court. (Vol 8) 1921 Mad 236 (242) : 44 Mad 381 (DB).

[2] Creditor accepting composition during insolvency after part payment by surety—Surety is not entitled to refund. (Vol 8) 1921 Mad 236 (239) : 44 Mad 381 (DB).

[3] Composition between principal and creditor discharging principal—Surety expressly contracting to remain liable even after principal is discharged, is not absolved. (Vol 27) 1940 Mad 487 (438) : ILR (1940) Mad 757 (DB).

[4] Surety for amount which may be decreed by Court—Maximum liability fixed at Rs. 500—Plaintiff in suit claiming Rs. 3000—Parties to suit compromising and agreeing to definite sum of Rs. 950—Surety held discharged. (Vol 19) 1932 Pat 313 (315) : 11 Pat 500 (DB).

[5] Adjustment materially altering decree, though not certified, discharges the surety. (Vol 30) 1943 Bom 246 (249) : 1 L R (1943) Bom 382.

[6] Where the plaintiff as the endorsee of a promissory note sues the maker of it, and the latter pleads that the plaintiff knew that the note was an accommodation note made for the benefit of the acceptor and that the plaintiff, after the note fell due, took a mortgage from the principal debtor, viz., the acceptor, and gave him time, these facts if found true, would be sufficient to discharge the maker from liability. (1890) 13 Mad 172 (177).

[7] Consent decree without surety's consent or knowledge discharges surety. (Vol 13) 1926 Cal 818 (818).

[8] Surety agreeing to pay decretal amount as decreed in suit after contest—Suit compromised and decreed on basis of award—Surety is discharged. (Vol 15) 1928 Cal 177 (178) : 55 Cal 91 (DB).

[9] Surety for performance of decree that may be passed—Compromise of suit not explicitly or implicitly excluded from scope of surety bond—*Bona fide* compromise of suit between creditor and principal debtor does not discharge surety. (Vol 18) 1931 Bom 55 (56) : 55 Bom 97 (DB).

[10] Suit compromised—Compromise not contemplated by surety for defendant and prejudicial to his interest—Surety is discharged. (Vol 17) 1930 Bom 122 (124) : 54 Bom 118 (DB).

3. Extension of time.—[1] Where a creditor extends time for the payment of debt, without surety's consent, the surety is discharged. (Vol 2) 1915 Low Bur 62 (62) (1929) 120 Ind Cas 552 (552) (All).

[2] Defence by surety that creditor gave time to the principal debtor without his consent, contemplates a subsequent contract between a creditor and the principal debtor whereby time originally fixed is subsequently extended. (Vol 16) 1929 All 664 (665) (DB).

[3] Grant of time to principal debtor discharges surety only if creditor cannot sue before extended time expires. (Vol 20) 1933 Mad 736 (759) : 57 Mad 398 (DB).

[4] Stipulation in surety bond that surety was not to be discharged by any dealings between creditor and principal debtor—Surety is not in any way relieved by time given to principal debtor without his knowledge or concurrence. (1901) 23 All 137 (146, 147) : 27 Ind App 168 (PC).

[5] Money decree against debtors and sureties—Debtors allowed time, thus increasing interest and burden on sureties—Decree-holder not entitled to interest after time when he might and ought to have put up property for sale. (1879) 4 Cal 331 (335, 336) (PC).

[6] When the payment of only a portion of a guaranteed debt is allowed to be postponed, the discharge of the surety extends only to such portion and not to the rest of the liabilities with regard to which he is not prejudiced. (1913) 14 Mad L Tim 249 (255) (DB).

[7] Section 135 does not apply to claims which have been decreed. Liability of surety is not discharged by the decree-holder's giving time to principal judgment-debtor. (1906) 9 Oudh Cas 28 (28, 29).

[8] Court and not decree-holder granting time to judgment-debtor to pay by adjourning case from time to time in spite of decree-holder's opposition—Surety is not discharged—Surety acquiescing in orders of Court cannot say that time was granted without his consent. (Vol 31) 1944 Nag 377 (277).

[9] Striking of balance by principal debtor unsigned by surety does not discharge surety, inasmuch as while it extended time and privileges to the creditor, it did not confer any benefit on principal debtor. (Vol 18) 1931 Lah 627 (627) (DB).

[10] Creditor granting time to the debtor and allowing instalments without surety's consent—Surety is discharged from liability. (Vol 31) 1944 Lah 428 (430) (DB).

[11] Consent order—Instalments or giving time to principal debtor—Surety is discharged unless it is expressly provided to proceed against surety. (Vol 20) 1933 Mad 809 (310) : 56 Mad 625 (DB).

[12] The question as to whether an advance of interest operates as giving time to the principal debtor is a mixed question of law and fact. As a rule acceptance of interest in advance by creditor operates as giving time to principal debtor and consequently as a discharge to the surety. (1879) 4 Cal 132 (134) (DB).

[13] Drawer of *hundi* paying interest to holder in order to obtain time for payment—Liability of accommodation acceptor depends on whether he knew of and consented to the arrangement. (1881) 6 Cal 241 (249) (PC).

[14] The mere taking of additional security will not discharge the surety, but the surety will be discharged if, along with the taking of additional security, there is an express or implied contract to give time to the debtor. (Vol 20) 1933 Mad 756 (758) : 57 Mad 398 (DB).

[15] A mere agreement between the creditor and the principal debtor, by which the creditor promised to give time to the principal debtor does not discharge the surety under S. 135, unless the agreement amounts to a contract, i. e., at the instance of the debtors. Where, therefore, there is no consideration to an agreement of the above nature, surety is not discharged by reason of the forbearance of the creditor to realize the instalments payable by the principal debtor. (1900) 22 All 351 (352) (DB) (Vol 23) 1936 Pesh 80 (80, 81) (Vol 20) 1933 Sind 311 (312). (Mere gratuitous agreement to give time does not discharge surety.)

[But see (1913) 14 Mad L Tim 249 (253) (DB). (When surety is prejudiced by the grant of time to the

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

Creditor's forbearance to sue does not discharge surety.

137. Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration.

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

Section 135 (contd.)

principal debtor, it is immaterial under the Indian Law whether the agreement for grant of time is or is not backed by consideration.]]

[16] Surety's liability does not come to an end if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter. (Vol 1) 1914 Mad 117 (117);

[17] An acknowledgment by the principal debtor does not save limitation against the surety unless it is shown that the latter allowed himself to be represented by the person who made the payment. (Vol 18) 1931 Lah 691 (694) : 13 Lah 240.

[18] Entering into an agreement with a principal debtor granting him time will not discharge the surety if the right against the surety is reserved. This principle is applicable to all negotiable instruments even though S. 139 of the Negotiable Instruments Act provides for such reservation only in the case of bills of exchange. (Vol 21) 1934 Mad 75 (78) : 37 Mad 482 (DB).

4. Assent of surety. — [1] Principle that the rights of surety are not to be interfered with without his consent, ought to be applied even to a case not governed by Contract Act. (Vol 26) 1939 Bom 23 (25) : 1 L R (1938) Bom 794 (DB).

[2] Where the surety acquiesces in an order of Court granting time to judgment-debtor to pay, it cannot be said that time was granted without surety's consent. (Vol 31) 1944 Nag 277 (277).

[3] Arrangement with creditor on behalf of surety by agent authorized or authority subsequently ratified — Arrangement is binding on surety none the less when agent is principal debtor — No direct notice to surety is necessary — Surety is not discharged from his liability. (Vol 16) 1929 P C 273 (279) (PC).

Section 137 — Note 1

[1] Mere forbearance to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. (Vol 5) 1918 P C 226 (228) (PC) * (Vol 7) 1920 Lah 80 (84) : 1 Lah 262 (DB).

[2] The fact that the creditor has not sued the principal debtor and exhausted the remedies against him is no defence to an action against the surety. There is no rule of law that a creditor cannot proceed against the surety unless he has first exhausted his remedies against the debtor. (Vol 22) 1935 Mad 748 (749) * (Vol 4) 1917 Mad 101 (101, 102) (DB) * ('69) 6 Bom H C R 241 (242) (DB).

[3] Principal debtor and surety — Mortgage decrees obtained by prior and subsequent mortgagees — Subsequent mortgagee not immediately executing decree but waiting for execution by prior mortgagee — Sale not sufficient even to satisfy prior mortgagee — Subsequent mortgagee then proceeding to execute decree against surety: Held, that failure by subsequent mortgagee to pro-

ceed against principal debtor did not discharge surety. (Vol 22) 1935 Oudh 260 (262) (DB).

[4] Debtor asking creditor for time to pay the instalments payable by him — Creditor agreeing provided there is no legal impediment in granting time : Held, a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract — In this case the agreement amounted to a mere gratuitous forbearance on the part of the creditor within S. 137. (1900) 22 All 351 (352) (DB).

[5] Where K supplied goods to employees of M who was surety for his employees, a statement by K that he did not intend to file a suit against the employees does not amount to waiver of claim so as to discharge M from liability nor does it take the case out of S. 137. (Vol 16) 1929 Rang 187 (187).

[6] Decree-holder agreeing to accept payment by instalments of decretal amount in execution of decree — Certain person standing surety to the effect that in case of default in instalments the whole amount was payable with interest within certain time — Default by judgment-debtor — Decree-holder failing to execute decree which becomes time-barred — He then sued surety for amount : Held, that as the bond laid down the period within which decree-holder had to execute his decree in case of default, his action in not doing so was much more serious than "mere forbearance" in favour of his debtors, and hence his suit was to be dismissed. ('86) 8 All 259 (261) (DB).

[7] A failure to sue the principal debtor until recovery is barred by the statute of limitation does not operate as a discharge of the surety. (Vol 26) 1939 P C 110 (112) : 66 Ind App 198 : 1 L R (1939) Rang 358 (PC). (Obiter.) * ('41) 1941 All W R (CC) 123 (124) * (Vol 19) 1932 Lah 419 (420) : 13 Lah 817 (DB).

[But see (Vol 28) 1936 All 549 (552) (DB) * (Vol 23) 1936 Pesh 20 (22) (DB) * ('02) 24 All 504 (510) (DB) * ('89) 11 All 310 (313) (DB).]

[8] Plaintiff suing surety along with debtor — Debtor not alive at the time of institution of suit — Failure on part of plaintiff to substitute debtor's legal representative within time thus allowing claim against debtor to become time-barred : Held, that surety was not discharged as suit against him was instituted within time and forbearance by creditor to enforce remedy against debtor did not discharge surety. ('86) 12 Cal 330 (332, 333) (DB).

[9] The fact that a person forbears to sue the moment the debt becomes due, at the request of the debtors, does not amount to a promise to give time to the debtors so as to discharge the surety. (Vol 23) 1936 Pesh 80 (80, 81).

[10] The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged — The liability of the surety continues in spite of the abatement. (Vol 7) 1920 Oudh 75 (75).

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.³

Release of one co-surety does not discharge others.

[a] See S. 44.

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

Illustrations.

(a) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A, as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.¹

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

SECTION 139 — Note 1

[1] Section 139 only applies where eventual remedy of surety against debtor is impaired—Suit against principal debtors withdrawn but continued against surety—Surety is not discharged as his remedy against the debtor is not impaired. (Vol 26) 1939 P C 110 (113); 66 Ind App 198 : 1939 Rang L R 358 (PC). (Reversing (Vol 24) 1937 Rang 302 (DB).) &(Vol 22) 1935 Lah 729 (732): 16 Lah 757 (DB). (Suit dismissed against principal debtor in default—Application for restoration of suit by creditor filed beyond time — Act is not sufficient to discharge surety from his liability.)

[2] To enable the surety to enforce his right against the principal debtor, there are two essential conditions (i) that the debt itself must subsist, (ii) that his remedy against the principal debtor must remain unimpaired — Consequently, the creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. (Vol 25) 1938 Nag 413 (414) : I L R (1939) Nag 175.

[3] A variation of the liability undertaken or a departure in the terms of the bond resulting from an act or omission of the creditor will discharge the surety from his obligation under the bond, and it is immaterial whether the variation is substantial or material. (Vol 20) 1938 Mad 422 (423) (DB).

[See ('12) 1912 Pun L R No. 58, p. 196 (DB). (Creditor doing certain acts inconsistent with rights of his surety and omitting to do certain acts which his duty to surety required him to do : Held that surety was discharged from liability under S. 139 of Contract Act to the extent that he was deprived from recovering from principal debtor amount claimed by creditor—Surety was allowed his costs for it was found that plaintiff's suit against him was wholly unjustifiable.)]

[4] Positive act on part of obligee to the prejudice of surety must be proved for surety's discharge — Mere laches or acquiescence on obligee's part is not enough. (Vol 25) 1938 Rang 90 (91, 92) : 1937 Rang L R 405 &(Vol 23) 1936 Lah 305 (306) : 16 Lah 583 (DB). (Surety bond executed in favour of employer by which S standing surety for faithful discharge of duties by K, an accountant — Embezzlements made by K — Mere laches of employer or negligence in supervision is no ground for discharging S from his liability.)

[5] A creditor's omission to sue the principal within limitation is not an act of omission of the kind contemplated by S. 134 or S. 139, whereby the surety is discharged. (Vol 14) 1927 Lah 396 (397) &(Vol 19) 1932 Lah 419 (420) : 13 Lah 817 (DB).

[But see (Vol 15) 1928 All 46 (49): 50 All 211 (DB).]

[5a] See also Notes under Ss. 134 and 137.

[6] Creditor without surety's consent granting time to debtor and allowing instalments—Surety is discharged from liability. (Vol 31) 1944 Lah 428 (430) (DB).

[7] A surety who has bound himself for a person's doing certain things, is not discharged from his liability unless it is shown that the creditor has by his conduct either prevented the things from being done or connived at the omission or enabled the person to do what he ought not to have done, and that but for such conduct the omission would not have happened. (Vol 7) 1920 Mad 259 (266) (DB).

[8] Surety guaranteeing full payment with interest of any amount deposited in Bank in case Bank goes into liquidation—Bank going into liquidation—Creditor realising dividend from liquidator — Suit by creditor against surety for recovery of deposit with interest : Held that the suit was maintainable as the act of the creditor in getting dividend was not inconsistent with the rights of surety against the principal debtor — Surety's liability being co-extensive with that of his debtors, the surety was liable to pay interest also. (Vol 9) 1922 Lah 89 (90, 91) (DB).

[9] Continuing guarantee for the honesty of a servant — Servant discovered dishonest during the course of service—Servant not dismissed but continued in service without the knowledge or consent of surety — Master cannot subsequently have recourse to surety to make good any loss which may arise during the subsequent service. (Vol 31) 1944 Lah 424 (426, 427) (DB).

[10] Surety binding himself to make good any loss if the employee was proved to have committed embezzlement — Embezzlement committed by employee — Suit against employee for amount embezzled — Suit decreed in part—Second suit against surety is not barred as the causes of action are different — Section 139 does not apply. ('13) 11 All L Jour 689 (690).

[11] Where a person stands surety for several defendants, but the plaintiff proceeds against one defendant only, the exoneration of the remaining defendants discharges the surety. (Vol 7) 1920 Mad 311 (311, 312) (DB).

[12] The opening of a second account in favour of the principal debtor, whose credit has been guaranteed in respect of a previous account, without the consent and knowledge of the surety, does not discharge the guarantee. (Vol 4) 1917 Cal 537 (541) (SB).

[13] Where certain persons executed a surety bond in favour of the creditors and paid an instalment but

140. Where a guaranteed debt has become due, or default of the principal debtor to perform *Rights of surety on payment or performance.* a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Section 139 (contd.)

subsequently some of the creditors in breach of the agreement sued the debtors: *Held*, that the liability of the sureties was not extinguished because of such suits. (Vol 17) 1930 Lah 1029 (1033) (DB).

[14] Where the Court obtains a security bond hypothecating immovable property to secure a proper disposal of money due to minors and the Court breaks the contract by acting inconsistently with the rights of the sureties, the sureties are thereby discharged. (Vol 22) 1935 Lah 863 (865) (DB).

[15] Surety for production of property under O. 38, R. 5, Civil P. C.—Compromise of suit not contemplated by surety and prejudicial to his rights — Passing of decree in terms of compromise discharges surety. (Vol 17) 1930 Bom 122 (124) : 54 Bom 118 (DB).

[16] Surety to produce in Court judgment-debtor on dismissal of appeal and in case of failure, to pay decretal amount—Appeal dismissed—Failure to give notice or to require production of debtor — Sureties are not liable to pay decretal amount. (Vol 12) 1925 All 5 (6).

[17] Surety bond executed when property of debtor was under attachment in execution of *ex parte* decree — Attachment withdrawn — *Ex parte* decree set aside and suit decreed on merits—Property again attached in execution — Attachment released by creditor in spite of surety's objection — Surety discharged to the extent of the property released and not absolutely under S. 139. (Vol 21) 1934 All 616 (616, 617).

[18] Surety guaranteeing payment of part of debt — Application by principal debtor to Debt Conciliation Board for settlement of debts—Creditor excluding debt guaranteed by surety from his statement of debts — Surety's remedy against principal debtor is impaired and surety is discharged. (Vol 25) 1938 Nag 413 (415) : I L R (1939) Nag 175.

[19] Principal and surety — Discharge of surety — Surety undertaking to pay any amount that may be decreed against two defendants in a suit — Compromise decree passed against one defendant and suit as against other defendant dismissed — Surety is discharged. (Vol 25) 1938 Mad 422 (423) (DB).

[20] Bills of exchange, each drawn by A upon and accepted by B, payable to drawer's order and endorsed by drawer to a Bank — A executing conveyance of all property to official trustee upon trust for the benefit of A's creditors—Deed assented to and executed by Bank — Deed not containing any composition with or release by creditors, or any covenant on their part not to sue A — Suit by Bank against B to recover amount payable under the bills: *Held* that the trust deed did not impair the eventual remedy of B and as such he was not discharged from this suretyship under S. 139, Contract Act. (1878) 3 Cal 174 (188, 189) (DB).

[21] Puisse mortgagee obtaining decree absolute against surety and mortgagor—Mortgaged property sold by prior mortgagee in execution of his decree but proceeds found insufficient to discharge his debt — Failure of puisne mortgagee to execute his decree does not discharge surety from personal liability—Section 139 held inapplicable. (Vol 22) 1935 Oudh 260 (262) (DB).

[22] Surety bond given to Court—Although Ss. 133, 135 and 139 do not in terms apply, principles underlying them can be applied. (Vol 26) 1939 Bom 23 (25) : I L R (1938) Bom 794 (D B) & (Vol 31) 1944 Lah 428 (431, 432) (DB).

[23] Where the lease of the right to collect tolls contained a clause that if payment of kist falls into arrears

the toll will be liable to be re-sold or conducted under *amari*: *Held*, that the alternative of re-sale or conduct under *amari* was one entirely within the option of the District Board and neither the contractor nor the surety was entitled to plead as a condition of the discharge of the obligations, that the Board should have adopted that course on default of payment of kist. (Vol 21) 1934 Mad 85 (88) (DB).

[24] Creditors cannot call upon the guarantor to pay any sum under his guarantee when they themselves have failed to carry out the most important term of their contract, such as conveyance of the property to the purchaser. (Vol 21) 1934 Cal 699 (702) (DB).

SECTION 140 — Note 1

[1] A surety paying off a debt is entitled to all the rights and securities of the creditor as against the principal debtor. (Vol 6) 1919 All 56 (58) : 42 All 70 (D B) & (Vol 14) 1927 All 538 (540) : 49 All 640 (D B). (Part payment of debt by surety is not enough to step into creditor's shoes.) & (Vol 5) 1918 Low Bur 115 (115). (It is immaterial whether the surety has incurred a fresh obligation to the creditor.)

[2] A surety who has paid the debt of his principal is subrogated to all the remedies and rights which the creditor has not only against the principal but against the others and to all the securities and rights of action generally which the creditor has in respect of the debt. (Vol 23) 1936 Mad 342 (343). (A and B undertaking to be liable jointly and severally for each other's debt owing to a Bank—Bank recovering B's debt from C who stood surety for B — C held was subrogated to right of action which the Bank had against A.)

[3] Section 140 expressly says that the surety upon payment of all that he is liable for is invested—that is immediately invested — with all the rights which the creditor had against the principal debtor. The condition laid down by the section for this right to arise is the payment by the surety of all that he is liable for, and not the payment of all that may be due to the creditor who holds the securities. Where the guaranteed debt is a fraction only of the debt, the surety's right comes into existence immediately on payment of that fraction, for, that fraction is, so far as he is concerned, the whole. Both under S. 140, Contract Act, and under the English law the surety's right to the benefit of the security vests in him the moment he pays the guaranteed amount. The creditor cannot afterwards make an appropriation to the prejudice of the rights of the surety which have accrued to him. Indeed, he cannot do so even before, as the surety is entitled to the benefit of every security held by the creditor, at the time when the contract of suretyship was entered into. The question is not whether the surety has a remedy against the principal debtor but whether he has any right against the creditor in respect of the securities held by him. A surety for a part only of a debt is on payment of that part entitled *pro tanto* to the security held by the creditors as cover for the debt as a whole. (Vol 31) 1944 Mad 195 (204, 205) : I L R (1944) Mad 304 (DB).

[4] Word "invested" dispenses with necessity of any written statement. (Vol 12) 1925 Bom 547 (559).

[5] A surety's rights against debtor arise only when the surety is requested by the debtor to take responsibility—An indemnifier cannot sue in his own name without an assignment from the promisee while a surety can. (Vol 18) 1926 Mad 544 (553) : 49 Mad 156 (DB).

[6] A and B referring dispute to arbitration—C who

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations.

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Section 140 (contd.)

stood surety for A paying amount to B awarded against A—Agreement of reference discovered to be void—Suit by C against A to recover amount paid under a ward—There being implied contract between A and C, C was held entitled to recover amount from A. (Vol 26) 1939 Lah 187 (188).

[7] A surety for the appearance of a judgment-debtor is not entitled to recover any sum forfeited under the surety bond either from the actual person for whom he stood surety or from any person who induced him to so stand. (Vol 19) 1932 Lah 23 (23).

[8] Surety for the appearance of one of several judgment debtors jointly and severally liable under decree can recover the amount paid by him from them. His right is on a higher footing than one for contribution. (Vol 8) 1921 Mad 530 (531) (DB).

[9] Bankruptcy of debtor — Surety's right to the security in the hands of the creditor cannot be enforced before payment of the entire debt. Where the surety guarantees the whole debt he is entitled to exemption to that portion for which dividend has been allowed; but where he guarantees only a part he cannot get any dividend until the creditor is discharged in respect of the whole debt. (Vol 17) 1930 Cal 17 (20) : 57 Cal 764 (DB).

[10] A executing a pronote in favour of B, C being the surety—A selling his property and asking vendee to discharge the debt—The debt having been collected from the surety, held that the surety can sue A and the vendee as he is entitled to all equities in favour of the creditor. (Vol 14) 1927 Mad 421 (421, 422).

[11] A joint decree was passed against surety and principal debtor. Surety applied to the Debt Conciliation Board for settlement of his debt. Debt was reduced and made payable in instalments. Surety made some payments : Held, that the surety could recover these payments from the principal debtor. ('42) 1942 Nag L Jour 311 (312).

[12] C becoming surety for a firm consisting of two parties A and B—A assigning his share to D—Creditor not accepting assignment or absolving assignor from liability—Assignee D is still liable to the creditor of the firm and surety is entitled to recover from him amounts paid by him to creditor. (1907) 1907 Pun Re No. 107, page 501 (503).

[13] The principles underlying Ss. 133 to 141 apply to surety bonds executed in favour of Courts under the Civil P. C., although the sections are not in terms applicable. (Vol 31) 1944 Lah 428 (431, 432) (DB).

SECTION 141 — Note 1

[1] Section 141, *prima facie*, has reference to the

simple case of a surety for a single debt for which the creditor holds a security or securities (Vol 31) 1944 Mad 195 (201) : I L R (1944) Mad 340 (DB).

[2] The surety is entitled to demand all the securities held by the principal debtor at the time of payment whether they had been received simultaneously with the loan advanced or subsequently. Section 141 only means that a surety cannot complain if before payment the creditor loses or parts with a security obtained by him after the contract of suretyship was entered into. Section does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid or in any other way to detract from the rights of the creditor as declared by S. 140. Section 141 only gives him liberty of action in respect of securities not held by him at the time of the contract of suretyship provided he exercises it before payment. (Vol 31) 1944 Mad 195 (200, 201) : I L R (1944) Mad 340 (DB).

[3] Agreement by A to advance certain sum to B and as security for that B to mortgage to A certain properties — Sureties — Subsequent agreement between A and B varying amounts to be advanced and properties to be mortgaged — Consent of sureties not obtained — Sureties are discharged from original contract. (Vol 19) 1932 Bom 168 (174) : 56 Bom 101 (DB).

[4] Property under attachment — Surety for judgment-debtor — Attachment released by creditor — Surety discharged to the extent of the property released. (Vol 21) 1934 All 616 (616, 617).

[5] Mortgagee is not at liberty to appropriate the mortgaged property to the discharge of another debt due to him without the consent of the person who has stood surety for the mortgage-debt, and if he does so he is bound to credit the surety with the value of the property. ('89) 2 C P L R 193 (194).

[6] Suit by mortgagee against principal debtor and surety on mortgage for more than Rs. 100 — Statement by mortgagee in plaint that he was suing on mortgage only as money bond, giving up his mortgage right — Except such statement, no other act of relinquishment, oral or documentary, giving up mortgage right — Mortgage right not being extinguishable except by registered document under S. 17 (i) (b) of Registration Act, mortgage right held was not extinguished by such statement — Surety, therefore, held was not discharged. (Vol 24) 1937 Mad 501 (502, 503).

[7] One of joint promisors paying entire debt — He is not surety nor entitled to subrogation in place of creditor in respect of securities held by latter. (Vol 20) 1933 Mad 39 (42) : 55 Mad 949 (DB).

Guarantee obtained by concealment invalid.

143. Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid.

Illustrations.

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A, in consequence, calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market-price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Guarantee on contract that creditor shall not act on it until co-surety joins.

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations.

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A, to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

SECTION 143 — Note 1

[1] The expression "keeping silence" in S. 143 of the Contract Act implies intentional concealment as distinguished from mere non-disclosure. The withholding must be fraudulent which necessarily must be the case when a material circumstance is intentionally concealed. (1891) 15 Bom 585 (591) (DB).

[2] The mistake which invalidates a contract under S. 143 must be occasioned either by means of a misrepresentation made by the creditor or with his knowledge and assent concerning a material part of the transaction or by the creditor keeping silence as to a material circumstance. There is nothing in law to indicate that sureties are entitled to evade their contract of guarantee because of a mistake induced by the principal debtor. (1906) 33 Cal 713 (755) (FB).

[3] To justify the application of the rule enacted by S. 143, Contract Act, it must be proved not only that there was silence as to a material circumstance but that the guarantee was obtained by means of such silence. (1883) 6 Mad 406 (408) (DB).

[4] Contract of service — Continuing guarantee for honesty of servant already in employ — Past gross misconduct not disclosed to surety — Surety is not responsible for dishonesty of servant. (Vol 31) 1944 Lah 424 (425) (DB).

[5] There is a difference between fiduciary guarantees and guarantees by persons in favour of banks. In the former case there may be a duty to disclose all material facts, there is no such duty in the case of a bank which takes a guarantee from a person to "disclose" the indebtedness of the person guaranteed at the date of the guarantee. Where, therefore, the suretyship is with regard to an advance to be made by a bank, the latter need not disclose past indebtedness to the surety. But if it gives wrong information when asked for, the suretyship is annulled. (Vol 17) 1930 Mad 874 (879) : 53 Mad 826 (DB) & (Vol 27) 1940 Mad 437 (439) : I L R (1940) Mad 757 (DB).

[6] M's bid at sale of Abkari farm accepted subject to his furnishing security — Failure to furnish security — Re-sale at loss — M becoming indebted for loss — In re-sale M again declared purchaser — N accepted as M's surety — N not inquiring nor informed by Collector as to M's indebtedness — N held was not discharged by reason of non-disclosure of M's indebtedness by Collector. (1883) 6 Mad 406 (418) (DB).

SECTION 145 — Note 1

[1] Apart from S. 140 of the Contract Act, a surety has a right under S. 145 to be indemnified by the debtor and the surety's rights under this section are not limited to the rights of the creditor against the debtor. (Vol 19) 1932 All 610 (613) : 54 All 1007 (DB).

[2] The implied rights possessed by a surety are available when the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. (Vol 4) 1917 Mad 83 (85) : 39 Mad 965 (DB).

[3] Where a person stands surety for another there is always an implied warranty by the latter, that he would indemnify such person in case he is damaged owing to a default made by him in the performance of any of the conditions imposed upon him under the security bond. (Vol 17) 1930 Lah 399 (400). (Surety for payment of decretal amount — Surety paying decretal amount on default by judgment-debtor — Surety is entitled to decree for decretal amount against judgment-debtor.)

[4] Surety, having undertaken the obligation at request of debtor, becomes entitled to recover from him whatever sums he has rightfully paid under the guarantee. (Vol 24) 1937 Oudh 19 (21) : 12 Luck 484 (DB).

[5] The liability of the principal debtor to pay the surety cannot arise from a mere implied promise to

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether *Co-sureties liable to contribute equally.* with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.^a

Illustrations.

(a) *A, B, and C* are sureties to *D* for the sum of 3,000 rupees lent to *E*. *E* makes default in payment. *A, B, and C* are liable, as between themselves, to pay 1,000 rupees each.

(b) *A, B, and C* are sureties to *D* for the sum of 1,000 rupees lent to *E*, and there is a contract between *A, B, and C* that *A* is to be responsible to the extent of one-quarter, *B* to the extent of one-quarter, and *C* to the extent of one-half. *E* makes default in payment. As between the sureties, *A* is liable to pay 250 rupees, *B* 250 rupees, and *C* 500 rupees.

[a] See Section 43.

Liability of co-sureties bound in different sums.

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Section 145 (contd.)

indemnify the surety, contained in S. 145, but must be the result of a contract between the surety and the creditor to which the debtor also is a party. (Vol 4) 1917 Mad 83 (86) : 39 Mad 965 (DB).

[6] A joint decree, *ex parte* against the principal debtor, but on contest against the surety—Surety making payment—*Ex parte* decree set aside—Surety can claim amount paid to the decree holder. (Vol 11) 1924 Lah 657 (659).

[7] Where a mortgage suit was dismissed against the principal debtor, but a money decree is passed against the surety, the latter can recover the amount paid for the former. (Vol 12) 1925 Nag 392 (392).

[8] Creditor's suit against principal debtor and surety—Summons against principal debtor not served—Creditor proceeding against surety alone—Remedy by suit against debtor, held, barred and that debt not extinguished—Remedy of surety under S. 145, Contract Act, to recover from debtor any sum which he was compelled to pay, or which he rightfully paid under his guarantee, held, remains open and unimpaired to surety. (Vol 24) 1937 Rang 72 (73, 74) : 14 Rang 594.

[9] A person, who is merely a surety, can be indemnified in an appropriate case, before actual payment, by an anticipatory action. (Vol 13) 1926 Mad 1035 (1037) (DB).

[10] Where the debtor executes a mortgage in consideration of his liability towards the sureties, but the mortgage is unregistered and, therefore, unenforceable, it does not amount to a contract, and there is no personal liability to pay under that mortgage-deed; consequently, the sureties can maintain a suit against the debtor for the moneys paid by them in his account. (Vol 24) 1937 Nag 104 (104) : 1 I L R (1937) Nag 353.

[11] Contract made and to be performed in State—Failure of contract—Surety obliged to pay—Surety suing principal in British India—Surety is entitled to recover money paid by him from principal. (1882) 8 Cal 337 (342, 343) : 9 Ind App 58 : 1882 Pun Re No. 7 (PC).

[12] Where a bail bond is forfeited, the surety cannot recover from person bailed, on grounds for public policy. (Vol 17) 1930 Cal 596 (597) : 57 Cal 1093.

[13] Surety for appearance cannot be allowed to recover any sum forfeited—S. 145 has no bearing on the matter. (Vol 19) 1932 Lah 23 (23).

[14] The expression "whatever sum he, has paid" occurring in S. 145 means a payment in money, or by transfer of property and not merely the incurring of a pecuniary obligation in the shape of a bond, promissory note, or acknowledgment of liability. ('08) 26 Mad 322 (328, 329) (DB) * (Vol 23) 1936 Rang 235 (236, 237) : 14 Rang 511. (Surety executing bond to pay in future—No payment.) * (Vol 17) 1930 Lah 812 (114). (Surety executing pro-note—No payment.) * (Vol 13) 1926 Nag

429 (431) * (Vol 11) 1924 Lah 657 (659) * (Vol 7) 1920 Nag 265 (265). (Execution of mortgage by a surety for the satisfaction of the decree is payment.) * (Vol 6) 1919 Nag 126 (127) : 15 Nag L R 78. (Fact that principal debtor is released and surety's liability is adjudged is not payment.)

[But see (Vol 17) 1930 Bom 331 (333). (Suit for indemnity is maintainable even if no actual payment is made but the surety has become only liable *in presenti*.)]

[15] A payment by surety to creditor, made after suit against the principal debtor had been instituted and with the object of assisting that suit to reach a successful termination, might be held to be a wrongful payment; while a payment made before the institution of such suit might be held to be a rightful payment. (Vol 17) 1930 Lah 812 (814).

[16] Where a surety keeps alive his liability by payments within time, at a time when creditor's remedy against principal has become barred, such payments are not wrongful. (Vol 12) 1925 Bom 244 (246) : 49 Bom 202 (DB).

SECTION 146 — Note 1

[1] In the case of co-sureties it is well-settled that if the creditor calls upon one of them to pay the principal debt or any part of it, that surety has a right, upon principles of equity, to call upon his co-sureties for contribution. (1904) 26 All 407 (418) (FB).

[2] The relation of co-sureties is not analogous to that of co-mortgagors—In the case of co-sureties no complication can possibly arise from the enforcement of the right of contribution. (1904) 26 All 407 (419) (FB).

[3] A guarantee drawn up in the plural number but signed by one surety only is binding on the surety who signed it unless he can show that he was to be liable only if the other surety or sureties signed. (Vol 13) 1926 Mad 62 (63).

[4] A surety is liable to allow co-sureties the benefit of any counter-security he has received from the debtor. (Vol 11) 1924 Mad 848 (848).

[5] Surety paying in excess of his share—Suit against co-surety and principal debtor is maintainable—All that the co-surety is entitled to claim is that he shall share proportionately in the proceeds of the security when it is realized. He is not in a position to insist that his liability is to be postponed until the security is realized and its extent ascertained on the ground that the property which has been conveyed to the plaintiff surety by the mortgagee on his paying the mortgage amount under the mortgage-deed is unrealized. (Vol 25) 1938 Cal 405 (408, 409).

[6] Where the sureties are bound by the same instrument as the principal debtor, a suit by one surety against another for contribution is a suit on an implied contract, and, therefore, within the jurisdiction of a Court of Small Causes. (1879-80) 4 Bom 321 (323) (DB).

Illustrations.

(a) *A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B, and C, are each liable to pay 10,000 rupees.*

(b) *A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.*

(c) *A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B, and C, have to pay each the full penalty of his bond.*

CHAPTER IX.

OF BAILMENT.

148. A "bailment" is the delivery of goods by one person to another for some purpose, upon '*Bailment*', '*bailor*', a contract that they shall, when the purpose is accomplished, be returned or and '*bailee*' defined. otherwise disposed of according to the directions of the persons delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

Explanation. — If a person, already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment.

SECTION 148 — Note 1

[1] A 'bailment' has been aptly defined by Chancellor Kent, as a delivery of a thing entrusted for some special object or purpose upon a contract, express or implied, to conform to the object or purpose for the trust. (Vol 15) 1928 Sind 106 (107) : 28 Sind L R 13 : 29 Cri L Jour 481 (DB).

[2] Bailments are of two kinds: voluntary and involuntary. When the bailee dies and the goods bailed pass into the hands of a person representing him, that person becomes an involuntary bailee. (Vol 8) 1921 Cal 416 (418)

[3] "For some purpose" does not indicate that bailee is to make use of goods deposited. (1935) 18 Nag L Jour 97 (99).

[4] "Directions" contemplated by S. 148, according to which goods are to be disposed of, cover the case of directions given after the purpose is accomplished. (Vol 9) 1922 Nag 127 (128).

[5] Issue of water-proof coat to railway servant on condition of renewal, at his cost, on damage or loss, is bailment. (Vol 21) 1934 Rang 41 (42) : 35 Cri L Jour 788.

[6] There is an implied contract in bailment to return articles in reasonable time after the purpose is served. (Vol 17) 1930 Oudh 395 (396) : 6 Luck 80 (DB).

[7] The true legal relation between the guest and hotel keeper in respect of the furniture used by the former is that of bailor and bailee as defined by S. 148. The bailment is one of hires; the guest hires not only the rooms which he occupies but the furniture which they contain. (1900) 22 All 164 (166) (DB).

Transfer of ownership. — [8] Where there is no obligation to return identical subject-matter, either in its original or in an altered form, there can be no bailment. (Vol 30) 1943 Nag 168 (169) : I L R (1943) Nag 486 : 44 Cri L Jour 423.

[9] Delivery of Government promissory notes to a Government treasury for cancellation and consolidation into a single note is not a bailment. There is a complete transfer of possession and ownership. (1878-80) 2 All 756 (762) (DB).

[10] Entrusting a person with goods for safe custody

is a species of bailment. (Vol 29) 1942 Mad 299 (300)* (Vol 24) 1937 All 255 (257). (Custodian is not agent of true owner.)

[11] Some precious stones and lumps of gold of special quality and three sovereigns were given to a goldsmith to convert into jewellery and were lost by theft, not caused by want of proper care: *Held*, that as the intention was to convert the identical stones and lumps of gold into jewellery, the ownership did not pass to the goldsmith and the transaction being one of bailment, he was absolved from liability for the loss under Ss. 148, 151; and as regards three sovereigns, as the identical sovereigns were not intended to be melted and turned into jewellery, the property had passed to the goldsmith and he was indebted to the owner thereof and was liable to make good the loss. (1912) 15 Ind Cas 431 (431) : 5 Bur L Tim 106 * (Vol 23) 1936 Oudh 264 (265) : 12 Luck 128. (Silver entrusted for making ornaments.)

Banker and customer. — [12] In the ordinary course of his trade, a banker is entitled to use moneys paid into his bank as his own, unless there is a direction which creates fiduciary relation between the banker and customer. Where the banker is to collect and remit, there is confidence and trust. Where the banker is to use and repay on demand there is no trust. (1909) 32 Mad 68 (70, 71) (DB).

[13] The relationship between a native banker and the person depositing money with him, in the ordinary way of business, is that of borrower and lender, and not bailor and bailee. (1889) 13 Bom 338 (341) (DB).

[14] There is distinction between bailment and deposit. Money paid into a bank to be credited into the current account of the person making the payment does not constitute a case of bailment. (Vol 33) 1946 Nag 114 (115) : I L R (1946) Nag 210.

Contract with carriers. — [15] Section includes bailment for carriage. (1909) 32 Mad 95 (119, 120, 121) (FB).

[16] When a railway company receives and undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates, it is a contract with the receiving company for the whole distance and the other railway company will

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations.

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.^b

[a] The responsibility of the trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Mad. 2 [II] of 1905), in regard to goods has been declared to be that of a bailee, under sections 151 and 152, without the qualifying words "in the absence of any special contract" in S. 152; see S. 40 (1) of that Act. [b] As to railway contracts, see the Indian Railways Act, 1890 (9 [IX] of 1890), S. 72. As to the liability of common carriers, see the Carriers Act, 1865 (8 [III] of 1865), S. 8.

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

[a] See S. 151, foot-remark a.

Section 148 (contd.)

be regarded as its agent, and not as contracting with the bailor. (Vol 26) 1939 All 649 (654).

[17] Railway company allowing goods to be placed in their premises for transportation is liable as bailee to consignor. (Vol 23) 1936 All 69 (72) : 58 All 576 (DB).

[18] Company depositing promissory note with Government as security in respect of private warehouse—Government becomes bailee and must return note without demand on termination of license. (Vol 26) 1939 Cal 746 (748) : 1 I L R (1939) 2 Cal 52 : 41 Cr L Jour 134.

Delivery of possession. — [19] Plaintiff arranging with defendant to get made certain jewels from goldsmiths working in defendant's house — Every evening plaintiff receiving from goldsmith half made jewels, putting them in box given by defendant for her use, keeping box in room and taking key in possession — Defendant, held, was not bailee, since there was no delivery of goods, the key remaining with plaintiff. (Vol 25) 1938 Mad 32 (32, 33).

[20] There must be the putting into the possession of the bailee or of his agent of the goods in question — Merely putting into possession of documents of title does not constitute bailment of goods. (Vol 21) 1934 All 568 (568, 569).

[21] Seller is not bailee of purchaser in absence of contract to that effect. (Vol 21) 1934 Oudh 380 (384) : 10 Luck 104 (DB).

[22] Property recovered from thieves and kept in custody of person in charge of *malikhanas*—Such person absconding with property—Secretary of State for India not liable as bailee, property having come into his possession under provisions of Criminal P. C. (Vol 24) 1937 Lah 572 (577) : 1 I L R (1937) Lah 380 (DB).

Explanation.—[23] After order of redelivery judgment-debtor and decree-holder become bailor and bailee. (Vol 18) 1929 Lah 386 (387).

Section 149 — Note 1

[1] When the goods have not been put in possession

of railway company, mere acceptance of consignment notes is not acceptance of goods. (Vol 16) 1929 Pat 296 (299) : 8 Pat 808 (DB).

[2] Lady handing over jewels to goldsmith to be melted for making new jewels—Every day lady receiving half-made jewels and keeping them in box in goldsmith's house, with key in her possession: *Held*, there was no delivery to goldsmith who could not, therefore, be regarded as bailee. (Vol 25) 1938 Mad 32 (33).

[3] The mere fact that the loading clerk filled up the serial number in the forwarding note, without doing anything further, would not amount to the delivery of goods to the Railway by the consignor. (Vol 10) 1923 All 449 (450) : 45 All 235 (DB).

[4] Section 72, Railways Act, makes the railway a bailee under Contract Act. Section 149, Contract Act, gives a clear definition of delivery and Ss. 148 and 149 are equally incorporated with Railways Act, and define and control the liability of the railway company. Hence a railway company is not exempted from liability within meaning of S. 72, Railways Act, even where a consignor did not take the railway receipt, when, as a matter of fact, the package was taken over by the goods clerk and was duly marked, and was actually dispatched from the receiving station. In such a case there is delivery within the meaning of S. 149, Contract Act. (Vol 9) 1922 All 9 (11, 12) : 44 All 218 (FB).

SECTIONS 151 & 152—Synopsis

1. Scope.
2. Common carriers by sea.
3. Carriers by railway.
4. Inn-keeper's liability.
5. Negligence of servant.
6. Standard and proof of negligence.
7. Special contract.
8. Burden of proof.

1. Scope. — [1] "Loss" in S. 152 denotes loss to goods distinct from loss to owner. (Vol 15) 1928 Lah 774 (776) : 10 Lah 360 (DB).

Sections 151 & 152 (contd.)

[2] Consignee is liable for demurrage if he unjustifiably refuses to take delivery. But that liability ceases from the date of notice that goods will be sold by the company if delivery is not taken. (Vol 5) 1918 Cal 824 (826) (DB).

[3] Bank taking possession of document of title only is responsible for safe custody of document and not of goods. (Vol 21) 1934 All 568 (569).

2. Common carriers by sea. — [1] In India the liabilities of a carrier are governed by the English Common Law. (1891) 18 Cal 620 (625) : 18 Ind App 121 (PC). (3 Bom 109, Overruled.) * (Vol 18) 1931 Sind 124 (125) : 25 Sind L R 222 * (Vol 6) 1919 Upp Bur 17 (18) : 3 Upp Bur Rul 120. (Licensee of ferry is common carrier.) * (Vol 5) 1918 Cal 824 (824) (DB) (Liability is that of insurer.) * (1911) 38 Cal 28 (41) (DB). (Do.)

[2] Where contract to carry passenger was made by foreign Company in Calcutta, they were bound by provisions of S. 151 of the Contract Act. (1881) 6 Cal 227 (235) (DB).

[But see (1905) 28 Mad 400 (408) (DB). (Carriers by sea for hire are common carriers by the common law of England and where the contract is made in Calcutta, whatever be the nationality of the carriers they will be governed by the *lex loci contractus*, which is the common law of England.)]

[3] Owners of lighter carrying goods are liable for loss of and damage to goods as bailees under S. 152 if in using lighter, they did not take amount of care described in S. 151. (Vol 4) 1917 Sind 47 (49) : 11 Sind L R 1.

3. Carriers by railway. — [1] The liability of a Railway Company for loss of goods consigned for carriage is governed by the tests laid in the sections. The Railway Company is not in the position of insurers as common carriers. (Vol 5) 1918 Cal 892 (893, 894) (DB).

[2] It is doubtful whether Ss. 151 and 161 of Contract Act apply to carriers by rail; even if they do not, a Railway Company would be entitled, like carriers before Carriers Act, to protection from liability by special contract. (1884) 10 Cal 210 (214) (FB).

[3] The responsibility of a Railway Company is, subject to the provisions of Act IX of 1890, that of a bailee under Contract Act. (1894) 17 Mad 445 (446) * ('86) 1886 Pun Re No. 97, page 240 (241) (DB).

[4] Railway Company is in the position of a bailee, and it should take as much care as an ordinary prudent man would take in respect of his own property. (Vol 4) 1917 All 172 (173).

[5] Railway Company is only a common carrier and liable as bailee. (Vol 9) 1922 All 9 (11) : 44 All 218 (FB).

[6] In the absence of the risk note, the liability of the railway is governed by Ss. 151 and 152, Contract Act. (Vol 31) 1944 Cal 50 (52) : 1 L R (1948) 1 Cal 397.

[7] Special contract in risk-note exempting Railway Company from liability in case of loss etc.—Company is not liable. (1898) 17 Bom 417 (421) (DB) * (Vol 19) 1932 All 584 (585). (Exemption under risk-note form A and B is available only during transit on ordinary route.) * (Vol 4) 1917 All 338 (339) : 39 All 418 (DB). (Railway is not liable unless plaintiff shows that loss was due to theft on wilful neglect of railway servants.) * (1908) 30 Cal 257 (261) (DB) * (1884) 10 Cal 210 (213) (FB).

[8] Transit of horse by railway — Horse sustaining injuries — No agreement signed by sender under S. 10 Railways Act IV of 1879 — Company is liable. ('82) 1882 Pun Re No. 27 p. 375 (382) (DB).

[9] Consignor's suit for compensation for non-delivery is a suit in contract, and not in tort. (Vol 10) 1923 Pat 285 (286) : 2 Pat 442 (DB).

[10] Railway Company accepting goods for carrying — "Bill of lading mentioning goods received in good condition" — Also providing that no English Common Law was applicable — Goods found damaged before being taken into custody by Company — Estoppel does not arise, as Railway Company's liability did not depend upon bill of lading or English Common Law. (Vol 22) 1935 Sind 218 (219, 220).

[11] Section 11, Railways Act IV of 1879 — Payment of increased charge puts Company in the position of ordinary bailees. (1893) 17 Bom 723 (727).

[12] Goods referred to in S. 75, Railways Act (1890) sent on "risk note" and not 'complying with that section — Railway company is not liable for loss of the goods. (1912) 34 All 656 (657) (DB).

[13] A Railway Company receiving goods for carriage is not bound to inquire into the apparent owner's title or to see that the risk note is read and understood by the person who delivers the goods. It is a contract binding on the consignor. In such a case the responsibility of the railway as bailee is governed by Ss. 150 and 151, limited by the agreement referred to above. (Vol 15) 1928 Cal 170 (173) : 55 Cal 142 (DB).

4. Inn-keeper's liability. — [1] English law not applicable to adjudge hotel manager's liability — His liability is that of bailee—Proprietor liable for damages caused to guest, when there were thefts, and he himself was aware of insecurity of premises. (Vol 9) 1922 All 471 (472, 473) : 44 All 735 (DB).

5. Negligence of servant. — [1] Bailee is responsible for negligence of servants in the use and custody of goods, in the course of employment, but not for unauthorised act done outside course of employment. (Vol 21) 1934 Cal 151 (155) (DB).

[2] Bailee is liable for employee's negligence unless expressly exempted. (Vol 11) 1924 Rang 356 (358).

6. Standard and proof of negligence. — [1] "Necessary care" within S. 151 is a finding of fact not open to question in revision. (Vol 23) 1936 Oudh 264 (265) : 12 Luck 128.

[2] Whether it can be inferred from facts found that ordinary prudence has been exercised, is a question of law and justifies an interference in second appeal. (Vol 2) 1915 Mad 80 (81).

[3] No cast iron standard for measure of care by bailee—Goods destroyed by unprecedented flood—Bailee not responsible. (Vol 20) 1933 All 158 (159) (DB).

[4] Held, Railway Company is responsible for negligence in preventing damage to goods after the discovery of the fire. (1913) 37 Bom 1 (15) (DB).

[5] Plaintiff depositing money with defendant for safe custody—Defendant depositing same in a bank, in which he had put his money—Bank solvent at the time —Subsequently failing—Defendant not liable. (Vol 3) 1916 All 7 (8) (DB).

[6] Pressure of work, or avoidable accident cannot help carrier to avoid liability under S. 151. (Vol 12) 1925 Cal 737 (738, 739) (DB).

[7] The degree of the care required of the carrier in dealing with the goods depends upon and varies with the nature and condition of the thing carried. A man of ordinary prudence would not send his own jute in a boat with 20 or 30 leaks of 1 or 1½ inches in length and keep the jute in the hold of the boat for thirty hours. (Vol 11) 1924 Cal 92 (94) (DB).

[8] Where omission to take precautions is deliberate and such as man of ordinary prudence would not make, carrier is liable—Carrying goods in unlocked van is wilful neglect. (Vol 15) 1928 Cal 498 (500) (DB).

[9] Where loss is due to theft by a railway servant the company is liable; but when it is by an outsider, railway company is not liable. (Vol 15) 1928 Cal 697 (700) (DB).

Sections 151 & 152 (contd.)

[10] Bags of *biri* stacked in open with station master's consent, as per custom and habits of business — Bags destroyed by fire, cause unknown — *Held*, Company was not liable. (Vol 19) 1932 Cal 257 (253).

[11] Bailee is to communicate bailor, in emergency, with reasonable diligence. (Vol 20) 1933 All 158 (159) (DB).

[12] In case of highly perishable articles, bailee should take special precautions. (1911) 9 Ind Cas 470 (471) (Low Bur).

[13] Plaintiff sending uninsured jewellery by V. P. P. to save insurance fee — Defendant doing same, plaintiff not objecting — Plaintiff cannot urge that defendants neglect to insure on a particular occasion was want of due care as laid down in section 151. ('06) 1906 Pun Re No. 70 page 260 (263) (DB).

[14] Gratuitous bailee and bailee for hire — No difference as to amount of care required by both in principle. (Vol 21) 1934 Cal 151 (154) (DB).

[15] Bailees are not liable for theft of goods bailed, if they had taken due care of the articles. (1900) 1900 Pun Re No. 90 page 371 (376) (DB) & (1912) 15 Ind Cas 431 (431, (Low Bur). (But bailee is liable to make good the loss of goods which were not the subject-matter of bailment e. g., sovereigns given to goldsmith for making ornaments.)

[16] Bailees insuring their own goods against fire, but not the goods bailed to them — Omission to insure is not absence of due care. (1898) 11 Mad 459 (466) (DB).

[17] A borrowed car from B — Car damaged by accident. B repaired car and sued A for amount — *Held*, it was contract of bailment, A failed to carry out obligation and suit was governed by Art. 115, Limitation Act. (Vol 20) 1933 Oudh 518 (519) : 9 Luck 139 (DB).

[18] Plaintiff entrusted driving beam of his sewing machine to defendant, who was a coppersmith, for repair. He wanted broken tip soldered with copper. Defendant undertook to do repair. He employed another coppersmith to do the work under his instructions. In the course of soldering excessive heat was applied, and other tip of driving beam was melted, rendering driving beam useless. *Held*, in a suit for damages, that S. 151 governed the case, which required from defendant care of skilled coppersmith. *Held*, also, that, if a man undertakes, whether for reward or not, to do something requiring special skill, he may be fairly called on, if things go wrong, to prove his competence. ('08) 1908 Upp Bur Rul 11.

[19] Absence of proof of negligence — Railway Company taking care of consigned goods with prudence — Loss of consigned goods — Railway Company was not responsible for loss. (Vol 21) 1934 Pat 583 (583) (DB).

[20] Plaintiff instructing defendant, who was a commission agent in bullion, to purchase silver bars and keep them with defendant — Defendant purchasing bars and reporting that they were kept at plaintiff's risk — Bars kept by defendant at his *pedis* unlocked and unattended — Three bars lost — Defendant was bound to take ordinary care as bailee and was liable for loss, being guilty of negligence — The fact that bars were kept at plaintiff's risk was an additional term, which was not accepted by plaintiff — Defendant was not therefore, absolved from ordinary liability of bailee, which he had accepted by purchasing bars. (Vol 26) 1939 Bom 101 (101, 102, 103) (DB).

7. Special contract. — [1] If there is a special contract, the bailee may be held liable for the loss etc., even though he has taken such care of the thing bailed, as is required by S. 151. (Vol 24) 1937 Sind 207 (208) (DB).

[2] Clause in laundry receipt "Clothing cannot be claimed in case of any accident by fire or if things get torn." *Held*, clause safeguards only accidental tearing happening in spite of reasonable care taken and would not safeguard laundry against tearing due to negligent treatment, or deliberately improper treatment — Clause to safeguard against employee's negligence must be explicit to that effect and bailee (laundry-keeper) was liable for employee's negligence. (Vol 11) 1924 Rang 356 (357).

[3] A bailee's liability cannot be reduced by any contract below the limits prescribed by S. 151. (1909) 32 Mad 95 (120) (SB) & (Vol 6) 1919 Low Bur 61 (66) (DB). (Carriers by sea.)

[But see (Vol 16) 1929 Rang 145 (146, 147) : 7 Rang 339. (Pawn broker issuing pawn ticket on deposit of jewellery can exempt himself from liability in case of destruction.) & (Vol 15) 1928 Bom 5 (7) : 52 Bom 37 (DB). (Shipowner can protect himself by express contract from liability for his or his servant's negligence.)]

8. Burden of proof. — [1] Bailees sued for damages for loss of goods — Plaintiff is to prove want of diligence or negligence by producing best evidence — In moments of peril and emergency, Court should not expect ordinary diligence, and should not attribute negligence merely because of wrong judgment. (Vol 4) 1917 P C 173 (175, 176) (P C).

[2] Mere happening of an accident is not sufficient evidence of negligence, the plaintiff must give some affirmative evidence of negligence on part of the defendant. (1887) 9 All 398 (408) (DB).

[3] Goods lost or damaged raises *prima facie* presumption of negligence against bailee — Onus of proving due care lies on bailee. (Vol 11) 1924 Cal 1056 (1058) (DB) & (Vol 10) 1923 Rang 74 (74) (DB) & (Vol 7) 1920 Oudh 70 (72) : 23 Oudh Cas 96.

[4] Tests in Ss. 151 and 152 determine Railway Company's liability. Onus is on the company to prove exoneration of its liability by special risk note. (Vol 10) 1923 Pat 235 (237) : 2 Pat 442 (DB).

[5] Plaintiff proving no delivery — Onus to prove absence of negligence and care on part of railway, or its servants is on railway Company — Onus is not shifted by fact that plaintiff had signed risk note B. (Vol 15) 1928 All 103 (105) : 50 All 246 (DB) & (Vol 24) 1937 Sind 85 (86) : 31 Sind L R 22 (DB) & (Vol 21) 1934 Cal 151 (153) (DB). (Burden cannot be enhanced to absurd extent, by requiring Railway Co., to prove its reasonable care and cause of loss.) & (Vol 13) 1926 Lah 217 (218) & (Vol 1) 1914 Bom 154 (159) : 39 Bom 191. (1) The bailee can show that cause, while unknown, must have been external to himself and beyond his control (2) He can prove that, while unknown, and, in all probability, attributable to himself cause was such as could not be foreseen and prevented by all reasonable care.)

[6] Railway Company is liable to compensate for loss of or damage to goods, though claim is not put forward till after delivery has been taken and "clear" receipt is granted. Receipt is only *prima facie* evidence of fact and raises presumption in favour of receipt of goods. Bailor is not precluded from proving that goods were really damaged or deficient in quantity when delivered to him. (1912) 39 Cal 311 (313) (DB).

[7] Where questions are whether plaintiff respondent has proved that appellant was hired by him to carry cask of sauce to his house and, if so, whether cask was broken through negligence of appellant and his servants; held that, under circumstances, mere occurrence of accident threw upon defendant burden of proving that due care was exercised and accident was unavoidable. ('01) 1901 Upp Bur Rul 337.

Termination of bailment by bailee's act inconsistent with conditions.

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the condition of the bailment.

Illustration.

A lets to *B*, for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of *A*, a termination of the bailment.

Liability of bailee making unauthorized use of goods bailed.

during such use of them.

154. If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or

Illustrations.

(a) *A* lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls, and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) *A* hires a horse in Calcutta from *B* expressly to march to Benares. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls, and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

Effect of mixture, with bailor's consent of his goods with bailee's.

thus produced.

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his

Effect of mixture, without bailor's consent, when the goods can be separated.

the mixture.

own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from

Illustration.

A bails 100 bales of cotton marked with a particular mark to *B*. *B*, without *A*'s consent, mixes the 100 bales with other bales of his own, bearing a different mark: *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales and any other incidental damage.

Effect of mixture, without bailor's consent when the goods cannot be separated.

loss of the goods.

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the

Illustration.

A bails a barrel of Cape flour, worth Rs. 45, to *D*. *B*, without *A*'s consent mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or

Repayment by bailor of necessary expenses.

the necessary expenses incurred by him for the purpose of the bailment.

to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the

159. The lender of a thing for use may at any time require its return, if the loan was

Restoration of goods lent gratuitously.

gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

SECTION 153 — Note 1

[1] Bailee is liable, if he does any act with regard to the goods bailed which causes loss to the bailor. (Vol 18) 1981 Oudh 15 (18) : 5 Luck 220 (DB).

SECTION 154 — Note 1

[1] Purchaser of car, under hire-purchase system, is in the position of a bailee when he has not paid all the instalments. (Vol 20) 1933 Bom 465 (467) : 53 Bom 189.

[2] Where a car has been entrusted to the defendant as a bailee and the evidence establishes that he was using the car for his private purposes in contravention of his agreement with the plaintiff, the bailor, he is liable for the damage arising from such use. (1934) 35 Pun L R 705 (707, 708) (DB).

[3] On the death of a bailee, his estate is responsible for the loss. (Vol 18) 1981 Oudh 15 (16) : 5 Luck 220 (DB).

Return of goods bailed on expiration of time or accomplishment of purpose.

they were bailed has been accomplished.

Bailee's responsibility when goods are not duly returned.

160. It is the duty of the bailee to return or deliver, according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. If, by the default of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.^b

[a] Section 161 has been declared to apply to the responsibility of the Trustees of the Port of Madras as to goods in their possession, see the Madras Port Trust Act, 1905 (Mad. 2 [II] of 1905), S. 40 (1). [b] As to railway contracts, see the Indian Railways Act, 1890 (9 [IX] of 1890), S. 72.

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

SECTION 160 — Note 1

[1] Railway Company is bound to deliver goods as per reasonable instructions of consignor, and also of consignee if latter's name appears on Railway receipt. (Vol 16) 1929 All 960 (960) : 52 All 126 (DB).

[2] Words "without demand" indicate reasonable and definite direction by pawner himself and not by his assignee. (Vol 9) 1922 Nag 127 (128).

[3] Company depositing, with Government, as security, in respect of ware-house, Government promissory note—Government liable to return note without demand after termination of license as bailee. (Vol 26) 1939 Cal 746 (748) : 1 L R (1939) 2 Cal 52 : 41 Cri. L Jour 134.

[4] It is unreasonable for person, who borrowed ornaments for use in ceremony, to detain them after ceremony, and after the owner has demanded their return. (Vol 17) 1930 Oudh 395 (396) : 6 Luck 80 (DB).

[5] Bailee having parted with the goods bailed with the consent of the bailor cannot claim it back—No suit for recovery is maintainable. (Vol 4) 1917 Pat 129 (131) : 19 Cri. L Jour 220.

[6] Bailee for hire—There is implied warranty of fitness of goods—In case of breach of warranty, there is no liability to pay hire. Bailee can have the article where it is and give notice to bailor of the breach and he is not bound to return it to bailor. (Vol 8) 1921 Bom 191 (191) : 45 Bom 1017 (DB).

SECTION 161 — Note 1

[1] Section 161 lays down the Common Law rule that a bailee who retains goods after the period, for which it has been bailed, does so at his own risk and is liable for the loss, destruction or deterioration of the goods whether or not he was at fault. (Vol 24) 1937 Mad 411 (415) (DB) * (Vol 11) 1924 Cal 1056 (1057) (DB).

[2] Bailee not returning goods without demand at expiry of period of bailment but creating obstacles to deprive bailor of use of goods—It is wrongful detention—Bailee is liable for loss or deterioration. (1934) 35 Pun L R 705 (708, 709) (DB).

[3] Word 'deterioration' in S. 161 includes depreciation in value owing to fall in price of goods—Its meaning is same as in risk note B protecting railway company under special conditions. (Vol 17) 1930 All 132 (134) : 52 All 238 (DB).

[4] Goods bailed or pledged—Implied contract of return on demand—Refusal to deliver unlawful—Action lies in tort or contract. (Vol 6) 1919 All 102 (103) : 41 All 643 (DB).

[5] Liability of railway is governed by S 161. Refusal to deliver, except for unjust and unreasonable condition, amounts to default. (Vol 18) 1931 Nag 29 (31) : 27 Nag L R 230.

[6] Railway cannot limit its liability for non-delivery by risk note. (Vol 15) 1928 Lah 774 (777) : 10 Lah 360 (FB).

[But see (Vol 9) 1922 All 63 (64).]

[7] When goods consigned to a railway company are taken by a devious route and delivered, such delivery cannot be said to be in proper time within the meaning of S. 161. (Vol 14) 1927 Pat 354 (354) (DB).

[8] Payment of port charges before date fixed for sale—Sale by Commissioners—Suit for compensation : Held, that as the sale took place owing to default of Commissioners under S. 161, Contract Act, Commissioners were responsible for the value of goods. (Vol 18) 1931 Rang 95 (96).

[9] Court can draw presumption as regards value against pledgee, not producing property in his possession, or improperly disposed of by him. (Vol 17) 1930 Mad 364 (368) (DB).

[10] In an action for damages, full value of the chattles, at the time of the conversion, is the measure of damages. Bailor is not, however, entitled to more damages than value of goods, if he delays filing suit. (Vol 3) 1916 Low Bur 93 (94) (DB).

[11] Executor of deceased bailee is personally liable, if he refuses to return goods on due date. (Vol 3) 1916 Low Bur 93 (94) (DB).

[12] On bailee's death, his estate is liable for loss caused to bailor, his heir being constructive trustee—Section 161 is not exhaustive. (Vol 18) 1931 Oudh 15 (16) : 5 Luck 220 (DB).

[13] The moment the default of the bailee is established, and the responsibility falls to be determined by S. 161, the burden shifts on to him to prove that the loss, for which he is sought to be made responsible, by the bailor occurred prior to the commencement of default on his part. (Vol 19) 1932 All 584 (585).

[14] Article 145 of the Limitation Act governs suits for recovering deposit from an involuntary bailee. Fact of possession with bailee becoming wrongful, after demand is made, does not make Art. 49 applicable. (Vol 8) 1921 Cal 416 (419).

SECTION 162 — Note 1

[1] The object of S. 162 is simply to bring out the general principle of law on the surface that the heir of a bailee, when the bailment is gratuitous, does not occupy on the death of such bailee the character of a bailee. The section does not do away with the principle of law that such an heir occupies the character of a constructive trustee in regard to the subject-matter of the bailment. (Vol 18) 1931 Oudh 15 (16) : 5 Luck 220 (DB).

[But see (Vol 8) 1921 Cal 416 (418).]

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from goods bailed.

Illustration.

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.^a

[a] See the Indian Evidence Act, 1872 (1 [I] of 1872), S. 117.

167. If a person, other than the bailor, claims goods bailed he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

169. When a thing, which is commonly the subject of sale, is lost, if the owner cannot, with reasonable diligence, be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

- (1) when the thing is in danger of perishing or of losing the greater part of its value; or,
- (2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value.

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations.

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

SECTION 163 — Note 1

[1] Old shares in a company pledged — New shares issued to share-holders out of dividend — Pledgee must deliver the new shares also as "increase or profit". (Vol 12) 1925 P C 86 (89) : 52 Ind App 137 : 49 Bom 283 (PC).

SECTION 165 — Note 1

[1] Rule as to validity of delivery by bailee to one of joint bailors is not general rule of Law of Contracts. (1910) 20 Mad L Jour 709 (715) (DB).

SECTION 166 — Note 1

[1] Pledgee of goods, without notice of plaintiff's title, delivered them to pledgor, in good faith, is not guilty of conversion. (1913) 37 Bom 122 (136, 137, 138); 40 Ind App 1 (PC) & (Vol. 10) 1923 Bom 155 (160) (DB). (Pledgee delivering according to directions of pledgee.)

[2] When a bailee delivered goods bailed to him to the original bailor, when he had notice of the sale by the original bailor, to another person, and with knowledge that he was going to sell it to a third party, the

bailee is guilty of conversion, and liable for damages. (Vol 27) 1940 Rang 249 (250) : 1940 Rang L R 361.

SECTION 168 — Note 1

[1] Principle of salvage lien applies to India—Person making payment for his own benefit, to save his property or under personal covenant binding on him — Principle does not apply. (Vol 28) 1941 Mad 208 (216) (DB).

SECTION 170 — Note 1

[1] Where there is an express contract, it must be performed in its entirety, and nothing can be claimed under it. So when a person agreed to repair an organ for a certain sum he cannot retain the organ, for remuneration of part of work done, when he refuses to repair it for any reason. (1884) 6 All 139 (141) (DB) & (Vol 13) 1926 Cal 464 (464, 465) : 53 Cal 174 : 26 Cri. L Jour 1505 (DB). (A person who is entrusted to repair article is not entitled to claim lien, after doing a certain amount of work which makes no improvement thereupon.)

171. Bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers may, in the

General lien of bankers, factors, wharfingers, attorneys, and policy-brokers. absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.^a

[a] As to lien of an agent, see S. 221. As to the lien of Railway Administration, see the Indian Railways Act 1890 (9 [IX] of 1890), S. 55.

Section 170 (contd.)

[2] When under one contract goods are delivered at recurring periods, and in different consignments, the bailee has a lien on all the goods for charges in respect of any goods comprised in the contract. (1882) 8 Cal 312 (316, 317).

[3] For application of the section, custody of goods must involve exercise of labour or skill. ('85) 1885 Pun Re No. 60, page 126 (127) (DB) & (Vol 21) 1934 Oudh 380 (385) : 10 Luck 104. (Seller, having goods sold for unpaid price, does not come under S. 170.)

[4] A bailee who has been entrusted with cattle for grazing has, in absence of contract to the contrary, no right of his own accord to sell the cattle for recovery of his grazing dues. (Vol 27) 1940 Nag 273 (274).

SECTION 171 — Synopsis

1. Scope.
2. Banker's lien.
3. Factor's lien.
4. Wharfinger's lien.
5. Attorney's lien.
6. Agent's lien.

1. Scope.—[1] In the absence of any provisions in the Contract Act, English law, in the matter of liens, can be applied in India, on grounds of justice, equity and good conscience. (Vol 33) 1946 Nag 114 (116, 117) : I L R (1946) Nag 210.

[2] Lien is a right of defence, and not right of action and therefore there is no bar of limitation. (Vol 33) 1946 Nag 114 (115) : I L R (1946) Nag 210.

[3] In the absence of contract to contrary, bailee cannot sell goods pledged and if sells, loses his lien. (Vol 17) 1930 Sind 36 (39) : 24 Sind L R 268.

2. Banker's lien. — [1] Customer having two accounts — Customer owing on one account to bank — According to English law, which can be applied in India, in the absence of specific provision, Bank can claim lien on other accounts, and liquidate debts by transferring monies from one account to another. (Vol 33) 1946 Nag 114 (116, 117) : I L R (1946) Nag 210.

[2] A bank can have a lien over money, of its customer, in its hands, and not on money, handed in for a specific purpose and accepted — Money handed over for transmission — Bank has no lien on it even if the remitter and payee are the same person. (Vol 13) 1926 Sind 225 (225) : 21 Sind L R 385 (DB).

[3] The rights of a creditor, who accommodates the customers by storing goods, for the purchase of which he has advanced money, are higher than those of an ordinary bailee, and he has a general lien under S. 171 of the Act, in so far that, in the former case, there is an implication, that the security shall, if necessary, be made effectual to discharge the obligation. (Vol 17) 1930 Lah 576 (577, 578) : 11 Lah 678 (DB) & (Vol 14) 1927 Lah 408 (410) : 8 Lah 373 (DB) & (Vol 7) 1920 Mad 664 (665) : 48 Mad 747 (DB). (Nattukottai Chetties are bankers).

[4] Banker's lien covers all moneys of a particular customer, except those held in trust account. Profits placed in old overdraft account by Administrator-General through mutual error, did not give bank lien thereon; as Administrator-General acted in fiduciary

character, and right to liquidate old overdraft was *pari passu* with general body of creditors. (Vol 21) 1934 Rang 66 (70, 71) : 12 Rang 25.

[5] Banker's lien can properly be said to arise only in respect of any securities held by the bank. If the customer deposits certain securities, and ultimately there is a sum due to the Bank, the Bank has a lien over these securities and it can hold them against the amount due by the customer. In the case of money of the customer, paid into the bank into his current account, or deposit account, the amount ceases to be the property of the customer, and becomes the property of the banker and he is thereafter under a contractual obligation to repay or give credit to the customer for the amount. In such a case, there is no property of customer of which the banker has possession, the possession of the banker co-existing with his ownership of his money. In such a case, therefore, the essential conditions necessary to the existence of the lien are lacking. In such a case, the purpose of the lien is attained by the application of the principle of set off, whereby the banker can take into account any item in his favour as against any payment made by his customer before arriving at the balance subsisting between them. Where there is a certain sum to the credit of the customer in some account and he later on becomes indebted to the bank in respect of bills drawn by it, the bank would clearly be at liberty to set-off the amount in question against the amount due on the bills. (Question, when does the right to set-off arise considered with reference to the facts of the case.) (Vol 32) 1945 Mad 447 (449, 450) : I L R (1946) Mad 200.

[6] General lien held by bank does not entitle it to appropriate the fixed deposit in "either or survivor's" account towards the debt due by one of them alone. (Vol 15) 1928 Lah 316 (316) (DB).

[7] The bankers lien is subject to any contract to the contrary, and the existence of such a contract must be proved by one alleging it. (1896) 19 Mad 234 (236) (DB).

3. Factor's lien. — [1] Factor is an agent entrusted with goods to be sold for principal. (Vol 18) 1926 Oudh 202 (202, 203) : 1 Luck 133 : 27 Cri L Jour 328 & (Vol 2) 1915 Mad 1001 (1003) (FB).

[2] Factor making advances against them cannot sell without owners consent — But he can sue for refund of advances, before actual sale, if he has reasonably waited for sale though refund of advance from sale proceeds alone was agreed. (Vol 7) 1920 Mad 183 (183) (DB).

[3] There is no rule of law giving a lien to the *banian* as against his employee nor is there any custom to that effect. (1891) 18 Cal 573 (597) : 18 Ind App 78 (P O).

[4] Secretaries and treasurers of company, who have made advances to the Company, and incurred expenses, and made disbursements on behalf of the company in the conduct of its business, are not "bankers, factors, . . . etc." and are not entitled to any lien on the property of the company in their possession. (1889) 13 Bom 314 (320, 321, 322).

4. Wharfinger's lien. — [1] Owners of a screw-house who have a wharf as an accessory are not wharfingers. (1882) 8 Cal 312 (315).

Bailments of Pledges.

172. The bailment of goods as security for payment of a debt or performance of a promise "pledge," "pawnor," and is called "pledge." The bailor is in this case called the "pawnor." "pawnee" defined. The bailee is called the "pawnee."

Section 171 (contd.).

5. Attorney's lien. — [1] Attorney has lien for his charges upon documents, moveables, etc., coming into his hands unless it comes for specific purpose inconsistent with right of retainer. (Vol 8) 1921 Cal 67 (68) : 48 Cal 817.

[2] Solicitor who is discharged by his client has lien on papers entrusted to him, for his costs. The lien extends also to translations of documents made by Court translator at his expense. (1880) 4 Bom 353 (356).

[3] Solicitor has no lien for his costs on property recovered or preserved by his exertions. Solicitors engaged in suit can ask for charge on assets of partnership in hands of receiver before creditors of partnership. (1910) 34 Bom 484 (485).

[4] Mere order for costs fastens notice of solicitor's lien on third party. (Vol 14) 1927 Bom 542 (549) : 51 Bom 855 (DB).

[5] Section 171 has not the effect of depriving attorneys of the passive or retaining lien which they possessed prior to the passing of the Contract Act. (Vol 21) 1934 Cal 341 (344) : 60 Cal 1442.

[6] Barrister, on behalf of his client, paid into Court large sum in satisfaction of decree under protest, stating that owing to mistake in decree more money was deposited. In execution of another decree, this sum was attached while being deposit in Court. The Barrister claimed lien over portion of sum deposited. *Held* that the Barrister had no lien against the sum under Ss. 171, 217 and 221. Rule of solicitor's equitable lien in England did not apply to case, Barrister having obtained no decree in favour of his client and there being no fruits to obtain lien on. As Barrister had parted with possession of money without making any reference to his lien for fees, amount of fees could not be regarded as having been paid in under protest. (Vol 1) 1914 Low Bur 224 (224, 225) : 8 Low Bur Rul 70 (DB).

6. Agent's lien.—[1] As to agent's lien on principal's property, see S. 221.

SECTION 172 — Note 1

Scope.—[1] English law on pawning does not apply in India. In latter, pawn can be taken in though time is not fixed for repayment of loan on account of which goods are deposited as security. (1907) 6 Cri L Jour 118 (119, 120) (Low Bur).

[2] A "pledge" or "pawn" as defined in S. 172 lies midway between a loan and a mortgage, which wholly passes the property in the thing conveyed. (Vol 5) 1918 Cal 974 (974) (DB).

[3] Creditor advancing money for purchase of goods, and storing them in his godowns—It is quite likely that goods are security for advances, but such arrangement has to be proved. (Vol 15) 1928 P C 219 (220, 221) (P C).

[4] Rights of a person in whose favour a hypothecation is made of a chattel are limited strictly to actual chattel hypothecated and do not extend beyond that. So when some animals are the subject of hypothecation, the young ones born, when under pledge with the pledgee, are not subject to hypothecation. The young ones are fructus, and not mere accession to property within the meaning of S. 70, T. P. Act. (Vol 1) 1914 Lah 515 (516, 517) : 1915 Pun Re No 10.

[5] Hypothecation of not only movables existing on the premises at the time, but also in respect of movables

which might be subsequently acquired and brought there is valid. (Vol 28) 1933 Cal 154 (159) : 59 Cal 1372 (D B).

Mortgage and pledge.—[6] Distinct right to redeem is inseparable incident of mortgage and cannot be taken away by express agreement — Pledge confers special interest in the property of right to sell if loan be not repaid. Pledgee has no right of foreclosure. In mortgage right to property is transferred to creditor. In pledge, the pledgee has no property in the pawn. Parties to pledge by special agreement can introduce a clause so that on failure to redeem within certain time pledged property to vest in pledgee. (Vol 26) 1939 Rang 413 (415, 416).

[7] Profits that would accrue from immovable property cannot be pledged, as pledge can be of movable property or goods, and such profits are neither movable property nor goods. (Vol 26) 1939 Lah 15 (16) (DB).

Essentials.—[8] To show that a person is a pawn broker, it must be proved that he carries on the business of lending money, on the security of goods pledged to him, and that he holds himself out to lend money on such security and is in the habit of doing so. (1907) 6 Cri L Jour 118 (120) (Low Bur).

[9] A pledge in law is neither a mortgage nor a lien and does not pass property in the goods but only passes what is described as "special" property, that is, no title to the goods passes but the pledgee is allowed to retain the thing pledged till payment of the debt and in default of payment, to sell the thing pledged so as to pass the property to the vendee. There can be a pledge of goods either by pledging the goods *eo nomine* or by pledging the relative documents. Mere deposit of share certificates which are not goods is not enough to constitute valid pledge. (Vol 28) 1941 Mad 394 (395, 396, 397) : 1 L R (1941) Mad 419.

[But see (Vol 5) 1918 Cal 947 (949) (DB). (For pledge possession of goods is essential and not mere delivery of title deeds).]

[10] To constitute pledge there must be delivery to pledgee of goods and retainer by him. (Vol 19) 1932 Cal 524 (528) : 59 Cal 667 (DB).

[11] In the case of pledge of goods delivery may not be simultaneous with money advanced—May be actual or constructive. (Vol 19) 1932 Cal 524 (528) : 59 Cal 667 (DB).

Hypothecation.—[12] In the absence of fraud, there is no inherent illegality, immorality, or opposition to public policy in the non-possessory hypothecation of movables, and, therefore, a contract for such a hypothecation is a valid contract. It is a transaction which is customary throughout the country and is suited to the circumstances and business intercourse of the people. (1911) 7 Nag L R 72 (77).

[13] The method provided by S. 172 for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question is whether there was an intention to create a security. If so equity gives effect to it. (Vol 5) 1918 Cal 165 (166) (DB).

[14] When there was a mortgage of certain shop goods then lying on the premises, and the mortgagor undertook to keep on the premises stock to the extent of the debt replacing sold goods by new goods it is not a mere license but an equitable mortgage of the sub-

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pawnee's right of retention.
Pawnee not to retain for debt or promise other than that for which goods pledged.

Presumption in case of subsequent advances.

Pawnee's right as to extraordinary expenses incurred.

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Section 172 (*contd.*).

stituted goods, and there is complete assignment of after-acquired property. It is not necessary that an equitable assignment should be enforced by a suit for specific performance. The only condition is that the goods on coming into existence should be capable of identification as the things assigned. (1912) 6 Sind L R 97 (99, 100).

[15] Equity governs hypothecation. (1936) 40 Cal W N 625 (626).

Priority. — [16] Where the question is as to the priority between two instruments of hypothecation, the ordinary rule of *qui prior est tempore potest jure* must prevail. (1936) 40 Cal W N 625 (626).

[17] Simple mortgage of movables with power of sale — Possession not delivered — Subsequent pledge in favour of another party — Pledge valid and takes priority. (Vol 19) 1932 Cal 524 (531) : 59 Cal 667 (DB).

[18] A subsequent incumbrancer, who has got possession of hypothecated movables is entitled to priority over a prior incumbrancer, without possession, unless the prior incumbrancer proves that the subsequent incumbrancer had notice. (Vol 18) 1931 Rang 201 (201) : 9 Rang 182 (DB).

[19] A *bona fide* incumbrancer, without notice, who is in possession of movable property is to be preferred to an incumbrancer whose security is of prior date. (Vol 1) 1914 Low Bur 265 (265) : 7 Low Bur Rul 336 (DB).

SECTION 174 — Note 1

[1] Pledge and subsequent advance raise a presumption that there is a contract to hold the pledge for such advances. Where the later advance is separately secured such presumption does not arise. (Vol 15) 1928 Bom 507 (508) (DB).

SECTION 176 — Note 1

[1] Section 176 by defining the personal rights of the pledgee does not in any way cut down his rights to seek any remedy he may have through Courts. (Vol 32) 1945 All 299 (302) : I L R (1945) All 873.

[2] Neither absence of power to sell the goods, nor to recover the debt out of the sale proceeds, bars the pawnee from suing for the debt under the contract of loan. (Vol 14) 1927 Nag 346 (347).

[3] Rights of pledgee to sue on debt or sell pledged property are concurrent. (Vol 5) 1918 Cal 947 (949)

(DB) * (Vol 16) 1929 Bom 471 (474) : 53 Bom 819 * (1904) 27 Mad 528 (530) (FB) * (1895) 22 Cal 21 (23, 24) (DB).

[4] Principle, that creditor cannot recover debt for which security is given, when he cannot return it, applies when the debtor and person giving security are same. (Vol 26) 1939 Mad 915 (916).

[5] When date for redeeming the pawned article has passed, the pawnee can sell article. (Vol 31) 1944 Pat 135 (136) : 45 Cri L Jour 633 * (Vol 4) 1917 Lah 421 (423) (DB).

[6] Reasonable notice must be given to the pledgor before effecting sale of the pledged articles. (Vol 4) 1917 Lah 421 (423) (DB).

[7] Pawnee is not bound to sell the pledged goods within a reasonable time after the time fixed in the notice. He can sell at any time. (Vol 15) 1928 Mad 1022 (1024).

[8] Where no time is fixed for repayment, pawnee has the right to sell after giving reasonable time for repayment by notice. Notice does not become invalid on failure to mention the specified amount payable. (Vol 30) 1943 Nag 162 (163, 164) : I L R (1943) Nag 234.

[9] The notice must refer to the debt for which the pledged goods are to be sold. (Vol 24) 1937 Bom 26 (27).

[10] Notice need not mention actual time and place of sale. (Vol 5) 1918 All 363 (364) : 40 All 322 (DB). (Fort night's notice reasonable.)

[11] No fresh notice is necessary for an adjourned sale. (Vol 19) 1932 Cal 524 (532) : 59 Cal 667 (DB).

[12] Debtor is in default, where he fails to pay by the date fixed for repayment in the notice. (Vol 31) 1944 Pat 135 (136) : 45 Cri L Jour 633.

[13] Notice is not necessary to make the debt due and recoverable. Notice is necessary only before the goods are sold. (Vol 20) 1933 Lah 536 (536).

[14] Where no period was fixed for the repayment of the loan in order to enforce the right of sale the pawnee should prove : (a) a demand for the amount due; (b) a default by the pawnor; (c) a notice of sale giving reasonable time to the pawnor to pay; and (d) an actual sale. (Vol 14) 1927 Lah 408 (410) : 3 Lah 373 (DB).

[15] Pawnee is not tied up by the same considerations as an unpaid vendor and can sell even though the price is not reasonable. (29) 1929 Mad W N 167 (167, 168).

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them:^a but he must, in that case, pay, in addition, any expenses which have arisen from his default.

[a] For limitation, see the Indian Limitation Act, 1908 [IX] of 1908), Sch. I, No. 145.

^a[178. Where a mercantile agent, is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.—In this section, the expressions ‘mercantile agent’ and ‘documents of title’ shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.]

[a] Sections 178 and 178A were substituted for the original S. 178 by the Indian Contract (Amendment) Act, 1930 (4 [IV] of 1930), S. 2.

Section 176 (contd.)

[16] A suit on a pledge is an administration suit. It is a suit to ascertain, and declare and to give effect to respective rights of persons having interest in specified property by the Court in its administrative jurisdiction. (Vol 32) 1945 All 299 (302) : ILR (1945) All 373 (DB).

[17] Goods of defendant company taken possession of by Bank allowing overdraft to defendant and sold—Proceeds of sale of goods being less than the amount due : Held, that the company was still liable to pay the balance. (02) 1902 Pun Re No. 57, p. 207 (217) (DB).

[18] Sale by pledgee to himself is void, and amounts to conversion. (Vol 31) 1944 Pat 135 (137) : 45 Cri L Jour 633 (Vol 17) 1930 Mad 364 (371) (DB). (Pledgor can recover damages or the property on payment.) (1892) 19 Cal 322 (333, 334) : 19 Ind App 60 (PC). (Damages can be recovered by pledgor—Pledgee can resell the goods to third party.)

[19] Deposit of jewels as collateral security for promissory notes—Sale of jewels without proper notice—Suit on promissory notes—Deduction of value of jewels on date of suit can be claimed. (Vol 20) 1933 Rang 76 (79) (DB).

[20] The remedy of pawnor for an improper sale of pawned property is damages. Measure of damages is loss actually sustained. (Vol 24) 1937 Bom 26 (27).

[21] Creditor having security for debt—Security dissipated—Creditor cannot sue to recover debt—Official Assignee of the insolvent creditor is in the same position. (Vol 22) 1935 Rang 201 (202).

[22] In a suit on pledge Art. 57, Sch. II, Limitation Act, governs relief for a personal decree; Art. 120 applies for the sale of pledged goods. (1895) 22 Cal 21 (24) (DB) (1904) 27 Mad 528 (530) (FB).

[23] Rights of creditor, accommodating customer by storing goods, for purchase of which he has advanced money, are higher than those of ordinary bailee. Such creditor is in a position of a pledgee and can resell goods stored by him. (Vol 17) 1930 Lah 576 (578) : 11 Lah 678 (DB).

SECTION 177 — Note 1

[1] Suit for redemption by pledgor without previous tender of money—Pledgee found willing to deliver property without suit—Suit should not be dismissed but pledgee should be awarded costs—But where it is found that tender of money would have been useless, say by the pledgee declaring his inability to hand over the property, the pledgor need not go through the useless ceremony of tender. (Vol 17) 1930 Mad 364 (370, 371) (DB).

SECTION 178 — Synopsis

1. Scope.
2. "Consent of the owner."
3. Goods.
4. Documents of title.
5. Pledge of documents of title.
6. Expressly authorised.
7. Proviso.

1. Scope. — [1] Even after the amendment of 1930, "regarding this section, the old rule that a person cannot give another a title," higher than what he himself has, and which is subject to certain exceptions embodied in Ss. 178 and 178A continues to apply and the goods entrusted for safe custody cannot be the subject of valid pledge by the depositor. Section 178, which is confined to cases of mercantile agents only, does not apply to such case. (Vol 29) 1942 Mad 299 (300).

[2] Section 179 does not limit the scope to S. 178, but saves a pledge to the extent of the pledgor's interest, notwithstanding the presence of invalidating conditions under S. 178 (case before the amendment). (Vol 4) 1917 Bom 152 (158) : 42 Bom 205 (DB).

2. "Consent of the owner." — [1] It is immaterial in the case of a mercantile agent how the consent of the owner to the agent's possession was obtained. Consent, though secured by fraud, protects pledgee acting *bona fide*. (Vol 24) 1937 Rang 146 (147, 148) : 38 Cri L Jour 711 (Vol 21) 1934 Rang 198 (199) : 35 Cri L Jour 1875.

3. Goods.—[1] 'Goods' includes share certificates. (Vol 12) 1925 Bom 814 (317, 318) (DB) (1910) 12 Bom L R 870 (878, 879).

[But see (Vol 4) 1917 Cal 399 (401) (SB).]

4. Documents of title. — [1] Railway receipt is a document of title. (Vol 25) 1938 P C 52 (54) : 65 Ind App 75 : ILR (1938) Mad 360 : 32 Sind L R 313 (PC) (Vol 21) 1934 P C 246 (251) : 61 Ind App 416 : 58 Mad 181 (PC).

5. Pledge of documents of title. — [1] A pledge by pledging document of title is valid. (Vol 20) 1933 Mad 207 (211) : 56 Mad 177 (DB).

[2] Pledge of a share by mere deposit of the share certificate is valid. (Vol 30) 1943 Mad 74 (77) : 1 I L R (1943) Mad 115 (DB) (Reversing (Vol 28) 1941 Mad 894 : 1 I L R (1941) Mad 419.)

6. "Expressly authorised."—[1] Selling agent pledging cotton and advancing money to principal, who knew about this practice—Agent becoming insolvent—Suit by principal for delivery of cotton—Pledgee held entitled to amount advanced before delivering cotton. (Vol 4) 1917 Bom 152 (158) : 42 Bom 205 (DB).

^a[178A. When the pawnor has obtained possession of the goods pledged by him under *Pledge by person in possession under voidable contract.* contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.]

[a] Sections 178 and 178A were substituted for the original S. 178 by the Indian Contract (Amendment) Act, 1980 (4 [IV] of 1980), S. 2.

Pledge where pawnor has only a limited interest. 179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suits by Bailees or Bailors against Wrong doers.

180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies *Suit by bailor or bailee against wrong-doer.* as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Section 178 (contd.)

[2] Bailment for specific purpose — Bailee selling unauthorisedly—Bailment ends and purchaser does not get good title. (Vol 9) 1922 Mad 44 (46) : 45 Mad 173 (DB).

7. Proviso.—[1] Act is done in good faith when it is done honestly; whether it is done negligently or not, is immaterial. (Vol 25) 1938 Mad 545 (547) (DB) (1908) 30 All 165 (166, 167) (DB).

[2] Where a person was entrusted with a diamond as agent for obtaining offers for it, and if any such offer was approved by the owner, for selling it, and acting contrary to the instructions of the owner, the agent pledged it to persons who assumed that the agent was entitled to do so : *Held* that the pledge was valid. (1929) 31 Bom L R 414 (418).

[3] Shop-owner's employee in charge of the shop pawning articles in shop — Pawnee, receiving in good faith, is protected by S. 178. (Vol 10) 1923 Rang 227 (230) : 24 Cri L Jour 858 : 1 Rang 199 (DB).

[4] Pledge by manager of firm—Manager convicted for criminal breach of trust — Pledgee acting *bona fide* —Pledge, held, to be valid. (Vol 18) 1931 Lah 526 (526, 527) : 12 Lah 304 : 32 Cri L Jour 960.

[5] Pledgee advancing large sum of Rs. 19,600.—This fact alone will not establish his *bona fides*. (1863) 9 Moo Ind App 140 (166) (P C).

[6] Where the pawnee does not act in "good faith" within the meaning of the proviso and where circumstances are such as to raise a reasonable presumption in his mind that the agent pawning goods was acting improperly, pawnee cannot claim to hold the goods liable for a debt contracted by an unauthorised agent. ('82) 1882 Pun Re No. 199, p. 577 (583) (DB). (Case before 1930 amendment.)

[7] Pledgee taking goods from agent of whom he knows nothing cannot be said to have acted *bona fide*, and if such agent has no authority to pledge, pledge is invalid. (Vol 25) 1938 Rang 243 (244, 245) : 39 Cri L Jour 784.

[8] Where A and B, not being mercantile agents within meaning of S. 2 (9), Sale of Goods Act, deposited ornaments with C, who received them not in good faith, and all of them were accused of criminal breach of trust but C was acquitted : *Held*, that C was not protected under S. 178, Contract Act, and hence, was not entitled to possession of property under S. 517, Criminal P. C., although the general rule is that on acquittal property, in relation to which accused is charged, should be returned to him. (Vol 24) 1937 Sind 33 (35) : 38 Cri L Jour 382.

[9] When it is alleged that circumstances exist whereby a transferee has obtained a better title to goods or documents than the transferor possessed, the person or persons relying on such transfer should be in a position to prove the circumstances. (1938) 67 Cal L Jour 276 (276) (DB).

SECTION 178A — Note 1

[1] Where certain ornaments are merely handed over to the accused for use and on their being misappropriated and pledged, the accused were convicted : *Held*, that the ornaments should be returned to the owner, that the pledgee could not retain them as the owner had been deprived of them by a criminal offence, and that the fact that the owner delayed to bring proceedings could not alter the fact that she was deprived of her possession of the ornaments by a criminal offence. Section 178A was not applicable to such a case as there was no contract. (Vol 22) 1935 Rang 205 (206) : 36 Cri L Jour 1106.

SECTION 179 — Note 1

[1] Section 179 protects the *bona fide* pledgee and not the buyer. (1909) 11 Bom L R 926 (984, 985, 986).

[2] Mortgagor in possession of movables mortgaging to third person—Third person selling it—First mortgagee cannot recover from second mortgagee unless he proves that second mortgagee had notice of prior mortgage. (Vol 27) 1940 Sind 177 (177, 178) (DB).

[3] Property in pledge—Pledger settling property in trust, but giving no power to redeem to trustee—Subsequent hypothecation to *bona fide* pledgee—Subsequent transferee can redeem property and proceed against it for his debt. (Vol 15) 1928 Mad 1201 (1206) : 52 Mad 465 (DB).

[4] Contract for sale, but vendor in possession—Pledge to third party, ignorant of contract — Pledge not valid. (Vol 16) 1929 Cal 497 (506) : 56 Cal 367.

SECTION 180 — Note 1

[1] Either a bailor or bailee of a chattel may maintain an action in respect of it against a wrong doer; the latter, by virtue of possession, the former, by virtue of his property. (Vol 3) 1916 Cal 788 (790) : 43 Cal 783 (DB).

[2] Under S. 180 the bailee is entitled to maintain an action against a third party who does not claim under the bailor. As a bailee, he is not the agent of the bailor and can sue and claim the full damages for loss due to the alleged negligence of the defendant without prejudice to the rights of the bailor to adjust with the bailee amount of damages when recovered. (Vol 20) 1938 Bom 465 (467) : 58 Bom 189.

Apportionment of relief or compensation obtained by such suit.

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X.

AGENCY.

Appointment and Authority of Agents.

182. An "agent" is a person employed to do any act for another or to represent another in "Agent" and "principal" defined. dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."

SECTION 182 — Synopsis

1. Scope.
2. Broker.
3. Del credere agent.
4. Commission agents.
5. Pakka adatia and cutcha adatia.
6. Manager of joint Hindu family and guardian of minor.
7. Illustrative cases.

1. Scope. — [1] Definition of agent given in S. 182 is wider than in English law. It does not limit the employment to one by the principal only. (Vol 28) 1941 Cal 643 (655) (DB). (Common manager appointed under S. 95, Bengal Tenancy Act, is agent within the definition.)

[2] Definition of agent given in S. 182 is very wide and embraces a servant pure and simple. (Vol 25) 1933 Nag 254 (255).

[3] Use of word "agent" in general way, loosely without specifying purpose of agency, does not help to determine, as a matter of fact, whether person is agent. (1913) 14 Mad L Tim 249 (255) (DB).

[4] Unless authority to act is conferred and accepted, the mere settlement of the terms of remuneration does not constitute a contract of agency. (Vol 5) 1918 Sind I (3) : 12 Sind L R 93.

[5] Whatever might be the words used in the pleadings, the relationship between the parties is to be determined upon the real character of the contract between them. (Vol 20) 1933 Cal 204 (208) (DB).

[See also (30) 1930 Mad W N 729 (746) (DB). (Question of agency is mixed question of fact and law.)]

[6] Agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. (Vol 18) 1931 All 372 (372, 373) (DB).

[7] The word 'agent' does not of itself imply full authority to bind the principal, in the same way that a partner can bind his co-partner. Sections 186 and 187, Contract Act, show that the authority of an agent is to be gathered from either "words" or "circumstances" and is not implied in the mere fact that he is an agent. (Vol 11) 1924 Bom. 232 (228) : 48 Bom 20 (DB).

[8] A person does not become an agent on behalf of another merely because he gives him advice in matters of business. Agency is founded upon contract express or implied between the parties. (1907) 6 Cal L Jour 580 (585) (DB).

[9] Every act of agent in course of his employment on behalf of principal and within apparent scope of his authority binds principal unless agent is in fact unauthorised to do that act and person dealing with him has notice of same. (Vol 1) 1914 Cal 687 (690) (DB).

[10] Agent empowered to pledge his principal to one kind of arbitration can pledge him to another, if it arises out of same transaction. (1910) 34 Bom 13 (49) (Vol 12) 1925 Cal 541 (544) (DB).

[11] The word 'person' in S. 182 includes a joint

family — An agent appointed by the manager of the family is the agent of the family and not of the manager. (Vol 21) 1934 All 553 (556) (DB).

[12] Where the term of an agency for sale has expired, a subsequent execution thereof by the agent is invalid unless the term has been extended. (Vol 3) 1916 Cal 964 (969) : 43 Cal 833 (DB).

2. Broker. — [1] A broker is the agent of the person for whom he acts. He is not entrusted with the custody and the apparent ownership of the goods, but he is to effect business on commission. (Vol 4) 1917 All 466 (468) : 39 All 81 (DB).

[2] Broker is the agent of party who first employs him. To make him agent of the other party there must be some words or conduct by which authorization to act on behalf of other party is expressed or is to be positively inferred. (1910) 8 Ind Cas 601 (603) (Low Bur).

[3] A broker is the agent of both parties and his contract is one of employment. But if he departs from the business of negotiation, makes himself the agent of his principal to sell or buy, he makes a contract of sale or purchase and is liable on it. (Vol 3) 1916 Cal 548 (550) : 42 Cal 1050 (DB).

[4] The broker's duty is simply to bring the parties together, to arrange a transaction and to get the contract completed. The performance of the contract is a matter between the promisor and promisee. The broker need not look for the fulfilment of the contract for earning his remuneration. (Vol 22) 1935 Pesh 56 (56, 57) (DB) (Vol 17) 1930 All 545 (548) : 52 All 688 (DB) (1923) 38 Cal L Jour 139 (141).

[5] Broker can claim commission if he brings about sale or even agreement to sell. (1921) 60 Ind Cas 727 (728) (Lah).

[6] To entitle a broker to his commission, he must prove either that the transaction has been completed or that if it is not, the non-completion was due to default on the part of the principal. (Vol 9) 1922 Bom 433 (434) (Vol 6) 1919 Low Bur 126 (127) : 10 Low Bur Rul 15.

[7] The main office of a loan broker is to bring the borrower and the lender together, and when he has done that he has done all that is necessary for him to do and earn his commission. There must be in the lender the willingness to open negotiation upon a reasonable basis. (Vol 15) 1928 Bom 270 (273) : 52 Bom 627.

[8] In the absence of a contract to the contrary brokerage is only payable on the completion of a deed of conveyance, it being the broker's duty to introduce a person willing and able to complete the purchase. (Vol 31) 1944 Sind 168 (169) : ILR (1944) Kar 42 (DB).

[9] Calcutta jute market — Brokers are liable to buyers and sellers in all "principal contracts" — In the case of breach of contract the broker is entitled to go to arbitration under a clause to that effect. (Vol 10) 1923 Cal 419 (422) : 50 Cal 12.

3. Del credere agent. — [1] *Del credere* agent is one who guarantees performance of contract in consi-

Section 182 (*contd.*)

deration of extra remuneration. He is also party to contract. A *dubash* is not a *del credere* agent for contracts entered into without his intervention. (Vol 13) 1926 Mad 544 (551) : 49 Mad 156 (DB).

[2] The certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credere* agents of their constituents. (Vol 9) 1922 Bom 308 (315) : 46 Bom 489 (DB).

4. Commission agents.—[1] A person who receives goods from another as a commission agent and then sells them for him is an agent up to a certain point, that is, up to the date of the sale, and thereafter may be a debtor pure and simple. The test to know the relation is this : does the commission agent, when he sells, has authority to sell in his own name; has he authority in his own right to pass a valid title. If he has, then he is acting as a principal *vis-a-vis* the purchasers and not merely as an agent and, therefore, from that point on, he is a debtor of his erstwhile principal and not merely an agent. Whether this is so or not must of course depend upon the facts in each particular case. (Vol 25) 1938 Nag. 254 (255).

[2] Commission agent is not legally agent of all persons and firms, whom he occasionally transacts business for. Agency is only with reference to specific sales or purchases made under directions of principal. (Vol 5) 1918 Sind 1 (3) : 12 Sind L R 93.

5. Pakka adatia and cutcha adatia. — [1] A *pakki adat* is a speculative transaction and not a wager and a *pakka adatia* has a right to be indemnified by the seller. (Vol 4) 1917 P C 101 (102) : 45 Ind App 29 : 42 Bom 373 (PC).

[2] *Pakka adatia* is something more than commission agent and very like ordinary *del credere* agent, receiving orders from constituents and placing them in open market; but he can allocate his principal's contracts to himself when it suits him to do so. (1913) 15 Bom L R 85 (96).

[3] Where there is a contract between a *pacca arhtiya* and a constituent, the *pacca arhtiya* is himself responsible to his constituent. The fact that he did or did not enter into a contract with a third party in pursuance of the order of his constituent makes no difference. For all practical purposes, the *pacca arhtiya* himself and his constituent act as principal parties. A contract between a *pacca arhtiya* on one side and his constituent on the other is a contract between them as principals and the *pacca arhtiya* does not act, in such cases, as an agent of his constituent. (Vol 27) 1940 All. 182 (188) : ILR (1940) All 186 & (Vol 27) 1940 Lah 195 (196). (The only claim of constituent against *pukka artia* is for liquidated sum.) & (Vol 24) 1937 Lah 581 (585) : ILR (1937) Lah 683 (DB).

[4] A *pakka adatia* can become principal to enforce any contract entrusted to him as agent by his original principal against that principal. (Vol 6) 1919 Bom 187 (187).

[5] *Pakka adatia* enters into contracts under instructions from his employer, principal. But constituent is not concerned with method in which his instructions are carried out. So it is open to constituents to set up plea of wagering contracts. (1913) 37 Bom 347 (350).

[6] In *pakka adatia* agency cases, place of payment is primarily place where constituent resides, but payment may be made in any other place if constituent so chooses. Mere fact that principal has to bear charges on account of remittance and exchange does not sufficiently show that place of payment is place whence agent remits money. Liability of *pakka adatia* ceases when hard cash has come into his constituent's hands. (1909) 33 Bom 364 (368) (DB).

[7] Rule of English law that payment of commis-

sion is conclusive proof of existence of agency does not equally apply to *pakka adatia* dealing in Bombay. (1909) 11 Bom L R 926 (943).

[8] Even where the contract purports to give an agent absolute discretion, just as *pakka adatias* in Bombay have discretion as to calling for margin, it is incumbent on him to show that circumstances exist for the reasonable exercise of that discretion. (Vol 14) 1927 Bom 125 (126, 127) (DB).

[9] When a *cutcha adatia* enters into transaction under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf. Hence a contract of *catcha adatia* agency is not a wagering contract. (Vol 13) 1926 P C 119 (120) : 51 Bom 1 : 53 Ind App 241 (PC) & (Vol 27) 1940 All 182 (183) : ILR (1940) All 136.

6. Manager of Joint Hindu family and guardian of minor.—[1] The managing member of a Hindu family is not an agent of the other members of the family. (1900) 22 All 807 (317, 320) (DB) & (1903) 26 Mad 544 (553) : 30 Ind App 220 (PC).

[2] The guardian of a minor cannot be treated as the agent of the minor. (1896) 20 Bom 61 (75) (DB).

7. Illustrative cases.—[1] Railway company under taking to carry goods from a station of its own Railway to a station on another railway. Contract is with former company which receives goods for whole distance; latter is only its agent. (Vol 26) 1939 All 649 (654).

[2] A person employed to sell unredeemed articles from a pawn shop on behalf of his employer is an agent within the meaning of S. 182, although he is a servant or a shop assistant. (Vol 25) 1938 Rang 248 (244) : 39 Cri L Jour 784.

[3] A suit for account lies against a servant on a fixed salary but the nature of whose employment is that of an agent. (Vol 17) 1930 Sind 142 (143).

[4] Person authorised to purchase goods hold them and resell them—Contract held to be one of agency with right of indemnity. (Vol 10) 1923 Lah 473 (474) (DB).

[5] When a person undertook, on behalf of co-sharers of land, to make an application under S. 8 of Act 11 [XI] of 1859, he became the agent of the co-sharers for that purpose. Absence of any consideration would not take away from him that character. (1878) 3 Cal 300 (304) (DB).

[6] Plaintiffs, *deshmukh* of village, entitled to fees and employments from revenues—Defendants, *gumastas*, appointed by *Peshwas*, making collections for plaintiff. Held, that, defendants were to be regarded as agents for the plaintiff, and the mere fact that they were not appointed by the plaintiff and were not removable by him did not prevent their being his agents. (Vol 26) 1939 Bom 126 (127, 128) : I L R (1939) Bom 154 (DB).

[7] Where there is authority to send title deeds by post the post office is the agent of the addressee; if there is no authority, the post office will be the agent of the sender. (Vol 24) 1937 Bom 39 (41) : I L R (1937) Bom 763.

[8] Provident fund money sent by a railway company by money order to its servant can be attached by

183. Any person who is of the age of majority according to the law to which he is subject, *Who may employ agent.* and who is of sound mind, may employ an agent.

184. As between the principal and third persons, any person may become an agent; but no *Who may be an agent.* person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Consideration not necessary. **185.** No consideration is necessary to create an agency.
Agent's authority may be expressed or implied. **186.** The authority of an agent may be expressed or implied.^a

[a] See however the Indian Registration Act, 1908 (16 [XVI] of 1903), S. 33; see also the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), O. 2, R. 4.

187. An authority is said to be express when it is given by words spoken or written. An *Definitions of express and implied authority.* authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration.

A owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

Section 182 (contd)

the judgment-creditor of the servant. The post office is the agent of the addressee. (Vol 3) 1916 All 336 (336).

[9] Plaintiff's contract to supply goods to defendant — Indent requesting defendant to purchase goods on plaintiff's account and risk same on conditions stated, created agency. (Vol 14) 1927 Cal 668 (672) : 54 Cal 549.

[10] If a married couple live together and husband acts alone in dealing with joint property, he is held to act as wife's agent in respect of her interest as well as his own. But presumption is rebuttable. (11) 10 Ind Cas 919 (920) (Low Bur).

[11] Where after the dissolution of partnership, an agreement was entered into between the partners to the effect that two of them were to collect the outstandings of the partnership as trustees, and to deposit the amount in a bank after paying off the partnership liabilities and that all the partners should share the balance equally and one of the partners sued for the rendition of accounts of the moneys realised under the agreement: *Held*, that the agreement created a modified form of relationship of principal and agent between the parties, quite apart from that of the original agreement of partnership that had been dissolved. (Vol 15) 1931 Lah 300 (301) (DB).

[12] It is within the authority of a manager of a mine to enter into a contract binding on the owner. (Vol 25) 1938 Cal 343 (346).

[13] B, not a producer himself, entered into a contract with A for supply of goods on certain commission: *Held*, that the relationship was not one of principal and agent and the mere mention of commission is not inconsistent with such relationship as between principals. (Vol 8) 1921 P C 129 (130) : 5 Rang 1 (PC).

[14] Honorary treasurer of a subscription committee is not its agent. (Vol 1) 1914 All 22 (23) : 36 All 268 (DB).

[15] A sub-contract was entered into by a contractor undertaking some building work of a railway company with another contractor on certain percentage basis. The sub-contractor sued the railway contractor for rendition of accounts: *Held*, that under the circumstances a suit for rendition of accounts could not lie, as there was no relationship of principal and agent between the two contractors for realising money from the railway company. (Vol 17) 1930 Lah 1062 (1063).

[16] A person contracting to purchase property and

promising damages on default is not agent. (Vol 6) 1919 Mad 411 (412) (DB).

[17] Where person appoints one branch of bank as agent for him, all other branches do not become agents of the person for purposes of carrying out instructions in respect of that agency. (Vol 14) 1927 Lah 562 (564) (DB).

[18] A barrister is not technically his client's agent, but the contract between an advocate, A. S., and his client is governed by general rules of contract under Contract Act. He is a special kind of agent selected out of special class for whom agency contract is reserved by law, but nevertheless governed by law relating to agency. (Vol 21) 1934 Bom 299 (301) : 58 Bom 597 (DB).

SECTION 183 — Note 1

[1] Minor principal is not bound by agent's acts unless agent is guardian, that too under specified circumstances. (Vol 15) 1928 Lah 854 (854).

SECTION 184 — Note 1

[1] Minor can be agent of a principal, who is competent to contract. (Vol 15) 1928 Lah 854 (854, 855) * (Vol 5) 1918 Lah 269 (270) (DB).

[2] Minor agent is not responsible for loss caused by his guardian. (Vol 4) 1917 Nag 97 (98).

[3] Person knowingly appointing minors as his agents — Contract subsisting for some time — Person cannot subsequently say that the contract is void, being made by minors. (102) 4 Bom L R 627 (629).

SECTION 185 — Note 1

[1] No consideration is necessary to create agency. (Vol 16) 1929 Lah 182 (185) (DB).

SECTION 186 — Note 1

[1] Section 186 provides that the authority of an agent may be expressed or implied. In cases where the authority is not expressed, the question whether an agent had or had not authority to act in a particular matter on behalf of the principal is to be decided according to the circumstances of each case. (Vol 22) 1935 Oudh 170 (173) (DB).

SECTION 187 — Note 1

[1] Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instru-

188. An agent, having an authority to do an act, has authority to do every lawful thing *Extent of agent's authority.* which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations.

(a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) *A* constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Section 187 (*contd.*)

ment the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. (Vol 25) 1938 Mad 966 (969) (DB).

[2] Agent with wide powers—Agent contracting debt —Principal, not repudiating is bound to pay it. (Vol 3) 1918 Pat 57 (58) (DB).

[3] An authority to sell implies authority to settle terms of sale. (Vol 12) 1925 Mad 227 (227).

[4] A general authority to sell house does not imply authority to settle price and arrange for the sale without any further reference to the principal. An authority to sell does not imply an authority to receive purchase money. (10) 20 Mad L Jour 479 (483, 491, 494) (DB).

[5] Authority for negotiating and completing sale for specified price within particular time includes authority to enter into contract for sale. (Vol 38) 1946 Mad 42 (44) : I L R (1946) Mad 465 (DB).

[6] Authority to procure purchaser does not imply authority to sell. (Vol 10) 1923 Cal 57 (58) (DB).

[7] Mere writing letters on behalf of principal — No authority to acknowledge debt. (Vol 11) 1924 All 855 (855) : 46 All 892 (D B).

[8] A servant ordered to do particular class of acts can bind his master by act in that class done in course of service and for his master's benefit. (Vol 14) 1927 Rang 44 (45).

[9] A Nattukottai Chettiar agent has an implied authority to pledge credit of firm. (Vol 2) 1915 P C 121 (123, 124) : 8 Low Bur Rul 536 : 43 Cal 527 : 43 Ind App 48 (P C).

[10] Transaction within the authority of agent is valid whether beneficial to principal or not. (Vol 2) 1915 P C 121 (124) : 8 Low Bur Rul 536 : 43 Cal 527 : 43 Ind App 48 (P C).

[11] Agent cannot bind his principal by doing acts which are not specifically included in the power of agency, nor are necessary for the declared purposes of the power. (1893) 1893 App Cas 170 (179) (P C).

[12] Where the authorities effected a settlement between the various communal parties to avoid serious trouble resulting out of their disputes, the question whether the agreement was entered into by the leaders in a representative capacity so as to bind others who did not sign the deed, must be determined on the attitude of those others whom the leaders were supposed to represent. (Vol 16) 1929 All 519 (520) (D B).

[13] Where goods purchased by a person are received by another and dealt with by him, it is a sufficient inference in law that the former is an agent for the latter. (Vol 15) 1928 Cal 863 (864) (D B).

[14] Where it was sought to prove that *D* had an implied authority to settle a lease on behalf of *B*, a shebait, and where the lower Court found that *D* was acting as if he was the real shebait, it was held that the finding was insufficient to prove implied authority. It was necessary to find that *D* had been authorized to do some work of this class to which the contract belonged. If this authority to settle the lease could be inferred from the facts and circumstances, it would have been

more than enough; or if it could be established that he had authority generally to make all settlements, that also would have been sufficient; or if the settlement of this lease was necessary in order to do an act which *D* was authorised to do, that also would have sufficed. But in the absence of any such proof, the authority cannot be held to be proved so as to bind the principal. (Vol 20) 1933 Cal 109 (113) : 60 Cal 111 (D B).

[15] The liability of a husband for his wife's debts depends on the principles of agency, and he can only be liable when it can be shown that he has expressly or impliedly sanctioned what the wife has done. (1887) 9 All 147 (155) (D B) & ('99) 1899 Pun Re No. 63, page 277 (282) (D B).

[16] Husband is liable for his wife's debts if he had sanctioned her to borrow. There is implied authority when wife manages the family affairs. (Vol 23) 1936 All 893 (895, 896).

[17] Necessaries supplied to wife — Wife having implied authority to pledge credit of her husband — Wife executing pro note for sums due on account of necessities supplied — Husband held liable under the pro-note. (Vol 23) 1936 All 869 (870) & (Vol 18) 1929 Lah 18 (19).

SECTION 188 — Note 1

[1] According to S. 188, power-of-attorney should be construed strictly. Such construction does not disable attorney from exercising all powers incidental to execution of powers expressly enforced on him or from exercising powers necessarily implied, and termed 'medium powers.' (1912) 23 Mad L Jour 595 (599) (D B).

[2] Power-of-attorney in suit empowers a person to file appeal and to take out execution and conduct all proceedings arising out of the litigation — Such person is competent to apply in execution for *mesne profits*. (Vol 20) 1933 Lah 876 (878).

[3] Where authority is conferred by special power, any act in excess of it will not bind principal. In such cases terms of power should be construed strictly. (Vol 4) 1917 Pat 234 (238) : 2 Pat L Jour 600 (D B).

[4] Where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. The limits of necessary implication are indicated by S. 188, Contract Act. (Vol 25) 1938 Mad 966 (969) (D B).

[5] Whenever the very act of the agent is authorised by the terms of the power, it is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to enquire into facts aliunde. The apparent authority is the real authority. (1893) 1893 App Cas 170 (180) (P C).

[6] Money-lending business—Agent expressly authorised to borrow and lend money to clients—Such authority implies authority to pledge principal's credit for borrowing. (Vol 2) 1915 P C 121 (123, 124) : 43 Ind App 48 : 43 Cal 527 : 8 Low Bur Rul 536 (P C).

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case, under similar circumstances.

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. D may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Section 188 (contd.)

[7] An agent has implied authority to pledge the credit of his principal for what is necessary to the successful management of the business and, as usual, an agent in charge of a business has implied authority to bind his principal by raising a loan for the purposes thereof, only if his act is necessary or is usual in the management of the particular business or is justified by an emergency. (Vol 14) 1927 Oudh 44 (45) : 2 Luck 253 (D B).

[8] Agent has no power to borrow when expressly prohibited in power of attorney. (Vol 19) 1932 Nag 27 (28) : 27 Nag L R 324.

[9] If power-of-attorney does not authorise agent to carry on business except with limitations, any act done by him in excess of such power will not bind principal. (Vol 5) 1918 Mad 706 (707) (D B).

[10] Agent to manage estate having no authority to borrow, borrows money — Borrowing not justified by necessity or usual course of business—Principal is not liable. (Vol 25) 1938 Mad 966 (969) (D B).

[See also (1906) 33 Cal 343 (347, 348) (D B).]

[11] Every agent who is authorised to conduct a particular business has implied authority to do whatever is incidental to the ordinary conduct of such business and whatever is necessary for the proper and effective performance of his duties but not to do anything outside the ordinary scope of his employment and duties. (1905) 1 Cal L Jour 199 (202, 203, 204) (D B) * (1909) 3 Sind L R 164 (166).

[12] When the manager of press, who had authority to do all acts necessary for the management of the press, borrows money to the knowledge of the principal and spends for the purposes of the press, the principal is liable. An agent has authority to do all acts impliedly necessary to the successful management of the business. (Vol 14) 1927 Oudh 44 (45) : 2 Luck 253 (D B).

[13] Where principal authorises his agent to supply goods to third person, agent is justified in supplying goods until authority of third person to demand goods is revoked. Principal can be sued for price of goods supplied to third person on account of principal. (1910) 1910 Pun L R No. 136, p. 373 (378) : 1910 Pun Re No. 55 (D B) * (Vol 2) 1915 Mad 1162 (1163).

[14] Power enabling agent to carry on business of firm does not entitle him to sue for dissolution of firm. (Vol 1) 1914 Low Bur 191 (2) (192) (D B).

[15] Possession of principal's house by dismissed agent is not permissive. (Vol 15) 1928 Nag 284 (286) : 24 Nag L R 148 : 29 Cr L Jour 902 * (Vol 4) 1917 Oudh 235 (236) (D B). (Authority to receive money for principal includes authority to do connected lawful and necessary acts.)

[16] Power of attorney given to agent to collect outstandings includes also power to collect debts due under decrees, obtained even before date of power. (Vol 1) 1914 Mad 632 (633).

[17] Agent authorised only to collect debts cannot realise their value or any part of it by selling them. (Vol 6) 1919 Mad 957 (959) : 41 Mad 923 (D B).

[18] Agent authorised to receive payment due to principal — Amount neither transferred nor assigned to him in his own right — Agent has no authority to

institute suit for its recovery. (Vol 26) 1939 All 623 (626).

[19] Where agent was authorised by power-of-attorney to direct, superintend, manage and control business of defendants and there was stipulation to the effect that agent was not to enter into speculations in "gunnies, opium, shares or exchange," Held, that contract for purchase of sugar was outside scope of prohibition, that words "as carried on by defendants in Singapore and elsewhere" were merely descriptive and not limiting articles of agent's business and that mere imprudence of act did not render act unauthorised. (1912) 39 Cal 563 (577, 578) (D B) * (1911) 10 Ind Cas 895 (897) (Cal).

[20] Agent ordinarily cannot bind his principal by reference to arbitration but where according to custom of business agent has such power, principal will be bound. (1909) 3 Sind L R 5 (6) * (Vol 17) 1930 Rang 332 (333) : 32 Cr L Jour 149.

[21] A solicitor has no implied authority as such to receive payment of mortgage debt though he may be authorised to receive interest. He cannot enter into agreement to release portion of mortgaged property from lien. Nor can he, where he is authorised to receive payment, receive cheque instead of cash. (1909) 10 Cal L Jour 150 (171) (D B).

[22] Without the express authority of the client, a pleader cannot compromise his case. (1898) 21 Mad 274 (277) (D B).

[See also (Vol 1) 1914 Lah 112 (113) : 1914 Pun Re No. 96 (DB).]

[23] A commission agent purchasing goods for merchant and consigning them by ship and insuring them under instructions from merchant has insurable interest in goods and can recover money under policy of insurance in case of loss of goods. (1912) 38 Bom 484 (488, 489).

[24] A company is responsible for all the acts done by its directors even though unauthorised by it, provided such acts are within the apparent authority of the directors and not *ultra vires* of the company. (Vol 19) 1932 All 141 (145) : 53 All 1009 (D B).

[25] Stockbroker is liable to retain equivalent number of shares and not necessarily specific shares purchased for his client. (Vol 25) 1938 PC 23 (24) (PC).

[26] Agent who has authority to receive goods for his principal has implied authority to sign an acknowledgment of balance due by the principal. (1910) 1910 Pun L R No. 136, p. 373 (378) : 1910 Pun Re No. 55 (DB).

SECTION 189 — Note 1

[1] Agents are ordinarily bound to carry out principal's instructions in all respects. If, however, goods are perishable or perishing, agent is entitled to deviate from his instructions as to time or place at which they are to be sold. (Vol 27) 1940 Lah 412 (415) (DB).

[2] Agent purchasing for principal and intimating that in default to pay property would be sold—Principal not sending price : Held, agent can sell at market value and be reimbursed for loss. (Vol 14) 1927 Lah 493 (494) (DB).

[3] In emergency, bailee has same power to act as agent under S. 189, Contract Act, and in cases of diffi-

Sub-Agents.

190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must be employed.

When agent cannot delegate.

191. A "sub-agent" is a person employed by, and acting under the control of, the original "Sub-agent" defined. agent in the business of the agency.

Representation of principal by sub-agent properly appointed.

appointed by the principal.

Agent's responsibility for sub-agent.

Sub-agent's responsibility.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by, and responsible for, his acts, as if he were an agent originally appointed by the principal.

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by, or responsible for the acts of, the persons so employed, nor is that person responsible to the principal.

Agent's responsibility for sub-agent appointed without authority.

Relation between principal and person duly appointed by agent to act in business of agency.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

Section 189 (contd.)

culty he is under same duty as has been cast upon agent under S. 214 of Act which makes it incumbent on agent to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions. (Vol 20) 1933. All 153 (159) (DB).

[4] Express instructions to ship "soonest" at New Yorke—Impossibility to avoid delay at New Yorke — Goods cannot be shipped elsewhere without promisee's previous consent. (Vol 12) 1925 Cal 609 (611) (DB).

SECTION 190 — Note 1

[1] As a general rule, an agent cannot without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to personally fulfil. But in special circumstances, it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Such a substitute is not a sub-agent but an agent of the principal. (Vol 26) 1939 All 188 (189).

[2] Authority to appoint sub-agent may be presumed from facts and the nature of the agency. (Vol 10) 1923 Rang 84 (85) : 11 Low Bur Rul 326 (DB).

SECTION 192 — Note 1

[1] There is no privity of contract between the principal and the sub-agent. (Vol 2) 1915 Mad 509 (513) (DB).

[2] Authority to appoint sub-agents does not discharge agent's liability to principal for acts of sub-agent, nor creates a privity between principal and sub-agent nor brings the case under S. 194 i.e. procur-

ing an agent. (Vol 17) 1930 Sind 247 (250, 251) : 25 Sind L R 28 (DB).

[3] Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment. (Vol 17) 1930 P C 274 (275) (PC) & (Vol 4) 1917 Bom 19 (31) (DB).

[4] Principal cannot sue sub-agent for accounts unless he can prove fraud or wrong doing by the sub-agent (Vol 25) 1938 Cal 12 (12) : 1 L R (1937) 2 Cal 124 (DB).

[5] Banian employed by agent for sale of goods selling such goods in good faith and duly accounting therefor to the agent — He cannot thereafter be held accountable to the principal. (1891) 18 Cal 573 (614, 615) : 18 Ind App 78 (PC).

[6] Receiver to an estate appointing tahsildar — Tahsildar may be regarded as sub-agent liable to Receiver and not to the principal. (1908) 8 Cal L Jour 114 (115) (DB).

SECTION 194 — Note 1

[1] The true test to determine whether the person appointed by the agent authorised in that behalf to perform part of the business of agency is a substituted agent of the principal or the sub-agent of the agent is to see if there is a privity of contract between the principal and the person so appointed, and the test to be applied is the same whether the case falls within S. 194 or whether the person so appointed is nominee of the principal, although there is difference in the obligation

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations.

(a) *A* instructs *B*, a merchant, to buy a ship for him. *B* employs a ship-surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy, and is lost. *B* is not, but the surveyor is, responsible to *A*.

(b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

Ratification.

Right of person as to acts done for him without his authority.

Effect of ratification.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such act. If he ratify them, the same effects will follow as if they had been performed by his authority.

Section 194 (contd.)

undertaken by the agent. (Vol 17) 1930 Cal 10 (14, 15): 56 Cal 886.

[2] Plaintiff who was owner of houses appointed a banking concern to lease out his houses. In the course of the correspondence, plaintiff wrote to bank's agent thus: "In any case you need not enquire from me about renting the cottages. You have full authority to accept anything." The banking concern appointed defendant as agent on behalf of plaintiff to rent the houses: *Held*, that the plaintiff had given very wide powers to the banking concern and the power to appoint an agent under these circumstances might well be inferred. A banking concern usually is not expected to go about in search of tenants and plaintiff must have known that other agencies would have to be employed in order to find suitable tenants for the houses. Under these circumstances the bank had authority to appoint defendant as agent and the latter was accountable to plaintiff. (Vol 26) 1939 All 188 (189).

[3] Where a person appoints one branch of a bank as his agent for the purchase of certain goods and that branch instructs another branch of the same bank to pay for and take delivery of the goods for such person the latter branch becomes a substituted agent of the person and is bound to carry out all the instructions of the principal in respect of the transaction. The Court cannot take judicial notice of a mercantile custom at variance with the statutory rights of a party to the contract when it has been neither pleaded nor proved. (Vol 16) 1929 Lah 586 (588) (DB). ((Vol 14) 1927 Lah 562, Reversed.)

[4] English mortgage — Mortgagor granting power-of-attorney to mortgagee to collect rents as mortgagor's agent.—Power-of-attorney giving authority to mortgagee to appoint substitute—Substitute so appointed is agent of mortgagor and not of mortgagee. (Vol 23) 1936 Pat 211 (217): 14 Pat 560 (DB).

SECTION 195 — Note 1

[1] It cannot be said that as the agent is responsible to the principal for negligence in the relation of a substituted agent, his hands would be tied as soon as he made the nomination and cannot revoke it although he may later discover that the person appointed by him was unworthy of his choice. Section 195 itself implies the power of revocation in an agent in the case of a substituted person. (Vol 31) 1944 Bom 76 (85).

[2] Where an agent selects a competent person as a sub-agent to do a particular business, the former is not responsible to the principal for the negligence of the agent so selected. (1909) 3 Sind L R 191 (194).

SECTION 196 — Synopsis

1. Ratification—Essentials of.
2. Acts done without authority.
3. Ratification—Effect of.
4. Ratification by quondam minor.
5. Acts which cannot be ratified.

1. Ratification—Essentials of.—[1] The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal. (Vol 23) 1936 P C 193 (197) (P C) * (Vol 23) 1936 Cal 87 (92) (DB) * (Vol 14) 1927 Mad 805 (811). (Man can ratify that which purported to be done for him, but cannot ratify thing done for somebody else.) * (Vol 4) 1917 Mad 250 (253) (DB) * (1908) 35 Cal 420 (429): 35 Ind App 48 (P C) * (1908) 8 Cal L Jour 458 (467) (DB) * (1881-'82) 6 Bom 463 (466) (DB).

[2] Section 196 refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later or by law. (Vol 26) 1939 Mad 957 (960): ILR (1939) Mad 928 (DB).

[3] Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies. (Vol 17) 1930 P C 278 (281) (P C) * (Vol 23) 1936 Cal 87 (92) (D B) * (Vol 17) 1930 Oudh 312 (314): 6 Luck 19 (DB) * (Vol 14) 1927 Mad 478 (485) (D B). (Full knowledge of facts must be proved.) * (Vol 2) 1915 Cal 54 (58) (DB).

[4] In order to ratify something it is necessary that that thing must exist. (Vol 18) 1926 Cal 1215 (1217) (DB).

[5] It is possible for the act of an agent done within time to be subsequently ratified by the principal. (Vol 21) 1934 Pat 290 (292) (DB).

[6] A principal cannot ratify a transaction in part and repudiate it in part. (Vol 2) 1915 Cal 54 (58) (D B) * (Vol 11) 1924 Pat 25 (27).

[7] In determining whether the principal ratified an act of the agent the question is not what the principal intended to do but what he did. That is, his acts are conclusive evidence of his intention. (Vol 14) 1927 Mad 478 (483) (DB).

[8] An option of ratification is capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open. (Vol 26) 1939 Mad 957 (960): ILR (1939) Mad 928 (DB).

[9] There can be no ratification of a contract unless it is communicated to the other side or that subsequent

Ratification may be expressed or implied.

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Section 196 (contd.)

actions show an approbation of the contract. (Vol 25) 1988 Nag 482 (482) : ILR (1940) Nag 29 (DB).

[10] Ratification is different from consent. Consent is an express or implied agreement to waive the right to avoid an act and precedes the transaction. Ratification is subsequent in point of time to the transaction which is voidable. (Vol 14) 1927 Nag 180 (182).

2. Acts done without authority. — [1] In order to establish a case of ratification, it is essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact, the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue. In either event, consciousness of the act done by the agent without authority must be proved, and, secondly, it should be proved that, after notice of such unauthorized act, the principal adopted the transaction. (Vol 23) 1936 Bom 62 (69) : 60 Bom 326 (DB).

[2] An act done by an agent of the Government, though in excess of his authority can be ratified by the Government and on being ratified is equivalent to previous authority. (1859) 7 Moo Ind App 476 (539, 540) (PC) * (Vol 1) 1914 Mad 174 (190) : 38 Mad 997 (D B) * (1861) 8 Moo Ind App 529 (554) (PC).

[3] Arbitration — Award — Agent not authorised to apply for or consent to reference — Principal aware of arbitration proceedings and tacitly ratifying action of agent — Principal cannot question validity of award. (1897) 24 Cal 469 (472) (DB).

[4] A mortgage executed by a general agent holding a power of attorney, which did not authorise him to execute mortgages is operative if acted upon and ratified by the principal. (Vol 9) 1922 All 197 (199) : 44 All 77 (DB).

[5] Where an act of an agent done in excess of his authority is ratified by the principal, the personal liability of the agent to the principal ceases. (Vol 14) 1927 Mad 478 (482) (DB).

3. Ratification—Effect of. — [1] Ratification is in law equivalent to previous authority. (Vol 30) 1943 P C 66 (68) : 70 Ind App 50 : I L R (1944) Mad 1 : I L R (1943) Kar (P C) 77 (P C) * (Vol 14) 1927 Mad 805 (811).

[2] Ratification relates back to the time of inception of the transaction and has a complete retroactive efficacy. (Vol 23) 1936 Cal 87 (92) (DB) * (Vol 21) 1934 Pat 290 (292) (DB).

[3] Since an act done by a person not authorised to do it can be ratified, it follows that such act is not void but voidable. If it is not ratified, it will become void; but if it is ratified, it is validated. (Vol 25) 1938 All 369 (373) : ILR (1938) All 614 (DB).

[4] Ratification once deliberately made upon full knowledge of all the material circumstances becomes at once obligatory and cannot afterwards be revoked or recalled. (Vol 1) 1914 Mad 174 (189, 190) : 38 Mad 997 (DB).

[5] Mere *ex post facto* submission not amounting to ratification does not amount to estoppel. (Vol 6) 1919 Oudh 95 (97) (DB).

4. Ratification by quondam minor. — [1] In order that an act may amount to a ratification, there must be after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an internal acknowledgment of his liability in respect of the act done on his behalf during minority. Where, therefore, a person, two months after attaining major-

ity, renews the promissory note executed by the late agent of his mother guardian and such agent at the time of the renewal is in the employ of the person in whose favour the promissory note is executed, it cannot be said that the act of the minor amounted to a ratification of the act of his mother guardian and the plaintiff must prove that there was a legal necessity. (Vol 22) 1935 Nag 127 (128) : 31 Nag L R 243 * (Vol 25) 1938 Nag 68 (72) (DB).

[2] The question of ratification in minors' cases can arise only with respect to the actions of guardians. Such actions are ordinarily binding until set aside by the minor on attaining majority or by someone on his behalf before that. Therefore, on the minor's attaining majority if he does not repudiate the actions of his guardian within a reasonable time or if he elects to ratify them, he is bound by his election. (Vol 24) 1937 Nag 390 (391) : ILR (1937) Nag 458.

[3] In order to ratify the transaction of a lease by guardian, it would not be enough to show that the rent was received by the *am mukhtear* unless it was further shown that that *am-mukhtear* was given the power not only to collect rent from tenants but also for ratifying contracts which his master could avoid. (Vol 14) 1927 Cal 796 (800) (DB).

[4] Sale deed by minor's guardian—Minor on attaining majority ratifying that transaction by deed—Latter deed does not require registration. (Vol 30) 1943 Nag 263 (264) : ILR (1943) Nag 574.

5. Acts which cannot be ratified. — [1] A void agreement cannot be ratified. (Vol 30) 1943 Bom 362 (364) * (Vol 24) 1937 Nag 390 (391) : I L R (1937) Nag 458 * (Vol 17) 1930 Cal 748 (749). (Void lease against minor.) * (Vol 17) 1930 Oudh 312 (314) : 6 Luck 19 (DB) * (Vol 16) 1929 Cal 612 (613) (D B). (Void lease.) * (Vol 16) 1929 Cal 50 (54) : 55 Cal 841 (D B) * (Vol 14) 1927 Nag 214 (215) * (Vol 11) 1924 Nag 338 (343) * (1899) 9 Mad L Jour 104 (105) (DB).

[2] Alienation by manager of joint Hindu family void in its inception — Subsequent assent of members cannot validate it. (1912) 35 Mad 177 (182) (DB).

[3] Mortgage of minor's property by guardian not for minor's benefit but for his own—There can be no ratification. (Vol 27) 1940 Pat 661 (662) (DB).

[4] Any action by a person who is not a guardian of the minor and who has no authority to act on behalf of the minor, is incapable of ratification. (Vol 24) 1937 Nag 390 (391) : ILR (1937) Nag 458.

[5] Official Receiver is not agent of Court and an unauthorised sale by him cannot be ratified by Court. (Vol 14) 1927 Mad 1 (2) : 50 Mad 135 (FB).

[6] Where one of the partners sells the firm property to a person in his own right and not on behalf of the other partner or the firm and subsequently, the second partner also sells the same property to other person, there can be no ratification under S. 196 by the second partner of the sale by the first. (Vol 27) 1940 All 453 (454) : I L R (1940) All 674 (D B).

[7] A company cannot ratify or adopt a contract entered by a person on its behalf before incorporation though it may enter into a new contract embodying the terms of the old one or adopting the old one. (Vol 10) 1923 Lah 100 (101).

SECTION 197 — Note 1

[1] Ratification may be express or implied. (Vol 30) 1943 P C 66 (68) : 70 Ind App 50 : I L R (1944) Mad 1 : I L R (1944) Kar P C 77 (P C).

[2] Express ratification unless communicated to other party is incomplete and is liable to be revoked. (Vol 1) 1914 Mad 174 (180) : 38 Mad 997 (D B).

Illustrations.

(a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account. *B*'s conduct implies a ratification of the purchase made for him by *A*.

(b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

Knowledge requisite to valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Effect of ratifying unauthorized act forming part of a transaction.

199. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations.

(a) *A*, not being authorized thereto by *B*, demands, on behalf of *B*, the delivery of a chattel, the property of *B*, from *C*, who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

Section 197 (contd.)

[3] Absence of notice by principal of his dissent to agent's unauthorised act within reasonable time raises presumption of ratification (Vol 6) 1919 Mad 343 (344) (D B).

[4] Ratification can be implied from the principal's silence or acquiescence. (Vol 3) 1916 Mad 1133 (1136) : (D B) * (Vol 17) 1930 Mad 476 (478) * (Vol 2) 1915 Mad 859 (862) (D B). (Loan advanced by agent beyond authority—Principal's acquiescence and interference in mode of collection absolves agent from personal liability.)

[See also (Vol 30) 1943 Oudh 174 (175). (Tenant readmitted by proprietor's agent without authority—Inaction by proprietor does not amount to acquiescence.)]

[5] Ratification by a long course of conduct is as effective as one by formal declaration. (Vol 1) 1914 Mad 174 (190) : 38 Mad 997 (D B).

[6] A mere *ex post facto* submission to what has taken place is no ratification of it. (Vol 6) 1919 Oudh 95 (97) (D B).

[7] Where an agent enters into a transaction not authorised by his principal, if the agent fully and frankly discloses what he has done and the principal takes no objection or abstains from pressing his objection after hearing the agent's explanations, ratification may readily be presumed. (Vol 6) 1919 Mad 343 (344) (D B).

[8] Ratification cannot be inferred from mere omission to repudiate in terms an unauthorised transaction. (Vol 6) 1919 Mad 652 (653) (D B).

[9] Where the supposed ratification relates to acts as to which there is no pretence of any prior authority, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were. (Vol 14) 1927 Mad 478 (485) (S B) * (Vol 23) 1936 Cal 87 (92) (D B).

[10] Acts relied upon as proving ratification must be inconsistent with denial of liability. (Vol 4) 1917 Nag 104 (104).

[11] When an agent, contrary to instructions, makes advances against security, the principal may realise the security and hold the agent liable for the balance. Such intermeddling will not amount to ratification. (Vol 6)

1919 Mad 343 (348) (D B) * (Vol 14) 1927 Mad 478 (482, 483, 486) (S B).

[12] Where an agent's authority to mortgage his principal's property is not established but it is proved that the principal was aware that the mortgage had been effected by his agent, and it is also proved that the money raised by the mortgage was received by the principal, the mortgagee would be entitled in equity to recover the mortgage debt from the principal. (13) 1913 Pun L R No. 11 p. 35 (40) : 1913 Pun Re No. 33 (DB).

[13] Where *gumastah* of landlord accepted rent from transferee of a jote and landlord failed to show that *gumastah* acted beyond scope of his authority, *haila*, that facts constituted sufficient recognition of transferee by landlord. (1911) 15 C W N 953 (955, 956) (D B).

SECTION 198—Note 1

[1] *P* entrusting with firm as agent money for investment in other firms—Firm without *P*'s knowledge employing money in its own business—Firm's dealing with money held did not constitute ratification so as to convert fund into mere bank deposit with it. (Vol 24) 1937 P C 296 (297, 298) : 64 Ind App 343 : I L R (1938) Mad 91 : 31 Sind L R 678 (P C).

[2] Loan by mortgage not for benefit of family incurred by manager of joint Hindu family—Agreement among brothers admitting such debt—Agreement not communicated to mortgagee—Mortgage held not ratified by other brothers. (Vol 25) 1938 Nag 482 (488) : I L R (1940) Nag 29 (D B).

SECTION 199—Note 1

[1] If the principal adopts a contract made by his agent, he is bound to adopt it cum-onera or not at all. He cannot take the benefit of it without bearing its burden. He must adopt the whole contract or repudiate it altogether. (1913) 40 Cal 335 (340) (D B).

SECTION 200—Note 1

[1] The provisions of the Contract Act relating to agency are not meant to be exhaustive. Neither S. 200, Contract Act, nor the other provisions relating to ratification affect the general principle of law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties. (Vol 28) 1941 Mad 6 (16) (D B).

[2] There can be no ratification by a person who at the time of ratification could not have done the act

Revocation of Authority.

201. An agency is terminated by the principal revoking his authority; or by the agent *Termination of agency.* renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency where agent has an interest in subject-matter. **202.** Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations.

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

Section 200 (contd.)

himself even though he had the power to do it when the original act unauthorised by him was done. (1903) 27 Bom 515 (531) (D B).

[3] Partner selling firm property to person in his own right and not on behalf of other partner — Subsequently second partner selling same property to other person — Ratification by second partner of sale by first would prejudicially affect rights of former's vendee. (Vol 27) 1940 All 453 (454) : I L R (1940) All 674 (D B).

[4] Notice to quit given by one of two joint Receivers on behalf of both without the authority of the other is not valid and cannot be rendered so by subsequent ratification by the other. (Vol 4) 1917 Cal 621 (624) (S B).

[5] Granting of *melcharth* by a person who is entitled to deal with mortgaged property is not void and the same can be ratified by a person having authority to make such a grant. (Vol 11) 1924 Mad 245 (246, 247) (DB).

SECTION 201 — Note 1

[1] Termination of agency is question of fact depending on usage and terms of contract. (Vol 4) 1917 Mad 393 (398) (DB) * (Vol 23) 1936 Mad 980 (982) (DB) * (Vol 4) 1917 Cal 436 (441) (DB) * (Vol 4) 1917 Mad 455 (455, 456) (DB). (Agent allowed to continue after period fixed in the contract—Agency continues.)

[2] Agency, unless it is for a fixed term continues and can be terminated at principal's pleasure — Agency is personal. (Vol 30) 1943 Sind 197 (203) : I L R (1943) Kar 49 (DB).

[3] Power-of-attorney executed by a certificated guardian in favour of a person to act for the minor can terminate only under this section. (Vol 33) 1946 All 1 (2, 3) : I L R (1945) All 882 (DB).

[4] Loan advanced and in consideration thereof, lands with their title deeds made over to lender with the understanding that rents and profits should be taken in lieu of interest—*Held*, the authority could not be revoked under S. 202 till the loan was repaid. (Vol 6) 1919 Low Bur 145 (146) : 9 Low Bur Rul 172 (DB).

[5] Telegram revoking authority — Agent handing over charge to another—His appointment has terminated. (Vol 3) 1916 Mad 281 (282) : 39 Mad 376 (DB).

[6] Letter of agency to purchase immediately followed by telegram revoking the order — Telegram held operated as revocation. (1900) 24 Bom 403 (406) (DB).

[7] The business of agency does not terminate on receipt of money by the agent on the sale of goods. (1899) 26 Cal 715 (724) * (1890) 12 All 541 (545) (DB).

[8] Agency of Bank collecting moneys and sending

drafts terminates on despatching drafts. (Vol 2) 1915 Lah 214 (215) : 1915 Pun Re No. 79 (DB).

[9] A *vakil* may be bound or entitled to act for his client in a suit even after decree without a fresh *vakil-patra*. (1883) 7 Bom 518 (519).

[10] Agency terminates on the death of principal. (Vol 9) 1922 Cal 53 (54) (DB) * (Vol 20) 1933 Lah 876 (878). (Power given by decree-holder to execute decree ceases on his death and fresh power from legal representatives is necessary to execute the decree.)

[11] Agent appointed by *Karta* of joint family is agent of family and not of *karta* and as such agency does not cease on death of *karta*. (Vol 21) 1934 All 553 (556) (DB).

[12] Death of one of two principals does not terminate the agency in respect of the other. (Vol 4) 1917 Cal 52 (62) (FB) * (Vol 23) 1936 Cal 650 (652, 653). (Death of one of two principals terminates agency in respect of his representatives.)

[See however (Vol 25) 1938 Mad 542 (544, 545). (Power of-attorney executed by several principals—One having distinct interest dies—Power terminates on latter's death)]

[13] Agency created by two principals of the firm — Agency does not terminate on the insolvency of one of them where the firm itself continues to exist. (Case arising before the Partnership Act of 1932). (Vol 24) 1937 Nag 314 (316) : I L R (1937) Nag 28.

[14] Upon the death of one of two joint agents, the agency terminates in so far as he is concerned. It has no effect upon the agency of the joint agent who survives. (1913) 17 Cal L Jour 201 (204) (DB).

[15] Power given to attorney terminates on principal's insanity. (Vol 27) 1940 P C 211 (214) : 1941 Rang L R 355 (PC).

[16] General power to do all acts besides carrying on trade—Power does not terminate on presentation of petition in bankruptcy — He can defend on behalf of the principal. (Vol 3) 1916 Mad 144 (147) : 39 Mad 693 (DB).

[17] Payment made by an agent after the death of his principal cannot give a fresh starting point for limitation. (1880) 1880 Pun Re No. 78, page 175 (176) (DB).

[18] Death of principal — Suit for accounts against the agent must be filed within three years of the death under Art. 89, Limitation Act—Section 209 of Contract Act or Art. 120 of the Limitation Act, does not apply. (Vol 9) 1922 Cal 53 (54) (DB).

SECTION 202 — Note 1

[1] Junior member of a *Malabar tarwad* who has been given power-of-attorney by the *karnavan* to collect rents of the *tarwad* property has an interest in the property within S. 202. (Vol 19) 1932 Mad 70 (71).

[2] The mere arrangement that an agent's salary be paid from the rent he collected does not give the agent

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly exercised.

Illustrations.

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

205 Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation by principal or renunciation by agent.

Section 202 (contd.)

any interest in the property. ('81) 5 Bom 253 (256) (DB).

[3] Where a contract was to the effect that the consignee shall have authority to sell the goods at his discretion, and repay himself the advance out of the proceeds, drawing on the consignor in the event of a shortfall, the consignee had an interest within the meaning of S. 202 and the authority to sell could not be revoked to the prejudice of such interest except in accordance with an express contract reserving such power to the consignor. (1897) 20 Mad 97 (105, 106) (DB).

[4] Mortgage by deposit of title-deeds—Mortgagee put into possession to realise profits and appropriate the same towards interest—Mortgagee is one having an interest in the agency and it cannot be terminated before repayment of loan. (Vol 6) 1919 Low Bur 145 (146) : 9 Low Bur Rul 172 (DB).

[5] Where the authority of an agent is given for the purpose of effectuating any security or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. The primary object of the power-of-attorney was to recover on behalf of the principal the fruits of his decree. It contained incidentally a provision for the employment of the agent, in order to realise that decree. It provided that his remuneration was to be one-half of the proceeds. It contained an indemnity clause against any out-of-pocket expenses which the agent was entitled also to recover from the amount of the decree. But the power-of-attorney was not for the purpose of protecting or securing any interest of the agent. That part of the agreement was purely incidental. *Held*, that the agency was not one coupled with interest under S. 202 of the Contract Act. (Vol 33) 1946 Mad 9 (10) : I L R (1946) Mad 121 (DB).

[6] Agent for sale of goods entitled to retain part of the sale-proceeds in lieu of remuneration has no interest in the goods within S. 202. (Vol 19) 1932 Nag 34 (35, 36) : 27 Nag L R 378.

[7] Section 202 makes no departure from English Law—Agency in plaintiff's favour wherein he has individual interest—Court will not grant injunction to restrain defendant from preventing plaintiff in acting as agent, when it would involve specific enforcement of contract, which cannot be so enforced. (Vol 31) 1944 Bom 76 (85, 86).

[8] The principle of S. 202, Contract Act, applies only to cases, where authority is given for the purpose of being a security or a part of the security, and not to cases where the interest of the donee arises afterwards and incidentally ; in such cases, there is no authority

coupled with an interest, but an independent authority, and an interest subsequently arising. (Vol 25) 1938 Mad 542 (545).

[9] Agency created by an ordinary power-of-attorney for the management of an endowment can be revoked even though the endowment is made for the spiritual benefit of the person creating the endowment and the members of the family including the agent for such spiritual benefit cannot amount to an interest within the meaning of S. 202. (Vol 17) 1930 Mad 231 (233) (DB).

SECTION 203 — Note 1

[1] Instructions received by plaintiff by letter to buy cotton as agent to X—Telegram revoking authority sent after receipt by plaintiff of letter—No action taken in pursuance of the authority by letter by plaintiff till receipt of telegram. *Held*, that the telegram revoked the authority. (1900) 24 Bom 403 (406) (DB).

[2] Where authority is conferred on agent, by two or more principals jointly, authority may be revoked by one, and notice of revocation given by one of principals is sufficient. (1913) 18 Cal L Jour 621 (626, 627) (DB).

[3] Where the agent is authorised or directed by his principal to pay to a third person money existing in his hands to the use of the principal, and he expressly contracts with such third person to pay him, or to hold the money on his behalf or for his use, he is personally liable to pay such third person. (Vol 22) 1935 Mad 115 (116) (DB).

[4] Where authority was given to an agent to execute a decree and when the principal found that agent was delaying execution he revoked the authority given to agent—*Held*, that under S. 203 the authority given to the agent was validly revoked. (Vol 8) 1921 Mad 599 (603) : 44 Mad 919 (FB).

SECTION 205 — Note 1

[1] Agent terminating his agency before the fixed period without sufficient cause must compensate principal. (Vol 2) 1915 Sind 30 (32) : 9 Sind L R 77 (DB).

[2] An agreement provided that the respondent was to be the agent of the appellants for a period of one season certain ; with an option to continue for two seasons more, and "that said agent shall not during the continuance of this agreement purchase second-hand clothing from any other dealer except from the principals ; nor shall he during the continuance of this agreement act as agent for any other rival trader or traders"—*Held*, there was a clear contract between the parties that the respondent was to be employed as the agent for the appellants for a particular period and that the latter were not at liberty to revoke the contract. If the latter were at liberty during the period the

206. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Notice of revocation or renunciation may be expressed or implied.

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration.

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

When termination of agent's authority takes effect as to agent, and as to third persons.

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations.

(a) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity.

Section 205 (contd.)
contract was in force to, or not to, supply goods to the respondent, the whole contract becomes meaningless and it is futile to describe the respondent as the agent of the appellants. (Vol 9) 1922 Sind 25 (26, 27, 29) : 15 Sind L R 140 (DB).

[3] Under S. 205, in the absence of any contract, the period of time to be implied depends on the particular circumstances of the case. (1904) 8 Cal W N 831 (837).

[4] Principal company appointing another company as managing agents for fixed term in view of latter's commercial reputation — Subsequently agent's reputation completely lost and principal suffering by its association—*Held*, there was sufficient cause for principal to terminate managing agency before fixed period. (Vol 16) 1929 All 87 (94) (DB).

SECTION 206 — Note 1

[1] What the section means to say is that when there is no express or implied contract that the agency should continue for any fixed period, reasonable notice must be given of the revocation or renunciation of the agency and etc. If the phrase "such revocation or renunciation" is to be taken as referring back to S. 205, it makes no meaning of the section. (Vol 18) 1931 Cal 676 (678, 679) : 58 Cal 1158 (SB).

[2] In determining the reasonableness of the notice a very important element to be taken into consideration is the nature of the employment. In cases of an exceptional nature such as when a chief agency of an insurance company which had done good business ranging over 47 years, is to be terminated, two years' notice is reasonable. (Vol 31) 1944 Bom 166 (169, 170) : 1 L R (1944) Bom 637 (DB).

SECTION 207 — Note 1

[1] The doctrine of implied revocation or renunciation cannot be invoked in a case when the decree-holder had in the course of execution assigned his rights to his pleader, as the assignment does not entitle him without the permission of the Court, to take control of the execution proceedings. (Vol 27) 1940 Bom 210 (212) : 1 L R (1940) Bom 370 (DB).

SECTION 208 — Note 1

[1] Where a person appoints agent to admit execution of document, and revokes authority before registration, document registered under such circumstances is valid, if revocation is not known either to grantee of document or to registering Officer. (1903) 80 Cal 265 (274) * (Vol 21) 1934 Rang 104 (104) (DB).

[2] Husband acting as agent of Burmese Buddhist wife in first of series of transactions—Unless authority is expressly revoked to the knowledge of other party to the transaction he would be presumed to have acted as agent for his wife in subsequent transactions. (Vol 21) 1934 Rang 341 (342).

[3] 'Gumasta' managing business of X—X dies about March 1903, 'gumasta' not knowing of it — In June 'gumasta' wrote a letter to his principal, acknowledging certain money retained by him on his behalf — In May 1906 plaintiffs, who had dealings with X brought a suit to recover monies of X, lying with 'gumasta'—Plea of bar of limitation, there being no acknowledgment of any debt — *Held* that, till X's death came to be known to him the 'gumasta' continued to be X's agent and hence letter of June 1903 was a valid acknowledgment. (1911) 85 Bom 302 (306) (DB).

[4] Express or actual notice of revocation of agent's authority is not necessary in the case of third person. It is sufficient to establish that the person had knowledge of the revocation of the agent's authority. (1918) 18 Cal L Jour 621 (626, 627) (DB).

[5] Agent appointed to sell house, employing auctioneers for the purpose—Before sale, authority of agent revoked—Public not informed of same—Subsequent sale is valid. (1974) 1874 Pun Re No. 63, p. 210 (211) (DB).

SECTION 209 — Note 1

[1] Entering into a contract by the agent for the supply of molasses in order to keep a distillery going is a reasonable step for the protection and preservation of the interests of the representatives entrusted to the agent. (Vol 8) 1921 Lah 48 (50, 51) (DB).

[2] Section 209 does not cover transfer of bank's property by accountant on the death of Managing Director. (Vol 29) 1942 Oudh 417(421) : 18 Luck 110(DB).

210. The termination of the authority of an agent causes the termination (subject to the Termination of sub-rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Agent's Duty to Principal.

211. An agent is bound to conduct the business of his principal according to the directions. *Agent's duty in conducting principal's business.* given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations.

(a) *A*, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. *A* must make good to *B* the interest usually obtained by such investments.

(b) *B*, a broker, in whose business it is not the custom to sell on credit, sells goods of *A* on credit to *C*, whose credit at the time was very high. *C*, before payment, becomes insolvent. *B* must make good the loss to *A*.

SECTION 211 — Note 1

[1] According to S. 211 an agent is bound to conduct the business of his principal according to his directions, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. (1927) 1927 Mad W N 578 (580) (D B).

[2] Under agreement two of the five brothers agreed to manage joint property for five years for improvement and upkeep of estate. *Held*, that relationship of principal and agent was created by agreement and that managers were under legal duty to exercise reasonable care and diligence in management of estate. (Vol 3) 1916 Cal 593 (594) (D B).

[3] Where an agent exceeds instructions given to him and acts, he cannot escape liability hiding under any fault on the part of his principal. (Vol 12) 1925 Lah 332 (332).

[4] Agent infringing principal's directions cannot hold principal liable for non-fulfilment of contract. (Vol 12) 1925 Lah 332 (332).

[5] Agent, whether he acts as gratuitous agent or not, negligently omitting to comply with principal's instructions is guilty of gross negligence and is responsible for any loss caused to principal. (Vol 18) 1931 Lah 302 (306).

[6] Per *Coutts-Trotter C. J.*—When an agent uses money entrusted to him for other purpose than that for which it is entrusted to him, he stands in the position of trustee in respect to that money. (Vol 14) 1927 Mad 478 (481) (D B).

[7] Agent is bound to carry out his principal's directions. Even if sub-agents are appointed, agent is bound to act as prudent man. (Vol 17) 1930 Lah 974 (975, 976) (D B).

[8] Agent mixing up the principal's goods for sale with others' goods in accordance with mercantile usage is not liable to the principal for loss. (Vol 16) 1929 Lah 591 (592) (D B).

[9] Agent who while acting as agent, deals as principal without knowledge of other contracting party acts contrary to Ss. 211-214. Onus of proof lies on agent to show that transaction is not disadvantageous to principal. (Vol 22) 1935 Sind 38 (43) (D B).

[10] Commission agent to sell and purchase for principal cannot deal with himself under fictitious name without principal's knowledge. Principal can repudiate such transactions as there is conflict between agent's duty and personal interest. Principal is bound where no such conflict exists and also if there is trade usage to that effect. But such usage is to be strictly pleaded and proved. (Vol 4) 1917 Sind 5 (9, 10) ; 10 Sind L R 86.

[11] Agent to collect rents though not entitled to sue is liable for damages if by his negligence he does not bring to the notice of the principal that certain arrears would be barred. Such a claim for damages for laches can be included in a suit for accounts by principal against agent. (Vol 6) 1919 Cal 423 (424) (D B).

[12] Agent, while acting on behalf of the principal joining a combination of speculators and artificially inflating the rate and then settling on the basis of these rates, acts in flagrant breach of his duty to his principal as the agent is in a fiduciary position towards his principal and cannot make any secret profits or do any act in which his personal interest may conflict with his duty to the principal. (Vol. 15) 1928 Lah 196 (200); 9 Lah 7 (D B).

[13] British Indian rupees were substituted for Baroda Babashai rupees. Government undertook to accept genuine Babashai rupees at rate of 100 British Indian for 130 Babashai. Defendant shroffs who were employed at treasuries to scrutinize coins and to pass only genuine Babashai passed. Shikkai coins as genuine Babashais and mint officers kept and used these shikkai for Government. Secretary of State sued defendants for damages for loss caused to Government. The defendant's contract implied a term that if he passed any other coin as Babashai and Government suffered loss, he should make it good. The injury complained of by Government is to their personal estate and action is one on *assumpsit*. (1911) 35 Bom 12 (16, 17, 18, 19) (DB).

[14] Plaintiff purchasing goods for defendant—Defendant indebted to plaintiff in certain amounts—Plaintiff cannot sell goods without defendant's instructions and, in absence of mercantile custom to that effect, plaintiff would be liable to defendant for loss sustained by such unauthorised sale. (Vol 16) 1929 Lah 666 (667) (D B).

[15] *Pucca Adatiya* entering into *teji mandi* contract on behalf of up country constituent is not bound, without further instructions from constituent, to exercise option on his behalf on due date and to enter into requisite cross contract, in absence of course of dealing between parties to that effect. (Vol 26) 1939 Bom 225 (227).

[16] Contract Act as to law of agency is not exhaustive—Agent making mistake can rectify his mistake so long as principal is not affected—Agent selling by mistake on loss principal's shares of company can rectify his mistake by purchasing fresh shares of company and keeping them for benefit of principal. (Vol 13) 1926 Oudh 576 (577, 578) ; 2 Luck 198 (D B).

[17] The measure of damages, in a case where an agent sells goods below the price fixed by his principal, is the loss which the principal sustains by the sale, and

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations.

(a) *A*, a merchant in Calcutta, has an agent, *B*, in London, to whom a sum of money is paid on *A*'s account, with orders to remit. *B* retains the money for a considerable time. *A*, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e. g., by variation of rate of exchange—but not further.

(b) *A*, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B*. *B*, at the time of such sale, is insolvent. *A* must make compensation to his principal in respect of any loss thereby sustained.

(c) *A*, an insurance-broker, employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the under-writers. *A* is bound to make good the loss to *B*.

(d) *A*, a merchant in England, directs *B*, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B*, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. *B* is bound to make good to *A* the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's accounts.

213. An agent is bound to render proper accounts to his principal on demand.

Section 211 (contd.)

if he has not sustained any loss, the principal can only ask for nominal damages. (1896) 20 Bom 633 (635) (DB).

[18] Neglect of duty by an agent does not cease to be such by repetition, and if there be any doctrine of lulling to sleep, it must depend upon and can only be another way of expressing estoppel or ratification. (Vol 17) 1930 P C 278 (281) (P C).

[19] There is nothing in S. 231 which would prevent a principal from seeking his remedy under S. 211, if he can bring his case under that section. (Vol 21) 1934 Cal 721 (729) : 61 Cal 504 (DB).

[20] *Pukka Adatia* — No profits made owing to stringent market — Agent is not responsible to principal for profits. (Vol 14) 1927 All 617 (618) (DB).

[21] Agent is not entitled to remuneration for business misconducted; see S. 220.

SECTION 212 — Note 1

[1] Principal is entitled to sue his agent for damages for loss caused to him by negligence of agent, but if agent proves that he used reasonable skill and diligence, which persons of common prudence are accustomed to use about their own business affairs, he cannot be made liable because agent cannot ordinarily be deemed insurer for any loss which could not have been prevented by exercise of reasonable skill and diligence. Paramount and vital principle of all agencies is good faith and loyalty to principal; if agent establishes this, he cannot be held liable. (1911) 13 Cal L Jour 165 (181) (DB).

[2] Reasonableness as between agent and principal depends upon usual course of conduct and trade custom. Agent accustomed to send goods by rail uninsured is not liable for loss due to non-insurance. (Vol 12) 1925 Mad 46 (48).

[3] Agent exercising reasonable skill and diligence is not responsible for loss caused due to an error of judgment. (Vol 2) 1915 Sind 30 (31) : 9 Sind-LR 77 (DB).

[4] Principal and agent — Plaintiff purchasing through defendants' agency — Directions to defendants after purchase to despatch the goods to a particular place — Goods sent to a wrong place — Defendants are liable in damages if negligence is proved. (1910) 7 All L Jour 732 (733, 734).

[5] Agent instructed to send goods by railway—Goods sent at owner's risk in open trucks destroyed in transit — Agent held to be negligent and liable for the same. (Vol 17) 1930 Lah 280 (280) : 11 Lah 227 (DB).

[6] Where a commission agent, authorised to realise moneys on behalf of the principal, collected as much as he could from a merchant who had also dealings with the principal, giving credit for the balance and the merchant became an insolvent :

Held, that the agent did not fail in any way to exercise due prudence and was not guilty of any negligence. (Vol 20) 1933 Lah 841 (842) (DB).

[7] An expert with special skill engaged for reward to perform a particular job, is bound to exercise his skill in the performance of the job and not rely on the statement of others. (1909) 13 Cal W N 59 (61).

[8] The standard applied to architects and engineers in England is not to be followed in India with regard to supervisors of buildings. Their liability to the employer is measured in the light of the agreement between them. (Vol 13) 1926 Cal 988 (989) (DB).

[9] Plaintiffs, grain dealers at Hathras, ordering defendants, agents at Karachi, to purchase goods — Plaintiffs paid some money and defendants despatched goods by rail—Railway receipt delayed and plaintiffs not able to receive goods — Defendants instructing carriers not to deliver goods till their money was paid — Plaintiffs, in the meanwhile, paying defendants — Carriers' refusal to deliver goods to plaintiffs, in view of instructions—Fall in price of goods resulting in loss to plaintiffs — Suit for compensation — *Held*, that this was a proper case for relief under S. 212. (1911) 8 All L Jour 1160 (1162) (DB).

[10] Agent is not entitled to remuneration for business misconducted; see S. 220.

SECTION 213 — Synopsis

1. Agent's duty to account.
2. Legal representatives of agent, liability of.
3. Suit for accounts.
4. Suit by agent.

1. Agent's duty to account.—[1] An agent will not discharge himself from the duty of accounting, by merely delivering to his employer a set of written

Section 213 (*contd.*)

accounts without attending to explain them, and without producing vouchers by which the items of disbursements are supported. (Vol 12) 1925 Cal 1069 (1071) : 52 Cal 766 (DB) * (1881) 8 Cal 754 (756) (DB) * (1911) 15 Cal W N 930 (939) (DB).

[2] Rendition of accounts means submitting and explaining them and paying balance found due from agent upon taking accounts. (12) 1912 Pun L R No. 59, p. 197 (207) : 1912 Pun R No 1 * (Vol 3) 1916 Cal 680 (684) : 43 Cal 248 (DB) * (Vol 4) 1917 Cal 156 (157) (DB).

[3] Principal writing "seen" on account books : *Held*, this was not by itself sufficient to prove that agent has rendered accounts. (Vol 21) 1934 All 553 (556) (DB).

[4] Principal is entitled to final account between himself and agent on termination of agency and agent can rely upon casual accounts settled between themselves as being *prima facie* correct. (1912) 13 Ind Cas 642 (642) (DB) (All).

[5] If illegal gratifications are given by agent he must, in account suit, show that they reached their destination and when account is being taken, no item can be passed without voucher or clear account of facts. (1909) 13 Cal W N 212 (216, 217) (DB).

[6] A suit for account lies against a servant on a fixed salary but the nature of whose employment is that of an agent. (Vol 17) 1930 Sind 142 (143).

[7] Agent, suspected of misappropriation, kept under supervision is still agent and liable to account for realisations during such period. (Vol 29) 1942 Pat 108 (111) (DB).

[8] Agent entrusted with principal's moneys to be employed in a specified manner—Agent making use of moneys for other purposes—Agent's liability in respect of such money is that of trustee. (Vol 14) 1927 Mad 478 (481) (DB).

[9] Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently, agent must account for the money. (Vol 8) 1921 Mad 609 (609) (DB).

[10] Person acting as agent to lady, used to take money from chest of lady's estate and put them to his own : *Held*, he was liable for money which was found deficit on taking accounts. (1909) 31 All 429 (438, 439) (DB).

[11] Audit of company's account does not preclude it from calling upon agents for rendition. (Vol 5) 1918 Lah 218 (219) : 1917 Pun Re No. 86 (DB).

[12] When an agent is appointed by more than one principal, he is liable to them jointly. He is not bound to account separately to any one of them and if he does so, he is not absolved from his liability to the others. (Vol 20) 1938 Lah 93 (94).

[13] Section 213, Contract Act, imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. (Vol 27) 1940 Mad 588 (589) * (Vol 19) 1932 Bom 42 (44).

[14] Agent is liable for interest for moneys retained after demand. (Vol 5) 1918 Mad 606 (606) (DB).

[15] An agent does not owe the same duty to the guarantor which he owes to the principal in the matter of proving the transaction. The agent is not bound to prove the transaction to the guarantor, but he has got to prove the amount of the liability for which the surety stood guarantees (Vol 28) 1941 Bom 108 (113) : I L R (1941) Bom 278.

2. Legal representatives of agent, liability of. — [1] After the death of an agent, his estate in the hands of his legal representatives continues to be liable to the principal for sums found due on account from the

deceased agent. But the legal representative cannot be called upon to render account in the technical forensic sense in which the agent himself would be liable in an ordinary suit for rendition of accounts. In a suit for accounts filed by the principal against the deceased agent's legal representative, the burden of proof primarily lies upon the plaintiff and it is for the Court to take an account on such materials as are laid before it by the parties and determine what amount, if any, was due to the plaintiff from his deceased agent. (Vol 32) 1945 Bom 21 (23) * (1912) 16 Cal L Jour 282 (284 to 287) (DB).

[2] Legal representative of agent is bound to furnish accounts and is liable for money found due on account which came to his hands. (1912) 16 Cal L Jour 288 (292, 293) (DB).

[3] Legal representative of deceased agent is liable to the extent of the assets of the agent in his hands for negligence or misfeasance of the agent. (1913) 17 Cal W N 5 (8) : 16 Cal L Jour 282 (DB).

[4] The death of the agent pending a suit for accounts against him does not exonerate his legal representatives from liability. Only the plaintiff would have to advance strict proof of the monies collected by the agent and not accounted for and a decree for the amount due should be passed against the assets of the deceased agent. (Vol 5) 1918 Cal 276 (277) (DB).

[5] In a suit for accounts by principal against agent and after his death his heirs the agent is liable to account not only for sums actually received by him but also those which he has failed to collect. (Vol 8) 1921 Mad 407 (408) : 44 Mad 214 (DB).

3. Suit for accounts. — [1] A suit for account is founded on the right of the plaintiff to receive an accounting from the other party; such a right can only arise if the parties are in a fiduciary relationship to each other. (Vol 25) 1938 Nag 254 (255).

[2] Suit for money found due on an account being taken and a suit for rendering an account cannot be distinguished. (1912) 16 Cal W N 1042 (1044) (DB).

[3] It is not open to any principal who has got all the accounts of his agent in his possession, to employ the machinery of the Court for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him. (Vol 16) 1929 Cal 418 (421) (DB).

[4] Plaintiff's suit for profits realised by defendants as agents — Agent pleading non receipt of any profits — Onus lies upon agent to prove that no profits were realised. (1901) 1901 Pun Re No. 46, page 152 (154).

[5] A suit by a principal for accounts because the defendant, his agent, has not rendered any account is different from a suit in which a principal alleges that the defendant, his agent, has rendered accounts but prays to have them re-opened or to surcharge and falsify them on the ground of fraud or material error. In the former, if agency is established a preliminary decree for accounts must follow as a matter of course, if account has not been already rendered. In the 2nd class of cases, the fraud must be specifically alleged and proved if the accounts are to be re-opened on the ground of fraud and if the principal seeks to surcharge and falsify, the particular grounds of such relief must be specifically stated and substantial errors pointed out. (1911) 13 Cal L Jour 165 (173).

[6] Plaintiff instructed defendant, commission agent, to re-ship goods to India — Instructions not carried out — No accounts rendered to plaintiff — Plaintiff sued for accounts : *Held*, plaintiff's relief was by way of damages. (Vol 20) 1933 Sind 247 (250) (DB).

[7] A decree can be passed in favour of an agent in a suit brought by principal for rendition of accounts.

214. It is the duty of an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Agent's duty to communicate with principal.

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal, and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Right of principal when agent deals, on his own account, in business of agency without principal's consent.

Illustrations.

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Section 213 (contd.)

But it cannot be laid down that a decree must be passed in favour of the defendant. (Vol 25) 1938 Lah 723 (724).

4. Suit by agent. — [1] This section lays down that agent is bound to render accounts to his principal, but it is nowhere laid down in the Act that it is the duty of principal to render account to agent. ('99) 1899 Pun Re No. 60, p. 268 (DB) & (Vol 12) 1925 Lah 100 (100) & (Vol 14) 1927 Lah 701 (702). (Must sue for specific amount.) & (Vol 24) 1937 Cal 359 (360); I L R (1937) 2 Cal 259 (DB) & (Vol 24) 1937 Sind 51 (53, 54); 30 Sind L R 371 (DB).

[2] Where it is equitable from the particular circumstances and the relations of the parties that one should account to the other, a suit for an account will lie. (Vol 24) 1937 Sind 51 (53, 54); 30 Sind L R 371 (DB) & (Vol 20) 1933 Lah 483 (484).

SECTION 214 — Note 1

[1] Agent authorised to buy and sell at best rates cannot defer carrying out order till communicating rate of day to principal. (Vol 5) 1918 Sind 1 (5); 12 Sind L R 93.

[2] Bailee has the same power as an agent under S. 189 and is under the same duty as cast upon by S. 214. (Vol 20) 1933 All 158 (159) (DB).

[3] As to agent's authority in an emergency, see Section 189.

SECTION 215 — Note 1

[1] An agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. (1902) 26 Bom 689 (702) (DB).

[2] Where there is conflict between duty and interest, the servant or agent must disclose any understanding, likely to result in gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain being a fraud on the master or principal will entitle him to rescind the contract with such third person. (Vol 16) 1929 All 87 (94) (DB).

[3] In order to set aside transaction by agent dealing on his own account, it is necessary that agent should have concealed material fact dishonestly or that the dealing should have been in fact to disadvantage of the principal. By law of England, however, if an agent, without disclosing the fact that he is the person dealing

himself, deals with his principal, principal on discovering that fact can have transaction set aside. (Vol 9) 1922 Mad 497 (498); 45 Mad 1005 (DB).

[4] A transaction which necessarily puts the agent's duty in conflict with the interest of his principal must be presumed to be disadvantageous to principal who is not informed of the fact. (Vol 22) 1935 Sind 38 (44) (DB).

[5] Disadvantage to principal does not mean a mere possibility. Disadvantage is a question of fact depending on the facts of each case and no presumption arises. (Vol 14) 1927 Sind 195 (196); 22 Sind L R 409.

[6] If agent appointed to sell principal's goods for fixed price, buys them himself without previous consent of latter, principal may either repudiate transaction according to S. 216 or affirm it. If he affirms, he will be liable to pay to agent such charges as are only incidents of transaction of purchase; but not charges annexed by terms of contract to agency. (1910) 34 Bom 292 (307) (DB).

[7] When agent uses his debt due to his principal to obtain property for himself he realises that debt on principal's behalf and is liable to account for same. (Vol 1) 1914 All 351 (351) (DB).

[8] Agent employed to raise a loan on behalf of principal cannot lend his own monies without the knowledge of the principal. Such a contract is not void but only voidable at the option of the principal. (Vol 15) 1928 Cal 727 (728) (DB).

[9] Agent joining secret combination to make personal profit—Agent is guilty of breach of duty. (Vol 15) 1928 Lah 196 (200); 9 Lah 7 (DB).

[10] Where the plaintiff company were managing agents of the defendant's company to which the former supplied goods, the plaintiff company was held not entitled to make any profit on the goods supplied to their principal, the defendant company. (Vol 1) 1914 Low Bur 205 (206); 8 Low Bur Rul 102 (DB).

[11] When an agent acts as principal in a contract without the knowledge of the party whose agent he is, he forfeits his right to remuneration from that party under the agency agreement. (1937) I L R (1937) 1 Cal 757 (761) & (1870) 7 Bom H C R 90 (95).

[12] Section 236 applies only where one person enters into a transaction with another on the basis that that other is an agent for a third person, and does not apply where an agent deals on his own account. In such a case, the principal may repudiate the transaction under S. 215. (Vol 5) 1918 Mad 568 (568, 569) (DB.)

216. If an agent, without the knowledge of his principal, deals in the business of the agency

Principal's right to benefit gained by agent dealing on his own account in business of agency.

on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration.

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

217. An agent may retain out of any sums received on account of the principal in the

Agent's right of retainer out of sums received on principal's account.

business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's duty to pay sums received for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

SECTION 216 — Note 1

[1] An agent is bound not only not to injure the interests of his principal but also to further them. He should not place himself in a position where his interests might be adverse to that of the principal. (Vol 6) 1919 All 440 (444) : 41 All 635 (DB).

[2] When a person is an agent for others, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of the employers. (1893) 16 Mad 238 (266) (DB).

[3] Where an agent sells his own goods to the principal converting himself into a principal in respect of the sale, without disclosing the true position to the principal, then the principal is entitled to claim from the agent any benefit which may have resulted to the agent from the transaction. (Vol 21) 1934 Bom 86 (87, 88) (DB).

[4] Principal can have a decree for an account of profits of property outside British India purchased by an agent at a sale in execution of a mortgage decree passed in favour of his principal but he is not entitled to a mandatory injunction directing the agent to execute a reconveyance to the principal. (Vol 3) 1916 Mad 1133 (1136) (DB).

[5] First mortgagee in possession of mortgaged property and authorised to collect profits in lieu of mortgage money — Second mortgagee selling property in exercise of his power of sale under the mortgage and first mortgagee purchasing same and obtaining fresh lease of land on which mortgaged property stands — First mortgagee cannot be said to be agent of mortgagor in the purchase and mortgagor cannot take benefit of same nor is the mortgagor entitled to the benefit of assignment of a subsequent mortgage. (Vol 16) 1929 Rang 140 (143, 144) : 7 Rang 61 (DB).

[6] Property purchased in court auction by agent acting on his own account contrary to principal's directions — Principal cannot ratify so as to derive benefit as it was not an act done in the course of the agency. (Vol 4) 1917 Mad 250 (253) (DB).

[7] No broker, unless specially authorised, is entitled to get commission from both sides. (Vol 20) 1933 Rang 184 (184).

[8] Section 216 is merely enabling and confers upon principal right to claim from his agent benefit of transaction to which agency business related, where agent, without knowledge of principal, has dealt with business on his own account, instead of on account of latter. Principal is free to exercise that right or not. (1910) 34 Bom 292 (303, 304) (DB).

[9] Agent entrusted with principal's moneys to be employed in a specified manner — Agent making use of these moneys for other purposes — Agent's liability in respect of such moneys is that of a trustee. (Vol 14) 1927 Mad 478 (481) (DB).

SECTION 217 — Note 1

[1] The agent is entitled to a lien or retainer upon monies of his principal which are in his hands, for all expenses properly incurred. In such cases there is no question of limitation. (Vol 10) 1923 Rang 84 (86) : 11 Low Bur Rul 326 (DB).

[2] The possessory lien of an agent attaches only to goods in respect of which the principal has a right against a third person to create a lien and such a lien is subject to all the rights and equities of a third person available against the principal. (1909) 36 Cal 713 (723) (DB).

[3] The word 'business' in S. 217 must mean a continuing business or the same business as that for which agent had been agent before. Hence, an agent cannot retain sums received on account of his principal in one business, on account of remuneration due to him for acting in another agency. (1885) 1885 Pun Re No. 49, page 97 (99) (DB). (Pleader realizing decretal amount for client in one suit — He cannot retain amount as fees in another suit.) (1910) 33 Mad 255 (256) (DB). (Pleader realizing money for his client in one cause — Money cannot be retained as fees in another cause.)

[4] A pleader was entrusted with certain shares in his private capacity for being sold but appropriated sale proceeds to fees due to himself: *Held*, that he had no right to pay himself for his fees out of sale proceeds of shares irrespective of his client's wishes. He had no lien or right of retainer under S. 217 or S 221. (1912) 13 Cr L Jour 513 (517-520) : 5 Sind L R 222 (DB).

[5] Where the amount of the promissory note was not an amount advanced by way of loan but an amount which, at the request of his client, the pleader disbursed for out-fees in the suit in which he was retained as vakil, it was held that independently of the promissory note, the pleader was entitled to recover the court-fees advanced by him and under S. 217 of the Contract Act, he was entitled to retain the same out of the sums received by him to the credit of his client. (1904) 27 Mad 512 (517) (DB).

[6] Order under S. 185, Companies Act, against managing agent — Managing agent should be allowed to retain such amounts as he is entitled to under S. 217 or the terms of the managing agency agreement or the Articles of Association. (Vol 24) 1937 Mad 401 (402) (DB).

[7] An executor creditor in possession of the estate can claim a right of retainer and a lien upon it. (Vol 3) 1916 Mad 720 (725) : 39 Mad 365 (DB).

SECTION 218 — Note 1

[1] Any person acting in the character of an agent, when he collects money professing to receive it on behalf of his principal is bound to render a proper ac-

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

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count to the principal. The fact that master could not have enforced the payment does not enable the agent to keep it for his own use. (1908) 30 Cal 1011 (1014) (D B).

[2] An agent recovering money on behalf of his principal under an illegal or void contract must account to the principal for the money so received. He cannot set up the illegality of the contract as a justification for withholding payment in an action by the principal when the illegality had been waived by other contracting party by paying the money. (1908) 25 All 639 (641) (D B).

[3] The principal can sue for accounts the sub-agent appointed by him for collecting rents, though the sub-agent was to pay over the collections to the agent. (Vol 14) 1927 Cal 917 (918) (D B).

[4] When a Hindu father incurs liability to pay a debt as an agent of another, the son becomes liable to pay it. The liability of the son arises at the same time as that of the father. The son is not absolved from such liability by the mere fact that the father subsequently misappropriated the sum or made himself criminally answerable. (1909) 19 Mad L Jour 759 (759).

[5] The suit properties were agreed to be sold to the plaintiff for the purposes of discharging certain debt due by the family of the defendants, but as there was some delay in completing the sale transaction, the plaintiff was requested to pay off the creditors even before the execution of the sale-deed and he was assured that the amount so paid might be adjusted towards the sale price and that, if the plaintiff had to pay to the creditors anything in excess of the sale price, the same would be made good to him with interest. The plaintiff managed to get a transfer of the documents held by the creditors on payment of smaller amount than was actually due under those documents and he claimed that he was entitled to get the benefit of the remission given by those creditors: *Held*, that in making disbursements out of the agreed sale price, the plaintiff was only acting as the agent of the defendants and he was not entitled to retain for his own benefit any remission that he obtained from the creditors. (Vol 24) 1937 Mad 810 (810) (D B).

[6] Contract taken by A from military authorities and according to rules money deposited in recognised Bank by way of security — Bank going into liquidation and amount deposited lost by A — Bank held to be agent to military authorities and liable to make up the loss. (Vol 19) 1932 Lah 34 (36) (D B).

[7] Principal also a banker under another name — Agent having deposit in the Bank — Suit by principal for sale proceeds in agent's hands — Agent can set off amount deposited. (Vol 8) 1921 P C 103 (104) (P C).

SECTION 219 — Note 1

[1] A broker's duty is to simply bring the parties together, arrange a transaction and to get the contract completed. The performance of that contract is a matter between the promisor and the promisee and the due fulfilment of the conditions is not the *sine qua non* for the earning of the commission. (Vol 22) 1935 Pesh 56 (57) (D B).

[2] Broker employed to sell is entitled to his commission when sale is completed in favour of purchaser found by broker though actual negotiations or completion of sale did not take place through direct interven-

tion of broker. (Vol 17) 1930 All 545 (548) : 52 All 688 (D B).

[3] A broker, to be entitled to his commission, must prove either that the transaction has been completed or that the non-completion was due to default of the principal. (Vol 9) 1922 Bom 433 (434) * (Vol 21) 1934 Bom 158 (160).

[4] Broker engaged to purchase house—Brokerage is payable only on completion of conveyance, in absence of agreement. (Vol 31) 1944 Sind 168 (169) : I L R (1944) Kar 42 (DB).

[5] Broker who has negotiated a contract is entitled to his commission, even though a modification of its term is made by the parties. (1896) 20 Bom 124 (128) (DB).

[6] In a suit by a broker for commission, if it is proved that he had acted as broker, he is entitled to commission; and even if he fails to produce evidence to show the rate of commission, a reasonable amount ought to be awarded to him as such commission. (Vol 20) 1933 Lah 784 (784).

[7] When agent is employed for commission to sell certain property and agent succeeds in finding purchaser but principal declines to sell, agent is entitled to reasonable remuneration for his work and labour. (1912) 15 Cal L Jour 312 (320, 321) * (1910) 8 Mad L Tim 40 (46).

[8] Where parties have reduced their bargain into writing in the commission note the principle of *quantum meruit* does not apply. (1923) 1 K B 110 (116).

[9] The principle of *quantum meruit* does not apply to agreement limiting commission to goods delivered. (Vol 14) 1927 Bom 225 (227).

[10] Where a contract is merely to procure a loan by the agent for the principal and the latter procures the same but only on certain conditions which the principal does not assent to, the agent will not be entitled to any commission, the terms of the contract being simply to procure a loan without any condition whatever. (1912) 15 Cal L Jour 40 (47) (DB).

[See however (Vol 15) 1928 Bom 270 (273) : 52 Bom 627. (Agent engaged to procure loan on security of immovable property—Agent procuring a lender—Principal borrowing money from same lender through another agent — Former agent is entitled to commission.)]

[11] Where an agent introduces a customer to his principal and the latter undertakes to pay him a fixed commission "after the satisfactory expiry and conclusion of the business", the payment is to be made on the completion of the contract, which takes place after the goods have been delivered and the buyer has paid the price. (Vol 31) 1944 Mad 546 (547, 548) : I L R (1945) Mad 338 (DB).

[12] Separate outstanding transactions with different provisions as to deposit and margin — *Pakkia adatia* making one general demand for margin money with reference to all outstanding transactions—He cannot close these transactions on non-compliance with demand. (Vol 28) 1941 Bom 211 (217) : I L R (1941) Bom 441.

[13] Insurance agent — Contract entitling agent to commission on completed business i. e., such business as is accepted by company and on which the first year's premium has been received in full — Insurance policy effected substantially through efforts of agent though its technical completion, such as signing of policy, was actually brought about by another person : *Held* that

Agent not entitled to remuneration for business misconducted.

220. An agent, who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations.

(a) *A* employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security. *B* recovers the 1,00,000 rupees, and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B*.

(b) *A* employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, *Agent's lien on principal's* papers, and other property, whether moveable or immovable, of the *property.* principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same, has been paid or accounted for to him.

Principal's Duty to Agent.

Agent to be indemnified against consequences of lawful acts.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations.

(a) *B*, at Singapur, under instructions from *A*, of Calcutta, contracts with *C* to deliver certain goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs *A* of the suit, and *A* authorizes him to defend the suit. *B* defends the suit, and is compelled to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

(b) *B*, a broker at Calcutta, by the orders of *A*, a merchant there, contracts with *C* for the purchase of 10 casks of oil for *A*. Afterwards *A* refuses to receive the oil, and *C* sues *B*. *B* informs *A*, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs, and expenses.

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the agent was entitled to commission on such policy. (1942) 23 Pat L Tim 318 (320, 321) (DB).

SECTION 220 — Note 1

[1] Forfeiture of commission or remuneration is the result of the misconduct of the agent and not of loss arising therefrom. Agent's claim to remuneration will be affected even though he is willing to make good the loss. (Vol 27) 1940 Mad 299 (301) (DB).

[2] Agent representing himself to be the principal which fact is not known to the latter — Former cannot claim from the latter remuneration as agent. (1937) 1 L R (1937) 1 Cal 757 (761).

SECTION 221 — Note 1

[1] Agent's lien to commission is restricted to certain specific property or things. He is not in the position of a mortgagee who can remain in possession until he is paid. (1928) 110 Ind Cas 23 (25) (DB) (Oudh).

[2] Agent holding property for special purpose — Property cannot be subjected to lien inconsistent with such purpose. (Vol 20) 1933 Sind 235 (238).

[3] Agent incurring expenditure before winding up order of the company — Unless the agreement between the company and the agent excludes the operation of this section, the Court has no authority under S. 149 of the Companies Act, to deprive him of the right to be in possession. (1908) 31 Mad 123 (124) (DB).

[4] The lien of the agent extends only to retention of the property till his dues are paid. He cannot sell the property without principal's consent and satisfy his lien. (Vol 13) 1926 Lah 94 (95) * (Vol 16) 1929 Lah 666 (667) (DB).

[5] Agent for collection of rent spending the rent from one property for the benefit of estate and willing to pay balance — Salary due to him : *Held*, as agent he was entitled to retain the balance till his salary was

paid. (Vol 22) 1935 All 922 (922, 923) : 37 Cri L Jour 308.

[6] Agent spending money for principal can sell his goods without his authority to realise his money. (Vol 15) 1928 Lah 747 (750) (DB).

[7] Agent for purchaser delivering goods to the railway company with request to treat the latter as consignor and consignee : *Held*, he lost the lien over the property so delivered. (Vol 17) 1930 Sind 130 (133).

[8] Sums advanced and expended by the agents do not come within the meaning of "disbursements and services in respect of" in S. 221 so as to entitle them to a lien over the property of the principal. (1889) 13 Bom 314 (322).

[9] When an agent by contracting renders himself personally liable for the price of goods, the property in the goods vests in the agent, and his rights with respect to them are identical with those of the principal, enabling him to resell or stop in transit, if the principal does not act according to S. 222. (Vol 16) 1929 Bom 260 (261) (DB).

SECTION 222 — Note 1

[1] Agent is entitled to reimbursement and indemnity by his principal when he acts within scope of directions. (1921) 3 Lah. Law Jour 141 (144) (DB) * (Vol 15) 1928 Lah 196 (201) : 9 Lah 7 (DB). (Agent making unauthorized settlement is not entitled to indemnity.)

[2] Plaintiff to purchase goods, hold them for defendant and resell them upon his instructions — Transaction is contract of agency carrying with it rights to indemnity conferred upon agent. (Vol 10) 1923 Lah 473 (474) (DB).

[3] Where agent is authorised to make contracts in his own name, he becomes entitled to an indemnity against any personal liability in respect of it. (1945) 80 Cal L Jour 297 (317, 318).

[4] Agent's right of action in respect of indemnity is not postponed to his satisfaction of the liabilities

Agent to be indemnified against consequences of acts done in good faith.

rights of third persons.

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the

Illustrations.

(a) *A*, a decree-holder, and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum, which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.

(b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards, *C*, the true owner of the goods, sues *B*, and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C*, and for *B*'s own expenses.

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.^a

Non-liability of employer of agent to do a criminal act.

Illustrations.

(a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.

(b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C*, and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

[a] See Section 24.

Compensation to agent for injury caused by principal's neglect.

225. The principal must make compensation to his agent in respect of injury^a caused to such agent by the principal's neglect or want of skill.

Illustration.

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

[a] Cf. the Indian Fatal Accidents Act, 1855 (13 [XIII] of 1855).

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against which he claims indemnity. (1945) 80 Cal L Jour 297 (318).

[5] Purchase of goods from commission agent under c. i. f. contract — Agent agreeing to supply goods "on account and risk of buyer"—Outbreak of war—Goods shipped in enemy ship—Contract of affreightment dissolved—Loss cannot be thrown on agent. (Vol 6) 1919 Mad 483 (484, 485); 41 Mad 1060 (DB).

[6] Agent executing *sarkat* in favour of *adatiya* and undertaking to pay him loss from contract is entitled to recover loss from principal. (Vol 23) 1936 Nag 87 (40); 31 Nag L R 154.

[7] Without actual proof of loss agent cannot claim indemnity. (Vol 22) 1935 Sind 38 (41) (DB).

[8] In absence of stipulation, money spent by commission agent during business trip on board and lodging cannot be considered to be incidental to carrying on business of principal who is not bound to pay bill though he could recover things kept by agent at hotel. (13) 1913 Pun L R No. 206, page 693 (694) (DB).

[9] Agent's allocation of cross-contracts to himself might mean that he is damaged on the day when the cross-contracts were entered into. If on the other hand, he entered into cross-contracts with others, it cannot be said that the loss has necessarily occurred to the commission agent on the day on which such cross-contracts were entered into. (Vol 19) 1932 Bom 25(30) (DB).

"*Lawful acts.*"—[10] Agents who engage to defraud principal forfeit their right to indemnity in respect of fraudulent transactions. Where securities deposited by principal with agents are fraudulently disposed of by agents, disposal amounts to conversion; and principal on each occasion on which shares were sold has right to damages for conversion measured by value of shares at the date of conversion. Where not-knowing of conversion principal receives from wrongdoer and retains goods converted or their equivalent, he must give credit for

value of what he has received. (Vol 25) 1933 PC 23 (25) (PC).

[11] In a 'badni' transaction if the debt owed to the agent is less than the sum lost by him, on account of his principal and the matter is settled by debit and credit, plus payment of cash by agent, the agent can recover both the amount adjusted by credit and debit, and paid in cash. But if there is no cash payment the agent cannot recover. In such a case the agent's liability to the third party is neither "enforced liability" nor is there a cash payment. ('08) 1908 Pun Re No. 79, page 366 (371) (FB) & (Vol 15) 1928 Lah 420 (422) (DB).

[12] Agent can recover moneys paid for principal even on wagering contracts. (Vol 19) 1932 Lah 356 (358); 13 Lah 766 (DB) & (1911) 33 All 219 (221, 222) (DB).

Limitation.—[13] The agent is not entitled to wait till the termination of the agency to make a claim under S. 222. Time begins to run from the time the claim materialises and not from termination of the agency. (1911) 34 Mad 167 (172) (DB).

[14] Principal's liability to indemnify agent is one under contract within meaning of Art. 83, Limitation Act. (Vol 31) 1944 Cal 302 (302); 1 LR (1944) 2 Cal 233 (DB).

[15] Where commission agent purchases goods for his principal and on the principal refusing to accept some goods, the agent re-sells them, suit for damages is governed by Art. 85 and not by Art. 61 of the Limitation Act. (Vol 19) 1932 Bom 593 (594).

[16] Agent sustaining losses in his agency has right, as direct consequence of agency contract, to be recouped by his principal in respect of such losses and suit to enforce that right is governed by Art. 83 of Limitation Act. (Vol 1) 1914 Lah 407 (408); 1915 Pun Re No. 23 (DB).

SECTION 223—Note 1

[1] Suit for accounts by principal—Agent is entitled to credit for amount spent by him authorisably for

Effect of agency on contract with third persons.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into, and the acts done, by the principal in person.

Illustrations.

(a) *A* buys goods from *D*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set off against that claim a debt due to himself from *B*.

(b) *A* being *B*'s agent, with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *D*.

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unlawful purpose, though no suit by agent for recovery of same may be. (Vol 13) 1926 Sind 40 (41) : 20 Sind L R 100.

Section 226 — Note 1

[1] Principal is bound by the act of his agent with all its results. (1909) 36 Cal 840 (853, 854, 855) : 36 Ind App 85 (P C).

[2] Bond—Loan to vakils of zamindar for zamindari. —Zamindar is liable. (1866) 5 Suth W R 72 (74).

[3] Representation by agent is as effectual for the purposes of estoppel as one made by principal. (Vol 18) 1931 Mad 647 (649).

[4] If a person, acting as agent of his co-sharers under power of attorney, contracts debt by writing handnote, then all co-sharers are liable for money. (1910) 11 Cal L Jour 236 (241, 242) (DB).

[5] Where an agent, signed a promissory note on behalf of a Mahant and utilised the money so got for his (Mahant's) personal purposes, the Mahant is liable personally for the loan. (Vol 21) 1934 Pat 435 (437, 438) (D B).

[6] A military contractor, according to rules, deposited a certain sum in the bank by way of security. The bank issued a deposit certificate in the name of the military authorities. The bank subsequently went into liquidation : *Held*, that the bank had become an agent to the military authorities, and on its failure to pay, the military authorities were liable to pay. (Vol 19) 1932 Lah 34 (36) (DB) & (Vol 23) 1936 Pesh 148 (148).

[7] *A* drew a bill in favour of *B* on *C* and gave it to *B*'s agent. *B*'s agent had asked *A* for a bill drawn on himself and not on *C* but kept the bill without ascertaining its nature for some time. In the meantime *C* became insolvent : *Held* that assuming that both parties were under a mistake as to the bill, *B* could not recover the amount of the bill from *A* as his agent had been guilty of gross negligence in taking the bill and keeping it without ascertaining its nature. (1882) 4 All 334 (337) (D B).

[8] Manager of mine can make contract binding on owner. (Vol 25) 1938 Cal 343 (346).

[9] Station master having power to accept or refuse bailment of goods, accepts bailment—Railway company is responsible for consequences. (Vol 10) 1923 All 71 (73) (D B).

[10] Compromise with authorised attorney of *pardana-shin* lady is valid. ('39) 1939 Oudh W N 1068 (1074) (D B).

[11] To bind the Secretary of State by contract, there must be deed executed on his behalf and in his name by proper authority. (Vol 23) 1936 Bom 19 (21) : 60 Bom 42 (D B).

[12] An agent having power to sell on behalf of another need not necessarily recite such authority or disclose the same either in body or at the signature. The question of agency is one of intention to be gathered from the terms of contract and the surrounding circumstances. (Vol 7) 1920 Oudh 105 (109) : 23 Oudh cas 353.

[13] Document executed by agents—No mention of principal in document—Agents not signing as agents—Conveyance not valid. (1911) 12 Ind Cas 206 (207) (Low Bur).

[14] A consignor of goods is bound by a risk note signed by a person who actually delivered the goods to the Railway Company (Vol 11) 1924 Pat 315 (317).

[15] Payment to agent is payment to principal. ('12) 1912 Pun L R No. 36, page 115 (116).

[16] Payment made to person who is not creditor's agent for realizing money due to creditor from third parties as debts, is not valid. (1910) 7 Ind Cas 530 (530) : 1910 Pun W R No. 89.

[17] In the absence of custom or authority of principal, payment to broker is no payment to principal. (Vol 4) 1917 Cal 818 (821) (D B).

[18] One of several joint debtors cannot be agent of their creditor so far as joint-debtors are concerned and payment to that debtor is not payment to creditor. (1911) 11 Ind Cas 864 (864) (Low Bur).

[19] Defendant's branch firm at Cawnpore was managed by *munim* from 1897 to 1911 who entered into forward contracts in name of defendant with plaintiff and they were entered in books at Cawnpore but no goods were ever actually delivered. Adjustment of accounts was made in 1908 and balance was found due to defendant. After 1908 no forward contracts were entered in accounts though *munim* carried on transactions with plaintiff who did not know that *munim* was acting in his own behalf. Defendant asked plaintiff for information about goods bought and sold through them. They supplied same some days after demand and brought suit for balance due on contracts : *Held* that defendant was bound by transaction entered into by *munim* both before and after 1908 upto 1911. But transactions being only for differences were wagering ones and hence could not be enforced. (Vol 1) 1914 Bom 142 (144) : 39 Bom 1 (D B).

[20] Right of support from adjoining soil affected by trench dug by contractor for the defendant—Defendant is liable for the act of contractor. (1893) 17 Bom 307 (311).

[20a] The plaintiff did work in the construction of defendant's building through a certain firm, who were acting as defendant's agents. No payment was made for the work done by the plaintiff though the firm submitted the final bill containing the amount due to the plaintiff. His work was got examined by a different engineer according to whose fresh estimate a lower amount was offered : *Held*, that the defendant was liable to pay according to the bill of the firm who were his agents and who were acting according to the duty imposed upon them. (Vol 15) 1928 Oudh 89 (91) (D B).

[21] A certain bank went into liquidation and the Official Liquidator took misfeasance of proceedings against the defendants who were the director and the manager and in the course of those proceedings, the defendants effected a compromise with the Official Liquidator by which they undertook among other things "to adjust or

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration.

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable.

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration.

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

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satisfy any claim" of one of the depositors of the bank among others and to indemnify the Official Liquidator against any such claim. A decree was passed in the terms of the compromise. The defendants having made default in satisfying the claim of the depositor, he instituted a suit against the defendants: *Held*, that the Official Liquidator who entered into a compromise with the defendants was representing all the depositors, creditors and share-holders of the bank was in the way acting as their agent. It could not be argued therefore that the plaintiff was a perfect stranger to the agreement and did not come within the ambit of the well-recognized exception based either on the ground that he claimed through a party to the contract or on that of agency, even if it be not possible to hold that an express or implied trust was created in his favour. The suit was therefore maintainable. (Vol 27) 1940 Lah 471 (473).

[22] Agent cannot act beyond scope of authority. (Vol 3) 1916 Sind 37 (42) : 10 Sind L R 72.

[23] Act of agent in excess of power of attorney does not bind principal. (Vol 5) 1918 Mad 706 (707) (DB).

[24] Person dealing with agent, whose authority he knows to be limited, deals at his risk and if agent exceeds his authority, principal is not liable. ('10) 14 Cal W N 381 (388) (PC).

[25] Where agent of landlord has no authority to incur pecuniary liability on his behalf, no personal decree can be passed against landlord. ('12) 16 Ind Cas 999 (1000) (Oudh).

[26] Agricultural tenancy created by zamindar's agent without his authorization — There is no valid tenancy — Tenant can be ejected. (Vol 30) 1943 Oudh 174 (175).

[27] Station master accepting goods at concession rates where such rates were not applicable is not acting within his authority. (Vol 8) 1916 All 306 (307).

[28] Where the master is sought to be made liable for the transactions of the servant, the person claiming against the principal must show that the act done was within the scope of the authority or ostensible authority held or exercised by the agent and this can be shown by practice as well as by a written instrument. (Vol 24) 1937 Pat 526 (527, 528).

[29] Principal is liable to extent of benefit received in unauthorised transactions. (Vol 3) 1916 Mad 1025 (1027) (DB).

[30] Agent borrowing for principal without authority—Money going into principal's coffers—Law implies promise to pay. (Vol 28) 1936 Bom 62 (66) : 60 Bom 326.

[31] Where agent signs pro-note *par pro* for business belonging to minor, holder must be fixed with notice of the contents of power of attorney under which agent acts and of the extent of his authority and of the fact that business belonged to minor. ('12) 35 Mad 692 (699, 700) (DB).

[32] Authority of agent to bind the principal must be determined from facts of each case. (Vol 4) 1917 Pat 512 (513).

[33] Agent cannot sue or be sued in respect of sale to him on behalf of principal. ('13) 25 Mad L Jour 32 (32) (DB).

[34] Suit to recover profits, promised to be paid just after sale of land itself, is to be brought against vendor and not against his agent. ('09) 2 Ind Cas 262 (262) (DB) (All).

[35] Compromises by a few self-constituted leaders, or even the leaders chosen by the officials, cannot bind an entire community. (Vol 18) 1931 All 341 (346) : 53 All 484.

[36] As to liability of principal inducing belief that agent's unauthorised acts were authorised, see S. 237.

SECTION 227 — Note 1

[1] Agent authorised to stand surety for one person only—Agent standing surety also for two more persons — Authorised act separable from unauthorised act — Principal's liability is restricted to authorized act only. (Vol 24) 1937 Rang 499 (501) (DB).

[2] Consignment of fire-works accepted under mistake by the parcel-clerk as parcel to be despatched by passenger train—Subsequently discovering the mistake, not despatching it at all even by goods train: *Held*, that the railway company was liable in damages for the loss caused thereby. (Vol 9) 1922 All 324 (330) : 43 All 623 (DB).

SECTION 228 — Note 1

[1] Authority to buy cotton at a particular time — Contract to buy it at a different time : *Held*, contract does not bind the principal. (1871) 8 Bom H C R 19 (22).

[2] Partner authorised to draw bill to the extent of certain amount drawing bill to a larger amount without firm's knowledge—Firm is not liable even to the authorised extent. (1873) 10 Bom H C R 319 (322, 323).

[3] Agent of co-sharers granting a perpetual lease of land—Such transfer is clearly beyond the scope of his authority : *Held*, transfer does not bind co-sharers. (1889) 2 O P L R 103 (104).

[4] Lambardar transferring absolute occupancy without specific authority from landlord—Custom prevailing under which such transfers were made : *Held*, landlord was bound by the transfer. (1895) 8 C P L R 41 (42, 43).

229. Any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to, or obtained by, the principal.

Illustrations.

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.

Such a contract shall be presumed to exist in the following cases :—

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :

(2) where the agent does not disclose the name of his principal :

(3) where the principal, though disclosed, cannot be sued.

Section 229 — Note 1

[1] An agent fully represents his principal in dealing with other persons, and knowledge acquired by him while acting within the scope of his agency must be held to be the knowledge of his principal. (1900) 3 Oudh Cas 55 (59) &(Vol 14) 1927 Sind 24 (25) &(Vol 8) 1921 Sind 121 (124) : 16 Sind L R 235. (Bill of lading signed by broker—Particular condition in it material to the business — Principals are bound even though they have not read them or even knew that such conditions existed.) &(Vol 16) 1929 Lah 500 (502). (Co-vendees in position of principal and agent to each other — Notice to one is notice to other except where agent acts fraudulently.) &(Vol 2) 1915 Lah 385 (386) (DB) &('03) 25 All 1 (17) : 29 Ind App 203 (PC). (Notice given to Mukhtyar binds his client.)

[2] Knowledge on part of agent prior to his employment is not information obtained in course of business as to impute notice to principal. (Vol 12) 1925 Nag 898 (401).

[3] Constructive notice of fact which agent knows cannot be imputed to principal when it was not to the interest of agent to disclose to principal and which agent did not in fact disclose. (Vol 6) 1919 P C 20 (24) : 46 Ind App 250 : 44 Bom 139 (PC) &(Vol 16) 1929 Cal 497 (499) : 56 Cal 367. (Member of pledgor firm also member of advisory committee of pledgee bank — Insufficient to impute notice to bank of pledgor's fraud.) &('13) 37 Bom 122 (137) : 40 Ind App 1 (PC). (Pledge by person not entitled to the goods — One of the managers of bank advancing money in partnership or collusion with the pledgor—Held, his knowledge cannot be imputed to the bank. ('10) 12 Bom L R 316, Reversed.) &(1875) 12 Bom H C R 262 (266).

[4] Knowledge of principal officers is imputed to bank and they are more than mere agents of it—Their acts and conduct are sufficient to raise plea of estoppel against bank. (Vol 17) 1930 Rang 265 (268, 269) : 8 Rang 223 (DB).

[5] If agent, acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against principal the principal is not bound by agent's knowledge of fraud. ('12) 36 Bom 564 (585).

[6] Agent, who did not enquire if mortgagor had interest in property mortgaged, imputes knowledge to principal (mortgagee) of fictitious entry of property in

the deed. (Vol 1) 1914 P C 67 (70) : 41 Ind App 110 : 41 Cal 972 (PC).

SECTION 230 — Synopsis.

1. Scope.
2. Agent having interest in the contract.
3. Contract to the contrary.
4. Principal resident abroad.
5. Undisclosed principal.
6. Where principal cannot be sued.

1. Scope — [1] An agent is not entitled to personally enforce nor is he bound by a contract entered into by him as such. (Vol 6) 1919 Pat 143 (143) &(Vol 1) 1914 Mad 97 (98) &(1882) 6 Bom 326 (362, 363).

[2] Where an elder brother signed a contract in his own name mortgaging his sister's property but the body of document described him as authorised agent, he was not personally liable. (Vol 25) 1938 Mad 146 (147).

[3] Defendant, an organizer of a company, receiving deposit from plaintiff promising to appoint him as selling agent of the company — Company adjudged insolvent—Plaintiff's suit against defendant for refund of deposit held not maintainable as the defendant must be deemed to have received the deposit as agent. ('42) 1942 Nag L Jour 515 (517, 518) (DB).

[4] It is quite a common thing for a broker to act for both the parties in the sale of produce, and if he does not exceed the limits of his authority, he incurs no personal liability. (1910) 8 Mad L J 353 (354).

[5] Contract between agent and principal that agent would pay for goods supplied by principal to purchaser—Order not placed through agent—Purchaser making agent believe that he would pay him — Agent's suit against purchaser—Held that the fact that the purchaser made agent believe that he would pay him does not override the provisions of S. 230. (Vol 24) 1937 Lah 607 (608).

[6] Where the principal sends goods to his agent and consigns them to railway but they are not delivered to agent, the agent has no *locus standi* to sue railway for damages, for railway receipt sent to him by principal does not confer upon him the ownership of the goods. (Vol 16) 1929 Lah 590 (590).

[7] Plaintiff purchased goods on behalf of another firm and sent them to defendant who accepted them and wrote to plaintiff complaining of shortage and

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promising to pay price — *Held*, plaintiff cannot sue defendant as latter was only agent of firm for whom goods were purchased. (Vol 4) 1917 Lah 404 (405).

[8] Ordinarily speaking, the words "*pacca arhtia*" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can, therefore, be no question of the application of S. 230, Contract Act. (Vol 25) 1938 Lah 253 (254) (DB).

[9] Promise enforceable against principal cannot be enforced against agent. (Vol 14) 1927 Mad 1102 (1103).

[10] Where the plaint merely discloses a contract between the plaintiffs and the agent of a disclosed principal, the agent cannot be sued. Where there is a matter of doubt as to the liability of the agent or the principal in a contract, the usual course is to sue both defendants alleging that the principal was the principal to the contract and, in the alternative, suing the agent for breach of warranty of authority. (Vol 21) 1934 Pat 269 (270) (DB).

[11] Mistake of fact on a consideration which was supposed to exist eventually turned out to be without substance — S. 230 has got no application — Purchaser is entitled to ask for return of deposit made with auctioneer. (Vol 29) 1942 All. 90 (93, 94).

2. Agent having interest in the contract. —

[1] An agent having an interest in the contract may sue in his own name, he being virtually a principal to the extent of his interest in the contract. (Vol 25) 1938 Lah 673 (674) (DB) * (Vol 16) 1929 Oudh 417 (418) : 5 Luck 201 (DB) * (Vol 12) 1925 Bom 547 (553) * (Vol 7) 1920 Lah 196 (197) * (1901) 24 Mad 130 (135, 136) (DB).

[2] Though an auctioneer is classified as an agent, the nature of his duties invest him with certain rights which differentiate him from an ordinary agent. In his capacity as an auctioneer he has an interest in the goods entrusted to him for auction-sale. He has a lien upon them for the charges and advances. His custody of the goods is not the bare custody of an ordinary agent, but he, by virtue of the auction of the principal's goods, acquires a special property in the goods which are in his possession for the purpose of the auction-sale. He can, therefore, sue in his own name for the value of goods sold at an auction-sale. (Vol 18) 1926 Sind 6 (7) : 20 Sind L R 287.

3. Contract to the contrary. — [1] The three cases mentioned in S. 230 in which contract to that effect may be presumed are by no means exhaustive. (Vol 16) 1929 Oudh 417 (418) : 5 Luck 201 (DB).

[2] The question whether an agent, who has made a contract on behalf of his principal, is to be taken to have contracted personally, or merely on behalf of his principal, and, if personally, what is the extent of his liability on the contract, depends on what appears to have been the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances. (Vol 28) 1941 Cal 643 (652) (DB).

[3] The latter part of S. 230 says that in certain cases a contract to the effect that the agent shall be personally liable shall be presumed. The case in which, though disclosing the name and identity of the principal, the agent contracts personally is not one of them, but there being a specific contract to that effect there is no need for any presumption. (1945) 80 Cal L Jour 297 (304).

[4] Man who is agent and describes himself as such, may still be contracting in his personal capacity but the mere fact that he fails to specify his capacity as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are

clearly to the contrary. (Vol 7) 1920 Lah 484 (485) (DB).

[5] Where there is nothing in the agreement raising implication that agent purports to render himself personally liable, the use of the word 'agent' negatives personal responsibility. (Vol 17) 1930 Bom 569 (572).

[6] Where the "principal contract" form is employed, the custom accepting the incident of broker's responsibility obtains even although the names are in fact disclosed. The contract on the face of it being between the buyers and the unnamed sellers and the language adapted accordingly, there is a good custom entitling the brokers to enforce the contract. (Vol 10) 1923 Cal 419 (421, 422) : 50 Cal 12.

[7] Evidence of a custom in the gunny market in Calcutta whereby brokers are made personally liable though they had no principals is admissible. Sections 230 and 236 do not apply to such case. (Vol 4) 1917 Cal 587 (588).

[8] If on the face of a contract an agent appears to be personally liable, he cannot escape his liability by evidence of disclosure of principal's name apart from the contract. (1880) 5 Cal 71 (79, 80).

4. Principal resident abroad. — [1] Presumption in S. 230 (1) is a rebuttable presumption. The fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting party looked to him alone for performance. (1922) 87 Ind Cas 157 (158) (DB) (Lah).

[2] Where corporate company is resident abroad, it must be presumed that agent is personally liable under contract of sale entered into with third party. But this presumption of law can be rebutted, when the foreign principal himself is, in writing, made the contracting party and contract is made directly in his name. (1904) 27 Mad 315 (333) (DB).

[3] Where plaintiff entered into a contract direct with the foreign merchant, the defendant only acting as a post officer in the matter, the latter is not personally liable under the contract though he would be if he acted as agent for the foreign merchant. (Vol 10) 1923 Lah 296 (297) (DB).

[4] Where plaintiffs' indent was not accepted by the defendants, commission agents, but by a merchant residing abroad and the defendants did not undertake any primary liability, *held*, that S. 230 (1) of the Act was not applicable to the case and the plaintiffs were not entitled to sue the defendants for any claim regarding their indent. (1905) 1905 Pun L R No. 135, p. 488 (489).

[5] Agent of foreign State is personally liable for contracts entered into on behalf of principal where the contracts do not come under S. 86, Civil P. C., and permission to sue need not be applied for. (Vol 15) 1923 Sind 189 (190).

5. Undisclosed principal. — [1] When an agent does not disclose the name of his principal, the agent would be personally liable. (Vol 19) 1932 Nag 27 (28) : 27 Nag L R 324.

[2] An agent while entering into a contract of charter-party mentioned the name of the ship and its registration number. *Held* that though he did not disclose the name of the principal, benefit of S. 230 could not be given. The ships' name and number was sufficient indication of the identity of the principal. The essential point is the knowledge and not the declaration. (1831) 5 Bom 584 (589).

[3] Where one party to a contract knows that the other is only acting as an agent for a person known to him, a formal disclosure of the principal is unnecessary to make principal liable. (1922) 65 Ind Cas 473 (474) (DB) (Lah).

231. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

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[See also (Vol 20) 1933 Sind 34 (35) : 26 Sind L R 85 (DB). (It is not necessary that an agent should have disclosed himself as an agent in the contract to enable the agent to prove that contracts entered into in his name were entered into on the principal's behalf.)]

[5] A principal cannot be said to disclose himself if the other party gets knowledge about him not from the principal himself but from some other source. (Vol 16) 1929 Bom 177 (178) : 53 Bom 110 (DB).

[6] Where an agent does not disclose the name of his principal, the presumption is that he contracts to be held personally liable as well. Such a presumption, however, is rebutted where the agent signs the contract expressly as "Agent and Manager." (Vol 12) 1925 Oudh 641 (641, 642).

[See also (Vol 16) 1929 P C 254 (255, 256) (PC).]

[7] Where an agent does not disclose the name of the principal, he is personally responsible for the result of any fraud or wrong committed. So much of the money as is necessary to compensate for the loss caused thereby must be refunded, though the amount has been paid over to his principal. (1897-1901) 2 Upp Bur Rul 341.

[8] Agent entering into a contract on behalf of a principal who is disclosed but who is a minor is not personally liable on the contract to the third party. (Vol 17) 1930 Oudh 312 (314) : 6 Luck 19 (DB).

[9] Presumption under S. 230 will not arise when broker brings his principal vendor face to face with purchaser. But where purchaser has been making payments only to broker and does not know the name of vendor, broker can sue purchaser for balance of purchase money. (Vol 16) 1929 Nag 170 (171) : 25 Nag L R 81.

[10] A broker who gives to the buyer a note in the form "bought by your order and for your account from our principals" is not an agent of the undisclosed principal for sale to make him liable under S. 230. (Vol 3) 1916 Cal 548 (550) : 42 Cal 1050 (DB).

[11] Plaintiff entered into contract as principal, and sued upon as a principal—Plea that he was an agent not taken by defendant at an early stage but after evidence of plaintiff—*Held*, that even if the plaintiff was an agent he could sue in his individual capacity under S. 230. ('81) 1881 Pun Re No. 64, p. 148 (149) (DB).

[12] Where defendant, as manager of Banali Raj, got some work done by the plaintiff and name of Raja was not disclosed, *held*, defendant was not personally liable to plaintiff for work done by him for the Raj. (Vol 1) 1914 All 253 (254) (DB).

[13] Where in a court-auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not the judgment-debtor or the decree-holder but the Court itself. In selling property in court-auction, the Court acts under the statutory powers given to it by the Code and not as the agent of any party and the contract that is made, when the bid is accepted and confirmed by the Court, is one between the Court on the one side and the auction-purchaser, whose bid is accepted, on the other, and therefore before Cl. (2) of S. 230, Contract Act, can be excluded, it must be alleged and proved by the party wishing to take advantage of S. 230, Cl. (1) that when making the bid or before doing so he had informed the

Court or the Court-officer conducting the sale that he was making the bid only as the agent of some named third party. It would then be open to the Court-officer, the Nazir, either to accept his bids or decline them, if he is not fully satisfied that he had a proper power of attorney to make the bid. Where the auction-purchaser is accepted by the Court as agent, he is liable personally for deficit on re-sale. (Vol 11) 1924 Mad 476 (477) (DB).

[14] The person liable is that whose name appears on the face of the bill. No other person can be held liable under a bill unless it is clearly indicated on the face of the instrument that an agent is acting in his behalf. (Vol 24) 1937 Pat 428 (429).

[15] A rented a house from B for a school. B sued A to recover possession of the house and arrears of rent. A contended that he was merely a secretary acting for a society in London which ran the school and was not personally liable. *Held*, that on the form of the contract and from receipts passed it could not be inferred that the contract was made on anybody's personal credit except that of A. (1898) 22 Bom 754 (756, 757).

[16] Agent whose principal is undisclosed can sue under this section. (1912) 39 Cal 802 (807) (DB).

[17] Auctioneer is entitled to maintain a suit for the recovery of the price of goods sold against purchaser at auction. ('84) 1884 Pun Re No. 86, p. 241 (242).

[18] The form of a sold note was as follows : "Sold this day by order and for account of G, to my principal, G. P. Notes for Rs. 20,000 at Rs. 99-11-0." The note was endorsed "X for principal." *Held*, there was nothing in the note to rebut the personal liability of the person. (1890) 17 Cal 449 (454) (DB).

[19] Where the managing members of an ancestral trading firm enter into a contract, without disclosing the names of the other members, it is competent for them to sue on the contract without impleading the undisclosed members of the firm. The managing members are in the position of agents for undisclosed principals. (1905) 27 All 361 (362, 363) (DB) & (1910) 32 All 183 (186) (DB) & (Vol 25) 1938 Mad 739 (740) (DB).

6. Where principal cannot be sued. — [1] A person sued an unregistered union of employees and a member of the said union as the person who signed the contract on behalf of the union. *Held*, that under the law an unincorporated body could not be sued as such for recovery of a debt or on a contract. Only those persons who signed the contracts on behalf of the union and those who adopted them could be sued. Other persons who were members of an unincorporated body could not be proceeded against. (Vol 30) 1943 Mad 530 (530, 531).

[2] Clause 3 of S. 230 is not applicable to a case where a contract is entered into by an unincorporated society. It is not that an unincorporated society cannot be sued at all, but that it cannot be sued except in the name of all the members. ('91) 1891 Pun Re No. 15 page 93 (99, 101) (DB).

SECTION 231 — Note 1

[1] Section 231 deals with the rights (a) of the principal and (b) of the third party in cases when the contract is entered into by the agent without disclosing the principal — The first clause refers to the general case and the rule is that the third party shall have, as

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect, that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration.

A, who owes 500 rupees to *B*, sells 1,000 rupees worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion, that such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off *A*'s debt.

Right of person dealing with agent personally liable.

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration.

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

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against the undisclosed principal the same rights which he would have against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The second clause should be read as governed by the first clause. (1908) 32 Bom 356 (361, 362) (DB).

[2] Even where a railway receipt is granted in the name of servant or agent, the real owner of the goods can claim for their value if lost. (1926) 92 Ind Cas 1007 (1008) (All.)

[3] Undisclosed principal selling goods through agent can enforce purchaser to pay purchase money. (1909) 1909 Pun Re No. 71 page 230 (236) (DB).

[4] If one partner enters into a contract in his own name still if he is acting as the agent of the firm, his co-partners will be in the position of undisclosed principals. They can be sued on the contract and may join as plaintiffs in suing. (1908) 10 Bom L R 306 (311) * (Vol 15) 1928 Cal 57 (59) * (Vol 12) 1925 Cal 29 (31) (DB) * (1908) 31 Mad 45 (46) (DB).

[5] A railway company entered into a contract with a person in the belief that he was the only person interested in the contract. They did not know that he had another partner. Subsequently the person who contracted with the company died. The defendant partner sued the company claiming payments and amounts due to the firm under one of the contracts. *Held*, that the right to claim performance rested with the deceased partner during his life time and that the dormant partner could not sue the contracting party after the death of the partner entering the contract. (1908) 10 Bom L R 306 (313).

[6] Business done by a commission agent in his own name though for the benefit of an undisclosed principal, who is liable to indemnify the commission agent against loss, is not business done by such undisclosed principal through the agent, but business done by the agent. (Vol 16) 1929 Sind 24 (26) : 23 Sind L R 229.

[7] An agent contracting in his own name without mentioning the agency can sue and be sued upon the contract. (Vol 2) 1915 Mad 509 (516) (DB).

[8] Under S. 231 a principal can, as against the agent, claim the full benefit of the contract entered into by the agent in his own name and as against the party contracting with the agent, the principal is bound by the equities arising between the agent and the contracting party. (Vol 2) 1915 Mad 509 (511) (DB).

[9] A simple creditor can derive no advantage out of the circumstance that an agent is held out as the owner of the property. It is only a person who has obtained any sale, pledge, mortgage or other disposition for value of the property from the agent whom he believed to be the principal that can derive any advantage from such holding out. ('36) 1936 Mad W N 1015 (1016) (DB).

[10] Where principal can bring his case under S. 211, S. 231 does not debar him from seeking his remedy under that section — Contract for undisclosed principal — Breach by reason of agent's default — Principal can proceed only against other contracting party under S. 231 and not against agent. (Vol 21) 1934 Cal 721 (722) : 61 Cal 504 (DB).

[11] An agent entered into a contract in his own name with a third party, brought a suit against him for damages for breach of the terms of the contract and successfully obtained a decree. The principal brought a suit against the agent subsequently for declaration of title to the decree — *Held* that the suit was not maintainable because the principal might have adopted the contract made by his agent and sued on it or he might have either commenced the action himself or intervened at any stage in the action begun by his agent. (1913) 40 Cal 335 (340, 341) (DB).

[12] The words "discloses himself" in S. 231 must be construed strictly. The third party's right to repudiate the contract arises only where the principal himself makes the disclosure; it cannot arise when the disclosure is made by some other person or the information reaches him from other person. (1908) 32 Bom 356 (363) (DB).

Section 232 — Note 1

[1] An undisclosed principal has a general right to enforce a contract entered into by his agent. Under S. 232, this general right of the principal to require performance is subject to the rights and obligations that existed between the agent and the other contracting party. Thus, S. 232 is to be read as a qualification of the first portion of para. 1 of S. 231. ('79-80) 4 Bom 447 (455).

Section 233 — Note 1

[1] Section 233 enacts substantive law, laying down who shall be held liable and not adjective law, defining the procedure by which the liability may be enforced. (Vol 4) 1917 Bom 268 (270, 271).

[2] Section 233 cannot be construed as meaning only that the plaintiff might sue both the principal and the agent in the alternative, but that he cannot get judg-

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Person falsely contracting as agent not entitled to performance.

236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

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ment against both of them jointly for the amount sued for (Vol 26) 1939 Mad 520 (523) : I L R (1939) Mad 282 (DB) & (Vol 13) 1926 Oudh 41 (42) & (Vol 4) 1917 Bom 268 (271).

[But see (Vol 13) 1926 Mad 1213 (1213) : 49 Mad 900. (Liability is not joint but alternative.)]

[3] If an agent expressly contracts in his own name, he cannot escape liability on his contract though by S. 233 the other party might elect to hold his principal liable also or in the alternative. ('45) 80 Cal L Jour 297 (304) & (Vol 13) 1931 Sind 4 (5, 6) : 25 Sind L R 91 (DB) & (Vol 7) 1920 Upp Bur 30 (31) : 3 Upp Bur Rul 217 & ('81-82) 6 Bom 326 (357, 358).

[See also (Vol 15) 1928 Bom 516 (517) : 52 Bom 640 (DB). (Hundi signed by a certain person—It is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal)]

[4] A person who has made a contract with an agent may, if and when he pleases, look directly to the principal unless he has waived that right by express terms of the contract. This right exists whether the person was or was not aware when he made the contract, that the person with whom he was dealing was an agent only. ('91) 18 Cal 31 (36) (FB).

[5] Agent obtaining loan on behalf of principal company—Lender not aware of principal for whom loan was obtained by agent—Subsequent discovery of principal by lender—*Held* that lender could sue principal for the money lent. ('81-82) 6 Bom 326 (353, 357).

[6] A plaintiff who has a right to sue both an agent and his principal under S. 233 is not competent, after he has sued one of them to judgment, to sue the other in a second suit. (Vol 4) 1917 Bom 268 (273) & (Vol 23) 1936 Bom 344 (350) : 60 Bom 954 (DB) & ('87) 9 All 681 (688, 689) (DB).

[7] Creditor sued agent of his debtor alleging that the agent had made himself personally liable for the debt—Suit dismissed on the ground that the creditor gave credit to the principal—*Held* that suit of creditor against the principal was not barred by the proceedings. ('84) 7 Mad 392 (396) (DB).

[8] Money paid to agent—Money not credited—Money recovered by principal by suit—Debtor cannot recover money paid to agent. (Vol 10) 1923 Mad 551 (552).

Section 235—Note 1

[1] There is no distinction in principle between the case of a man who represents that he has authority from another when he has no authority whatever, and the case of a man who represents that he has certain authority from another when he has authority of another description. In neither case can the man who makes the representation be said to be the authorised agent of the other with reference to the matter on which he has no authority. Section 235 of the Contract Act is in-

tended to apply to both classes of cases. ('12) 34 All 168 (171) (DB).

[2] The representation that he has authority to act as agent may not be fraudulent; all that is required is that it was untrue. (Vol 25) 1938 Cal 151 (156, 157) : I L R (1938) 1 Cal 463 (DB) & ('10) 8 Mad L Tim 353 (353).

[3] An untrue representation of agency under this section need not necessarily be made in express and literal words; it may be conveyed by any words spoken or written combined with acts and omissions which would induce another person into the belief that he has such authority—The untrue representation must be one of fact and not merely of law—The fact that he made the representation under the belief that he had such authority does not affect his liability under this section except in cases where he would be prosecuted under S. 208. ('04) 17 C P L R 67 (71, 72).

[4] The words "if his alleged principal does not ratify his acts" in S 235 appear to indicate a named principal. (Vol 20) 1933 Sind 207 (209).

[5] The measure of damages must be what benefit the other party would have had from the contract if the representation had been true. (Vol 25) 1938 Cal 151 (156, 157) : I L R (1938) 1 Cal 463 (DB).

[6] A person who borrows representing himself to be the agent, without authority, must recoup the creditor. (Vol 17) 1930 Mad 439 (440).

[7] Muhammadan son who is not agent of his father mortgaging father's land—Section 235 applies and not S. 230. (Vol 21) 1934 Pesh 49 (49, 50).

[8] Agent representing his principal purchasing goods on his behalf—Principal repudiating liability—Agent alone is liable. (Vol 11) 1924 Oudh 184 (185).

[9] A person was provisionally appointed as teacher by the secretary of school—At the next meeting of the Committee, it recognized him as one of the staff but owing to financial stringency it decided to dispense with his services from August—*Held*, that the secretary would not be personally liable to pay the compensation, for the case was not covered by S. 235, Contract Act. (Vol 16) 1929 Cal 289 (289).

[10] Under a charter-party when a person untruly represents himself to be the authorised agent of the master to enter into contracts on his behalf he is personally liable for damages to the other party, and he is not liable for a greater amount than could have been recovered from the alleged principal and the fact that the master or principal is also liable would not make any difference in the liability of the agent. ('83) 7 Bom 51 (66).

Section 236—Note 1

[1] Section 236 deals with dispute between two persons one of whom falsely professed agent of third party and it does not apply where dispute is between principal and his agent. ('10) 34 Bom 292 (304).

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has, by his words or conduct, induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorized acts were authorized.

Illustrations.

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

238. Misrepresentations made, or frauds committed, by agents acting in the course of their

Effect, on agreement, of misrepresentation or fraud by agent.

business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Section 236 (contd.)

[2] Person with whom contract is made as agent, when he is not so, cannot sue under S. 236. ('12) 39 Cal 802 (809) (DB) * ('07) 34 Cal 628 (633).

[3] Section 236 applies to contract when agent purports to act for a named principal, as well as when he purports to act for undisclosed principal. (Vol 20) 1933 Sind 207 (208, 209).

[4] The section does not enact that the contract is void in circumstances mentioned in the section. It only provides that the alleged agent cannot require its performance. Being therefore enforceable by one of the parties and not enforceable by the other, it is a voidable contract under S. 2 (1) of Contract Act. (Vol 20) 1933 Sind 207 (208, 209).

Section 237 — Note 1

[1] Unless the relationship of principal and agent is proved to exist between the parties, S 237, Contract Act, can have no application. (Vol 24) 1937 All 255 (257).

[2] Principal benefitting by money received through wrongful or unauthorised act of agent—His liability to restore it is joint and several with agent. (Vol 24) 1937 Lah 570 (571).

[3] Agent borrowing for principal, who refuses to ratify—Creditor can sue principal to the extent money was applied to pay his legal debts. (Vol 17) 1930 Nag 42 (42).

[4] Wife giving shares to husband for safe custody—Unauthorized pledge of shares by husband to secure overdraft—*Held*, there was no relationship of principal and agent and S. 237 had no application—Shares were not liable for amount due on overdraft. (Vol 24) 1937 All 255 (257).

[5] Person who deals with agent whose authority he knows to be limited does so at his peril, in this sense that should agent be found to have exceeded his authority, the principal cannot be made responsible. In order that principle of "holding out" should apply to act done by agent and relied upon to bind principal, it must be an act of that particular class of acts which he has general authority on behalf of his principal to do. But if agent be held out as having limited authority to do on behalf of his principal, acts of particular class, then principal is not bound by an act done outside that authority. Where principal did not by any negligent or improper act, allow agent to be apparently invested with authority beyond or greater than the limited authority which customer knew him to possess, there could not be any stoppage as against principal in respect of any of the steps in transaction whereby customer was deceived by agent acting beyond his authority. (1910) 14 Cal W N 881 (887, 889) (PC).

[6] Owner of house authorises licensed auctioneer to

sell it — Latter sells at lower price than authorised — Owner is bound by sale (Vol 16) 1929 Lah 822 (823) (DB).

[7] Railway company is liable for mistake of Parcel-clerk, not sending parcel, accepted for transit. (Vol 9) 1922 All 324 (330) : 43 All 623 (DB).

[8] Principal and agent—Relationship of — Person ordering goods for firm A from firm B—Person neither manager nor one held out as agent of firm A — Person only servant of firm A with limited powers — Firm B having no knowledge of and making no enquiry about firm A — Such person is not entitled to bind firm A so as to make it liable for value of goods ordered. (Vol 24) 1937 Sind 151 (152) (DB).

[9] Person alleged that he had implied authority to settle lease on behalf of a shebait. Lower Court found he was acting as if he were the shebait. *Held*, the finding was insufficient to prove implied authority. He must prove, he had authority. (Vol 20) 1933 Cal 109 (113): 60 Cal 111 (DB).

[10] Contractor asking goods to be sent to District Board Engineer—Engineer not agent of Board—District Board not liable. (Vol 18) 1931 Cal 423 (424, 425) : 58 Cal 17.

[11] Where share-holders of limited company induced people to believe that certain firm were their agents and allowed manager of firm to sign *hundies* on behalf of company, held that company was liable for sum due under *hundies*. (Vol 1) 1914 All 238 (241) : 36 All 416 (DB).

[12] The right of a third party against the principal on the contract of his agent, though made in excess of agent's actual authority, is nevertheless to be enforced when the evidence shows that the contracting party has been led into honest belief in the existence of the authority to the extent apparent to him. Where an agent, acting within the scope of his implied authority, commits a fraud for his own benefit, the principal is liable to the party defrauded. (Vol 32) 1945 Nag 121 (127) : I L R (1945) Nag 204 (DB).

Section 238 — Note 1

[1] Agent's authority may be express or implied — Agent acting in excess of authority — Still principal is liable — So also even when fraud is committed, while acting within scope of authority. (Vol 32) 1945 Nag 121 (127) : I L R (1945) Nag 204 (DB).

[2] Principal is liable for agent's fraud, acting within the scope of his authority. (Vol 11) 1924 Nag 79 (79).

[3] Fraud by agent need not be for principal's benefit; it is enough if it is committed in the course of business. (Vol 10) 1923 Cal 167 (160) : 58 Cal 258 (DB).

[4] There may be causes, outside the scope of the provisions of S. 238, in which a fraud or misrepresenta-

Illustrations.

(a) *A*, being *B*'s agent for the sale of goods, induces *C* to buy them by a misrepresentation which he was not authorized by *B* to make. The contract is voidable as between *B* and *C* at the option of *C*.

(b) *A*, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

CHAPTER XI. — [Of Partnership ss. 239 to 266.] *Repealed by the Indian Partnership Act, 1932 (9 [IX] of 1932), S. 73 and Schedule II.*

SCHEDULE.

Repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914), S. 3 and Sch. II.

[THE] CONTROL OF SHIPPING ACT, 1947.

(ACT XXVI of 1947.)

CONTENTS.**SECTIONS.**

1. Short title, extent, commencement and duration.
2. Interpretation.
3. Licences.
4. No port-clearance until licence is produced.

SECTIONS.

5. Power to give directions.
6. Power to fix shipping rates.
7. Power to call for information.
8. Penalties and procedure.
9. Power to make rules.

STATEMENT OF OBJECTS AND REASONS.

"Ordinance No. XX of 1946, whereby provision was made for the continuance *inter alia* of Defence of India Rule 65 relating to control of trade by seas, ceases to be valid on the 25th March 1947. It is considered that conditions are still so abnormal as to make it necessary to continue a form of control with a view to ensuring the required priority for movement by sea of coal, foodstuffs, and other essential cargoes. With regard to ships registered in British India, the Bill provides for a system of licensing which will enable the shipping authority to specify the trades in which ships may engage and the voyages which they may undertake, and also to issue directions in respect of passengers and cargo priorities and routes. Ships registered outside British India will not be subject to licensing, but may be given priority directions provided they are taking on passengers or cargo in a British Indian port for dis-

charge at any port in the continent of India. By the exercise of these powers, Government will be able to ensure essential supplies of coal both for the railways and for industry in the south and west of India, and transport of foodgrains and salt from the west coast.

Provision has also been made for control over fares and freight rates. In existing conditions Government consider it desirable that this power should be taken in order to protect the public from exploitation; fares and rates in nearly all other forms of transport are being controlled, and it is not desirable that sea transport should be allowed to form an exception. This provision will also enable action to be taken, should circumstances necessitate it, to prevent rate wars and other forms of wasteful competition."

—Gazette of India, 1947, Part V, page 263.

[THE] CONTROL OF SHIPPING ACT, 1947.

(ACT NO. XXVI OF 1947).^a

An Act to provide for the control of shipping.

WHEREAS it is expedient to provide for the control of shipping for a limited period;

It is hereby enacted as follows :—

[a] For Report of the Select Committee, see Gazette of India, 1947, Part V, page 363.

Short title, extent, commencement and duration.

1. (1) This Act may be called the Control of Shipping Act, 1947.

Section 238 (contd.)

tion, practised or made by an agent, may invalidate an agreement, entered into by the principal. (Vol 29) 1942 All 341 (344) (DB).

[5] Agent bought war bonds; forged principal's endorsements in his own favour and pledged with bank. *Held*, latter cannot hold them against principal. (Vol 8) 1921 Sind 172 (174) : 15 Sind L R 93.

[6] *A* selling house to *B*—*B* paying certain amount in cash and executing promote for balance — Suit by *A* on promote — *B* denying liability on ground of fraud; alleging that, *C*, who acted as agent of *A* had represented to him that there was another purchaser *L* in the field who was prepared to pay higher price and that *B* would profit by reselling house, that after completion of sale information supplied was found to be false — *C* acting

as commission agent for *A* to sell house—*C*, having no express authority to give any information about house — Case held not to come within S. 238, Contract Act. (Vol 29) 1942 All 341 (343) (DB).

[7] The condition of mind of the agent cannot be imputed to principal, who is not criminally liable therefor; but where particular intent or state of mind is not the essence of offence, agent's act or omission makes principal criminally liable though he was not aware of it or even when act is done against his orders. (Vol 3) 1916 Cal 431 (443) : 42 Cal 1094 : 17 Cri L Jour 13 (DB).

SECTIONS 239 TO 266 — *Repealed by Indian Partnership Act.*

SCHEDULE — *Repealed by Amending Act (X of 1914).*

(2) It extends to the whole of British India, and applies also to, and to persons on, ships registered in British India, wherever they may be.

(3) It shall be deemed to have come into force on the 25th day of March 1947, and it shall remain in force only up to the 31st day of March, 1948 :

Provided that the Central Government may, by notification in the official Gazette, direct that it shall remain in force for a further period not exceeding one year.

Interpretation. 2. In this Act, unless there is anything repugnant in the subject or context,

- (a) "master" and "passenger" have the meanings respectively assigned to them in the Indian Merchant Shipping Act, 1923;
- (b) "owner" includes the agent of an owner;
- (c) "prescribed" means prescribed by rules made under section 9;
- (d) "ship" does not include a ship of less than 150 gross registered tons or a sailing ship;
- (e) "Shipping Authority" means any authority or officer authorised by the Central Government by notification in the official Gazette to perform the functions of a Shipping Authority under this Act.

3. (1) No ship registered in British India shall be taken to sea from a port or place within *Licences.* or outside British India except under a valid licence granted by a Shipping Authority under this section.

(2) A licence granted under this section may be either a general licence or a specified voyage licence.

(3) A general licence shall remain valid until it is revoked by the Shipping Authority which granted it and a specified voyage licence shall be valid only for the particular voyage for which it is granted.

(4) A licence granted under this section may contain such limitations and conditions as the Shipping Authority granting it may think fit to impose with respect to the trades in which the ship may engage and the voyages which it may undertake, and such limitations and conditions may be imposed so as to apply to the ship wherever it may be, or while in such waters or engaged in such trades or on such voyages, as may be specified.

(5) When a licence ceases to be valid, the person to whom it was granted shall, without unreasonable delay, return it or cause it to be returned to the Shipping Authority which granted it.

(6) For the avoidance of doubts it is hereby declared that any licence granted under an order made under rule 65 of the Defence of India Rules or that rule as continued in force by the Emergency Provisions (Continuance) Ordinance, 1946, and valid immediately before the expiry of the said Ordinance shall continue to be valid according to its tenor and shall be deemed to have been granted under this section.

4. Without prejudice to the provisions of section 127 of the Indian Merchant Shipping Act, *No port-clearance until* 1923, no officer of customs shall grant a port-clearance to a ship *licence is produced.* registered in British India until after the production by the owner or master thereof of a valid licence granted under this Act in respect of the ship.

5. (1) The Shipping Authority which granted a licence in respect of a ship under section 3 *Power to give directions.* may, from time to time while the licence is valid, by order in writing give directions with respect to—

- (a) the ports or places, whether within or outside British India, to which, and the routes by which, the ship shall proceed for any particular purpose;
- (b) the classes of passengers or cargo which may be carried in the ship;
- (c) the order of priority in which passengers or cargo may be taken on or put off the ship at any port or place, whether within or outside British India.

(2) The Central Government or any Shipping Authority may from time to time by order in writing give general or special directions applicable to any ship registered outside British India and about to proceed from a port or place in British India to any port or place in the continent of India with respect to the order of priority in which passengers or cargo may be taken on the ship at such port or place in British India :

Provided that no directions under this sub-section shall apply to any such ship which is not taking on passengers or cargo at a port or place in British India for discharge at any port or place in the continent of India.

6. The Central Government may from time to time, by order published in the official Gazette *Power to fix shipping rates* fix in the prescribed manner the rates at which any ship, registered in British India may be hired, and the rates which may be charged for the carriage of passengers or cargo taken on any ship, whether registered in British India or not, at a port or place in British India for discharge at any port or place in the continent of India.

Power to call for information. 7. A Shipping Authority may, by notice served personally or by post, require—

- (a) the master or owner of any ship in respect of which a licence granted by the Shipping Authority under this Act is in force, or
- (b) the master or the agent in British India of the owner of any ship in respect of which any directions have been or may be given under sub-section (2) of section 5,—

to furnish, within the period specified in the notice, information regarding any of the following matters, namely :—

- (i) the classes of passengers and cargo which the ship is about to carry or is capable of carrying ;
- (ii) the rates of passenger fares and freight charges applicable to the ship ;
- (iii) any other matter which may be prescribed.

8. (1) If the provisions of sub-section (1) of section 3 or of an order under section 6 or, with- *Penalties and pro-* out reasonable excuse, any limitations or conditions contained in a licence *cedure.* granted under this Act or any directions given under section 5, are contravened, the master and the owner (or in the case of a ship registered outside British India, the agent in British India of the owner) of the ship in respect of which the contravention has taken place shall each be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(2) If any person on whom a notice has been served under section 7 fails to furnish the information required within the specified time or, in furnishing such information, makes any statement which he knows to be false in any material particular, he shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

(3) If any licence is not returned to the Shipping Authority which granted it within a reasonable period after it has ceased to be valid, the person to whom it was granted shall be punishable with fine which may extend to one hundred rupees.

(4) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence punishable under this section.

(5) If the person committing an offence punishable under this section is a company or other body corporate, every managing director, manager, secretary or other officer or agent thereof shall, unless he proves that he exercised all due diligence to prevent the commission of the offence, be deemed to be guilty of such offence.

OBJECTS AND REASONS

Sub-section (5) — "Managing director." — "The ordinary director of a company is not normally in close touch with, or responsible for, the day to day working of the concern, and for this reason we think that he should not be included among those liable for offences committed by his company. We therefore replace the word 'director' by 'managing director'." — S. C. R.

Power to make rules. 9. (1) The Central Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for any of the following matters, namely :—

- (a) the forms of licences granted under this Act ;
- (b) the manner in which rates shall be fixed under section 6, including the constitution and functions of a Board to advise the Central Government in respect of such rates ;
- (c) the matters regarding which information may be required to be furnished under section 7.

(ACT XXXI of 1854)

CONTENTS.

PREAMBLE.

SECTIONS.

1. (*Repealed*).
2. Tenant in tail may dispose of or enlarge his estate by simple deed, etc.
3. Married woman, with husband's concurrence, may dispose of her estate by deed acknowledged.
4. Sections 2 and 3 to apply to money subject to be invested in land.
5. Execution of deeds by married women.
6. If husband be lunatic, etc., Court may direct acknowledgment by deed without his concurrence, saving right of the husband, etc.
7. Supreme Courts may appoint Commissioners to take such acknowledgments.
8. Examination of married woman apart from her husband.
9. Judge, etc., to sign memorandum of acknowledgment.
10. Deed of married woman when to take effect.

SECTIONS.

11. Deed when presumed to have been duly acknowledged.
12. Saving of married woman's powers of alienation.
13. Contingent estates without trustees to preserve to be protected.
14. Estates may be conveyed, etc., by simple deed.
15. No conveyance to operate tortiously.
16. Words of limitation not necessary in a deed to give estate by inheritance. Estate limited to heirs shall not unite with prior life-estate.
17. *Bona fide* purchaser not required to see to application of trust money.
18. Act to apply only to cases governed by English law.
19. (*Repealed*).

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O.

—Repealed in part by Acts 14 of 1870; 16 of 1874; 12 of 1876; (locally) 4 of 1882.

[THE] CONVEYANCE OF LAND ACT, 1854.^a

(ACT XXXI OF 1854.)

[16th December, 1854.]

An Act ^b[* * *] *to simplify the modes of conveying land in cases to which the English law is applicable.*

WHEREAS it is expedient, in cases to which the English law applies ^b[* * *] to simplify *Preamble.* the modes of conveying land, and to exempt the purchasers of trust-property from the liability to see to the application of the purchase-money; It is enacted as follows :—

[a] Short title was given by the Indian Short Titles Act, 1897 (14 [XIV] of 1897).

The Act has been declared to be in force in the whole of British India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (15 [XV] of 1874), S. 3.

It has been declared, by notification under the Scheduled Districts Act, 1874 (14 [XIV] of 1874), S. 3 (a), to be in force in the following Scheduled Districts, namely: Sind; *See Gazette of India*, 1880, Pt. I, p. 672. West Jalpaiguri, *ibid.* 1881, Pt. I, p. 74. The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see Calcutta Gazette*, 1899, Pt. I p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, *ibid.*, 1881, Pt. I, p. 504. The Scheduled portion of the Mirzapur District, *ibid.*, 1879, Pt. I, p. 383. Jaunsar Bawar, *ibid.*, 1879, Pt. I, p. 382. The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. [Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the N.-W. F. P., *see Gazette of India*, 1901, Pt. I, p. 857, and *ibid.*, 1902, Pt. I, p. 875; but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal), Regulation, 1900 (2 of 1900) S. 5]. *ibid.*, 1886, Pt. I, p. 48. The Scheduled District of the C. P., *ibid.*, 1879, Pt. I, p. 771. The Scheduled Districts in Ganjam and Vizagapatam, *ibid.*, 1898, Pt. I, p. 870. The District of Sylhet, *ibid.*, 1879, Pt. I, p. 631. The rest of Assam (except the North Lushai Hills), *ibid.*, 1897, Pt. I, p. 631.

It has been declared, by notification under S. 3 (b) of the last-mentioned^a Act, not to be in force in the Scheduled District of Labaul. *See Gazette of India*, 1886, Pt. I, p. 301.

[b] The words "to abolish real actions and also fines and common recoveries and" were *repealed* by the Repealing Act, 1874, 16 [XVI] of 1874).

1. [Real actions, fines and recoveries abolished.] *Repealed by the Repealing Act, 1870 (14 [XIV] of 1870).*

2. Every tenant in tail or other owner of an estate of inheritance less than an estate in fee simple, either at law or in equity, in any lands or hereditaments, not being under any disability, shall have power to dispose of such lands and hereditaments against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of his own, or to enlarge his said estate into an estate in fee simple, by any deed declaring an intention so to dispose of the said lands or hereditaments, or to enlarge his estate therein; and every tenant in tail or other owner of an estate of inheritance less than an estate in fee-simple, who shall be under the disability of coverture, shall have power to dispose of or enlarge her said estate in manner aforesaid, by any deed declaring her intention so to do, and acknowledged by her as hereinafter mentioned :

Provided that every disposition under this section shall be subject to the rights of all persons in respect of estates prior to the estate tail or other estate of inheritance which is the subject of such disposition, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made.

3. Every married woman who, either alone, or jointly with her husband, is possessed of, or entitled to, any estate or interest in, or any power to be exercised over, any lands or hereditaments, which, but for the passing of this Act, she might have disposed of or extinguished by levying a fine, or suffering a recovery, or by joining in either of such assurances, shall have power by deed, to be acknowledged by her as hereinafter mentioned, to dispose of, release, surrender, or extinguish any such estate, interest, or power, as fully and effectually as if she were an unmarried woman.^a

[a] Cf. The Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 77.

Ss. 2 and 3 to apply to money subject to be invested in land.

4. The provisions of the last two preceding sections shall, so far as circumstances will admit, apply to money subject to be invested in lands or other hereditaments.

5. No deed to be executed by a married woman under the provisions hereinbefore contained shall, so far as regards the interest of such married woman, be valid or effectual unless her husband concur therein, nor unless the deed be acknowledged in manner hereinafter prescribed before a Judge of one of Her Majesty's Supreme Courts, or before a Judge or other covenanted officer of the East India Company exercising civil jurisdiction in the place wherein such deed shall be acknowledged, or before some Commissioner appointed either specially for the occasion, or appointed as a permanent Commissioner by one of Her Majesty's said Courts to take such acknowledgments.^a

[a] Cf. The Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 79.

6. If the husband of any married woman, desirous of enlarging, passing, or destroying any estate, interest, or power, by a deed to be acknowledged by her under this Act, shall be a lunatic, idiot, or of unsound mind, whether he shall have been found such by inquisition or not, or from any other cause shall be incapable of executing a deed, or if his residence shall not be known, or if he shall be in prison, or living apart from his wife either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatever, it shall be lawful for any of Her Majesty's said Courts, by an order to be made in a summary way upon the application of such married woman, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of her husband in the deed so to be acknowledged; and any deed to be executed or acknowledged by her in pursuance of such order shall (but without prejudice to the rights of her husband as then existing, independently of this Act) be as valid and effectual as if he had concurred therein.^a

[a] Cf. The Fines and Recoveries Act, 1833 (3 & 4 Will. IV, c. 74), S. 91.

7. It shall be lawful for any of Her Majesty's said Courts to appoint by its order, under the seal of the Court, to be published in the ^a[Official Gazette] or otherwise as the Court shall direct, permanent Commissioners, either by name or office, and to appoint from time to time, under special commissions, special Commissioners, any one of whom shall be authorized and empowered unless the act is directed to be done before more than one, to take the acknowledgment of any deed by any married woman, who, by reason of her place of residence, or ill-health, or other sufficient

cause, shall be unable to make such acknowledgment before one of the Judges or other officers described in the preceding section.

[a] Substituted by A. O. for "Government Gazette."

8. Every such Judge, officer, or Commissioner as aforesaid, before he shall receive the acknowledgment by any married woman of any deed to be acknowledged by her under this Act, shall examine her apart from her husband touching her knowledge of such deed, and shall ascertain whether she understands its object, and freely and voluntarily consents to the same, and unless she appears to understand its object, and freely and voluntarily to consent to such deed, he shall not permit her to acknowledge the same, and in such case, such deed, so far as relates to the execution thereof by such married woman, shall be void.^a

[a] Cf. The Fines and Recoveries Act, 1833 (3 & 4 Will, IV, c. 74), S. 80.

9. Every Judge, officer, or Commissioner taking such acknowledgment under this Act, shall, at the time of taking the same, sign a memorandum to be endorsed on or written at the foot, or in the margin of such deed, which memorandum shall be to the following effect, namely, "This deed, marked (), was this day produced before me and acknowledged by therein named, to be her act and deed, previous to which acknowledgment the said was examined by me separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and appeared to understand the same, and declared the same to be freely and voluntarily executed by her."^a

[a] Cf. The Fines and Recoveries Act, 1833 (3 & 4 Will, IV, c. 74), S. 84.

10. Every deed executed by a married woman, and hereby required to be acknowledged, shall, so far as regards the interest of such married woman, take effect only from the time of the acknowledgment thereof.

11. It shall not be necessary for any person producing a deed so acknowledged in any Court of Justice to prove the handwriting or authority of the Judge or other officer, or the Commissioner taking such acknowledgment; but if such memorandum purports to have been in substance regularly made and signed, the deed shall be presumed to have been duly acknowledged by the party, until the contrary is shown.

12. Nothing in this Act contained shall abridge, extend, or affect the powers of alienation or disposition which any married woman might have exercised over any property or rights, otherwise than by levying a fine or suffering a recovery, or by joining in one of such assurances before the passing of this Act.

13. In any deed or will executed after this Act comes into operation, and disposing of immoveable property situate in ^a[British India], wherein contingent estates are limited without the appointment of any trustees to preserve such contingent estates, the same shall be, to all intents and purposes, as effectually protected by the law as if such trustees had been duly appointed.

[a] Substituted by A. O. for "the territories under the Government of India."

14. Any estate or interest in immoveable property, situate within the said territories, whether in possession, remainder, or reversion, may, in addition to any other mode of conveyance or release which is now valid, be conveyed, passed, or released by a simple deed, whether such deed operate under the "Statute of Uses or not.

[a] See the Real Property Act, 1845 (8 & 9 Vict., c. 106), Ss. 2 and 4.

15. No conveyance of any kind shall operate to destroy, impair, or affect, any estate or interest which the conveying party has no right to destroy, impair, or affect, or beyond the extent to which he may impair or affect the same.

16. It shall not be necessary in any deed relating to immoveable property situate within the said territories, to be executed after the passing of this Act, to add words of limitation to heirs, when the intention is to give the absolute interest to a person and his heirs general; but a gift, grant, or other conveyance of immoveable property to, or in favour of, any person, shall be taken to give him the entire and absolute interest in the nature of an estate in fee simple, unless such construction is rendered inadmissible by the other contents of the deed; and when, in any deed or will executed after the passing of this Act, any property is given to a person for life or for other freehold interest,

Estate limited to heirs shall not unite with prior life-estate.

and afterwards, in the same deed or will, is limited to his heirs or heir special, the estate shall not unite, but the limitation to the heirs shall be a limitation of an estate to be taken by the heirs by purchase.

Bona-fide purchaser not required to see to application of trust money.

17. ^aWhen any property is sold, the proceeds of which are subject to any trust, the *bona fide* purchaser of the property shall not in any case be bound to see to the application of the purchase-money to the purposes of the trust.

poses of the trust.

[a] Section 17 was *repealed* in places to which the Transfer of Property Act, 1882 (4 [IV] of 1882), extends or is extended by Act 4 [IV] of 1882, S. 2 and the schedule.

Act to apply only to cases governed by English law.

18. Nothing in this Act contained shall extend to any case to which the English law is not applicable.

19. [Interpretation-clause.] *Repealed by the Repealing Act, 1874 (16-[XVI] of 1874).*

[THE] CO-OPERATIVE SOCIETIES ACT, 1912.

(Act II of 1912)

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STATEMENT OF OBJECTS AND REASONS.

"When the Bill, which subsequently became the Act of 1904,^a was published, the following remarks were made in the Statement of Objects and Reasons:— "Legislation is called for not only in order to lay down the fundamental conditions, which must be observed; but, also with a view to giving such societies a corporate existence, without resort to the elaborate provisions of the Companies Act; but it is thought that legislation should be confined within the narrowest possible limits. The Bill has, therefore, been drawn so as to deal only with those points which the Government consider to be essential and its provisions have been expressed in simple and general terms, a wide rule-making power being reserved to Local Governments, so that what is felt to be of the nature of an experiment may be tried in each Province or part of a Province on such lines as seem to offer most promise of success;" and these principles were followed in the Act as passed.

2. The adequacy of the existing Act was examined at a conference of Registrars of Co-operative Credit Societies in 1909, and it was held that, the Act still remained in many ways unduly restricted, and that it also required certain alterations in detail which had been suggested by experts since 1904. The conference of Registrars drew up proposals for the amendment of the Act, and after consulting Local Governments on these proposals the Government of India have prepared the Bill now published. The chief changes, contemplated by the Government of India, are four in number:—

(i) The Act of 1904 applies to societies for the purpose of co-operative credit only and not to co-operative societies of other kinds, such as those established for production or distribution. It has in practice been found that the establishment of credit societies has led to the founding of other classes of co-operative societies also, and it is advisable that the privileges, extended by the Act to co-operative credit societies, should be extended to these other societies. It is proposed, therefore, that the Act, as now revised, should be made applicable to all classes of co-operative societies—*vide* clause 1(i) and clause 4 of the Bill.

(ii) In the Act of 1904, societies were classified according as they were "Urban" or "Rural" and the principle

* That is, the Co-operative Credit Societies Act, 1904 (Act II of 1912).

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O.

—Amended in C. P. and Berar by C. P. & Berar Acts 7 of 1930; 5 of 1940; 6 of 1941; 10 of 1945.

—Amended in U. P. by U. P. Acts 3 of 1919; 1 of 1944.

—Supplemented in C. P. by C. P. Act 1 of 1937.

—Repealed in part by Act 17 of 1914.

—Repealed and amended by Act 88 of 1920.

was laid down that, as a general rule, rural societies should be with unlimited liability. This basis for distinction was adopted, mainly because it represented a classification which had already been recommended and put in force in the initiation of co-operative credit societies in certain parts of India, but it was at the time criticised as unsuitable by experts, and it has in practice been found artificial and inconvenient. The real distinction is between societies with limited and those with unlimited liability and it is proper in the new Bill to maintain this distinction only while retaining the principle that agricultural credit societies must as a general rule be with unlimited liability—*see* clause 4 of the Bill.

(iii) The Act of 1904 did not contemplate that societies with unlimited liability should distribute profits. It is still felt that such societies do not represent the best form of co-operation for agricultural communities, but this form of societies has, in practice, been for some time in existence in several Provinces, and societies of this character, though not of the orthodox type, are recognized to be capable of useful work. Although, therefore, it is not intended to give them undue encouragement, it is proposed to legalize their existence and to permit an unlimited society, with the sanction of the Local Government to distribute profits—*see* clause 28 of the Bill (now *see* section 83).

(iv) A cardinal principle which is observed in the organization of co-operative societies in Europe is the grouping of such societies into Unions and their financing by means of Central Banks. This stage of co-operation had not been fully realised or provided for in the Act of 1904, but such grouping of societies has already been found feasible in most Provinces, and it is now considered desirable to legalize the formation of co-operative credit societies of which the members shall be other co-operative credit societies—*vide* clauses 5 (1), 6 and 10 (3) of the Bill (now *see* sections 6 and 8).

3. In addition to carrying out the main alterations above described the present Bill contains the several changes of detail and it has been found advisable to recast the Bill in order to improve the drafting and to incorporate the changes now contemplated. . . . "

—Gazette of India, 1911, Part V, page 95

(10 [X] of 1904). This Act is repealed by the present

—Repealed in—

(a) Bengal by Bengal Act 21 of 1940;

(b) Bihar and Orissa by B. & O. Act 6 of 1935;

(c) Bombay by Bom. Act 7 of 1925;

(d) Coorg by Coorg Act 2 of 1936;

(e) Madras by Mad. Act 6 of 1932;

(f) Orissa by Reg. I of 1936.

THE CO-OPERATIVE SOCIETIES ACT, 1912.

(ACT II OF 1912.)^a

[1st March, 1912.]

An Act to amend the Law relating to Co-operative Societies.

WHEREAS it is expedient further to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means, and for that purpose to amend the law relating to Co-operative Societies; It is hereby enacted as follows :—

OBJECTS AND REASONS

Preamble. — The preamble is prefixed by the Select Committee. It follows the wording of the preamble of the Co-operative Credit Societies Act, 1904 (now re-

pealed by this Act). It affords registering officers some indication of the class of society which may suitably be registered under this Act—*see* S. O. R., 1912.

[a] For Report of Select Committee, *see* Gazette of India 1912, Pt. V, p. 7; and for Proceedings in Council *see ibid.*, 1911, Pt. VI, pp. 186, 679, and *ibid.*, 1912, Pt. VI, pp. 3, 31, and 256.

This Act has been declared to be in force in the Sonthal Parganas by notification under S. 3 of the Sonthal Parganas Settlement Regulation (3 [III] of 1872), *see* Bihar and Orissa Gazette, 1918, Pt. II, p. 105; and in British Baluchistan by the British Baluchistan Laws Regulation, 1918 (2 [II] of 1918), S. 3.

It has been repealed in its application to —

- (1) the Bombay Presidency by the Bombay Co-operative Societies Act, 1925 (Bom. 7 [VII] of 1925), S. 73;
- (2) the Madras Presidency by the Madras Co-operative Societies Act, 1932 (Mad. 6 [VI] of 1932), S. 66;
- (3) Bihar and Orissa by the Bihar and Orissa Co-operative Societies Act, 1935 (B. and O. 6 [VI] of 1935), S. 67;
- (4) Orissa, separately, by the Orissa Laws Regulation, 1936 (1 [I] of 1936);
- (5) Bengal by the Bengal Co-operative Societies Act, 1940 (Ben. 21 [XXI] of 1940), S. 3 and Sch. I, except (a) S. 28 (1) and (b) S. 28 (2) so far as it relates to the stamp duties specified in the second paragraph thereof; and
- (6) Coorg by the Coorg Co-operative Societies Act, 1936 (2 [II] of 1936). It has been supplemented in its application to the Central Provinces and Berar by the Central Provinces and Berar Co-operative Land Mortgage Banks Act, 1937 (C. P. & Berar Act 1 [I] of 1937).

Preliminary.

1. (1) This Act may be called the Co-operative Societies Act, 1912; and (2) It extends to *Short title and extent.* the whole of British India.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "by-laws" means the registered by-laws for the time being in force, and includes a registered amendment of the by-laws;
- (b) "committee" means the governing body of a registered society to whom the management of its affairs is entrusted;
- (c) "member" includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules;
- (d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the by-laws to give directions in regard to the business of the society;
- (e) "registered society" means a society registered or deemed to be registered under this

Act:

Preamble—Note 1

[1] The policy of the Co-operative Societies Act is to save the persons concerned from protracted, expensive and sometimes ruinous litigation of the civil Courts. At the same time, these special enactments should be strictly construed and the rights of the subject to have recourse to the Courts of justice provided by the Crown should not be unnecessarily surrounded with restrictions. (Vol 22) 1935 Lah 681 (632) * (Vol 5) 1918 All 419 (420) : 40 All 89 (DB).

[2] Object of the Act is to encourage thrift, help and co-operation among agriculturists, artisans and persons of limited means. (Vol 11) 1924 Lah 418 (420) (DB).

[3] The provisions of the Act provide stringent safeguards to prevent the society from having dealings with strangers. (Vol 18) 1931 Nag 48 (49).

SECTION 2 — Synopsis

1. Clause (c) — "Member."

2. Clause (d) — "Officer."

1. Clause (c) — "Member."—[1] There is nothing in the Act to prevent a joint Hindu family from becoming a member of a co-operative bank. (Vol 33) 1946 Nag 16 (18) : I L R (1945) Nag 677 (DB) * (Vol 25) 1933 Mad 809 (809) * (Vol 25) 1938 Pat 315 (316 & 317) (FB). (There is no provision in the bye-laws of the Rajput Co-operative Society in Bihar Province to preclude a joint family from becoming a member of the society through one of its members.) * (Vol 20) 1933 Nag 211 (213) (DB).

[2] Where the application for a share of a co-

operative Bank is made in the name of the joint family firm, though it is signed by the manager of the family shop, and the share certificate is issued in the name of the head of the family, all the members of the joint family become members of the Bank. (Vol 33) 1946 Nag 16 (18) : I L R (1945) Nag 677 (DB).

[See also (Vol 18) 1931 Nag 48 (49) (Order of contribution cannot be passed against joint family as such, but can be passed only against such persons as are explicitly mentioned as members of society.)]

[3] Merely on basis of alleged loan taken by person, he cannot be held to be member of society. (Vol 27) 1940 Lah 193 (194).

[4] The admission of a member to a society cannot be unilateral act on the part of the society. (Vol 18) 1931 Nag 48 (49).

2. Clause (d) — "Officer."—(1) Treasurer of a Co-operative Bank is one of the officers of the Bank under S. 2 (d). (Vol 33) 1946 Nag 16 (19) : I L R (1945) Nag 677 (DB).

[2] The legal adviser of a society is an officer of the society but a mere vakil of society is not. (Vol 20) 1933 Mad 682 (684, 685) : 56 Mad 970 (DB).

[3] An accountant is not an officer within the meaning of S. 2 (d) in the absence of any rules framed by the Provincial Government under S. 43 (2) (g) empowering him to give directions in regard to the business of the society. (Vol 32) 1945 Nag 183 (184) : ILR (1945) Nag 457.

[4] An Inspector of Co-operative Societies is not excluded from the definition of officer. (1937) 65 Cal L Jour 206 (208).

- (f) "Registrar means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act: and
 (g) "rules" means rules made under this Act.

Registration.

3. The "[Provincial Government] may appoint a person to be Registrar of Co operative *The Registrar.* Societies for the Province or any portion of it and may appoint persons to assist such Registrar, and may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

[a] *Substituted by A. O. for "Local Government".*

4. Subject to the provisions hereinafter contained, a society which has as its object the *Societies which may be registered.* promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with or without limited liability :

Provided that unless the "[Provincial Government] by general or special order otherwise directs—

- (1) the liability of a society of which a member is a registered society shall be limited ;
- (2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists, and of which no member is a registered society, shall be unlimited.

[a] *Substituted by A. O. for "Local Government".*

OBJECTS AND REASONS.

"We have amended the clause so as to make it clear that a society the object of which is the promotion of other societies which may be registered under the Bill—is itself a society which may be registered under the Bill although it cannot be said to have as its object the

promotion of the interests of its own members. We have further provided that where one of the members of a society is itself a registered society the liability of the society must ordinarily be limited."—S. C. R., 1912.

Restrictions on interest of member of society with limited liability and a share capital.

5. Where the liability of the members of a society is limited by shares, no member other than a registered society shall—

- (a) hold more than such portion of the share capital of the society, subject to a maximum of one-fifth, as may be prescribed by the rules ; or
- (b) have or claim any interest in the shares of the society exceeding one thousand rupees.

6. (1) No society, other than a society of which a member is a registered society, shall be *Conditions of registration.* registered under this Act which does not consist of at least ten persons above the age of eighteen years and, where the object of the society is the creation of funds to be lent to its members, unless such persons—

- (a) reside in the same town or village or in the same group of villages ; or,
- (b) save where the Registrar otherwise directs, are members of the same tribe, class, caste or occupation.

(2) The word, "limited" shall be the last word in the name of every society with limited liability registered under this Act.

[See S. 40.]

7. When any question arises whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages shall be considered to form a group, or whether any person belongs to any particular tribe, class, caste or occupation, the question shall be decided by the Registrar, whose decision shall be final.

Application for registration.

8. (1) For purposes of registration an application to register shall be made to the Registrar.

Section 8 — Note 1

[1] Services of director to be gratuitous under bye-law of society — Secretary to be paid portion of yearly profit as honorarium under another bye-law — Director acting as Secretary is entitled to honorarium—Word

'honorarium' means fee for services rendered — Society cannot withhold payment of honorarium unless bye-law is altered—Secretary is not entitled to honorarium for service for portion of year. (Vol 24) 1937 Mad 879 (381).

(2) The application shall be signed—

- (a) in the case of a society of which no member is a registered society, by at least ten persons qualified in accordance with the requirements of section 6, sub-section (1); and
- (b) in the case of a society of which a member is a registered society, by a duly authorised person on behalf of every such registered society, and where all the members of the society are not registered societies, by ten other members or, when there are less than ten other members, by all of them.

(3) The application shall be accompanied by a copy of the proposed by-laws of the society, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Registrar may require.

9. If the Registrar is satisfied that a society has complied with the provisions of this Act and *Registration.* the rules and that its proposed by-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its by-laws.

10. A certificate of registration signed by the Registrar shall be conclusive evidence that the *Evidence of registration.* society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.

11. (1) No amendment of the by-laws of a registered society shall be valid until the same *Amendment of the by-laws of a registered society.* has been registered under this Act, for which purpose a copy of the amendment shall be forwarded to the Registrar.

(2) If the Registrar is satisfied that any amendment of the by-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

(3) When the Registrar registers an amendment of the by-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

OBJECTS AND REASONS.

"We have inserted a new clause 11 providing that amendments of the by-laws of a society must be registered in order to be valid. We consider this to be an important matter which should not be left to the rules and we are strengthened in this view by a consideration of section 10 of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict., Ch. 39)."—S. C. R., 1912.

Rights and liabilities of members.

12. No member of a registered society shall exercise the rights of a member unless or until *Member not to exercise rights till due payment made.* he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or by-laws.

13. (1) Where the liability of the members of a registered society is not limited by shares, *Votes of members.* each member shall, notwithstanding the amount of his interest in the capital, have one vote only as a member in the affairs of the society.

(2) Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

(3) A registered society which has invested any part of its funds in the shares of any other registered society may appoint as its proxy, for the purpose of voting in the affairs of such other registered society, any one of its members.

14. (1) The transfer or charge of the share or interest of a member in the capital of a *Restrictions on transfer of share or interest.* registered society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.

(2) In case of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless —

- (a) he has held such share or interest for not less than one year; and
- (b) the transfer or charge is made to the society or to a member of the society.

Duties of registered societies.

15. Every registered society shall have an address, registered in accordance with the rules. *Address of societies.* to which all notices and communications may be sent, and shall send to the Registrar notice of every change thereof.

16. Every registered society shall keep a copy of this Act and of the rules governing such society, and of its by-laws, open to inspection free of charge at all reasonable times at the registered address of the society.

17. (1) The Registrar shall audit or cause to be audited by some person authorised by him *Audit.* by general or special order in writing in this behalf the accounts of every registered society once at least in every year.

(2) The audit under sub-section (1) shall include an examination of overdue debts, if any, and a valuation of the assets and liabilities of the society.

(3) The Registrar, the Collector or any person authorised by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection may require.

OBJECTS AND REASONS.

The duty of auditing the accounts of a society is on the Registrar or some person authorised by him. The authority in the latter case is to be given by order in writing.—See S. C. R., 1912.

Privileges of registered societies.

18. The registration of a society shall render it a body corporate by the name under which *Societies to be* it is registered, with perpetual succession and a common seal, and with power to *bodies corporate.* hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

19. Subject to any prior claim of the ^a[Crown] in respect of land-revenue or any money re-
Prior claim coverable as land-revenue or of a landlord in respect of rent or any money recover-
of society. able as rent, a registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member —

(a) in respect of the supply of seed or manure or of the loan of money for the purchase of seed or manure—upon the crops or other agricultural produce of such member or person at any time within eighteen months from the date of such supply or loan ;

(b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things—upon any such things so supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

[a] Substituted by A. O. for "Government."

Section 17—Note 1

[1] A refusal to furnish information by an officer of the society is not penalised by this Act. But in Bombay, Madras, Bengal and Bihar a wilful negligence or refusal to furnish information is made an offence and punishable as such ; see Bombay Act VII of 1925, Ss. 60 (b), 61, Madras Act VI of 1932, Ss. 52 (b), 55, Bengal Act XXI of 1940, S. 136 and Sch. V, item 2 ; and Bihar and Orissa Act VI of 1935, S. 45.

Section 18—Note 1

[1] Under S. 6 (2) of the Co-operative Credit Societies Act, 1904, it was held that the chairman of a society had no right to institute a suit against a member of the society in his own name, but that the suit should be one by the society itself. (1911) 10 Ind Cas 570 (570) (DB) (Cal).

[2] When the suit in which the decree was obtained was a suit against a Co-operative Loan Society, with unlimited liability and against the Secretary, the Chairman and two members who signed the bond in respect of the money lent by the plaintiff in the suit held that the suit was clearly wrongly constituted as the Co-operative Society alone should have been sued. (Vol 12) 1925 Cal 203 (203) (DB).

[3] A decree against a Co-operative Society as a corporate body cannot be executed against a share-holder or member in his individual capacity. (Vol 21) 1934 Mad 181 (182, 183) (DB).

[4] A village Society on registration under S. 18 of the Co-operative Societies Act, 1912, becomes a body corporate and a creditor who has obtained an award under the Act against the Society is not entitled to execute the award against any individual member of the same but only against the Society and its assets. (Vol 18) 1931 Pat 321 (323) : 11 Pat 174 (FB).

[5] A co-operative society is a legal person and its debts are distinct from liability of its members and they can be reached in winding up proceedings only. (1937) 20 Nag L Jour 6 (8) (DB).

[6] If a corporate body is not registered with limited liability, the members are liable to the full amount of the corporation's debts, but the liability, however, is a liability to contribute with others and such liability can only be enforced upon the winding up and no execution can proceed against a member. (Vol 18) 1931 Pat 321 (323) : 11 Pat 174 (FB).

Section 19 — Note 1

[1] Where the money is due to the District Co-operative Bank from a Co-operative Society on account of loans having been advanced by the former to the latter, S. 19, Co-operative Societies Act, has no application. (Vol 27) 1940 All 188 (188, 189) : 1 L R (1940) All 181 (DB).

[2] Fat intended to be purchased and sold at profit and not for purpose of manufacturing some other commodity is not "raw material." (Vol 4) 1917 Lah 81 (82).

20. A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society, and may set off any sum credited or payable to a member or past member in or towards payment of any such debt.

21. Subject to the provisions of section 20, the share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1907, shall be entitled to or have any claim on such share or interest.

[a] See now the Provincial Insolvency Act, 1920 (5 [V] of 1920).

22. (1) On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member, or pay to such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws :

Provided that —

(i) in the case of a society with unlimited liability, such nominee, heir or legal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained as aforesaid ;

(ii) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative, as the case may be, being qualified in accordance with the rules and bye-laws for membership of the society, or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified.

(2) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

OBJECTS AND REASONS.

“We have redrawn cl. 19 (now S. 22) in order to make it clear that the successor of a deceased member may claim the right to be paid the value of the share or interest of the deceased in the case of a society with

unlimited liability, and to secure in the case of a society with limited liability that the successor if duly qualified for membership may claim transfer of the shares or interest of the deceased.”—S.C.R., 1912.

23. The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

Section 19 (contd.)

[3] Musical instruments are not industrial “implements or machinery” within the meaning of the section. (Vol 4) 1917 Upp Bur 4 (5) : 2 Upp Bur Rul 133.

Section 20—Note 1

[1] Under S. 73, Civil P. C., a Co-operative Society cannot enforce a charge under S. 19 unless there is a decree or charge under S. 20 of the Act. (Vol 2) 1915 Cal 197 (197) : 42 Cal 377 (DB).

Section 21—Note 1

[1] Shares of member in Co-operative Society attached—Co-operative Society has *locus standi* to object to attachment. (Vol 26) 1939 Lah 305 (306).

[2] Society keeping postal life policy of member as security for loan advanced—After death of member, society recovering policy amount—Surplus left after adjusting debt due is not exempt from attachment. (Vol 32) 1945 Mad 507 (508). (Case under Bombay Co-operative Societies Act, 1925, S. 26 which corresponds with S. 21.)

[3] A person does not cease to be a member of the society by his adjudication as insolvent. (Vol 26) 1939 Lah 275 (275).

Section 22 — Note 1

[1] Bye-law 17 (b) of a Society which provided that “on the death of a share-holder, his shares may be transferred to his heir or nominee if he or she is eligible for membership and is duly elected as such,” held, was *ultra vires* and hence on the death of a member his share or interest could be transferred to his legal representative though he was not elected as a member. (Vol 21) 1934 Cal 537 (541) (DB).

Section 23 — Note 1

[1] Inasmuch as no member can be called upon to contribute to the debts of the Society until liquidation, S. 23 of the Act applies only to members who cease to be members before liquidation. (Vol 33) 1946 Nag 317 (318) : 1 L R (1946) Nag 474.

[2] The words “the debts of a registered society as they existed at the time when he ceased to be a member” in S. 23, refer to the debts due from the Society to

24. The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease.

Register of members. **25.** Any register or list of members or shares kept by any registered society shall be *prima facie* evidence of any of the following particulars entered therein:—

- (a) the date at which the name of any person was entered in such register or list as a member ;
- (b) the date at which any such person ceased to be a member.

Proof of entries in societies' books. **26.** A copy of any entry in a book of a registered society regularly kept in the course of business, shall, if certified in such manner as may be prescribed by the rules, be received, in any suit or legal proceeding, as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is admissible.

Exemption from compulsory registration of instruments relating to shares and debentures of registered society.

27. Nothing in section 17, sub-s. (1), clauses (b) and (c), of the Indian Registration Act, 1908, shall apply to —

- (1) any instrument relating to shares in a registered society, notwithstanding that the assets of such society consist in whole or in part of immovable property ; or
- (2) any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or
- (3) any endorsement upon or transfer of any debenture issued by any such society.

OBJECTS AND REASONS.

"We have inserted a new clause 27, to provide for the exemption from compulsory registration of instruments relating to the shares and debentures of regis-

tered societies, thus placing registered societies on the same footing in this respect as joint stock companies." —S. C. R., 1912.

Section 23 (contd.)

third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. (Vol 28) 1941 Oudh 315 (317) : 16 Luck 658 (DB) & (Vol 24) 1937 Lah 931 (932) : I L R (1937) Lah 649 (DB). & (Vol 22) 1935 Lah 947 (947)

[3] A person claiming not to be a past member within the meaning of S. 23 has a right to have his claim investigated by a civil Court. (Vol 24) 1937 Lah 912 (913).

[4] The period of two years mentioned in S. 23 is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society, that is, the date on which its registration was cancelled. (Vol 28) 1941 Lah 284 (286) : I L R (1942) Lah 379 (DB).

[5] No doubt S. 23 limits the liability of a past member for the debts of the registered society, but there is no limitation either in the Act or in the rules under the Act for a debt of a past member due to a registered society. (Vol 22) 1935 Lah 947 (947).

[6] Under Ss. 23 and 24 the liquidator cannot award anything against the estate of a deceased or the past member. (1939) 41 Pun L R 269 (270).

Section 24 — Note 1

[1] S. 24 is restricted to proceedings in liquidation under S. 42 of the Act. (Vol 12) 1925 Cal 203 (204) (DB).

[2] It does not matter whether a member dies before or after liquidation. His estate is liable for a year after his death, but only for the debts as they existed at the date of his death. (Vol 33) 1946 Nag 317 (318) : I L R (1946) Nag 474.

[3] Under S. 24 the estate of a deceased member which devolves by inheritance on his widow under the Hindu Women's Rights to Property Act, is liable to the same extent as it would have been had he been alive. (Vol 33) 1946 Nag 317 (318, 319) : I L R (1946) Nag 474.

[4] Under S. 24 the limitation of one year for a suit by the liquidator against the heirs of a deceased member in possession of his estate for contribution due from him, starts from the date of death of the member and not from the date of liquidation. (Vol 33) 1946 Nag 317 (318) : I L R (1946) Nag 474

Section 25 — Note 1

[1] Section 26 does not abrogate S. 34, Evidence Act. It merely obviates production of the original books of account which would otherwise be necessary. The words "to the same extent as the original entry itself is admissible" show that the copies stand on no higher footing than the original. When copies of account are filed it is essential to produce evidence *abundant* to prove that the books of account are regularly kept in the course of business. Having done that the entries become evidence, but like all entries in books of account they are not substantive evidence except as regards admissions against the interest of the maker. They can only be used for corroboration. The accounts of Co-operative Societies form no exemption to this rule. (Vol 33) 1946 Nag 317 (319) : I L R (1946) Nag 474.

^a[28. (1)] The ^b[Central Government], by notification^c in the ^d[Official Gazette], may, in the case of any registered society or class of registered society, remit^e ^f[*] the income tax payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits,^g

^f[*] * * * * *

^g[(2) The ^h[Government], by notification in the ⁱ[Official Gazette], may, in the case of any registered society or class of registered society, remit—

(a) the stamp duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business of such society, or any class of such instruments, are respectively chargeable,^j and

(b) any fee payable under the law of registration for the time being in force]

^k[In this sub-section "Government" in relation to stamp-duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts, and in relation to any stamp-duty falling within Item 59 in List I in the Seventh Schedule to the Government of India Act, 1935, means the Central Government, and save as aforesaid means the Provincial Government.]

[a] The original S. 28 was re-numbered as sub-s. (1) of that section by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [b] Substituted by A. O. for Governor-General in Council. [c] For notifications under this section, see General Rules and Orders, Vol. 4, pp. 840-841. [d] Substituted by A. O. for "Gazette of India". [e] The letter and brackets "(a)" were repealed by Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [f] In Bengal even though the rest of the Act is repealed, sub-s. (1) of S. 28 is excepted; see Bengal Act (21 [XXI] of 1940), S. 3 and Sch. I. [g] Clauses (b) and (c) were repealed, *ibid.* [h] Inserted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [i] Substituted by A. O. for "Local Government". [j] Substituted by A. O. for "local official Gazette". [k] In Bengal even though the rest of the Act is repealed, sub-s. (2) of S. 28 so far as it relates to the stamp duties specified in this paragraph is excepted; see Bengal Act (21 [XXI] of 1940), S. 3 and Sch. I. [l] Inserted by A. O.

PROVINCIAL AMENDMENT.

UNITED PROVINCES.

After section 28 the following new section shall be inserted namely,—

"28-A. *Deductions from salary to meet societies' claim in certain cases.*—(1) A member of a society may execute an agreement in favour of the society providing that his employer shall be competent to deduct from the salary or wages payable to him by the employer such amount as may be specified in the agreement and to pay the amount so deducted to the society in satisfaction of any debt or other demand owing by the member to the society.

(2) On the execution of such agreement, the employer shall, if so required by the society, by a requisition in writing and so long as such debt or demand or any part of it remains unpaid, make the deduction in accordance with the agreement and pay the amount so deducted to the society.

(3) The provisions of this section shall also apply to all such agreements of the nature referred to in sub-section (1) as were in force on the date of the commencement of the Co-operative Societies (United Provinces Amendment) Act, 1944.

(4) Nothing contained in this section shall apply to persons employed in Federal Railways or other departments directly under the control of the Central Government."

—The Co-operative Societies (United Provinces Amendment) Act, 1944 (U. P. 1 (I) of 1944), S. 2. [25-3-1944.]

Property and funds of registered societies.

Restrictions on loans. 29. (1) A registered society shall not make a loan to any person other than a member :

Provided that, with the general or special sanction of the Registrar, a registered society may make loans to another registered society.

(2) Save with the sanction of the Registrar, a society with unlimited liability shall not lend money on the security of moveable property.

Section 28 — Note 1.

[1] Co-operative Society investing fluid assets in Government securities as per Government orders—Such investment not being part of their business, interest on those securities is not profits and is, therefore, assessable under the Income-tax Act. (Vol 16) 1929 Mad 387 (389) : 52 Mad 640 (FB).

Section 29 — Note 1

[1] A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced, but if the society pays moneys on the basis of such contract, it can be recovered on the principle that

the obligee at the time of taking the money made an implied contract to repay. (Vol 16) 1929 Lah 330 (331) (DB).

[2] Where a Co-operative Society advances a loan before its registration and subsequent to its registration the debtor acquiesces in the registration and makes payments towards the principal and interest, it must be inferred that the debtor agreed that the transaction entered into by him with the society before its registration should be binding upon him and the society after its registration. (Vol 27) 1940 Rang. 145 (146) : 1940 Rang. L. R. 77.

(3) The ^a[Provincial Government] may, by general or special order, prohibit or restrict the lending of money on mortgage of immovable property by any registered society or class of registered societies.

[a] Substituted by A. O. for "Local Government".

30. A registered society shall receive deposits and loans from persons who are not members *Restrictions on borrowing.* only to such extent and under such conditions as may be prescribed by the rules or by-laws.

Restrictions on other transactions with non-members.

by rules, prescribe.

[a] Substituted by A. O. for "Local Government".

31. Save as provided in sections 29 and 30, the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions, if any, as the ^a[Provincial Government] may,

OBJECTS AND REASONS.

"We have inserted a new Cl. 31, giving power to the Local Government to restrict the transactions other than in regard to loans and borrowing of registered societies with persons who are not members of the society. We consider that it may be necessary in view

of the extended scope of the Bill to impose such restrictions in certain cases, but we think that in view of our present limited experience, it would be unwise to endeavour to lay down definite restrictions in the Bill itself."—S. C. R. 1912.

Investment of funds. **32. (1)** A registered society may invest or deposit its funds —

- (a) in the Government Savings Bank, or
- (b) in any of the securities specified in section 20 of the Indian Trusts Act, 1882, or
- (c) in the shares or on the security of any other registered society, or
- (d) with any bank or person carrying on the business of banking approved for this purpose by the Registrar, or
- (e) in any other mode permitted by the rules.

(2) Any investments or deposits made before the commencement of this Act which would have been valid if this Act had been in force are hereby ratified and confirmed.

Funds not to be divided by way of profit.

33. No part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members :

Provided that after at least one-fourth of the net profits in any year have been carried to a reserve fund, payments from the remainder of such profits and from any profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or by-laws :

Provided also that in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the ^a[Provincial Government] in this behalf.

[a] Substituted by A. O. for "Local Government".

OBJECTS AND REASONS.

"We have amended clause 28 (now section 33) so as to permit distribution of profits not only from the profits of a single year but also from the accumulation of profits which might have been distributed in previous

years but were not so distributed. By this means it will be open to societies to provide for the equalisation of dividends."—S. C. R., 1912.

34. Any registered society may, with the sanction of the Registrar, after one-fourth of the net profits in any year has been carried to a reserve fund, contribute an amount not exceeding ten per cent. of the remaining net profits to any charitable purpose, as defined in section 2 of the Charitable Endowments Act, 1890.

Section 29 (contd.)

[8] A bye-law of a Co-operative Society to the effect that the Society shall not sell goods on credit to a non-member cannot have the force of law, but can be regarded only as a domestic matter and it cannot be brought in defence of him for recovery of balance standing against him. (Vol 18) 1926 Nag 463 (464).

[4] Where a society registered under the Act constructs a house for its member under the bye-law framed under S. 8 (3), the transaction does not amount to a loan. (Vol 25) 1938 Lah 8 (10) (DB).

Section 33 — Note 1

[1] Where *prima facie* there has been no breach of any provision of the Co-operative Societies Act itself or any of its bye-laws, by a resolution passed at an annual general meeting of the share-holders of a co-operative society declaring payment of certain dividend on the preference shares, such a resolution is not *ultra vires*, although it may be that the profits shown are apparent and not real profits, a considerable portion of them being unrealized interest income. (Vol 25) 1938 Cal 394 (397) : I L R (1938) 2 Cal 144.

Inspection of affairs.

35. (1) The Registrar may of his own motion, and shall on the request of the Collector, or *Inquiry by Registrar* on the application of a majority of the committee, or of not less than one-third of the members, hold an inquiry or direct some person authorised by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

(2) All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorised by the Registrar may require.

36. (1) The Registrar shall, on the application of a creditor of a registered society, inspect *Inspection of books of indebted society.* or direct some person authorized by him by order in writing in this behalf to inspect the books of the society :

Provided that —

(a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time ; and

(b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

(2) The Registrar shall communicate the results of any such inspection to the creditor.

OBJECTS AND REASONS.

"We have amended clause 31 (now section 36) so as to render it possible for a creditor independently of the amount of his debt to move the registrar to take action, while on the other hand we have made it necessary for

him to satisfy the registrar that his debt is for a sum due at the time of his application, that he has demanded payment of his debt and that payment has not been made within a reasonable time."—S. C. R., 1912.

37. Where an inquiry is held under S. 35, or an inspection is made under S. 36, the Registrar *Costs of inquiry.* may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

38. Any sum awarded by way of costs under section 37 may be recovered, on application to *Recovery of costs.* a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of any moveable property within the limits of the jurisdiction of such Magistrate belonging to such person.

Dissolution of society.

39. (1) If the Registrar, after an inquiry has been held under section 35 or after an inspection *Dissolution.* has been made under section 36 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be dissolved, he may cancel the registration of the society.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period.

(4) Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the appellate authority.

(5) The authority to which appeals under this section shall lie shall be the ^a[Provincial Government]:

Provided that the ^a[Provincial Government] may, by notification in the ^b[Official Gazette], direct that appeals shall lie to such Revenue-authority as may be specified in the notification.

[a] *Substituted* by A. O. for "Local Government". [b] *Substituted* by A. O. for "Local official Gazette".

40. Where it is a condition of the registration of a society that it should consist of at least ten *Cancellation of registration of society.* members, the Registrar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than ten.

Section 39—Note 1

body incorporated under the Co-operative Societies Act, 1912, shall be deemed to die when it is dissolved; *see* Securities Act, 1920, S. 4 (4).

[1] For the purposes of S. 4, Securities Act, 1920, a

*Effect of cancellation
of registration.*

41. Where the registration of a society is cancelled, the society shall cease to exist as a corporate body —

- (a) in the case of cancellation in accordance with the provisions of section 39, from the date the order of cancellation takes effect;
- (b) in the case of cancellation in accordance with the provisions of section 40, from the date of the order.

42. (1) Where the registration of a society is cancelled under section 39 or section 40, the Registrar may appoint a competent person to be liquidator of the society.

(2) A liquidator appointed under sub-section (1) shall have power —

- (a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office;
- (b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society;
- (c) to investigate all claims against the society and subject to the provisions of this Act, to decide questions of priority arising between claimants;
- (d) to determine by what persons and in what proportions the costs of the liquidation are to be borne; and
- (e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

(3) Subject to any rules, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.^a

(4) Where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge.

(5) Orders made under this section shall, on application, be enforced as follows:—

- (a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court;
- (b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

[a] In its application to British Baluchistan this sub-section shall be read as if the words "or the British Baluchistan Civil Justice Regulation, 1896, as the case may be" were inserted at the end: see the British Baluchistan Laws Regulation, 1913 (2 [II] of 1913), Sch. I.

PROVINCIAL AMENDMENTS.

CENTRAL PROVINCES AND BERAR.

"2. In sub-section (2) of section 42 of the Co-operative Societies Act, 1912 (hereinafter referred to as the said Act),—

- (i) in clause (d), the word 'and' occurring for the second time shall be omitted;
- (ii) in clause (e) for the words 'affairs of the society', the words 'affairs of the society; and' shall be substituted; and
- (iii) after clause (e), the following clause shall be inserted, namely—

"(f) to determine the debts secured or otherwise and liabilities, personal or joint, payable by the members or past members or by the estates or nominees, heirs or legal representatives of deceased members to the society, and to make orders, as may be necessary, for payment and realisation of such debts and liabilities."

SECTION 42 — Synopsis

1. Scope.
2. Sub-section (2)—Powers of liquidator.
 - 2a. Contribution by members.
 - 2b. "Direction in regard to collection."
3. Sub-section (3)—Evidence.
4. Sub-section (5)—Enforcement of order.
5. Sub-section (6)—Jurisdiction of Civil Court.

1. Scope. — [1] Co-operative Society is a legal person—Its debts are distinct from members' liability—Members can be reached by corporation's creditors only in winding up proceedings. (Vol 25) 1938 Nag 484 (436) : I L R (1938) Nag 604 (DB).

[2] Even though the members of a co-operative credit society are subject to a statutory liability to contribute to the debts of the society, that liability can only be enforced by the procedure of winding up contained

3. The power referred to in clause (f) of sub-section (2) of section 42 of the said Act shall be deemed to have been conferred on a liquidator from the commencement of the said Act and all orders, purporting to have been passed by him in exercise of that power, prior to the coming into force of this Act, and all proceedings taken in pursuance of such orders, shall be valid notwithstanding any decree or order of a civil Court to the contrary.

4. Any suit, appeal, or proceeding, pending in a civil Court on the date on which this Act comes into force, in which the validity of an order purporting to have been passed by a liquidator in exercise of the power referred to in clause (f) of sub-section (2) of section 42 of the said Act has been called in question on the ground that no such power existed, shall abate.

— C. P. & Berar Act X of 1945, Ss. 2, 3 and 4. [17-9-1945.]

Section 42 (contd.)

in the act and not directly by a suit of the creditor. (Vol 20) 1933 Bom 191 (194) : 57 Bom 319 (DB).

[3] Paid manager of Co-operative Bank appointed liquidator—His duties are quasi-judicial and he is public officer as defined in S. 2 (17), Civil P. C., and requires notice under S. 80 of Code. (Vol 26) 1939 Nag 232 (233) * (Vol 29) 1942 Lah 287 (288) : I L R (1943) Lah 389 (DB).

2. Sub-section (2)—Powers of liquidator. — [1] A person cannot be proceeded against by the liquidator in a summary manner under S. 42 (2) (b) as a debtor to the society but as a member contributing to the assets of the society. (Vol 24) 1937 Lah 931 (932, 933) : I L R (1937) Lah 649 (DB).

[2] While deciding the matter of contribution under S. 42 (2) the liquidator has jurisdiction to decide whether the liability of the past member has ceased under S. 23 (Vol 22) 1935 Lah 330 (331).

[3] Liquidator cannot order that debtors are jointly and severally liable for each other's mortgage but may determine contribution to be made by several debtors to meet debts. (Vol 5) 1918 All 419 (420) : 40 All 89 (DB).

[4] Liquidator's order without notice to party against whom it is made is without jurisdiction and a nullity. (Vol 29) 1942 Lah 237 (240) : I L R (1943) Lah 553 (DB).

[5] Section 42 (2) (e)—Collection and distribution of assets. Only liquidator can collect assets of society from its members and distribute them rateably among creditors. (Vol 25) 1938 Nag 434 (439) : I L R (1938) Nag 604 (DB).

[6] Where a liquidator makes an assessment on a person, who is not a member, or has ceased to be a member for over two years before the dissolution of the society, or whose liability to contribute had otherwise been extinguished by operation of law, he acts in excess of his jurisdiction and his order is a nullity and, therefore, incapable of execution. (Vol 29) 1942 Lah 237 (239) : I L R (1943) Lah 553 (DB).

2a. Contribution by members. — [1] Member means member at date of dissolution of society. (Vol 26) 1939 Lah 275 (275).

[2] "Past member" means past member, liable for debts under S. 23. (Vol 24) 1937 Lah 912 (912).

[3] "Past member" means person, who is alive at all material times, but who has ceased to be member of society, otherwise than by death. (Vol 33) 1946 Nag 317 (318) : I L R (1946) Nag 474.

[4] What has to be seen is whether liability of past member is subsisting at date of dissolution in winding up of society—Crucial date is date of dissolution. (Vol 28) 1941 Lah 284 (286) : I L R (1942) Lah 379 (DB).

[5] The heirs of a chairman of a society, against whom a personal decree has been obtained cannot call in the provisions of S. 24 as an answer to the claim of the decree-holder to execute the decree, as that section applies only to a proceeding in liquidation under S. 42. (Vol 12) 1925 Cal 203 (203 and 204) (DB).

[6] Section 42 (2) (b) is limited to members or past members and has no application to claim for contribution against the heirs of a deceased member. In such a

case, the liquidator's only remedy is by way of a civil suit. (Vol 33) 1946 Nag 317 (319) : I L R (1946) Nag 474.

[7] "Contribution" presupposes existing liability. (Vol 29) 1942 Lah 237 (239) : I L R (1943) Lah 553 (DB).

[8] No claim can be made for contribution either against a member, a past member or the estate of a deceased member until the assets and liabilities of the society are determined. If it can pay off its debts from existing assets no claim for contribution can be made. That is only a last resort when all else fails. (Vol 33) 1946 Nag 317 (319, 320) : I L R (1946) Nag 474.

[9] Section 42 (2) (b) : Contributory order made before assets of society are ascertained is *ultra vires*. First, the assets of the individual debtors should be realized. The contributory order made before such realization is *ultra vires* and cannot be executed. (41) 1941 Nag L Jour 412 (414) (DB).

[10] Member of joint family joining society and taking loan—Joint family, as such, not brought on list of members—Debt borrowed for family necessity—Contributory order against members of family, who are not members of the society cannot be made. (Vol 18) 1931 Nag 48 (49).

[11] The liability of a member of co-operative society to contribute to the assets of the society in the event of its being dissolved before or during insolvency of the member is a debt provable in insolvency and therefore the liquidator should either prove it or have it excluded from the schedule under S. 33, Provincial Insolvency Act, 1920, if it came within the provisions of that section. Where he does not do so, the member's liability for such debt ceases on his being granted a complete discharge by the insolvency Court as expressly provided in S. 44 (2) of that Act. The liquidator, therefore, has no jurisdiction to assess the contribution of the insolvent as a member of the society under S. 42 (2) of this Act after his complete discharge. (Vol 29) 1942 Lah 237 (238) : I L R (1943) Lah 553 (DB).

[12] Member applying in insolvency after society has gone into liquidation and obtaining his discharge—Decree passed by liquidator under S. 42 (2) (b) cannot be executed against the insolvent even if the liquidator was competent to make a decree and the liability could not be challenged by the executing Court because it was a decree made by a competent Court, as the liability must be deemed to have disappeared by force of S. 42 (2), Provincial Insolvency Act. (Vol 2c) 1941 Lah 314 (315).

[13] Where certain members of a society are adjudged insolvents, before the society is dissolved, and a liquidator is not appointed until after the discharge of the insolvents, the liability of the insolvents as members of the society is not provable under the terms of S. 34 (2), Provincial Insolvency Act. Under S. 42 (b), it is the liquidator alone who can ascertain and fix the liabilities of the members. Therefore, until a liquidator is appointed, it cannot be said that there is any debt or liability, certain or contingent, which can affect the members. The liquidator is not, therefore, debarred from fixing the liability of the insolvents as

UNITED PROVINCES.

(i) After sub-section (4) of section 42 insert the following sub-section, namely—

“(4A) Any sum ordered under this section to be recovered as a contribution to the assets of the society or as costs of liquidation may be recovered, on a requisition being made in this behalf to the Collector by the Registrar of Co-operative Societies, in the same manner as arrears of land revenue.”

(ii) In sub-section (5) of that section, before the words ‘orders made under this section’ insert the words ‘Save as provided in sub-section (4A).’ — [U. P. Act III of 1919, S. 2.]

Section 42 (contd.)

members, under the provisions of the Provincial Insolvency Act. (Vol 26) 1939 Lah 275 (276).

[14] Order of liquidator under S. 42 (2) (b) is not decree for money within meaning of S. 7 (iv-A), Court-fees Act (Madras Amendment) — Court-fee for suit for declaration that order is null and void is Rs. 100, under Sch. II, Art. 17-A (iii). (Vol 24) 1937 Mad 604 (605) : I L R (1938) Mad 65.

2b. “Direction in regard to collection.”—[1] Sub-sections (2) (b) and (2) (e) must be read as a whole. The directions given in sub-s. (2) (e) are mainly administrative. A liquidator has no power under sub-s. (2) (e) to make an order having the force of a decree in respect of a debt due to a society in liquidation. Such a debt is not included in contributions mentioned in sub-s. (2) (b). (Vol 28) 1941 Lah 355 (355).

3. Sub-section (3)—Evidence.—[1] Powers given by S. 42 (3) are subject to rules under the Act, Applicability of S. 32, Civil P. C., is restricted by R. 26 (e) framed by the Punjab Government under S. 43 (1). Liquidator summoning person has no power to ask security from such person or impose sentence of imprisonment or fine for failure to furnish security. (Vol 26) 1939 Lah 357 (358) : I L R (1939) Lah 192 : 40 Cri L Jour 791.

[2] Proceedings under S. 42 (2) (b) and (d) are quasi-judicial—Some evidence is necessary for determination of questions referred to in cls. (b) and (d). Procedure laid down in rules not followed. Application for execution of order is not competent. (Vol 20) 1933 Cal 631 (632) (DB).

4. Sub-section (5) — Enforcement of order. —

[1] Proceedings under S. 42 (2) (b) and (d) are quasi-judicial. Some evidence is necessary for determination of questions referred to in cls. (b) and (d)—Procedure not followed — Application for execution is not competent. (Vol 20) 1933 Cal 631 (632) (DB).

[2] An heir of a deceased member of a co-operative society can be arrested for an arrear due from his deceased father by virtue of S. 2, U. P. Co-operative Societies (Amendment) Act, 1919, read with R. 31 (4), (5), (8) and (10) framed by U. P. Provincial Government under S. 43, and S. 42 (4a) of the Act as inserted by U. P. Act and S. 146, U. P. Land Revenue Act. (Vol 15) 1928 All 128 (131) : 29 Cri L Jour 244.

[3] No appeal lies from civil Court's order enforcing liquidator's order under S. 42. (Vol 5) 1918 All 419 (420) : 40 All 89 (DB).

5. Sub-section (6)—Jurisdiction of Civil Court.

—[1] A civil suit for refund of money realised under the provisions of S. 42 (4a) of the Act as amended by U. P. Act, 3 of 1919 with S. 149 of U. P. Land Revenue Act is barred by the provisions of S. 233 (m) of the U. P. Land Revenue Act. (Vol 14) 1927 All 532 (533) : 49 All 701 (DB).

[2] Decree on an award in favour of a certain Co-operative Bank — On requisition from Registrar of Co-operative Societies, trees belonging to judgment debtor put to sale for realising the amount due — No objection to attachment and sale of trees by person claiming to be the real owner within the prescribed time— Suit in civil Court by such person is not maintainable as the amount was realised as arrear of land revenue under the Co-operative Societies Act. (Vol 24) 1937 Oudh 249 (250).

[3] Rule 15 framed in 1931 under Burma Co-operative Societies Act (6 of 1927) S. 50, does not bar the jurisdiction of civil Courts in relation to proceedings of the Registrars or arbitrators in the same way as the jurisdiction of civil Court is barred with respect to matters connected with the liquidation of society under S. 42 of the Co-operative Societies Act. (Vol 24) 1937 Rang 363 (364) : 1937 Rang L R 899.

[4] Civil Court in execution of order of liquidator cannot go behind it. If the order is thus enforced there is no error of jurisdiction on the part of the civil Court and revision to High Court does not lie. (Vol 17) 1930 Rang 18 (18, 19) : 7 Rang 533.

[5] Contribution levied on member — Member not representing submitting to payment of amount—Suit by him for realisation of amount — Civil Court cannot entertain it. (Vol 21) 1934 Oudh 431 (433).

[6] Suit for declaration by past member (who admits himself to be one) that he is not liable to pay the amount declared by the liquidator as his liability ceased under S. 23—Liquidator, held, had jurisdiction to decide the amount of contribution under S. 42, sub s. (2) and the suit was not maintainable in civil Court. (Vol 22) 1935 Lah 330 (331).

Liability to contribution disputed. — [7] If the liquidator makes an assessment on a person who is not a member, or had ceased to be a member for over two years before the dissolution of the society, or whose liability to contribute had otherwise been extinguished by operation of law, he has clearly acted in excess of his jurisdiction and his order is a nullity and, therefore, incapable of execution. (Vol 29) 1942 Lah 237 (239) : I L R (1943) Lah 553 (DB).

[8] Liquidation of society — Civil Courts have jurisdiction to consider whether a person is liable as past member — Person denying his liability as past member — Liquidator cannot make him liable as past member. (Vol 23) 1936 Mad 574 (576) : 59 Mad 895 (DB)* (Vol 27) 1940 Mad 831 (836) : I L R (1940) Mad 929 (DB) * (Vol 24) 1937 Lah 912 (913). (Person claiming not to be past member.) * (Vol 20) 1933 Lah 422 (423) : 14 Lah 703 (DB). (Person disputing his membership) * (Vol 24) 1937 Cal 643 (644). (Do.)

Action by non-member. — [9] Section 42 (6) is no bar to a civil suit by a member of the society against the purchaser for declaration that the property attached and sold for debt due from him was not liable to be sold. (Vol 14) 1927 Nag 217 (219) : 23 Nag L R 66.

[10] Society wound up — Liquidator selling property, conveyed to him, to person having nothing to do with the society—Suit by a purchaser for possession — Civil Court not precluded from questioning the validity of the transfer since the matter is not connected with dissolution or winding up of society. (Vol 24) 1937 Rang 98 (98, 99). (Case under S. 49, Burma Co-operative Societies Act, 1927.)

[11] Section does not bar a suit between co-members as to their respective rights when the plaintiff's property has been utilised by the defendant. (Vol 12) 1925 Rang 38 (39) : 2 Rang 325.

[12] There is nothing in S. 42 (6), express or implied, to prevent the Court from entertaining the application

PROVINCIAL AMENDMENT

SECTIONS 42A, 42B, 42C.

CENTRAL PROVINCES AND BERAR.

After section 42 the following new sections shall be inserted, namely—

"42A. Where a dispute has been referred to the Registrar or to arbitration under the rules, the Registrar or the arbitrators, as the case may be, if satisfied on affidavit, enquiry or otherwise, that a party to such arbitration with intent to delay or obstruct the execution of any award that may be made :—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the jurisdiction of the Registrar. may, unless adequate security is furnished, direct the conditional attachment of the said property; and such attachment shall have the same effect as if made by a competent civil Court." — C. P. Act VII of 1930, S. 2.

[29-3-1930.]

"Compromise or arrangement for repayment of liabilities of registered societies.

42B. (1) Notwithstanding anything contained in this Act or the rules made thereunder, where a compromise or arrangement is proposed between a registered society and its creditors or any class of them, the Registrar may, on the application of the society or of any creditor, or, in the case of a society the registration of which has been cancelled, of the liquidator, order a meeting of the creditors or class of creditors, as the case may be, to be called, held and conducted in such manner as may be determined by him :

Provided that the Registrar may, on his own motion, order such a meeting to be called for the purpose of effecting a compromise or arrangement.

(2) If creditors, not less than three-fourths in value of the creditors present either in person or by proxy at the meeting, agree to any compromise or arrangement, the Registrar may, in his discretion pass an order confirming the compromise or arrangement, and thereupon such compromise or arrangement shall be binding on all the creditors or the class of creditors, as the case may be, and also on the society, and, in the case of a society the registration of which has been cancelled, on the liquidator and on all persons who have been, or may be, required by the liquidator acting under clause (b) of sub-section (2) of section 42 to contribute to the assets of the society :

Provided that the Registrar shall not confirm a compromise or arrangement unless the creditors who agree to it are not less than 51 per cent. in value of all the creditors or the class of creditors, as the case may be.

(3) A compromise or arrangement confirmed by the Registrar under sub-section (2) shall not be called in question in any civil Court.

(4) When an order calling a meeting is passed under sub-section (1) or the proviso thereof, the Registrar may give notice of such order to a civil Court in which proceedings, whether instituted before or after the order, in respect of any liability of the society due to a creditor to whom a copy of the order is posted under sub-section (6), are pending, and on receipt of such notice the civil Court shall stay the proceedings. If no compromise or arrangement is confirmed under sub-section (2), the Registrar shall inform the civil Court accordingly, and the proceedings which may have been stayed shall be resumed.

Section 42 (contd.)

of one of the debtors of a co-operative society, which is in liquidation, for being declared insolvent. The official liquidator can press his claim against the insolvent in the same way as the other creditors will do. (Vol 21) 1934 Pat 290 (290).

Action without jurisdiction.—[18] Executing Court can go behind the order passed by the liquidator under S. 42 (2) (b) and inquire if it has been passed within the limits of jurisdiction and can refuse to execute it, if it is found to be without jurisdiction. (Vol 29) 1942 Lah 237 (239) : I L R (1943) Lah 553 (DB) & ('41) 1941 Nag L Jour 412 (414) (DB).

[14] Civil Court can intervene if liquidator's act or order is shown to be *ultra vires*. (Vol 18) 1931 Nag 48 (49, 50).

[15] Liquidator exceeding his power under S. 42 — Court can determine its legality — Person proceeded against by liquidator as debtor and not as member of society — Suit by person that he is not so liable is maintainable. (Vol 24) 1937 Lah 931 (934) : I L R (1937) Lah 649 (DB).

[16] Contributory order of liquidator against member of society without jurisdiction—Order can be challenged by way of suit in civil Court but it cannot be questioned in proceedings for its execution in civil Court. (Vol 33) 1946 Nag 161 (162) : I L R (1946) Nag 60 (DB).

Matters relating to dissolution — [17] Correctness of amount assessed cannot be questioned by Court when award is passed by liquidator within his powers. (Vol 28) 1941 Lah 284 (286) : I L R (1942) Lah 379 (DB).

[18] Order of the liquidator under S. 42 (2) (b) and (e) directing contribution by members is final and cannot be questioned in a civil Court even if the order is wrong, the matter being connected with dissolution of society. (Vol 18) 1926 Nag 379 (380) : 24 Nag L R 5.

[19] No question of validity of dissolution — No civil suit for declaration that order of contribution is null and void is maintainable. (Vol 31) 1944 Cal 245 (246) : I L R (1943) 2 Cal 186. (Assam Rules, R. 41 (e), (f) and (j).)

[20] Court can question liquidator's jurisdiction in making award. (1939) 41 Pun L R 269 (270) & (Vol 21) 1934 Oudh 431 (433). (Where the money is realised a suit by member for its realisation is barred.) & (Vol 5) 1918 Oudh 112 (113) (DB).

[21] Liquidator's order to collect assets of society from persons accountable to him — Civil Court cannot interfere. (Vol 7) 1920 Bom 62 (62) : 44 Bom 582 (DB).

[22] Civil Court cannot entertain suit by members of the Executive Committee to recoup the amount paid under liquidator's orders from ordinary members, since the matter is connected with dissolution of society. (Vol 14) 1927 Cal 578 (579) (DB).

[23] Court cannot refuse execution of liquidator's award under S. 42 (2) (f) though member against whom award was made, was discharged under S. 44, Prov. Insol. Act. The matter is not one of lack of inherent jurisdiction but only a question of illegal exercise of jurisdiction. (Vol 27) 1940 Lah 280 (280). (Reversed in (Vol 29) 1942 Lah 287 : I L R (1943) Lah 389 (DB).)

(5) If a compromise or arrangement is confirmed under sub-section (2), the proceedings, if any, stayed under sub-section (4) shall abate, and no proceedings shall lie in a civil Court in respect of any liability of the society to which the compromise or arrangement relates.

(6) An order of the Registrar calling a meeting under sub-section (1) or the proviso thereof shall be published in the official Gazette at least fifteen days before the date of the meeting and a copy thereof shall be posted to each creditor concerned to his address as entered in the books of the society at least thirty days before the date of the meeting.

(7) An order of the Registrar confirming a compromise or arrangement under sub-section (2) shall be published in the official Gazette and a copy thereof posted to each creditor concerned to his address as entered in the books of the society, and the order shall be open to inspection free of charge at the office of the Registrar or the office of the society by any person interested in the compromise or arrangement.

(8) The Registrar may pass such order as he deems necessary with regard to the costs of calling, holding and conducting a meeting under sub-section (1) or the proviso thereof.

(9) The Registrar may, with the sanction of the Provincial Government, exempt such class of creditors as he thinks fit from the operation of this section.

(10) The provisions of this section shall also apply to proceedings pending in a civil Court, in respect of any liability of the society due to creditors or class of creditors, on the date on which this section comes into force."

—Heading and S. 42B, sub-ss. (1) to (9) were inserted by C. P. and Berar Act V of 1940, S. 2 [26-3-1940] and sub-s. (10) was inserted and deemed always to have been inserted by C. P. and Berar Act VI of 1941, S. 2.

[21-3-1941.]

"42-C. (1) Notwithstanding the terms of a compromise or an arrangement confirmed by the Registrar under section 42-B, a society which has paid to its creditors not less than two-thirds of the total amount payable to them under such compromise or arrangement, may, with a view to terminate such compromise or arrangement and with the previous sanction of the Registrar, borrow money or acquire new assets in such manner and from such sources as may be specified in the sanction.

(2) With the money borrowed or the new assets acquired the society shall pay off the balance of the amount payable to the creditors under such compromise or arrangement within such period not exceeding six months from the date of sanction as the Registrar may fix :—

Provided that, instead of paying the amount due to a creditor, the society may, with his consent in writing, treat the amount payable to him as a fresh deposit for a period of not less than two years. On treating the amount as fresh deposit, the liability of the society to such creditor as determined by the compromise or arrangement shall be deemed to have been discharged and he shall thereafter rank as a new creditor in respect of the deposit.

(3) When, for the purpose of determining the balance of the amount payable to creditors under sub-section (2) of this section, it is necessary to take into account assets of the society, which are not likely to be realised in cash for a long time, or which, in the opinion of the Registrar, it is not desirable to convert into cash, the Registrar shall make a valuation of such assets, and such valuation shall, subject to an appeal to the Provincial Government, be conclusive for the said purpose.

(4) If a creditor in respect of whom a compromise or an arrangement has been confirmed by the Registrar under section 42-B, fails to receive the amount payable to him under such compromise or arrangement by reason of his not accepting it or by reason of his not being traceable, the society shall keep the amount in deposit by opening a separate account in his name in the society. On the making of such deposit the amount payable to him under the compromise or arrangement shall be deemed to have been paid to the extent of the deposit. The creditor or any person claiming through him shall thereafter be entitled to claim only the amount so deposited.

(5) A compromise or an arrangement in respect of a society and its creditors confirmed by the Registrar under section 42-B, shall cease to be in force as soon as the whole amount of the liability determined thereunder has been or is deemed to have been paid, whether under the provisions of this section or otherwise, notwithstanding that the period originally stipulated for the discharge of such liability has not expired.

(6) After such compromise or arrangement has ceased to be in force no further claim shall remain against the society, or against any property movable or immovable which it may acquire thereafter, in respect of the liability which had been the subject of the compromise or arrangement and the society shall be free to conduct its business as a normally functioning society."

—C. P. and Berar Act X of 1945, S. 5. [17-9-1945.]

Rules.

43. (1) The ^a[Provincial Government] may, for the whole or any part of the Province ^band for any registered society or class of such societies, make rules^b to carry out the purposes of this Act.

SECTION 43 — Synopsis

1. Scope.
2. Sub-section (2) (1) — "Dispute touching the business of a society."
3. Decisions bearing on rules framed under sub-section (2), cl. (1).

4. Other rules.

5. Rule and bye-law.

1. Scope. — [1] The limits within which the rule-making powers of the Provincial Government could be exercised are contained in sub-s (1) of S. 43. Sub-section (2) simply sets out by way of illustration certain matters on which rules are considered desirable. It does

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) subject to the provisions of section 5, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member;
- (b) prescribe the forms to be used and the conditions to be complied with in the making of applications for the registration of a society and the procedure in the matter of such applications;
- (c) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altering and abrogating by-laws, and the conditions to be satisfied prior to such making, alteration or abrogation;
- (d) prescribe the conditions to be complied with by persons applying for admission or admitted as members, and provide for the election and admission of members, and the payment to be made and the interest to be acquired before the exercise of the right of membership;
- (e) regulate the manner in which funds may be raised by means of shares or debentures or otherwise;
- (f) provide for general meetings of the members and for the procedure at such meetings and the powers to be exercised by such meetings;
- (g) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers;

Section 43 (contd.)

not, in any way, limit the powers given by sub-s. (1) and the items mentioned in sub-s. (2) do not exhaust the list of matters on which rules might be framed by the Provincial Government. (Vol 25) 1938 Cal 394 (398) : I L R (1938) 2 Cal 144 * (Vol 25) 1938 Cal 327 (332, 333) : I L R (1938) 2 Cal 103 (DB).

2. Sub-section (2) (i) — "Dispute touching the business of a society."—[1] The disputed liability of a member to repay money due to a co-operative society is a dispute touching the business of the society. (Vol 23) 1936 Pat 225 (226) : 14 Pat 292 (DB).

[2] Dispute between A, B and C members of society, relating to money alleged to have been borrowed by A from society but in reality misappropriated by B and C — Dispute held was concerning business of society. (Vol 23) 1936 Lah 786 (787).

[3] Dispute between member, officer and society regarding money entrusted to officer for purchase of articles is within sub-s. (2) (i). (Vol 10) 1923 Mad 481 (482) (DB).

[4] The expression 'touching the business of the society' includes disputes arising out of particular transactions and disputes between members and officers. The words of S. 43 are very general and do not merely refer to a dispute regarding the internal management of the affairs of a society or disputes in regard to the principles which would regulate the conduct of business. (Vol 10) 1923 Mad 481 (482) (DB).

[5] "Business" is not confined to money business and includes election of officers. (Vol 12) 1925 All 356 (358) : 47 All 374 (DB).

[6] Dispute within clause (i) cannot be limited to dispute concerning the internal management of the society. Where the principal business of a society is to finance its members, a dispute concerning the financial obligations of its members to the society would be a dispute concerning the business of the society. (Vol 25) 1938 Cal 327 (333) : I L R (1938) 2 Cal 103 (DB).

[7] Where a co-operative society has considered its treasurer to be responsible for embezzlement of money deposited with it by a person and the treasurer has throughout contended that he was not concerned with

the alleged embezzlement, there is clearly a dispute between the treasurer and the society regarding question of embezzlement of money and hence the dispute can be referred to arbitration. (Vol 26) 1939 Lah 301 (302).

[8] A suit for a declaration that the constitution of the board of management of a co-operative society was illegal, that it had no authority to function or to call an extra-ordinary general meeting of the share-holders, and that the resolution passed at the meeting thus convened was itself *ultra vires* is not a dispute between a member and the committee touching the business of the society. (Vol 25) 1938 Cal 394 (396, 397) : I L R (1938) 2 Cal 144.

[9] Under clause (i), the dispute referred to the Registrar must be dispute between the members of the society and the committee. (Vol 29) 1942 Cal 290 (291) : I L R (1941) 2 Cal 551.

[10] Mere willingness of the debtor to discharge his debt does not mean that there is no dispute. The dispute arises when the demand made for the payment is not immediately met and cannot be recovered without recourse to law. (Vol 33) 1946 Nag 16 (18) : I L R (1945) Nag 67 (DB).

3. Decisions bearing on rules framed under sub-section (2), clause (i). — [1] The purpose of the Legislature as embodied in cl. (i) of S. 43 (2), Co-operative Societies Act, clearly is that when the Registrar gives directions for "arbitration", the parties would have no right to have recourse to any alternative proceeding. The words "arbitration" and "award" in S. 43 (2), cl. (i) have been used merely to signify a special tribunal and the order of a special tribunal, as contradistinguished from a civil Court and the decree of civil Court respectively. That special tribunal may or may not in all respects, or substantially conform to the characteristics of an arbitration tribunal strictly so-called. The conferment of a right of appeal from the decision of such a tribunal does not involve any inherent inconsistency. If, it is within the objects of the Act to set up a special tribunal for the decision of disputes, the power to create such a tribunal includes the power to set up an appellate authority, which would create more confidence and a greater sense of security

- (h) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication of a balance-sheet showing the assets and liabilities of a society ;
 - (i) prescribe the returns to be submitted by a society to the Registrar and provide for the persons by whom and the form in which such returns shall be submitted ;
 - (j) provide for the persons by whom and the form in which copies of entries in books of societies may be certified ;
 - (k) provide for the formation and maintenance of a register of members and, where the liability of the members is limited by shares, of a register of shares ;
 - (l) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators ;
 - (m) provide for the withdrawal and expulsion of members and for the payments, if any, to be made to members who withdraw or are expelled and for the liabilities of past members ;
 - (n) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred ;
 - (o) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member ;
 - (p) provide for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society ;
 - (q) prescribe the extent to which a society may limit the number of its members ;
 - (r) prescribe the conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies ;
 - (s) subject to the provisions of section 39, determine in what cases an appeal shall lie from the orders of the Registrar, and prescribe the procedure to be followed in presenting and disposing of such appeals ; and
 - (t) prescribe the procedure to be followed by a liquidator appointed under section 42, and the cases in which an appeal shall lie from the order of such liquidator.
- (3) The ^a[Provincial Government] may delegate, subject to such conditions, if any, as it thinks fit, all or any of its powers to make rules under this section to any authority specified in the order of delegation.
- (4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.
- (5) All rules made under this section shall be published in the ^a[Official Gazette], and on such publication shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Local Government."

[b] For rules, see different local Rules and Orders.

[c] *Substituted* by A. O. for "local official Gazette."

Section 43 (contd.)

in the disputants. Clause (s) of S. 43 (2) is not the only provision giving rule-making power to set up a tribunal of appeal. As the Provincial Government has been given power to create by rules a special tribunal to decide disputes of the nature and between the parties mentioned in S. 43 (2), cl. (l), the jurisdiction of such special tribunal would be exclusive. Clause (l) gives that indication when it says that the Registrar, if he so chooses, may direct that the dispute shall be referred to arbitration. (Vol 25) 1938 Cal 327 (384) : 1 L R (1938) 2 Cal 108 (DB).

(4) Bengal Rules.

[2] As to settlement of disputes touching the business of a co-operative society registered in the Province of Bengal, now see the Bengal Co-operative Societies Act, 1940, Ss. 86 to 88 and S. 140 (2) (lvii). The following cases were decided under the Rules framed by the Bengal Provincial Government under S. 43, Co-operative Societies Act, 1912.

[3] In the case of a mortgage in favour of the society, the award made by the Registrar can in no sense be a mortgage decree. The Registrar has no power to decide disputed claims of priority or to make

Section 43 (contd.)

a decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption. (Vol 29) 1942 Cal 290 (291) : I L R (1941) 2 Cal 551.

[4] Court can entertain suit to have award declared invalid when reference to arbitrator itself is questioned. (Vol 21) 1934 Cal 23 (24) : 60 Cal 1207 (DB).

[5] Where a dispute, which cannot be referred to arbitration, is referred to arbitration and no objection is taken before the arbitrator or the Registrar in appeal, the objection cannot be taken in revision against execution. (1936) 163 Ind Cas 591 (591) (Cal).

[6] The decision of the arbitrator may be wrong in fact or in law, but that is not a ground which would entitle the civil Courts to interfere in the matter. (Vol 27) 1940 Cal 198 (202) : I L R (1940) 1 Cal 82 (DB) & (Vol 27) 1940 Cal 162 (163) & (1936) 164 Ind Cas 802 (804) (Cal). (Civil Court cannot alter award under S. 151, Civil P. C., even if it is anomalous or erroneous.) & (1934) 60 Cal L Jour 572 (575) (DB).

[7] The machinery and the procedure indicated by the provisions of R. 20 are totally inconsistent with the provisions contained in Chap. 2 of the Arbitration Act. Consequently the civil Court has no jurisdiction to appoint an arbitrator in a proceeding under R. 20 nor can it remove an arbitrator. (Vol 30) 1943 Cal 255 (256) : I L R (1943) 2 Cal 431 (DB).

[8] In the case of an award made under R. 22, the date of the award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby and not the date of the decision of the arbitrator. An execution application filed within three years of the date on which award is communicated to the party will be within time. (Vol 28) 1941 Cal 152 (153) : I L R (1940) 2 Cal 460.

[9] Article 178, Limitation Act, does not apply to the execution of the award under R. 22. (1936) 163 Ind Cas 591 (591) (Cal) & (Vol 30) 1943 Cal 255 (260) : I L R (1943) 2 Cal 431 (DB).

[10] An award given by an arbitrator under R. 22 need not be stamped. (Vol 20) 1933 Cal 695 (696) : 60 Cal 906 (DB).

[11] Rule 22 (1) is not confined to such disputes as are referable to membership only, but covers all disputes between a society and a member. Hence a dispute arising from a transaction entered into by two members as brokers is referable to arbitration. (Vol 20) 1933 Cal 267 (268) (DB).

[12] A dispute regarding a loan taken by a past member of a society from the Co-operative Bank, being a dispute between a past member and a committee within R. 22 (1), cannot be referred to arbitration but should be referred to the Registrar. (1936) 163 Ind Cas 591 (591) (Cal).

[13] The whole scheme of the provisions of R. 22, sub-r. (1) to (7) is to oust the jurisdiction of the civil Court throughout the arbitration proceedings. (Vol 30) 1943 Cal 255 (256) : I L R (1943) 2 Cal 431 (DB).

[14] Suit for declaration that constitution of board of management of society is illegal and that it could not function or call extra-ordinary general meeting of share-holders and that resolution passed in such meeting is *ultra vires* is within jurisdiction of civil Court. (Vol 25) 1938 Cal 394 (396, 397) : I L R (1938) 2 Cal 144 & (Vol 19) 1932 Cal 317 (319) : 59 Cal 1165 (DB).

[15] In giving, by sub-r. (6) of R. 22, a finality to the decision of the special tribunal, the Provincial Government did not transgress its powers, but carried out the implications of cl. (1) as well as of general law. Sub-rules (2), (5) and (6) of R. 22 framed under S. 43 (1) are therefore not *ultra vires* and a Registrar has power to appoint a single arbitrator to decide a

dispute filed before him. (Vol 25) 1938 Cal 327 (334) : I L R (1938) 2 Cal 103 (DB) & (Vol 27) 1940 Cal 196 (201) : I L R (1940) 1 Cal 82 (DB) & (Vol 27) 1940 Cal 162 (163).

[16] If the award is without jurisdiction, the civil Court can certainly declare it to be a nullity. Even if the arbitrator was validly appointed, the award can still be a nullity, if there was violation of the rules regulating the arbitration in matters of substance. Not only a proper appointment of the arbitrator in accordance with the rules is essential for creating jurisdiction in the arbitrator but the fundamental rules attaching restraint to the exercise of authority by the arbitrator are equally mandatory and a violation of them would nullify the award. (Vol 27) 1940 Cal 198 (201) : I L R (1940) 1 Cal 82 (DB).

[17] Rule 22 (6) framed under S. 43 of the Co-operative Societies Act is not meant to take away the jurisdiction of the executing Court to enquire into the competency of an award made under the provisions of the section, on the ground of jurisdiction. (Vol 29) 1933 Cal 267 (268) (DB).

[18] A contracting debt from Co-operative Bank—Inspector of Co-operative Societies standing as surety—Debt not paid—Bank filing dispute and Inspector forwarding same to Assistant Registrar recommending arbitration—Inspector later on challenging award and arbitrator's jurisdiction by instituting suit : *Held* that Inspector had brought himself within scope of R. 22 and, therefore, his suit, which was brought when Bank's claim was barred by limitation, was barred under R. 22 (6). (1937) 65 Cal L Jour 206 (209).

[19] An award given by an arbitrator under R. 22 has the force of a decree and before it can be enforced as a decree it is not necessary to file it in Court as in the case of awards by arbitrators appointed by the contract of parties. (Vol 20) 1933 Cal 695 (696) : 60 Cal 906 (DB) & (1936) 163 Ind Cas 591 (591) (Cal).

(B) Bihar Rules.

[20] The following case was decided with reference to S. 49 of the Bihar and Orissa Co-operative Societies Act, 1935. (Vol 26) 1939 Pat 500 (501) (D B). (Dispute referred to Registrar for award—Registrar functions as civil Court and does not act without jurisdiction in deciding whether dispute is time-barred or not.)

[21] As to settlement of disputes touching the business of a co-operative society registered in the Province of Bihar and Orissa, now see the Bihar and Orissa Co-operative Societies Act, 1935, sections 48, 49 and 66 (2) (XXVI), (XXVII). See also the following cases :

[22] The disputed liability of a member to repay money due to a co-operative society is covered by R. 12 (1) and hence an award by the Registrar against such member is not without jurisdiction. (Vol 23) 1936 Pat 225 (226) : 14 Pat 292 (D D).

[23] Under R. 12 of the rules framed under S. 43 of the Co-operative Societies Act, it is only members and persons claiming through members against whom the Registrar can pronounce a decision which can be executed as a civil Court decree. The society must enforce in the regular course any claim which it may have against outsiders. The decision of the Registrar so far as it affects a non-member is a nullity as being made without jurisdiction. This question must be considered by the Court executing the decision if it is raised by the person affected. (Vol 21) 1934 Pat 145 (146) (D B).

[24] The co-operative society has complete power to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. So, if the Registrar passes an award

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against the sons of a deceased member personally, the civil Court has complete jurisdiction to set aside the award. (Vol 12) 1925 Pat 575 (575, 576) (D B).

(C) *Bombay Rules.*

[25] For the settlement of a dispute touching the business of a co-operative society registered in the Province of Bombay, now see the Bombay Co-operative Societies Act, 1925, Ss. 54 to 59 and S. 71 (2) (u) and (oc). See also the following cases :

[26] An application to execute an award falls within S. 3, Limitation Act and hence it is subject to the law of limitation. Application to enforce award is not step-in-aid. (Vol 25) 1938 Bom 424 (425) (D B).

[27] Award — Certificate of Registrar on award — Darkhast proceedings filed within three years of certificate are not barred — Whether award is decree of civil Court doubted. (Vol 23) 1936 Bom 396 (397) (D B).

[28] Awards under the Bombay Act are executable as decrees of civil Court. They are effective from the date on which they are made. An application to execute an award made under the provisions of the Bombay Act is not a "proceeding arising out of a suit" within the meaning of these words in S. 3, Civil P. C., (Second Amendment) Act, 1937 (9 of 1937). (Vol 27) 1940 Sind 147 (147, 148, 150).

[29] Rules 31 and 34 provide that awards are to be enforced as decrees — Court having power to execute them can transfer them for execution. (Vol 9) 1922 Bom 877 (877) : 46 Bom 130 (D B).

[30] In a dispute between the society and a member, if the member dies, the arbitrators can decide for the purposes of continuing proceedings as to who the legal representatives of the deceased are. If decision is wrong an appeal lies to the Registrar and the civil Courts have no jurisdiction in the matter. (Vol 13) 1926 Bom 352 (353) (D B).

(D) *C. P. and Berar Rules.*

[31] Under the Co-operative Societies Act and the rules and regulations thereunder, the Registrar has clearly the power to pass an award not only against society but also its members individually. He can pass two awards one against the society in favour of the bank and another against each member of the society in favour of the society. But where he does not pass two distinct awards but a consolidated award both against the society and its members and mentions the names of all the members of the society, it can bear the interpretation that the award is both against the society and the members. It may be irregular in form but that would not invalidate the award. There is a presumption that the award was made against both the society and its individual members in accordance with the usual preliminary formalities and if it is not objected to by the judgment-debtor at any time, the sale held thereunder cannot become void. (Vol 30) 1943 Nag 7 (8, 9) : I L R (1942) Nag 885.

[See also (Vol 25) 1938 Nag 434 (436) : I L R (1938) Nag 604 (D B).]

[32] Under R. 26, a dispute touching the business of the society between its member and its treasurer, who is an officer of the bank under S. 2 (d) must be referred to the Registrar who has jurisdiction to decide it. (Vol 33) 1946 Nag 16 (18, 19) : ILR (1945) Nag 677 (DB).

[33] The expression "the business of a co-operative society" occurring in S. 26 is not restricted to the dealing with the members of the society only but includes business which the co-operative society is, under the law, empowered to transact. Hence the safe deposit of the fund of a society being essential to enable the society to command resources to grant loans to its members at any time, the investment or deposit of its funds cannot be isolated from the general business of

the society. (Vol 33) 1946 Nag 16 (19) : I L R (1945) Nag 677 (D B).

[34] C. P. Government, R. 26—Joint family members in corporate capacity becoming treasurers of society — Liability undertaken as treasurers can be treated as domestic dispute and Registrar has jurisdiction to decide dispute (Vol 33) 1946 Nag 16 (19, 20) : ILR (1945) Nag 677 (DB).

[35] Award can be enforced as a decree or in the manner prescribed for recovery of land revenue. (Vol 32) 1945 Nag 281 (282, 283) : I L R (1945) Nag 651.

[36] Application under R. 33 for enforcement as in the manner for recovery of land revenue — Subsequent attachment and sale under S. 128 (g), T. P. Act—Transferee is not affected by doctrine of *lis pendens*. (Vol 32) 1945 Nag 281 (282, 283) : ILR (1945) Nag 651.

[37] Rule 33 of the rules made by C. P. Government under S. 43 does not say that an award by the Registrar is a decree. The rule, therefore, recognises that the award, decision or order of the Registrar is not a decree. There is a vast difference between an award being deemed to be a decree and an award being executable as a decree. (Vol 28) 1941 Nag 243 (244) : I L R (1942) Nag 636.

[38] Rule 33 prescribes that any sum falling due under an award shall on a certificate signed by the Registrar be recovered by the Deputy Commissioner as an arrear of land revenue. The award cannot be called in question in the revenue Court. But where there is an error patent on the face of the certificate, the Revenue Officer is justified in refraining from executing it and in referring it back to the Registrar. ('89) 1929 Nag L Jour 405 (407, 408).

(E) *Madras Rules.*

[39] As to the settlement of disputes touching the business of a co-operative society registered in the Presidency of Madras, now see the Madras Co-operative Societies Act, 1932, Ss. 51 and 65 (2) (o). See also the following decisions :

[40] Whether the Registrar of Co-operative Societies is empowered to pass a mortgage decree or not, when such a decree has been passed and it is sought to be executed, the executing Court cannot refuse to execute the decree; nor could it amend it in any way as it cannot be said that the decree is in such cases on the face of it passed without jurisdiction. (Vol 21) 1934 Mad 40 (44) : 57 Mad 426.

[41] The Registrar of Co-operative Societies acting under R. 14 is a Court for the purposes of S. 52, T. P. Act. At any rate, where once the award made by him has been put before a competent civil Court in execution and the Court directs the sale of mortgaged property, any purchase during such proceedings will be subject to the rule of *lis pendens*. (Vol 21) 1934 Mad 40 (42) : 57 Mad 426.

[42] Assistant Registrar acting under S. 14 is 'Court' within the meaning of S. 195, Criminal P. C. (Vol 17) 1930 Mad 869 (870) : 32 Cri L Jour 219.

[43] The second sentence of sub-r. (1) of R. 14 of Madras Rules, is not beyond the rule-making powers granted by S. 43. (Vol 15) 1928 Mad 210 (210).

[44] Debt due from one society to another—One of them preferring claim before Registrar—This reference to the Registrar constitutes "dispute" under R. 14 (2) to vest jurisdiction in the Registrar or Deputy Registrar. ('32) 1932 Mad W N 18 (20, 22) (DB).

[45] Bye-laws providing that president represents society in legal proceedings—President given opportunity of appearing and being heard—President deliberately evading opportunity—Rule 14 (4) is satisfied and there is no ground for writ of *certiorari*. ('32) 1932 Mad W N 18 (21) (DB).

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[46] A Collector acting under R. 14 (5) of the rules made under the Co-operative Societies Act, is not a Court and an application made to him for execution of a decision of the Registrar of Co-operative Societies is not an application to a Court so as to save limitation under Art. 182 (5), Limitation Act. (Vol 23) 1936 Mad 150 (151) : 59 Mad 257.

[47] An award under the Co-operative Societies Act when it is filed in a Civil Court under R. 15 (7) (e), attracts all the provisions of the Civil P. C., in the matter of execution. If it attracts all the provisions of the Code with regard to execution, it must of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award, when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. The provisions of S. 48, Civil P. C., must therefore, apply. Section 48 provides that a decree shall run for a period of twelve years, provided, of course, that steps in execution are taken at intervals of not more than three years as required by Art. 182, Limitation Act. If, S. 48 applies, it follows that the appropriate Article is 182 and not Art. 181. If Art. 182 does not apply but Art. 181 does, there would be a conflict as Art. 181 fixes a period of three years and S. 48, a period of twelve years. (Vol 27) 1940 Mad 635 (635) : I L R (1940) Mad 649 (DB). ((Vol 24) 1937 Mad 31, Overruled).

(F) *N. W. F. P. Rules.*

[48] No procedure is provided in R. 18 for conducting the inquiry either by the Registrar or by the arbitrator for the appointment of a guardian for the minor debtor. It would, therefore, be unsafe to rely on the appointment of a guardian by a Registrar in the summary proceeding and to extend it to the execution of a payment order in a Civil Court, which should, by its very nature, be governed by the Civil P. C. Hence it would be just that whenever an executing Court is approached to carry out the payment order of the Registrar and there are minors in the case, the execution Judge should act under O. 32, Civil P. C., and appoint a proper person to protect the interests of the minors concerned. (Vol 32) 1945 Pesh 39 (41) (DB).

(G) *Punjab Rules.*

[49] Where it is alleged that an award made under the Co-operative Societies Act was made without jurisdiction or was not within the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in execution proceedings held in pursuance of the award, the objector's remedy being an appeal to the Registrar. (Vol 26) 1939 Lah 40 (40) (Vol 23) 1936 Lah 901 (903) : I L R (1937) Lah 92 (DB).

[50] The rules framed under S. 43 of the Co-operative Societies Act must be read together and then it becomes clear that the intention was to make all awards appealable and the use of the singular word in one sub-rule and the plural in another is due to unskilful drafting only. (Vol 24) 1937 Lah 673 (675) (DB).

[51] Death of person before institution of proceedings relating to award—Award against him—Execution—Execution application dismissed—On appeal, execution ordered to continue—Revision is maintainable. (Vol 24) 1937 Lah 63 (64).

[52] Awards transferred to Civil Court for execution. Decree held to be fully satisfied—No dispute remains outstanding and matter cannot be referred to the Registrar again—Remedy of the bank if not satisfied with the order of the executing Court is to appeal therefrom—Suit for a declaration in civil Court that the subsequent arbitration proceedings taken and the award therein are ineffectual is entertainable. (Vol 22) 1935

Lah 631 (632) (Vol 23) 1936 Lah 901 (903) : I L R (1937) Lah 92 (DB).

[53] The mere fact that the minor was not properly represented, before the arbitrator, does not give sufficient ground to Civil Courts to entertain a suit for declaration that the award was not binding on the minor. (Vol 20) 1933 Lah 376 (377).

[54] An award against the representative of a deceased debtor affects only the estate of the deceased in the hands of the representative and not the representative personally. (Vol 20) 1933 Lah 376 (377).

[55] A dispute between a committee of a Co-operative Credit Union and its officer cannot be referred to the Registrar. Award, if made, is a nullity. (Vol 19) 1932 Lah 53 (54) (DB).

[56] In cases of dispute between a society and a member no action lies in Civil Court. (Vol 11) 1924 Lah 418 (420) (DB) (Vol 24) 1937 Lah 268 (269) (Vol 22) 1935 Lah 947 (948) (Vol 13) 1926 Lah 547 (547).

[57] An award granted under the Act is to be executed in the same manner as a decree of a civil Court. (Vol 24) 1937 Lah 63 (64).

(H) *U. P. Rules.*

[58] Member owing money to co-operative society dying—Dispute whether certain person represented deceased referred to arbitration—Arbitrator held had no jurisdiction to pass personal decree against such person and suit by such person for declaration that property was not liable to attachment in execution of such decree was not barred by S. 233 (m), U. P. Land Revenue Act. (Vol 27) 1940 All 482 (484).

[59] Where dispute referred to arbitration is still pending, a fresh reference to another arbitrator is not competent and must be regarded as of no legal effect upon the rights of the parties. (Vol 28) 1941 Oudh 315 (319) : 16 Luck 658 (DB).

[60] A reference to arbitration under the provisions of the second schedule of the C. P. Code, is entirely distinct from the procedure contemplated by R. 20 of the Rules. (Vol 12) 1925 All 356 (358) : 47 All 374 (DB).

[61] The provisions of R. 20 (7) (i) (ii) and (iii) refer merely to defects of the procedure and do not invalidate an award by reason of such defects or irregularities. Even if an award is invalid on the ground that it was antedated or had been made after the expiration of the time fixed for making the award or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting it aside is by means of an appeal to the Assistant Registrar under R. 20 (12) (i). (Vol 28) 1941 Oudh 315 (318) : 16 Luck 658 (DB).

[62] The bar of jurisdiction of a Civil Court created by R. 20 (12) (ii) is not absolute but limited only. A civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction. (Vol 28) 1941 Oudh 315 (321) : 16 Luck 658 (DB).

4. Other rules.—[1] Rules framed under S. 43 of the Act are not *ultra vires* merely because they deprive a mortgagor of his right to a period of six months to pay up the mortgage decree. (Vol 20) 1933 Nag 211 (218) (DB).

[2] Rule 25—Failure to give intimation of loan over Rs. 1000 by society to Registrar as provided by Rule 25 does not invalidate loan. (Vol 32) 1945 Cal 350, (354) (DB).

[3] Rule 26 (c)—This rule restricts the powers given by S. 32, Civil P. C., to those given in the sub-rule. Hence in whatever capacity a person may have been summoned, the liquidator has no power either to ask for security or to impose a sentence of imprisonment or fine for his failure to furnish security. (Vol 26) 1939 Lah 357 (358) : I L R (1939) Lah 192 : 40 Cri L Jour 791.

Miscellaneous.

44. (1) All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any costs awarded to the Government under section 37, may be recovered in the same manner as arrears of land-revenue.

(2) Sums due from a registered society to Government and recoverable under sub-section (1) may be recovered, firstly, from the property of the society; secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability and, thirdly in the case of other societies, from the members.

45. Notwithstanding anything contained in this Act, the "[Provincial Government] may, by special order in each case and subject to such conditions, if any, as it may impose, exempt any society from any of the requirements of this Act as to registration.

Power to exempt societies from conditions as to registration.
[a] Substituted by A. O. for "Local Government".

46. The "[Provincial Government] may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

Power to exempt registered societies from provisions of the Act.
[a] Substituted by A. O. for "Local Government".

47. (1) No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the "[Provincial Government]".

Prohibition of the use of the word "co-operative".
Provided that nothing in this section shall apply to the use by any person or his successor in interest of any name or title under which he traded or carried on business at the date on which this Act comes into operation.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to fifty rupees, and in the case of a continuing offence with further fine of five rupees for each day on which the offence is continued after conviction therefor.

[a] Substituted by A. O. for "Local Government".

Indian Companies Act, 1882, not to apply. **48.** The provisions of the "Indian Companies Act, 1882, shall not apply to registered societies.

[a] See now the Indian Companies Act, 1913 (7 [VII] of 1913).

49. Every society now existing which has been registered under the Co-operative Credit Societies Act, 1904, shall be deemed to be registered under this Act, and its by-laws shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

Section 43 (contd.)

[4] Rule 28 (8) refers to the auditor's report and not to his oral evidence. (Vol 25) 1938 Cal 394 (398) : ILR (1938) 2 Cal 144.

[5] Rule 137 (i) (U. P.).—Rule 137 merely provides summary procedure for realisation of money.—It does not invest debt due to co-operative bank with character of land revenue due to the Crown. Bank cannot claim substantive right of priority by reason of R. 137 (i). (Vol 27) 1940 All 188 (189) : I L R (1940) All 181 (DB).

5. Rule and bye-law. — [1] Ordinarily a rule, which is as effective as a section of the Act, must be followed in preference to a bye-law if there is a conflict between the two. (Vol 25) 1938 Lah 8 (10) (DB).

Section 44—Note 1

[1] Decree against society cannot be executed against members before winding up. (Vol 21) 1934 Mad 181 (182) (DB).

[2] Reading S 44 with S. 128 of C. P. Land Revenue Act, an Agriculturist's house is not exempt from being sold for debt to society. (Vol 14) 1927 Nag 217 (218) : 23 Nag L R 86.

[3] Composite award passed by the Registrar against the Society and its members is not void — Award not challenged by the judgment-debtor — Sale under the

award which followed it is not void and ineffective. (Vol 30) 1943 Nag 7 (8, 9) : ILR (1942) Nag 685.

[4] According to the strict meaning of the words "in the same manner as arrears of land revenue" a Revenue Officer cannot proceed under Ss. 46 and the following of the Burma Land and Revenue Act, against any land belonging to the defaulter, unless the amount due from him is due on account of the land sought to be sold. (Case under S. 51, Burma Co-operative Societies Act, 1927). (Vol 27) 1940 Rang 240 (242) : 1940 Rang L R 230.

[5] Sale proceeds in the hands of the Collector are not liable to attachment at the instance of other creditor — Principle of S 73, Civil P. O., cannot apply. (Case under S. 59 (b), Bombay Co-operative Societies Act, 1925). (Vol 25) 1938 Sind 157 (159, 160) : I L R (1939) Kar 104.

Section 49—Note 1

[1] Bye-law framed under old Act 10 of 1904 giving rights and imposing liabilities of deceased member on successor-in-interest who is elected as member of society is not *ultra vires* not being inconsistent with express provision of the new Act — Person so elected must pay debts of deceased though exceeding assets left by him. (Vol 2) 1915 Oudh 15 (16) : 18 Oudh Cas 157.

50. [Repeal] *Repealed by the Second Repealing and Amending Act, 1914 (17 [XVII] of 1914), S. 3 and Sch. II.*

[THE INDIAN] COPYRIGHT ACT, 1914.

(ACT III of 1914).

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THE FIRST SCHEDULE. — PORTIONS OF THE COPYRIGHT ACT APPLICABLE TO BRITISH INDIA.

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STATEMENT OF OBJECTS AND REASONS.

"The question of the amendment of the Indian Copyright Act (XX of 1847) has been considered on several occasions since 1864 on the ground that the Act was incomplete and did not provide, among other matters, for the protection of copyright in photographs, translations, newspaper, telegrams etc. Legislation, however, has been postponed in view of the possibility of an amendment of the English Acts on the subject of copyright.

In 1908 a Conference and Convention, to which Great Britain was party, was held in Berlin with the object of bringing the domestic laws of all countries concerned into harmony with one another so as to obtain international uniformity of treatment and the ratification of that convention involved certain changes in the English Law. Its provisions were examined by a strong departmental committee appointed by the Board of Trade which came to the unanimous conclusion that the Berlin convention should be accepted by Great Britain with as few reservations as possible.

An Imperial Copyright Conference was subsequently convened in 1910 containing representations of the self-governing dominions and of the India Office, Colonial Office, etc. It endorsed the recommendation of the Board of Trade Committee and recommended that an Act dealing with the essentials of Imperial Copyright Law should be passed by the Imperial Parliament and that this Act should be expressed to extend to all British possessions subject to the rights of self-governing dominions and possessions to modify or add to its provisions by legislation in certain cases affecting only procedure and remedies.

A Draft Bill was approved by the Conference and

eventually passed into law as the Copyright Act, 1911 (1 and 2 Geo. V, ch. 46) which came into operation in the United Kingdom on 1st July 1912.

The important changes in the Act are:—

(i) the abolition of the formality of registration of copyright;

(ii) the extension of the term of copyright from 42 years to one of life and 50 years subject to certain conditions;

(iii) the extension of the scope of copyright;

(iv) the substitution of one Act for several on the subject of copyright.

The Government of India considered that the early introduction of the Act into India was desirable both for Imperial and International as well as domestic reasons and consulted Local Governments in regard to the modifications and additions referred to in S. 27 of the Act that might be necessary to suit the special conditions of India. In view, however, of difficulties that were experienced in England through the non-proclamation in India of the Act of 1911 and having regard to the serious hardship and loss which might thereby be inflicted on English authors, the Act was brought into force in India by proclamation in the Gazette of India on the 31st October 1912 under S. 37 (2) (d) of the Act, the question of modifications or additions being postponed for subsequent consideration on receipt of the views of Local Governments. These are in substantial agreement with those of the Government of India who propose by virtue of the powers conferred by S. 27 of the Act of 1911 to pass the Draft Bill which embodies the modifica-

tions in and additions to the Act which are considered desirable, together with certain formal and necessary alterations due to the difference between English and Indian administration and procedure.

It will be observed that the changes proposed are as

few as possible in view of the desirability of securing that uniformity throughout the Empire which was advocated by the Imperial Copyright Conference of 1910. . . ."

—Gazette of India, 1913, Part V, page. 163.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act 4 of 1924.

—Adapted by A. O.

—Repealed in part by Act 12 of 1927.

[THE INDIAN] COPYRIGHT ACT, 1914.

(ACT III OF 1914.)^a

[24th February, 1914.]

An Act to modify and add to the provisions of the Copyright Act, 1911.

WHEREAS it is expedient to modify and add to the provisions of the ^bCopyright Act, 1911, in its application to British India; It is hereby enacted as follows :—

[a] For Report of Select Committee, see Gazette of India 1914, Pt. V, p. 23; and for Proceedings in Council, see *ibid.*, 1913, Pt. VI, p. 515, *ibid.*, 1914, Pt. VI, pp. 12 and 369. [b] 1 & 2 Geo. V, c. 46, see Collection of Statutes relating to India, Vol. II and *infra*.

CHAPTER I.

PRELIMINARY.

Short title and extent. 1. (1) This Act may be called the Indian Copyright Act, 1914.

(2) It extends to the whole of British India including British Baluchistan, the District of Angul^a and the Sonthal Parganas.

[a] Now two districts, *viz.*, the Khondmals District and the Angul District. This Act has been^a declared to be in force in these two districts by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch., and the Angul Laws Regulation 1936 (5 [V] of 1936), S. 3 and Sch., respectively.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "the Copyright Act" means the Act of Parliament entitled the ^aCopyright Act, 1911; and

(2) words and expressions defined in the Copyright Act have the same meanings as in that Act.

[a] 1 & 2 Geo. V, c. 46, see Collection of Statutes relating to India, Vol. II and *infra*.

CHAPTER II.

CONSTRUCTION AND MODIFICATION OF THE COPYRIGHT ACT.

3. In the application to British India of the Copyright Act (a copy of which Act, except such *Application of Copyright Act to* of the provisions thereof as are expressly restricted to the United *British India with adaptations.* Kingdom, is set out in the First Schedule), the following modifications shall be made, namely :—

- (1) the powers of the Board of Trade under section 3 shall, in the case of works first published in British India, be exercised by the ^a[Central Government];
- (2) the powers of the Board of Trade under section 19 shall, as regards records, perforated rolls and other contrivances, the original plate of which was made in British India, be exercised by the ^a[Central Government]; and the confirmation of Parliament shall not be necessary to the exercise of any of these powers;
- (3) the references in section 19, sub-section (4), and in section 24, sub-section (1), to arbitration shall be read as references to arbitration in accordance with the law for the time being in force in that part of British India in which the dispute occurs;
- (4) as regards works the authors whereof were at the time of the making of the works resident in British India, and as regards works first published in British India, the reference in section 22 to the ^bPatents and Designs Act, 1907, shall be construed as a reference to the Indian Patents and Designs Act, 1911, and the reference in the said section to section 86 of the ^bPatents and Designs Act, 1907, shall be construed as a reference to section 77 of the Indian Patents and Designs Act, 1911;
- (5) as regards works first published in British India, the reference in section 24, sub-section (1), proviso (a), to the London Gazette and two London newspapers shall be construed as a reference to the Gazette of India and two newspapers published in British India; and the reference in proviso (b) of the same sub-section of the same section to the 26th day of July, 1910, shall, as regards works the authors whereof were at the time of the making

of the works resident in British India, and as regards works first published in British India, be construed as a reference to the 30th day of October, 1912.

[a] *Substituted by A. O., for "Governor-General in Council".* [b] 7 Edw. VII, c. 29.

Modification of copyright as regards translation of works first published in British India.

4. (1) In the case of works first published in British India, copyright shall be subject to this limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of the first publication of the work:

Provided that if within the said period the author, or any person to whom he has granted permission so to do, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

(2) For the purposes of sub-section (1) the expression "author" includes the legal representative of a deceased author.

OBJECTS AND REASONS.

"Under Ss. 1 and 3 of the English Act of 1911 the term for which the copyright subsists in translation is the life of the author and a period of fifty years after his death. The special linguistic conditions of India render desirable a substantial relaxation of this provision. The languages spoken in India are so numerous and differ so widely that the conditions which prevail cannot be compared with those in most European countries and vernacular translations from English and from one vernacular to another are not only common

but serve the usual purpose of disseminating knowledge. Accordingly, translations of works first published in British India are permitted after the expiry of ten years from the date of first publication. However, if within this period of ten years the author himself publishes a translation of the work in any particular language, the limitation upon copyright prescribed by this section shall not apply to translation into that particular language. This provision is in accordance with the provisions of the Berne Convention." — See S. O. R. and S. C. R.

5. In the application of the Copyright Act to musical works the authors whereof were at the time of the making of the works resident in British India, or to musical works first published in British India, the term "musical work" shall, save as otherwise expressly provided by the Copyright Act, mean "any combination of melody and harmony, or either of them, which has been reduced to writing".

OBJECTS AND REASONS.

"The provisions of S. 19 of the English Act of 1911 are new, and in view of the peculiar conditions of Indian music objections were urged against the applications of this section *in toto* to Indian works. It was pointed out that it was impossible in most cases to identify the original composer or author and that the majority of Indian melodies have not been written in staff notation except through the medium of the phonograph and are subject to infinite variety of notation and tune. If, under these circumstances, S. 19 was adopted with its

retro-active principle there might be fictitious claims of ownership in musical works and much confusion and undesirable litigation. To make it clear that in order to fall within the definition of 'musical work' music must have been graphically represented, the Legislature has adopted *mutatis mutandis* the definition of the term 'musical work' contained in the English Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. VII, c. 15), namely, 'musical work means any combination of melody and harmony, or either of them, printed, reduced to writing,'. — See S. O. R.

6. (1) Copies made out of British India of any work in which copyright subsists which if made in British India would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Chief Customs officer, as defined in the Sea Customs Act, 1878, that he is desirous that such copies should not be imported into British India, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be prohibited imports within the meaning of section 18 of the Sea Customs Act, 1878.

(2) Before detaining any such copies, or taking any further proceedings with a view to the confiscation thereof, such Chief Customs officer, or any other officer appointed by [the Chief Customs-authority] in this behalf, may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself, in accordance with these regulations, that the copies are such as are prohibited by this section to be imported.

(3) The [Central Government] may, by notification in the [Official Gazette] make regulations, either general or special, respecting the detention and confiscation of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and confiscation; and may, by such regulations, determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) Such regulations may apply to copies of all works the importation of copies of which is

prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant re-imbursing the ^d[Central Government] all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention, and may provide that notices given under the Copyright Act to the Commissioners of Customs and Excise of the United Kingdom, and communicated by that authority to any authority in British India, shall be deemed to have been given by the owner to the said Chief Customs officer.

(6) This section shall have effect as the necessary modification of S. 14 of the Copyright Act.

[a] *Substituted by the Central Board of Revenue Act, 1924 (4 [IV] of 1924), S. 4 and Schedule for "the Local Government"*. [b] *Substituted by A. O. for "Governor-General in Council"*. [c] *Substituted by A. O. for "Gazette of India"*. [d] *Substituted by A. O. for "Secretary of State for India in Council"*.

CHAPTER III.

PENALTIES.

Offences in respect of infringing copies.

7. If any person knowingly —

- (a) makes for sale or hire any infringing copy of a work in which copyright subsists; or
- (b) sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work; or
- (c) distributes infringing copies of any such work, either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
- (d) by way of trade exhibits in public any infringing copy of any such work; or
- (e) imports for sale or hire into British India any infringing copy of any such work;

he shall be punishable with fine which may extend to twenty rupees for every copy dealt with in contravention of this section, but not exceeding five hundred rupees in respect of the same transaction.

8. If any person knowingly makes, or has in his possession, any plate for the purpose of

Possession of plates for purpose of making infringing copies.

making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be punishable with fine which may extend to five hundred rupees.

9. If any person, after having been previously convicted of an offence punishable under S. 7

Punishment on second conviction.

or S. 8, is subsequently convicted of an offence punishable under either of these sections, he shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Power of Court to dispose of infringing copies or plates for purpose of making infringing copies.

10. (1) The Court before which any offence under this Chapter is tried may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies, or plates for the

Section 7 — Note 1

[1] Offence described in S. 7 (a) is complete as soon as the book infringing the copyright is printed and does not depend for its completion upon the ensuing of any consequence as is contemplated by S. 179 Criminal Procedure Code (Vol 4) 1917 Lah 335 (336) : 1916 Pun Re No 28 : 18 Cr L Jour 353

[2] Criminal proceedings for infringement started by order not disclosing under which clause of S. 7 it was started — Accused also did not know it — *Held* that accused had not got a fair trial. (Vol 21) 1934 Pat 522 (523) : 36 Cr L Jour 30.

[3] Infringement complaint in respect of work published when Act XX of 1847 was in force — Plea of non-payment of fee for registration required under the former Act as bar to the maintainability of action — *Held* plea was not valid as the procedure for payment of fees had no place in the present Act. (Vol 14) 1927 Mad 981 (983) : 51 Mad 180 : 28 Cr L Jour 957.

[4] Where the Court has proceeded on a wrong view

of the law in acquitting the accused and where the matter is of great importance to the complainant in his position as author of the book which will be pirated by another who will secure for himself the gains that ought legitimately to go to the petitioner, a retrial should be ordered. (Vol 14) 1927 Mad 981 (983) : 51 Mad 180 : 28 Cr L Jour 957.

[5] The complainant alleged in his complaint that certain pictures were entrusted to the accused for the preparation of blocks and printing them, that he clandestinely used the said blocks for printing more pictures and that he did not return the blocks. *Held*, that complaint disclosed an offence under Ss. 7 and 8 and its dismissal on the ground that the dispute is of a civil nature could not be sustained. (Vol 29) 1942 Mad 124 (124).

Section 10 — Note 1

[1] Clause (2) provides for special appeal on order under cl. (1). (Vol 21) 1934 Pat 522 (523) : 36 Cr L Jour 30.

purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright, or otherwise dealt with as the Court may think fit.

(2) Any person affected by an order under sub-section (1) may, within thirty days of the date of such order, appeal to the Court to which appeals from the Court making the order ordinarily lie; and such appellate Court may direct that execution of the order be stayed pending consideration of the appeal.

11. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class *Cognizance of offences.* shall try any offence against this Act.

Saving in case of infringement by construction of building.

12. The provisions of this Chapter shall not apply to any case to which s. 9 of the Copyright Act, regarding the restrictions on remedies in the case of a work of architecture, applies.

CHAPTER IV.

MISCELLANEOUS.

Courts having civil jurisdiction regarding infringement of copyright.

13. Every suit or other civil proceeding regarding infringement of copyright shall be instituted and tried in the High Court or the Court of the District Judge.

Effect of non-registration under Act XX of 1847.

14. No suit or other civil proceeding instituted after the 30th of October, 1912, regarding infringement of copyright in any book the author whereof was at the time of making the book resident in British India, or of any book first published in British India, shall be dismissed by reason only that the registration of such book had not been effected in accordance with the provisions of the Indian Copyright Act, 1847.

OBJECTS AND REASONS.

This section has been added in view of the decision in *Evans v. Morris* (1913) W. N. 58—See S. O. R.

15. [Repeals.] Repealed by the Repealing Act, 1927 (12 [XII] of 1927), S. 2 and Sch.

THE FIRST SCHEDULE.

PORTIONS OF THE COPYRIGHT ACT APPLICABLE TO BRITISH INDIA.

(See Section 3.)

COPYRIGHT ACT, 1911.

[1 & 2 GEO. V, CH. 46.]

ARRANGEMENT OF SECTIONS.

PART I.

IMPERIAL COPYRIGHT.

Rights.

SECTIONS.

1. Copyright.
2. Infringement of copyright.
3. Term of copyright.
4. Compulsory licences.
5. Ownership of copyright, etc.
- Civil Remedies.*
6. Civil remedies for infringement of copyright.
7. Rights of owner against persons possessing or dealing with infringing copies, etc.
8. Exemption of innocent infringer from liability to pay damages, etc.
9. Restriction on remedies in the case of architecture.

SECTIONS

10. Limitation of actions.
- * * *

Importation of Copies.

14. Importation of copies.

Delivery of Books to Libraries.

15. Delivery of copies to British Museum and other libraries.

Special Provisions as to Certain Works.

16. Works of joint authors.
17. Posthumous works.
18. Provisions as to Government publications.
19. Provisions as to mechanical instruments.
20. Provision as to political speeches.

Section 13 — Note 1

[1] Madras City Civil Court has no jurisdiction to

entertain and try any suit for infringement of a copyright. (Vol 24) 1937 Mad 94 (94).

SECTIONS.

21. Provision as to photographs.
22. Provisions as to designs registrable under 7 Edw. VII, c. 29.
23. Works of foreign authors first published in parts of His Majesty's dominions in which Act extends.
24. Existing works.

Application to British Possessions.

25. Application of Act to British dominions.
26. Legislative powers of self-governing dominions.
27. Power of Legislatures of British possessions to pass supplemental legislation.
28. Application to protectorates.

SECTIONS.

PART II.

INTERNATIONAL COPYRIGHT.

29. Power to extend Act to foreign works.
30. Application of Part II to British possessions.

PART III.

SUPPLEMENTAL PROVISIONS.

31. Abrogation of common law rights.
32. Provisions as to Orders in Council.
33. Saving of university copyright.
34. Saving of compensation to certain libraries.
35. Interpretation.
36. Repeal.
37. Short title and commencement.

SCHEDULES.

CHAPTER 46.

An Act to amend and consolidate the Law relating to Copyright.

[16th December, 1911.]

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows :—

PART I.

IMPERIAL COPYRIGHT.

Rights.

1. (1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

SCHEDULE I — SECTION 1 — Synopsis

1. Original literary, dramatic, musical and artistic work.
2. Author.
3. Sub-section (2).
4. "Substantial part thereof."

1. Original literary, dramatic, musical and artistic work. — [1] The work "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought and in the case of "literary work" with the expression of thought in print or writing. The originality which is required relates to the expression of the thought but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author. (Vol 11) 1924 P O 75 (85) : 51 Ind App 109 : 48 Bom 808 (PC) & (Vol 25) 1938 All 266 (268) : 1 L R (1938) All 370 (DB). (Ideas are not protected by copyright but by patent laws. Copyright protects the particular expression of ideas).

[2] The compiler of a work in which absolute originality is of necessity excluded is entitled to make use of preceding works upon the subject and where he bestows such mental labour upon what he has taken and subjects it to such revision and correction as to produce an original result he will not be committing a piracy. (Vol 25) 1938 All 266 (268, 269) : 1 L R (1938) All 370 (DB).

[3] New book produced by author after further studies and research — Fresh incidents and details, taken from works published before as well as after book, copyright

of which alleged to be infringed — No infringement of copyright held committed. (Vol 21) 1934 Lah 777 (780) : 16 Lah 103 (DB).

[4] Design registered as "The christograph—The Christian's Puzzle—Suitable for all sects and denominations"—Design consisting of envelope containing card-board piece casting a shadow of a well-known picture when held up — Design is not a literary work. (1888) 52 L J Ch 107 (108).

[5] Though letters may approach the character of a literary work, every private letter cannot be described as a literary work. (1813) 35 E R 225 (229).

[6] Copyright subsists in new corrections and addition made to an old work. (1801) 102 E R 138 (139).

[7] Old traditional poem renovated—Result is original literary work. (Vol 25) 1938 Cal 594 (595).

[8] There is no copyright in book consisting of extracts from a larger work linked together by connecting words, but there may be copyright in notes to such extracts. (1923) 93 L J P C 113 (121).

[9] Milton's poems with Dr. Newton's notes published with the addition of some commentary—Copyright was infringed. (1818) 36 E R 1017 (1020).

[10] The author of a book the subject-matter of which is arranged in a new way totally different from the earlier works on the subject can get a copyright in the work. (Vol 8) 1921 All 95 (96) : 43 All 412 (DB).

[11] Generally a title of a composition by itself cannot be the subject-matter of the copyright though in certain cases it may be so extensive and important as to require protection against being copied. (Vol 27) 1940 P O 55 (58) (PC).

[12] Adopting title of a musical composition to a talkie film does not constitute an infringement of the

- (a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid ; and
- (b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid ;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ; if the work is unpublished, to publish the work or any substantial part thereof ; and shall include the sole right—

- (a) to produce, reproduce, perform, or publish any translation of the work ;
- (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work ;
- (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise ;
- (d) in the case of a literary, dramatic or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered ;

and to authorise any such acts as aforesaid.

(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

Sch. I — Section 1 (*contd.*)

performing rights in the composition where not a word of the composition is repeated in the film. (Vol 27) 1940 P C 55 (57) (PC).

[13] Pictorial album is not a book — Copying title of such album ("castle album") is no infringement of copyright. (1886) 33 Ch D 546 (550).

[14] Title of a novel—No originality or invention displayed in the title—There can be no copyright. (1881) 50 L J Ch 809 (814).

[15] Publisher of trade advertisements classified under different headings has copyright in such headings though not in the advertisements themselves. (1893) 1 Ch 218 (225).

[16] Copyright subsists in a translation. There is no copyright in specifications of patents. (1814) 35 E R 408 (408).

[17] A's work translated into German — B retranslating it into English — Copyright is infringed. (1858) 22 L J Ch 457 (464).

[18] Though copyright might not include exclusive right of translation, author of book who made translation of it is entitled to copyright in it as if it were original work. (Vol 2) 1915 All 331 (331) : 16 Cr L Jour 656.

[19] Illustrated catalogue for advertisement and not for sale and without letter press is a book and subject-matter of copyright. (1882) 21 Ch D 869 (879).

[20] Person employing another to compile a book of designs has himself the copyright in the work. Copyright may subsist in an advertising catalogue. (1875) 19 Eq 623 (626).

[21] A subsequent compiler of a directory or a guide book cannot adopt information contained in previous works on the same subject, and must work out the information by original enquiry. (1866) 1 Eq 697 (701, 702).

[22] Registrar of London Coal Market publishing statistics of coal imports in annual sheets priced at £835 per annum — Lord of the Treasury publishing

mineral statistics priced at 2s. 6d, including and acknowledging the registrar's statistics — Registrar, held, was entitled to an injunction. (1867) 3 Eq 718 (724).

[23] Telegraphic code-word book substantially copied for private use—Copyright is infringed. (1884) 26 Ch D 637 (643).

[24] Tables of information in a diary reproduced without making enquiry about the existence of copyright—Copyright is infringed. (1943) 1 All E R 323 (327).

[25] Diary called "The Birthday Scripture Text Book" interleaved with blank space against each day with a text of scripture appended and designed to record birthday's of friends—Subsequent publication of work called "The Children's Birthday Text Book," can be restrained. (1872) 14 Eq 431 (433).

[26] Though there can be nothing to prevent a person from publishing a work like a Court calendar, the making of a *verbatim* copy of another work without the application of original labour can be restrained. (1809) 33 E R 987 (988).

[27] East India calendar published by A — B copying the work and selling at a lesser price — Copyright is infringed, though there can be no copyright in works of this nature generally. (1806) 33 E R 105 (106).

[28] Reporter of law reports has no copyright in respect of reports of judgments but has the protection of law in selecting and reporting cases which he obtains by expenditure of time, labour and money. (Vol 2) 1915 Cal 112 (112).

[29] *Verbatim* copying of head-notes or marginal notes inserted in digest of cases—Copyright is infringed. (1855) 24 L J C P 175 (181).

[30] While there may be no copyright in news, the particular form of language in which information is conveyed is the subject of copyright. (1892) 3 Ch 489 (495).

[31] To constitute a true and equitable abridgment, the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment is

Sch. I — Section 1 (*contd.*)

an exertion of the individuality employed in moulding and transmuting a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader. Independent labour must be apparent and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship, and the result will not be an abridgment entitled to protection. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgment requires the exercise of mind and labour, skill and judgment brought into play and the result is not merely copying. To constitute a proper abridgment the arrangement of the book abridged must be preserved, the ideas must also be taken and expressed in language not copied but condensed. The mere process of selecting passages from works readily accessible to the public is not, but difficulty in obtaining access to the original or skill manifested in making or arranging the selection is sufficient to give the character of an "original literary work" to the selection. (Vol 11) 1924 P C 75 (79, 80): 48 Bom 308; 51 Ind App 109 (PC). ✕ (Vol 8) 1921 Bom 463 (469) (DB). (To copy certain passages and omit others, so as to reduce the volume in bulk is not such an abridgment as the Court would recognize as sufficiently original to protect the author.)

[32] University lectures taken down and published by student. Professor can restrain publication. (1888) 57 L J P C 2 (9).

[33] Printed music is to be considered as a book. (1835) 160 E R 117 (122).

[34] *P* originating name of a play, and of leading characters and supplying some lines in the dialogue—*T, H* and *V* writing music and lyrics: *Held*, that *P*'s contribution could not be the subject-matter of copyright and he could not be called one of the joint authors. (1921) 1 Ch 503 (511).

[35] *A* producing a foreign drama but introducing two scenes of his own—*B* producing same foreign drama with *A*'s scenes included: *Held*, in the circumstances of the case, there was no infringement of copyright. (1878) 1876 App Cas 488 (499).

[36] There can be a separate copyright in a building as distinct from a copyright in the plans on which the building is based and it vests in the architects. (1941) 3 All E R 144 (147, 148).

[37] Copyright subsists in a photograph taken from a picture. (1869) 4 QB 715 (723).

[38] The copyright of ordinary photographs of an actress as a stationary figure taken by a film company for its own purpose and with its own apparatus belongs to that company. (Vol 26) 1939 Rang 266 (270): 1939 Rang L R 121.

[39] Drawing representing a hand holding a pencil and making a cross within a square is not an artistic work and there can be no copyright in it. (1890) 25 QBD 99 (104).

2. Author.—[1] Reporter of a speech delivered in public is the author of his own report. (1900) 1900 App Cas 539 (551).

[2] Person controlling the operation of taking a photograph is the "author" of it and not the person who does mechanical acts under his control. (1895) 2 Ch 531 (535).

[3] Proprietors of photographic firm sending an employee to take a photograph—The proprietors are not the "authors" of the photograph. (1889) 11 QBD 627 (633).

[4] *A* agreeing with *B* that *B* should adapt a foreign play, *A* to have the right of representing it on stage in

London and *D* in provinces: *Held*, *A* by employing *B* did not become owner of copyright in the adaptation. (1856) 25 L J C P 127 (131).

[5] The term "author" applies also to a foreigner residing in the United Kingdom. (1868) 3 H L 100 (115).

[6] Whether a right of survivorship would or would not apply to a copyright in books published by one coparcener, the right can be inherited by the heirs of the author who owned the copyright. (Vol 8) 1921 All 95 (96): 43 All 412 (412) (DB).

3. Sub-section (2).—[1] Even before the Copyright Act of 1911, the owner of a copyright had the exclusive right to representation and performance of his work and not only to the printing and publication thereof. (Vol 21) 1934 Cal 671 (672).

[2] It is not only quantity of the matter alleged to have been copied but the value of that portion, that has to be looked to. (1838) 40 E R 1110 (1110).

[3] The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether a work is a colourable imitation of another is a question of fact. Similarity is a great point to be considered but mere similarity is not enough. A conglomeration of similarities which cannot be mere coincidence is evidence of infringement. (Vol 13) 1931 Cal 233 (236) (DB).

[4] If a defendant, who is undoubtedly at liberty to draw upon common sources of information, saved himself the trouble and labour requisite for collecting that information by adopting the plaintiff's work in general plan, style and arrangement with colourable variation, he is guilty of infringement of plaintiff's copyright even though the plaintiff's work is based on materials which are common property. ('85) 61 Cal L Jour 573 (575) (DB).

[5] When in a book published by the defendant, not only references of significance are copied from the plaintiff's book, but there is absolute identity of information and language that it appears that the work of the defendant is a copy of the plaintiff's in a high degree, the plaintiff is entitled to succeed in an action for infringement of copyright. (1922) 67 Ind Cas 983 (984) (Lah).

[6] Similarity in two dramatic works due to coincidence, both works being derived independently from common stock of dramatic ideas—There is no infringement of copyright. (1911) 28 T L R 69 (72).

[7] No appreciable likeness of words in two plays—Likeness of stage situation and scenic effect ought not to be taken into consideration. (1908) 77 L J K B 577 (582).

[8] A photograph of a lion reproduced in posters with minor change—*Held*, there had been an infringement of copyright. (1898) 14 T L R 550 (550, 551).

[9] Proprietor of copyright in two paintings entering description of the same under S. 4, (25 & 26 Vict., c. 68)—Person making and selling photographic copies of the same, *held*, would be convicted under S. 6 of the same Act. (1868) 3 Q B 387 (395).

[10] Music broadcasts diffused in factory by means of loudspeakers—Act is "performance in public and an infringement of the performing rights in such pieces. (1943) 1 All E R 413 (417, 418).

[11] As regards the position of broadcasters, so far as infringement of copyright is concerned, it is sufficient for them to show that they have "authorised" the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. (Vol 27) 1940 P C 111 (113) (PC).

[12] Cinema company engaging film actress placing order for advertisement with Cinema Journal—Publisher

2. (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:—

- (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:
- (ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:

Sch. I — Section 1 (*contd.*)

of Journal using advertisement by reproducing her photograph taken by another company for their use.—The proprietor of the first company knowing or having reason to suspect that the publisher will so use the photograph in infringement of copyright.—There is authorisation of the infringement by him. (Vol 26) 1939 Rang 266 (271, 272): 1939 Rang L R 121.

[13] Representation of a picture by means of a *tableau vivant*, cannot be restrained. (1894) 2 Ch 1 (6).

[14] The copyright exists from the moment the work is made. (1887) 19 Q B D 629 (636).

[15] In England an author, publisher or painter had no copyright in his productions at Common law before the Statute of Anne (8 Anne, c. 19). (Vol 7) 1920 Bom 84 (85): 44 Bom 720 (DB).

[16] The Fine Arts Copyright Act of 1862 (25 & 26 Vict., c. 68) does not extend to any part of the British Dominions outside the United Kingdom. (Vol 7) 1920 Bom 84 (84, 85): 44 Bom 720 (DB).

4. "Substantial part thereof".—[1] Picture of winged female kneeling on a rock and looking into the water below, reproduced in a magazine without the background and the wings.—Copyright, held, was infringed. (1905) 74 L J Ch 304 (309).

[2] It is a piracy to take a great portion of a melody such as Seventeen Bars in succession. (1835) 4 L J Ex Eq 2 (22).

[3] A man cannot, under the pretence of quotation, publish either the whole or part of another's work, though he may use, what it is in all cases very difficult to define, fair quotation. (1810) 11 R R 118 (120) & (1826) 38 E R 380 (385).

[4] Cartoons copied, some with and some without descriptive writing.—Object of larger work containing copies of the cartoons same as that of the originals.—Copyright is infringed. (1873) 8 Ex Ch 1 (7).

[5] *Prima facie*, an abridgment of a work was not, upto the year 1914, an infringement of copyright, if an abridgment was a fair and *bona fide* one and did not amount to reprinting of the work of the author. But the position seems now to have been considerably changed in view of the wider language employed in the Act of 1914. Now in order to decide whether a fair abridgment of the original work is or is not an infringement of copyright the test is whether or not it is a reproduction of the work or substantial part of it in any material form whatsoever. It may be that upto a certain limit when an abridgment is not more than a mere short synopsis index to other work there would be no infringement. On the other hand, when an abridgment is on such an extensive scale as to amount to a reproduction of a substantial part of the original work in a material form, it would undoubtedly be an infringement of copyright. (Vol 21) 1934 All 922 (924, 925) (DB).

[6] In the following English cases decided before 1914, it was held that a fair abridgment of the original work does not constitute infringement of copyright. (1801) 81 E R 817 (817). (Abridgment of Law Reports

leaving out arguments of the counsels and some other parts is not a fair abridgment.) & (1785) 28 E R 1235 (1235) & (1761) 27 E R 270 (271) & (1740) 26 E R 489 (490). (Colourable shortening for evading the statute cannot be called an abridgment.)

[7] Portion copied not substantial and material.—Copyright is not infringed. (1878) 3 App Cas 483 (498).

SCHEDULE I. — Section 2 — Note 1.

[1] Right to republish 90 songs composed by D sold to P — Subsequently D selling 47 songs to M, 40 of which were the same as those sold to P. In a suit by the former to restrain M, the second purchaser, from selling or publishing any of the songs, held, that since P had acquired an exclusive right to publish them any one publishing them without his consent will be infringing his copyright. (Vol 7) 1920 Mad 529 (531) (DB).

[2] The language of S. 2 is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempt to sell the same. Accordingly, an advertisement by the defendant claiming a right in a copyright which was owned by the plaintiff and offering to sell the same constitute an infringement of the right. (Vol 32) 1945 All 55 (57): 1 L R (1945) All 20.

[3] An infringement takes place not only when a book is reprinted but also when a book, in respect of which a copyright exists, is sold. There is a fresh cause of action in every sale of the book. (Vol 21) 1934 All 922 (927) (DB).

[4] Picture of delty — Infringement of — Test for detecting piracy is whether mistakes and deviations have been reproduced. (Vol 32) 1945 Bom 51 (53).

[5] In deciding whether there is an infringement of copyright in pictures, the question is whether the offending pictures are copies of substantial portions of the copyright pictures. The figures may have been reduced in the offending pictures and slight modifications may have been introduced or the clothes and colours may have been different but it is sufficient if the main figures have an identical pose. (Vol 15) 1928 Cal 859 (860): 30 Cr L Jour 16.

[6] The Court should be reluctant to sit as an expert to decide the question of infringement of copyright without the aid of the expert evidence. But in a case capable of construction, the Court should exercise a *prima facie* judgment upon it. The proper course, in ordinary circumstance, in such cases is to get the opinion of such experts who may be appointed as Commissioners to investigate and report on the matters in issue. (Vol 11) 1924 Cal 595 (597).

[7] In an action for breach of copyright intrinsic evidence to be derived from comparison of the two literary works must be of a most cogent force, though it may be sufficient and accepted in the face of direct evidence pointing the other way. Much stress cannot be laid upon the actual coincidences in two works by different authors in respect of the plan, scheme, phrasal identities and similar mistakes while deciding

- (iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art :
 - (iv) The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged :
 - (v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer ; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries :
 - (vi) The reading or recitation in public by one person of any reasonable extract from any published work.
- (2) Copyright in a work shall also be deemed to be infringed by any person who—
- (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire ; or
 - (b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright ; or
 - (c) by way of trade exhibits in public ; or
 - (d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Sch. I — Section 2 (*contd.*)

upon the question of infringement when such evidence can be explained on basis of authors having recourse to common source. (Vol 20) 1933 P C 26 (28, 29) (P C).

[8] List of selections of courses of study by a member of the Board of Studies of University—Publication of the list in the syllabus by the University : *Held* that the member retained no copyright in the selections inasmuch as when he laid the results of his skill and experience before the board and joined with the other members in preparing the syllabus for the examination he placed his labours unreservedly at the disposal of the university authorities : *Held* also, that when the University authorities published their syllabus they surrendered their copyright into the hands of the public. (Vol 9) 1916 All 216 (317) : 38 All 484 (D B).

[9] In suit for injunction for infringement of plaintiff's copyright in his almanac it was found that tables given in parties' almanacs agreed except in minutes and second, that calculations were admittedly worked out on *makrand* and that there were other almanacs resembling that of defendants : *Held*, that these findings were not sufficient to establish infringement, and that in previous years defendants purchased information for their almanacs from plaintiff did not affect the case. Weakness of defence does not compensate for want of proof of plaintiff's allegations ('10) 1910 Pun L B No. 95, page 273 (274, 275).

[10] Innocence is no defence to a charge of infringement under S. 2 (1)—Offence is complete even if the offender authorises infringement innocently. (Vol 17) 1930 P C 314 (317) (P C).

[11] Law restraining human enterprise should be liberally construed and therefore Copyright Act cannot be interpreted so as to shut out research and scholarship. (Vol 21) 1934 Lah 777 (781) : 16 Lah 103 (D B).

[12] The Court will not interfere where the value of the extract taken for the purpose of criticism is very minute and trifling. (1839) 8 L J Ch 141 (142).

[13] Broken and detached fragments from a literary work consisting of six pages out of forty for criticism — There is no infringement of copyright. (1817) 36 E R 679 (681).

[14] Proviso (iv) to S. 2 (1) allows only two passages from the works of the same author and not two poems out of each of many works published by the same author separately. (Vol 20) 1933 All 474 (476) : 55 All 564 (D B).

[15] Local body authorising infringement of a musical piece—Profits made applicable in relief of rate payers : *Held*, local body was acting for its private profit within the meaning of sub-s. (3). (Vol 17) 1930 P C 314 (318) (P C).

[16] "Lecture delivered in public" — As to political speeches, *see* Sch. I, S. 20.

3. The term for which copyright shall subsist shall, except as otherwise expressly provided *Term of copyright.* by this Act, be the life of the author and a period of fifty years after his death:

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act, thirty years, from the death of the author of a published work copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice, in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make "regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

[a] Regulations called the Indian Copyright Regulations, 1914, have been made under the proviso to S. 3 and in conjunction with sections 14 and 19 of this Act as modified in its application to British India, see General Statutory Rules and Orders, Vol. IV, p. 480.

4. If, at any time after the death of the author of a literary, dramatic or musical work which *Compulsory licences.* has been published or performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit.

Ownership of copyright, etc. 5. (1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that—

(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright;

(b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations, to the United Kingdom or any self-governing

Schedule I, Section 3 — Note 1

[1] In the case of any works in existence before this Act, the question which has to be examined to determine whether there is copyright under this Act in respect of such work, is to see whether copyright under the old Act (1847) was subsisting when this Act came into force. (Vol 18) 1931 All 353 (354) : 32 Cri L Jour 814.

[2] The powers of the Board of Trade under this section are, in the case of works first published in British India, to be exercised by the Central Government, see the Indian Copyright Act, 1914, S. 3 (1).

[3] For modification in the case of translations of works first published in British India, see the Indian Copyright Act, 1914, S. 4 (1).

[4] "Except as otherwise expressly provided" — For such exceptions, see Sch. I, Ss. 16 to 19 and 21.

Schedule I, Section 5 — Note 1

Sub-section (1), clause (a). — [1] Husband can res-

train photographer from exhibiting the photograph of his wife and children in public. The inference being that wife acts as agent of her husband in having herself and children photographed. (1901) 18 TLR 126 (126).

Sub-section (1), clause (b). — [2] Publisher agreeing to pay author for writing a story on lines of a synopsis approved by them—Arrangement is equivalent to employment. (1906) 2 Ch 550 (561).

[3] Proprietor of trade directory getting headings of classified advertisements prepared by some persons on payment—Copyright rests in the proprietor. (1893) 1 Ch 218 (225).

[4] Author and designer of a drama employing and paying a person to compose music for the same—Music so composed becomes the property of the author and designer. (1859) 29 LJ CP 20 (24, 25).

[5] Proprietor of encyclopaedia employing and paying a person to write articles for the same has the copyright of the articles in absence of special circum-

dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent :

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, as respects the rights so assigned, and the assignor, as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

Civil Remedies.

6. (1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

Civil remedies for infringement of copyright.

Sch. I — Section 5 (*contd.*)

stances, and where the employment and the payment are the only material facts. (1904) 1904 App Cas 17 (21, 22).

[6] Article written for an encyclopaedia and paid for accordingly — Publisher cannot issue the same as a separate work. (1848) 17 L J Ch 210 (214).

[7] Where the employment is in terms that the copyright shall belong to the proprietor of the journal in which the work is published as an article the proprietor cannot publish the same separately, except as part of the journal to which the article was contributed. (1860) 70 E R 766 (767).

[8] Editor paid for securing contributions from writers for a journal—No evidence of the writers having been paid for the articles — Articles do not become the copyright of the publishers of the journal. (1846) 16 L J Ch 140 (144).

[9] Actual payment to the author of an article is a necessary condition to entitle a publisher to a copyright. (1851) 20 L J Ch 553 (555).

Sub-section (2). — [10] Assignment of copyright — Work not completed at the time when document assigning copyright is drawn up — Copyright is not transferred. (Vol 26) 1933 Lah 433 (435).

[11] An instrument which is merely an acknowledgment on the part of the author that he has received the consideration for the copyright and agreed to deliver a regular assignment when called upon to do so does not operate as an actual present assignment. It is a mere agreement to assign. (1838) 59 E R 316 (317, 318).

[12] Copyright of work not in existence but to be written can be assigned by an agreement. (1906) 75 L J Ch 732 (736).

[13] Right to publish 90 songs composed by D sold to P—Subsequently D selling 47 songs to M 40 of which were the same as these sold to P : Held that the sale to P was complete and its completeness was not affected by the mere fact of D undertaking to revise some of the songs or rewrite some of them. (Vol 7) 1920 Mad 529 (531) (D B).

[14] Copyright is moveable property and can be assigned by unregistered deed even in India. T. P. Act S. 54 does not apply. (Vol 26) 1939 All 305 (308): I L R (1939) All 275 (D B).

[15] An assignment of copyright if not in writing, is not valid. (1876) 4 Ch D 419 (420).

[16] Oral agreement conferring exclusive right to publish a work in England amounts only to a license and does not operate to assign copyright. (1814) 171 E R 3 (3, 4).

[17] Proprietor of a work becoming bankrupt—Copyright will pass to trustee in bankruptcy without assignment in writing. (1826) 33 E R 380 (383).

[18] Mere acquiescence does not prove assignment of copyright which must be according to the mode prescribed by statute. (1818) 171 E R 679 (680).

[19] Author agreeing to grant to publishers sole and exclusive license to print, publish and sell his work — Author reserving to him copyright of such volume and also other rights—Agreement held merely amounting to a publishing agreement and not assignment of copyright. (Vol 25) 1933 Lah 173 (175) : I L R (1933) Lah 84 (D B).

[20] Sale of first edition of book amounts to assignment of interest in copyright until the last copy is sold. (Vol 22) 1935 Cal 508 (508, 509) : 62 Cal 1057.

[21] The vendor of a copyright can continue to sell the copies remaining in his possession after disposing of the copyright unless there is a stipulation to the contrary in the conditions of the sale. (1869) 7 Eq 418 (420).

Schedule I, Section 6 — Note 1

[1] The rights conferred upon the owner of copyright by Ss. 6 and 7 are based on different grounds. Under S. 6 he has the usual remedies available where a similar right of property is infringed and can recover damages for the loss sustained by infringement or if he prefers payment of the profits resulting from the piracy. Under S. 7 he has an action of detinue in respect of unsold infringing copies and plates which by virtue of the section are deemed to be his own property and an action for conversion in respect of such infringing copies and plates as may have been sold, and further the measure of damages for conversion under S. 7 is not limited to profits but extends to the full value of the work converted. (Vol 18) 1931 Cal 233 (237, 238) (DB)* (1918) 2 Ch 281 (284, 285).

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the Court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or as the case may be, the title of the plaintiff, and where any such question is in issue, then —

- (a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;
- (b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

Rights of owner against persons possessing or dealing with infringing copies, etc.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Sch. I — Section 6 (contd.)

[2] Though remedies given by Ss. 6 and 7 are not alternative yet owner of copyright getting damages under S. 6 is not generally entitled to damages under S. 7. (Vol 25) 1938 Lah 173 (175) : 1 L R (1938) Lah 84 (DB).

[3] Where in a case of infringement of copyright the plaintiff asked for damages under S. 6 on the footing of the loss sustained and in the alternative under S. 7 for the delivery of the unsold infringing copies and damages on the footing of conversion in respect of the infringing copies sold, and the Court awarded damages under S. 6 and also decreed delivery of the unsold copies, held, that the plaintiff could not claim damages under S. 7 also. (Vol 18) 1931 Cal 233 (238) (DB).

[4] The plaintiff is entitled to an account and payment of net profits. (1857) 69 E R 1241 (1242).

[5] Since under Sch. I one of the remedies available for the infringement of a copyright is by way of injunction the precise rule of law contained in S. 56 of the Specific Relief Act cannot in any way interfere with the discretion of the Court in regard to the grant of temporary injunction thereunder. (Vol 18) 1931 Lah 624 (625).

[6-7] Where a person publishes a book containing selections from another book there is a *prima facie* case for issue of temporary injunction. (Vol 22) 1935 Lah 282 (283).

[8] In order to justify the grant of temporary injunction in an action by the plaintiff restraining the defendant from infringing his copyright it is not necessary for the plaintiff to make out a strong case and show that there is no other remedy open to him by which he can protect himself from the consequence of the injury. Injunction in such a case is an appropriate relief. In doubtful cases where the question as to legal right is one on which the Court is not prepared to pass an opinion, or the legal right being admitted the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right or to order the motion to stand over until the legal right has been tried. In determining which of these two courses it shall adopt the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties

which may arise from granting or withholding the injunction. (Vol 18) 1931 Lah 624 (626).

[9] Temporary injunction will not be granted in cases where no irreparable injury will be caused to the plaintiff by its non-issue and where the plaintiff's interest is otherwise protected. (Vol 20) 1933 Lah 448 (449).

[10] Where the publications are voluminous it is the common course to state the piracy generally and refer to particular passages of the works in argument in proof of it, and injunction if granted being granted generally. If any part is shown to be taken from common source it would not in fact be copied from plaintiff's work and would not fall within the terms of the injunction (1840) 9 L J Ch 323 (324).

[11] An irrebuttable presumption arises that an alleged work is a work in which copyright exists and that the plaintiff is the owner of it where the defendant does not dispute the existence of the copyright. (Vol 11) 1924 Cal 595 (595).

[12] There was provision in S. 3 of the Copyright Act of 1847 that a certificate of the entry in the Copyright Register Book was *prima facie* evidence of the proprietorship of the person mentioned therein to the copyright of the book in question. That provision has been repeated by the new Act of 1914. (Vol 3) 1916 Mad 1015 (1016) : 16 Cr L Jour 673.

[13] Action for infringement of copyright — Onus of proof — It is not for the defendant to prove that there was no infringement — The onus is upon the plaintiffs to prove that in fact there was. (Vol 26) 1939 Bom 347 (349) : 1 L R (1939) Bom 295.

[14] Joint owners of copyright — One or more of them may sue on the infringement of the entire copyright, although the owners take as tenants-in-common. (1892) 3 Ch 402 (413, 414).

Schedule I, Section 7 — Note 1

[1] Owner of copyright can recover unsold infringing copies and price of copies actually sold. (Vol 25) 1938 AH 266 (271) : 1 L R (1938) AH 370 (DB).

[2] Action on infringement — Defendant in possession of some unsold copies — Plaintiff is entitled to delivery of such copies besides an injunction. (1898) 1 Ch 59 (64).

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware, and had not reasonable ground for suspecting, that copyright subsisted in the work.

9. (1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as impose summary penalties, shall not apply in any case to which this section applies.

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

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Importation of Copies.

14. (1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section 42 of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, condition or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876 : Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

[a] 39 and 40 Vict., c. 36. [b] Regulations called the Indian Copyright Regulations, 1914, have been made under the proviso to S. 3 and in conjunction with Ss. 14 and 19 of this Act as modified in its application to British India see General Statutory Rules and Orders, Vol. IV, page 480.

Schedule I, Section 8 — Note 1

[1] Defendant pleading that he had no reasonable ground for suspecting infringement should prove it affirmatively. (Vol 17) 1930 P C 314 (317) (P C).

[2] The defendant should allege ignorance in respect of the existence of the copyright and prove it to come within the provisions of S. 8. (Vol 26) 1939 Bom 347 (351) : I L R (1939) Bom 295.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

Delivery of Books to Library.

15. (1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum,^a who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depot in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely, the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh,^b and the Library of Trinity College, Dublin; and, subject to the provisions of this section, the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression "book" includes every part or division of a book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letter-press or in the maps, prints, or other engravings belonging thereto.

[See The Press and Registration of Books Act, 1867 (XXV of 1867), S. 9.]

[a] See British Museum Act, 1932 (22 & 23 Geo. V, C. 35.)

[b] The words "the National Library of Scotland" were substituted for the words "the Library of the Faculty of Advocates at Edinburgh" by the National Library of Scotland Act, 1925 (15 & 16 Geo. V, C. 73), S. 5 (1).

Special Provisions as to certain Works.

16. (1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

17. (1) In the case of a literary, dramatic or musical work, or an engraving, in which copy-right subsists at the date of the death of the author or, in the case of a work of joint authorship at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter and the proviso to section 3 of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.

19. (1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make, within the parts of His Majesty's dominions to which this Act extends, records, perforated rolls or other contrivances by means of which the work may be mechanically performed, if such person proves —

- (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and
- (b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned :

Provided that —

- (i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations

Schedule I — Section 19 — Note 1

[1] Section 19 presupposes lawful making of record and lawful existence of plate from which record is made — Previous consent of owner of copyright necessary before making plate — Owner can refuse consent or give consent subject to conditions restricting copyright available to owner of plate under S. 19. (Vol 24) 1937 Bom. 472 (473) : 1 L R (1937) Bom 724.

[2] The powers of the Board of Trade under this section are, as regards records, perforated rolls and

other contrivances, the original plate of which was made in British India, to be exercised by the Central Government; and the confirmation of the Parliament is not necessary to the exercise of any of these powers; see the Indian Copyright Act, 1914, S. 3 (2).

[3] The reference in sub-section (4) of this section to arbitration is to be read as reference to arbitration in accordance with the law for the time being in force in British India; see the Indian Copyright Act, 1914, S. 3 (3).

and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

- (ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.
- (3) The rate at which such royalties as aforesaid are to be calculated shall —
 - (a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and
 - (b) in the case of contrivances sold as aforesaid after the expiration of that period, be five per cent.;

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing :

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make ^aregulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices and the mode, time, and frequency of the payment of royalties and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

[a] Regulations called the Indian Copyright Regulations, 1914, have been made under the proviso to S. 3 and in conjunction with Ss. 14 and 19 of this Act as modified in its application to British India, see General Statutory Rules and Orders, Vol. IV, p. 480.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions :—

- (a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work shall not apply :
- (b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the 1st day of July 1918, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the 1st day of July, 1910 :
- (c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignees, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives :

- (d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in the section :
- (e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls or other contrivances by means of which the work may be mechanically performed.
- (8) Notwithstanding anything in this Act where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived :

Provided that—

- (i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and
- (ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

Provisions as to political speeches.

20. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Provisions as to photographs. 21. The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

Provisions as to designs registered under 7 Edw. VII, c. 29. 22. (1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section 86 of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends. 23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

24. (1) Where any person is immediately before the commencement of this Act entitled to *Existing works.* any such right in any work as is specified in the first column of the First

Schedule I—Section 22—Note 1

[1] The reference in this section to the Patents and Designs Act, 1907 (7 Edw. VII, c. 29) is to be construed as a reference to the Indian Patents and Designs Act, 1911, and the reference to S. 86 of the English Act is to

be construed as a reference to S. 77 of the Indian Act : see the Indian Copyright Act, 1914, S. 3 (4).

Schedule I—Section 24—Note 1

[1] A new copyright under the Act is substituted for an old copyright provided that copyright was in exis-

Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder :

Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would have so expired was the owner of the right or interest shall be entitled at his option either—

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found, advertised in the London Gazette and in two London newspapers;

(b) where any person has, before the 26th day of July, 1910, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section 19, sub-sections (7) and (8), and of section 33 of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

Application to British Possessions.

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions : Provided that it shall not extend to a self-governing dominion, unless declared

Sch. I — Section 24 (contd.)

tence at the time when the Act came into force. (Vol 18) 1981 All 353 (354) : 32 Cr L Jour 814.

[2] The new Act of 1914 grants, by S. 24 (a) of the first schedule, to the owners of existing copyrights, rights as valuable as the rights given under the repealed Act. (Vol 3) 1916 Mad 1015 (1016) : 16 Cr L Jour 678.

[3] The reference in sub-s. (1) of this section to arbitration is to be read as reference to arbitration in accordance with the law for the time being in force in British India: see the Indian Copyright Act, 1914, S. 3 (3).

[4] The reference in proviso (a) to sub-s. (1) of this section to the London Gazette and two London newspapers is to be construed as a reference to the Gazette of India and two newspapers published in British India. And the reference in proviso (b) to the 26th day of July, 1910, is to be construed as a reference to the 30th day of October, 1912 : see the Indian Copyright Act, 1914, S. 3 (5).

Schedule I — Section 25 — Note 1

[1] The certificate by the Secretary of State under S. 25 (2) has merely the effect of bringing into operation

by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26. (1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including *Legislative powers of self-governing dominions.* this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this sub-section, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

Sch. I—Section 25 (*contd.*)

the provision that the Dominion in respect of which the certificate is issued should, for the purposes of the rights conferred by the Act, be treated as if it were a Dominion to which the Act extended. Thus, although under S. I, an author writing in a Dominion would not, when the Act was passed, have any copyright under the Act, the effect of the certificate would be that such an

author would become a person entitled to the rights conferred by the Act. Hence the authors in that Dominion will have the same rights under the Act within the area to which that Act extends as they would have if the Act extended to the Dominion. But the certificate does not and cannot extend the Act to the Dominion if it is not in force there. (Vol 24) 1937 P C 326 (329) (PC).

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

PART II.

INTERNATIONAL COPYRIGHT.

Powers to extend Act to foreign works.

29. (1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

- (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;
- (b) to literary, dramatic, musical and artistic works, or any class thereof, the authors whereof were, at the time of the making of the works, subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;
- (c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which the Act extends;

and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly :

Provided that—

- (i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I of this Act;
- (ii) the Order in Council may provide that the terms of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;
- (iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;
- (iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;
- (v) in applying the provisions of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;
- (vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section 5 of the ^aInternational Copyright Act, 1886.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

[a] 49 & 50 Vict., c. 33.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possessions specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

^a(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like Orders as under this Part of this Act His Majesty in

[a] For Proclamation applying the Copyright Act, 1911, see Notification No. 55 dated 30th October, 1912, Gazette of India, Extraordinary, dated 30-10-1912.

Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions and the provisions of this Part of this Act shall, with necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any Order any part of his dominions, not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

PART III.

SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

32. (1) His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every order in Council made under this Act shall be published in the London Gazette and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

33. Nothing in this Act shall deprive any of the universities and colleges mentioned in the *Saving of University copyright.* ^aCopyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

[a] 15 Geo., III, c. 58.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books:

Provided that this compensation shall not be paid to a library in any year, unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

Interpretation. **35.** (1) In this Act, unless the context otherwise requires,—

“Literary work” includes maps, charts, plans, tables, and compilations;

“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character.

“Artistic work” includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

“Work of sculpture” includes casts and models;

“Architectural work of art” means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or

Schedule I — Section 35 — Note 1

[1] A map described as “Panoramic bird’s eye view of the seat of war, from special drawings by French and German artists, showing the Rhine, France, Russia and Belgium” etc., is a book. (1871) 40 L J Ch 489 (491).

[2] Biographical notes compiled in golf annual from replies sent by golf players to questions sent by com-

piler — Copyright in notes vests in the compiler. (1907) 23 T L R 370 (371).

[3] Copies of wood engravings pirated — Injunction to restrain same granted. (1852) 84 E R 1111 (1114).

[4] Copying a print by photography — Copyright in the print is infringed. (1867) 36 L J C P 189 (141) * (1863) 143 E R 463 (468).

structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction ;

"Engravings" include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs ;

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography ;

"Cinematograph" includes any work produced by any process analogous to cinematography ;

"Collective work" means—

(a) an encyclopædia, dictionary, year-book, or similar work,

(b) a newspaper, review, magazine, or similar periodical ; and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated ;

"Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation made or imported in contravention of the provisions of this Act ;

"Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument ;

"Delivery," in relation to a lecture, includes delivery by means of any mechanical instrument ;

"Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be made ;

"Lecture" includes address, speech, and sermon ;

"Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was, during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

36. Subject to the provisions of this Act, the enactments mentioned in the Second Schedule *Repeal.* due to this Act are hereby repealed to the extent specified in the third column of that schedule :

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

Short title and commencement. 37. (1) This Act may be cited as the Copyright Act, 1911.

(2) This Act shall come into operation—

- (a) in the United Kingdom, on the 1st day of July, 1912, or such earlier date as may be fixed by Order in Council ;
- (b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion ;
- (c) in the Channel Islands, at such date as may be fixed by the States of those Islands respectively ;
- (d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

SCHEDULES.

FIRST SCHEDULE.

Section 24.

EXISTING RIGHTS.

Existing Right.	Substituted Right.
<i>(a) In the case of Works other than Dramatic and Musical Works.</i>	
Copyright	Copyright as defined by this Act. ^a
<i>(b) In the case of Musical and Dramatic Works.</i>	
Both copyright and performing right	Copyright as defined by this Act. ^a
Copyright, but not performing right	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright	The sole right to perform the work in public but none of the other rights comprised in copyright as defined by this Act.

[a] In the case of an essay, article, or portion forming part of and first published in a review, magazine or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen* of the Copyright Act, 1842 (5 and 6 Vict., c. 45).

*Section 18, which is reproduced here, is as follows :—

"18. When any publisher or other person shall, before or at the time of the passing of this Act have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher or conductor, and paid for by such proprietor, projector, publisher or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act;

Except only that in the case of essays, articles, or portions, forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act :

Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns :

Provided also that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right ; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings :—

“Copyright,” in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

“Performing right,” in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
8 Geo. 2, c. 13 . . .	The Engraving Copyright Act, 1734 . . .	The whole Act.
7 Geo. 3, c. 38 . . .	The Engraving Copyright Act, 1767 . . .	Ditto.
15 Geo. 3, c. 53 . . .	The Copyright Act, 1775 . . .	Ditto.
17 Geo. 3, c. 57 . . .	The Prints Copyright Act, 1777 . . .	Ditto.
54 Geo. 3 c. 56 . . .	The Sculpture Copyright Act, 1814 . . .	Ditto.
3 & 4 Will. 4, c. 15 . . .	The Dramatic Copyright Act, 1833 . . .	Ditto.
5 & 6 Will. 4, c. 65 . . .	The Lectures Copyright Act, 1835 . . .	Ditto.
6 & 7 Will. 4, c. 59 . . .	The Prints and Engravings Copyright (Ireland) Act, 1836 . . .	Ditto.
6 & 7 Will. 4, c. 110 . . .	The Copyright Act, 1836 . . .	Ditto.
5 & 6 Vict., c. 45 . . .	The Copyright Act, 1842 . . .	Ditto.
7 & 8 Vict., c. 12 . . .	The International Copyright Act, 1844 . . .	Ditto.
10 & 11 Vict., c. 95 . . .	The Colonial Copyright Act, 1847 . . .	Ditto.
15 & 16 Vict., c. 12 . . .	The International Copyright Act, 1852 . . .	Ditto.
25 & 26 Vict., c. 68 . . .	The Fine Arts Copyright Act, 1862 . . .	Sections 1 to 6. In section 8 the words “and pursuant to any Act for the protection of copyright engravings,” and “and in any such Act as aforesaid.” Sections 9 to 12.
38 & 39 Vict., c. 12 . . .	The International Copyright Act, 1875 . . .	The whole Act.
39 & 40 Vict., c. 36 . . .	The Customs Consolidation Act, 1876 . . .	Section 42, from “Books wherein” to “such copyright will expire.” Sections 44, 45 and 152.
45 & 46 Vict., c. 40 . . .	The Copyright (Musical Compositions) Act, 1882 . . .	The whole Act.
49 & 50 Vict., c. 33 . . .	The International Copyright Act, 1886 . . .	Ditto.
51 & 52 Vict., c. 17 . . .	The Copyright (Musical Compositions) Act, 1888 . . .	Ditto.
52 & 53 Vict., c. 42 . . .	The Revenue Act, 1889 . . .	Section 1, from “Books first published” to “as provided in that section.”
6 Edw. 7, c. 36 . . .	The Musical Copyright Act, 1906 . . .	In section 3 the words “and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886.”

THE SECOND SCHEDULE.—[REPEAL OF ENACTMENTS.] *Repealed by the Repealing Act, 1927 (12 [XII] of 1927), S. 2 and Schedule.*

[THE] CORONERS ACT, 1871
(Act IV of 1871).
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REPORT OF SELECT COMMITTEE

"We, the undersigned, the Members of the Select Committee of the Council of Governor-General of India for the purpose of making Laws and Regulations, to which the Bill to consolidate laws relating to Coroners has been referred, have the honour to present this preliminary report.

The Bill, as introduced, was intended merely to consolidate the existing law contained in two statutes and three Acts, and it provided, in the words of 33 Geo. III, Cap. 52, S. 157, that the Coroners should exercise the like jurisdictions as by law might be exercised by Coroners elected for counties in England. We have struck out this provision, which would have necessitated constant reference to English statutes and text-books, and we have in lieu thereof codified such part of the English

law of Coroners as seemed adapted to the Presidency towns.

The amended Bill accordingly declares the coroner's jurisdiction to enquire into deaths by accident, homicide or suicide, sudden deaths by means unknown, and deaths of prisoners in prison. It enables him to order a body to be disinterred. It provides for summoning juries, swearing the jurors, viewing the body, summoning witnesses, and *post mortem* examinations.

It declares that the evidence shall be taken on oath, that witnesses unacquainted with English shall be examined through an interpreter, that questions suggested by the jury shall be put, and that the coroner shall take down the material parts of the evidence. Power is given to adjourn the inquest. When the wit-

nesses have been examined, the Coroner will sum up, and the jury will consider of their verdict. When the verdict is delivered, the Coroner will draw up an inquisition setting forth the matters specified in S. 24, and in the form given in the second Schedule.

When the verdict amounts to murder, culpable homicide, or killing by a rash or negligent act (the last mentioned offence is about to be added to the Penal Code), the Coroner will bind by recognizance any person acquainted with the facts to appear at the next sessions, and prosecute or give evidence. The Coroner will also certify the recognizances and deliver them with the inquisition and evidence to the Court in which the trial is to be. He may also issue his warrant for the apprehension of the accused.

The amended Bill expressly abolishes the Coroner's jurisdiction as to treasure trove and wrecks, and declares that he shall not be liable to execute process.

The Coroner of Calcutta will, under the amended Bill, be appointed by the Lieutenant Governor of Bengal, and not by the Governor-General in Council.

As to Coroner's juries, we have provided (S. 81) that

when an inquest is held on the body of a prisoner, no officer of the prison and no prisoner confined therein shall be a juror. There is a similar provision in the Schedule to the English Prisons' Act (28 & 29 Vic., c. 126), clause 48.

As to a Coroner's rights, we have added three clauses, one providing for repaying his disbursements for fees to medical witnesses, hire of rooms for the jury, and the like; another exempting him from serving on juries, and a third privileging him from arrest while engaged in the discharge of his official duty.

We have omitted the clause corresponding with Act 12 of 1867, S. 12, as this will more fitly be placed in the Prisoners' Bill now before the Council.

We have omitted, as unnecessary, the elaborate specification of the informalities in case of which the inquisition may be amended by a Judge of the High Court. For variances between the statements in the inquisition and the evidence. Act 18 of 1862 (Ss. 1 and 57) appears to provide sufficiently"

—Gazette of India, 1870, Part. V.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts 5 of 1889, 38 of 1920.

—Adapted by A. O.

—Amended in Bengal by Bengal Act 7 of 1944.

—Amended in Bombay by Bombay Acts 13 of 1930; 25 of 1942.

—Repealed and amended by Acts 10 of 1881; 4 of 1908.

—Repealed in part by Acts 9 of 1871; 10 of 1873; 12 of 1873; 16 of 1874; 12 of 1891.

[THE] CORONERS ACT, 1871

(ACT IV OF 1871)^a

27th January, 1871.

An Act to consolidate and amend the laws relating to Coroners.

WHEREAS it is expedient to consolidate and amend the laws relating to Coroners in the Preamble. Presidency towns; It is hereby enacted as follows:—

[a] For Statement of Objects and Reasons, see Gazette of India, 1870, Pt. V, p. 295; for Preliminary Report of the Select Committee, see *ibid.*, p. 351; and for Proceedings in Council, see *ibid.*, Supplement, pp. 1077, 1195, 1298; and *ibid.*, 1871, pp. 198 and 207.

CHAPTER I.

PRELIMINARY.

Short title. 1. This Act may be called THE CORONERS ACT, 1871.

a[* * * * *

[a] The local extent and commencement clauses were repealed, by the Coroners Act, 1881 (10 [X] of 1881), S. 2 and by the Repealing Act, 1874 (16 [XVI] of 1874), respectively.

2. [Repeal of enactments.] *Repealed by the Repealing Act, 1873 (12 [XII] of 1873).*

CHAPTER II.

APPOINTMENT OF CORONERS.

3. ^a[Within the local limits of the ordinary original civil jurisdiction of each of the High Coroners of Calcutta and Courts of Judicature at Fort William and Bombay, there shall be a Coroner. Such Coroners shall be called respectively, the Coroner of Calcutta and the Coroner of Bombay.]

[a] Substituted by the Coroners (Madras) Act, 1889 (5 [V] of 1889), S. 2, for the original section.

Their appointment, suspension and removal. 4. Every such officer shall be appointed and may be suspended or removed by the ^a[Provincial Government.] ^b[* * *]

[a] Substituted by A. O. for "Local Government". [b] The words "Every person now holding such office shall be deemed to have been appointed under this Act" were repealed by the Amending Act, 1891 (12 [XII] of 1891).

Coroners to be public servants. 5. Every Coroner shall be deemed a public servant within the meaning of the Indian Penal Code.

Power to hold other offices. 6. Any Coroner may hold simultaneously any other office under Government.

7. [Oath to be taken by Coroner.] *Repealed by the Indian Oaths Act, 1873 (10 [X] of 1873).*

CHAPTER III

DUTIES AND POWERS OF CORONERS.

8. When a Coroner ^b[has reason to believe] that the death of any person has been caused *Jurisdiction to enquire into deaths.* by accident, homicide, suicide or suddenly by means unknown, or that any person being a prisoner had died in prison, and that the body is lying within the place for which the Coroner is so appointed, the Coroner shall enquire into the cause of death.

Every such enquiry shall be deemed a judicial proceeding within the meaning of section 193 of the Indian Penal Code.

[a] This chapter has been *extensively amended* in its application to Bombay by the Coroners (Bombay Amendment) Act, 1930 (Bom Act 13 [XIII] of 1930). New sections have been *substituted* for sections 8 to 20. The text of these substituted sections is reproduced in this Manual after section 20 of the main Act. [b] *Substituted* by the Coroners Act, 1881 (10 [X] of 1881), S. 5 for "is informed."

PROVINCIAL AMENDMENT.

BENGAL

To the first paragraph of section 8 ending with the words "inquire into the cause of death" *add* the following proviso:—

"Provided that, unless the Provincial Government otherwise directs, no such inquiry shall be held in the case where the death of any person has been caused by enemy action."—Bengal Act VII of 1944. [8-2-1945].

9. Whenever a prisoner dies in a prison situate within the place for which a Coroner is so *Coroner to be sent for when prisoner dies.* appointed, the Superintendent of the prison shall send for the Coroner before the body is ^a[disposed of]. Any Superintendent failing herein shall, on conviction before a Magistrate, be punished with fine not exceeding five hundred rupees.

Nothing in the former part of this section applies to cases in which the death has been caused by cholera or other epidemic disease.

[a] *Substituted* by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 2, for "buried".

Power to hold inquests on bodies within local limits wherever cause of death occurred.

10. Whenever an inquest ought to be holden on any body lying dead within the local limits of the jurisdiction of any Coroner, he shall hold such inquest, whether or not the cause of death arose within his jurisdiction.

11. A Coroner may order a body to be disinterred within a reasonable time after the death of the deceased person, either for the purpose of taking an original inquisition *Power to order body to be disinterred.* where none has been taken, or a further inquisition ^a[where the Coroner considers it necessary or desirable in the interests of justice to take a further inquisition].

[a] *Substituted* by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 3, for "where the first was insufficient."

12. On receiving notice of any death mentioned in section 8, the Coroner shall summon five, *Summoning jury* seven, nine, eleven, thirteen or fifteen respectable persons to appear before him at a time and place to be specified in the summons, for the purpose of enquiring when, how and by what means the deceased came by his death.

Inquest may be on Sunday. Any inquest under this Act may be held on a Sunday.

13. When the time arrives, the Coroner shall proceed to the place so specified, open the Court *Opening Court.* by proclamation, and call over the names of the jurors.

Section 8 — Note 1

[1] A Coroner's inquest is aimed at inquiring into the cause of the death of any person which he has reason to believe to have been caused by 'accident, homicide, suicide or suddenly by means unknown.' (Vol 38) 1946 Bom 184 (185) : 47 Cr L Jour 555.

[2] One of the objects of holding such a public inquiry is to satisfy the public conscience that an unnatural death was not hushed up. (Vol 33) 1946 Bom 184 (185): 47 Cr L Jour 555.

[3] It is a general inquiry for further action by police if necessary. (Vol 33) 1946 Bom 184 (185): 47 Cr L Jour 555.

[4] Inquiry before the Coroner, although it may be judicial proceeding, is not a proceeding between the prosecutor and the accused (Vol 20) 1933 Bom 479 (479) : 35 Cr L Jour 106 & (Vol 33) 1946 Bom 184 (185) : 47 Cr L Jour 555.

[5] No analogy exists between a Coroner's inquest and an inquiry into the cause of death under Criminal P. C. ('78) 3 Cal 742 (752) (DB).

14. When a sufficient jury is in attendance, he shall administer an oath to each juror to give *Jurors to be sworn.* a true verdict according to the evidence, and shall then proceed with the jury to view the body.

15. The Coroner and the jury shall view and examine the body at the first sitting of the in-
View of body. quest, and the Coroner shall make such observations to the jury as the appearance of the body requires :

^a[Provided that the Coroner may, with the concurrence of a majority of the jury, dispense with a view of the body, if he is satisfied, from medical evidence or medical certificates, that no advantage would result from such viewings.]

[a] *Inserted by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 4.*

Proclamation for witnesses.

16. The Coroner shall then make proclamation for the attendance of witnesses, or, where the inquiry is conducted in secret, shall call in separately such as know anything concerning the death.

17. ^a[It shall be the duty of all persons acquainted with the circumstances attending the death
Summoning witnesses. to appear before the inquest as witnesses; the Coroner shall enquire of such circumstances and the cause of death; and if before or during the enquiry he is informed that any person, whether within or without the local limits of his jurisdiction, can give evidence or produce any document material thereto, may issue a summons requiring him to attend and give evidence or produce such document on the inquest.

Any person disobeying such summons shall be deemed to have committed an offence under section 174, section 175 or section 176 of the Indian Penal Code, as the case may be.]

For the purpose of causing prisoners to be brought up to give evidence, the Coroner shall be deemed a Criminal Court within the meaning of ^b[Part IX of the Prisoners Act, 1900].

[a] *Substituted by the Coroners Act, 1881 (10 [X] of 1881), S. 6, for the original paragraphs. [b] Substituted by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 5, for "Act No. 15 [XV] of 1869, (to provide facilities for obtaining the evidence and appearance of prisoners and for service of process upon them)".*

18. The Coroner may direct the performance of a *post mortem* examination with or without
Post-mortem examinations. an analysis of the contents of the stomach or intestines, by any medical witness summoned to attend the inquest; and every medical witness, other than the Chemical
Fees to medical witnesses. Examiner to Government, shall be entitled to such reasonable remuneration as the Coroner thinks fit.

^a[18-A. Any document purporting to be a report under the hand of any Chemical Examiner
Report of Chemical Examiner. or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Act, may be used as evidence in any inquest under this Act and in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898.]

[a] *Inserted by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 6.*

Evidence to be on oath.
Evidence on behalf of accused.

19. All evidence given under this Act shall be on oath, and the Coroner shall be bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person.

Witnesses unacquainted with the English language shall be examined through the medium of
Interpreter. an interpreter, who shall be sworn to interpret truly as well the oath as the questions put to, and the answers given by, the witnesses.

After each witness has been examined, the Coroner shall enquire whether the jury wish any
Questions suggested by jury. further questions to be put to the witness, and if the jury wish that any such questions should be put, the Coroner shall put them accordingly.

Section 19 — Note 1

[1] An inquest is not the same thing as a trial before a Criminal Court where under a special provision of the Criminal Procedure Code the accused is not to be administered an oath—In the absence of any similar provision in the Coroner's Act, the person accused at the inquest can give evidence on his own behalf. ('28) 29 Cr L Jour 284 (284) (Bom).

[But see (Vol 18) 1926 Bom 144 (148): 50 Bom 56: 27 Cr L Jour 433.]

[2] The whole spirit of the Coroner's Act is that all persons acquainted with the circumstances and cause of

the death of a deceased person, excepting persons implicated in a crime in respect of such death, shall be examined as witnesses on oath by the Coroner. (Vol 18) 1926 Bom 144 (148): 50 Bom 56: 27 Cr L Jour 433.

[8] Evidence of witness given before Coroner in enquiry into death—Death of witness prior to enquiry before Magistrate—Evidence is not admissible under S 83 of Evidence Act in trial of accused in Sessions Court. (Vol 20) 1983 Bom 479 (479): 35 Cr L Jour 106.

[4] Under S. 19 (8), as amended by Bombay Act 18 of 1930, a Coroner shall be deemed to be a Magistrate

20. The Coroner shall commit to writing the material parts of the evidence given to the jury, and shall read or cause to be read over such parts to the witness, and then procure his signature thereto.

Coroner to take down evidence in writing.

Any witnesses refusing so to sign shall be deemed to have committed an offence under section 180 of the Indian Penal Code.

Witnesses to sign depositions.

Every such deposition shall be subscribed by the Coroner.

Coroner to subscribe depositions.

^a[For the purposes of section 26 of the Indian Evidence Act, 1872, a Coroner shall be deemed to be a Magistrate.]

[a] Inserted by the Coroners Act, 1881 (10 [X] of 1881), S. 7.

SECTIONS 8 TO 20 BOMBAY.

PROVINCIAL AMENDMENT.

Sections 8 to 20 are substituted for the original sections 8 to 20 by Bombay Act 13 [XIII] of 1930, section 2. These sections are as follows :

CHAPTER III.

DUTIES AND POWERS OF CORONERS.

"8. (1) When the Coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that such person has died under any of the circumstances mentioned in section 9 or has died a sudden death of which the cause is unknown, the Coroner may proceed to hold a preliminary inquiry on the body, without a jury.

(2) For the purpose of an inquiry under sub-section (1) the Coroner shall, as soon as practicable, after receipt of the information proceed to view and examine the body. Such view and examination shall be held in the presence of the Police Officer to whose section the case belongs and, if possible, in the presence of the relations or friends, if any, of the deceased and the Coroner may reduce to writing such observations as the appearance of the body requires. When the inquiry is concluded if the Coroner is satisfied as to the cause of death and if a post-mortem examination is in his opinion not necessary, the Coroner may authorise the body to be disposed of.

9. (1) If it appears to the Coroner, either before or in the course of an inquiry under section 8, that there is reason to suspect :—

(a) that the deceased came by his death by homicide, suicide or infanticide; or
(b) that the death was caused by an accident, or poison, or machinery; or
(c) that the death was caused by an occurrence arising out of the use of a vehicle in a street, public road or in a private place; or

(d) that the death occurred in a prison in which the deceased was a prisoner or that it occurred whilst the deceased was in the custody of the police; or

(e) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public; —

and in any other case, if it appears to the Coroner either before or in the course of the preliminary inquiry that there is reason for holding an inquest by jury, he shall proceed to hold such inquest, whether or not the cause of death arose within his jurisdiction.

^a[Provided that such inquest shall not be held in the case of death caused by enemy action, unless the Provincial Government so directs.]

(2) Such inquest shall ordinarily be held in the Coroner's Court-house.

(3) The Coroner may hold one inquest on the bodies of several persons provided that they all are believed to have come by their deaths, in or in consequence of one and the same incident.

(4) Every such inquest shall be deemed to be a judicial proceeding within the meaning of section 193 of the Indian Penal Code and for the purpose of any such inquest the Coroner shall have and may exercise all the powers of a Criminal Court under section 476 and section 480 of the Code of Criminal Procedure, 1898.

(5) The Coroner may hold an inquest by jury simultaneously with the preliminary inquiry.

[a] Proviso was added by Bombay Act 25 [XXV] of 1942, section 2. [4-1-1943].

10. (1) When a person dies in a prison situate within the local limits of the Coroner's jurisdiction or whilst he is in the custody of the police, the Superintendent of the prison or the police officer in charge of the section concerned, as the case may be, shall report the death to the Coroner and await his orders before the body is disposed of.

Report to Coroner when prisoner or person in police custody dies.

Section 19 (contd.)

for the purpose of S. 26 of the Evidence Act. (Vol 28) 1941 Bom 50 (50) : I L R (1941) Bom 27.

[5] There is no provision of law which renders a statement made voluntarily by an accused, a suspect, in inquest proceedings before a Coroner inadmissible against the accused on his trial for the offence. (Vol 15) 1928 Bom 52 (53) : 29 Cr L Jour 651 & (Vol 13) 1926 Bom 151 (152) . 50 Bom 111 : 27 Cr L Jour 466 & (1928) 29 Cr L Jour 234 (234) (Bom).

[6] Accused examined as witness on oath by Coroner — Statement made by accused cannot be admitted as a confession, it not being a voluntary statement. (Vol 13) 1926 Bom 144 (149) : 50 Bom 56 : 27 Cr L Jour 433.

[7] A statement of a person on oath in the course of an inquest by the Coroner cannot be used against him during his trial for an offence suspected to have been committed by him in the same proceedings for which the inquest is held. (Vol 13) 1926 Bom 144 (146) : 50 Bom 56 : 27 Cr L Jour 433.

(2) Any Superintendent of Prison or any such police officer who fails to comply with the requirement in sub-section (1) shall, on conviction before a Magistrate, be punished with fine which may extend to five hundred rupees.

11. (1) Any person who, with the intention of preventing the holding of an inquest on a dead body which the Coroner is bound to hold under S. 9, buries, cremates or otherwise disposes of it, and any person who with such intention abets such burial, cremation or disposal of a dead body shall, on conviction before a Magistrate, be punished with fine which may extend to five hundred rupees.

(2) Such punishment shall be in addition to the punishment to which such person may be liable for any offence of which he may be found guilty in respect of the death of the deceased or under S. 201 of the Indian Penal Code.

12. A Coroner may order a body to be disinterred within a reasonable time after the death of the deceased person, either for the purpose of taking an original inquisition where none has been taken, or a further inquisition where further inquisition is, in the opinion of the Coroner, necessary or desirable in the interests of justice.

13. In order to the impanelling of a jury for an inquest under S. 9 the Coroner shall summon not less than five nor more than eleven respectable persons to appear before him at a time and place to be specified in the summons for the purpose of inquiring where, when and by what means the deceased came by his death.

14. (1) On the day and at the hour fixed for the inquest the Coroner shall proceed to open his Court by proclamation and shall call over the names of the jurors on whom summonses under S. 13 have been duly served. If not less than five jurors are in attendance the Coroner shall administer an oath to each juror to give a true verdict according to the evidence.

(2) If the number of jurors in attendance is less than five, or, if in the course of an inquest at any time before the return of the verdict a juror is absent and it is not practicable to enforce his immediate attendance, the Coroner may appoint such number of persons as may be necessary to serve as jurors in the inquest.

Inquest may be on Sunday or public holiday. 14A. An inquest under this Act or its adjourned hearing under S. 21 may be held on a Sunday or a public holiday.

15. At or before the first sitting of an inquest on a body the Coroner shall view the body and if before the body has been disposed of, a majority of the jurors so desire, it shall be viewed by the jurors also :

Provided that when a preliminary inquiry on the body has been held under S. 8, or if from the medical evidence or from a medical certificate, the Coroner is satisfied that no advantage will result from such viewing, the Coroner may dispense with a view of the body at the inquest.

Proclamation for witnesses. 16. The Coroner shall then make proclamation for the attendance of witnesses, or, where the inquiry is conducted in secret, shall call in separately such as know anything concerning the death.

17. (1) It shall be the duty of all persons acquainted with the circumstances attending the death to appear before the inquest as witnesses. The Coroner shall inquire of such circumstances and the cause of death, and if before or during the inquiry he is informed that any person, whether within or without the local limits of his jurisdiction, can give evidence or produce any document material thereto, may issue a summons requiring him to attend and give evidence or produce such document on the inquest.

(2) When any person so summoned fails to appear and the summons has been proved to be duly served on him in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure, the Coroner may, after recording his reasons in writing, issue a warrant for his arrest. Such warrant shall be executed as if it were issued under section 90 of the Code of Criminal Procedure, 1898.

(3) Any person disobeying a summons issued under sub-section (1) shall be deemed to have committed an offence under section 174, section 175 or section 176 of the Indian Penal Code, as the case may be.

(4) For the purpose of causing prisoners to be brought up to give evidence the Coroner shall be deemed a criminal Court within the meaning of Part IX of the Prisoner's Act, 1900.

18. (1) If before proceeding to view a body under section 8 or at the view or at any stage of an inquest by jury, it appears to the Coroner that a *post-mortem* examination of the body is necessary to ascertain the cause of death, he may direct such examination to be held by his Surgeon or by a duly qualified Registered Medical Practitioner invited to attend as a witness. The Coroner may also direct an analysis of any of the organs or parts of the body or of their contents. Every Medical witness other than the Chemical Examiner to Government and the Coroner's surgeon shall be entitled to such reasonable remuneration as the Coroner thinks fit. For the purpose of such *post-mortem* examination the Coroner may order the removal of the body to any place within his jurisdiction which may be provided for that purpose.

(2) Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination, or analysis and report in the course of any proceeding under this Act, may be used as evidence in any inquest under this Act and in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898.

19. (1) All evidence given under this Act, shall except in the case provided in sub-section (2), be on oath and the Coroner shall be bound to receive the evidence on behalf of the person who is alleged to have caused or to be concerned in causing the death of the deceased person.

(2) If such person himself wishes to make a statement it shall be the duty of the Coroner to warn him that he is not bound to make any statement; but if such person persists, the Coroner shall, without administering him any oath, record his statement in full after duly warning him that any incriminating statement which he may make may be used in evidence in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898.

(3) For the purpose of section 26 of the Indian Evidence Act, 1872, a Coroner shall be deemed to be a Magistrate.

(4) Witnesses unacquainted with the English language shall be examined through the medium of an interpreter, who shall be sworn to interpret truly as well the oath as the question put to, and the answer given by each witness.

(5) After each witness has been examined, the Coroner shall enquire whether the jury wish any further questions to be put to the witness, and if the jury wish that any such questions shall be put the Coroner shall put them accordingly.

(1) The evidence given to the jury shall be recorded in the manner prescribed in section 356 of the Code of Criminal Procedure, 1898.

(2) For the purpose of this section the Coroner shall be deemed to be a Magistrate.

21. The Coroner may adjourn the inquest from time to time, and from place to place.

Whenever the inquest is adjourned the Coroner shall take the recognizances of the jurors to attend at the time and place appointed and notify to the witnesses when and where the inquest will be proceeded with.

The amount of such recognizances shall in each case be fixed by the Coroner, ^a[and the whole or such part thereof as the Coroner deems fit, shall, in default of attendance by the jurors, be recoverable in the same manner as a fine imposed under section 31.]

[a] Inserted by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 7.

PROVINCIAL AMENDMENT.

SECTION 21A. BOMBAY.

After Section 21 insert Section 21A, namely —

21A. (1) If on an inquest touching a death, the Coroner is informed, before the jury have given their verdict that criminal proceedings have been instituted against some person before a Magistrate in respect of an offence touching the death of the deceased, he may adjourn the inquest until after the conclusion of the criminal proceedings and may, if he thinks fit, discharge the jury.

(2) After the conclusion of the criminal proceedings which it shall be the duty of the police to communicate to the Coroner, the Coroner may, subject as hereinafter provided if he thinks fit, resume the adjourned inquest :

Provided that at such resumed inquest no inquisition shall be held against any person in respect of any offence with which he was charged or of which he could have been convicted in the proceedings referred to in sub-section (1), and no finding shall be recorded which is inconsistent with the determination of any matter by the result of those proceedings.

(3) Where the Coroner resumes an inquest which has been adjourned and the jury has been discharged, he shall proceed in all respects as if the inquest had not previously been begun and the provisions of this Act shall apply accordingly as if the resumed inquest were a fresh inquest, except that it shall not be obligatory on the Coroner to view the body.

(4) If, having regard to the result of the criminal proceedings, the Coroner decides not to resume the inquest, he shall furnish the Commissioner of Police with a certificate stating the result of the criminal proceedings and any particulars necessary for the registration of the death which may have been ascertained.

(5) For the purposes of this section, the expression "the criminal proceedings" means the proceedings before a Magistrate and before any Court to which the accused person is committed for trial or before which an appeal from the conviction of that person is heard, and criminal proceedings shall not be deemed to be concluded until no further appeal can be made in the course thereof.—Bombay Act XIII of 1930, S. 8.

22. When all the witnesses have been examined, the Coroner shall sum up the evidence to the jury, and the jury shall then consider of their verdict.

23. When the verdict is delivered, the Coroner shall draw up the inquisition according to the finding of the jury, or, when the jury is not unanimous, according to the opinion of the majority.

24. Every inquisition under this Act shall be signed by the Coroner with his name and style of office and by the jurors, and shall set forth—

(1) where, when, and before whom the inquisition is holden,

Section 24 — Note 1

[1] The inquest is not a decision, but a *prima facie* opinion and stands on no higher footing than an order of commitment to the sessions — It is not a judgment

much less a judgment *inter partes*. (Vol 33) 1946 Bom 184 (185) : 47 Cr L Jour 555.

[2] Coroner's inquest is not admissible in evidence in subsequent trial of the accused. (Vol 33) 1946 Bom 184 (185) : 47 Cr L Jour 555.

- (2) who the deceased is,
- (3) where his body lies,
- (4) the names of the jurors, and that they present the inquisition upon oath,
- (5) where, when, and by what means the deceased came by his death, and
- (6) if his death was occasioned by the criminal act of another, who is guilty thereof.

If the name of the deceased be unknown, he may be described as a certain person to the jurors unknown.

Every such inquisition shall be in the form set forth in the second schedule hereto annexed, with such variation as the circumstances of each case require.

25. ^a[When the jury or a majority of the jury find that the death of the deceased person was occasioned by an act which amounts to an offence under any law in force in British India, the Coroner shall immediately after the inquest forward a copy of the inquisition, together with the names and addresses of the witnesses, to the Commissioner of Police.]

[a] Substituted by the Coroners (Amendment) Act 1908 (4 [IV] of 1908), S. 8, for the original section.

26. ^a[The Coroner may also, where the verdict justifies him in so doing, issue his warrant for the apprehension of the person who is found to have caused the death of the deceased person, and send him forthwith to a Magistrate empowered to commit him for trial.]

[a] Substituted by the Coroners (Amendment) Act 1908 (4 [IV] of 1908), S. 9 for the original section.

27. [Power to accept bail.] *Repealed by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 10.*

28. When the proceedings are closed, or before, if it be necessary to adjourn the inquest, the Coroner shall give his warrant for the ^a[disposal] of the body on which the inquest has been taken.

[a] Substituted by the Coroners (Amendment) Act 1908 (4 [IV] of 1908), S. 11, for "burial".

Inquisitions not to be quashed for want of form. 29. No inquisition found upon or by any inquest shall be quashed for any technical defect.

In any case of technical defect, a Judge of the High Court may, if he thinks fit, order the inquisition to be amended and the same shall forthwith be amended, accordingly.

30. It shall no longer be the duty of the Coroner to enquire whether any person dying by his own act was or was not *felo de se*, to enquire of treasure trove or wrecks to seize any fugitive's goods, to execute process, or to exercise as Coroner any jurisdiction not expressly conferred by this Act.

Felo de se A *felo de se* shall not forfeit his goods.
Deodands. *Deodands* are hereby abolished.

CHAPTER IV.

CORONERS' JURIES

31. Whenever any person has been duly summoned to appear as a juror by a Coroner, and fails or neglects to attend at the time and place specified in the summons, the Coroner may cause him to be openly called in his Court three times to appear and serve as a juror; and upon the non-appearance of such person, and proof that such summons has been served upon him, or left at his usual place of abode, may impose such fine upon the defaulter, not exceeding fifty rupees, as to the Coroner seems fit.

Section 29 — Note 1

[1] Bombay High Court has, subject to the provisions of the Coroners Act, all the powers which the Court of King's Bench had with reference to the inquisitions when the High Court was constituted—There is no provision in the Act enabling the Coroner to make a reference to the High Court—But any party interested in or affected by the inquisition may apply to the High Court either amending or quashing the verdict of the jury. Under

S. 29 the High Court can amend the inquisition only in cases of technical defects — High Court will not quash an inquisition merely on the ground that the findings of the jury are against the evidence in the case. (Vol 14) 1927 Bom 163 (164, 165) : 51 Bom 300 : 28 Cr L Jour 285 (DB).

[2] Coroner's Court is not a Criminal Court within the meaning of Cl. 27 of the Letters Patent of the Bombay High Court. (Vol 14) 1927 Bom 163 (165) : 51 Bom 300 : 28 Cr L Jour 385 (DB).

PROVINCIAL AMENDMENT.

BOMBAY

For Section 31 substitute the following, namely—

"31 (1) The Coroner shall prepare and from time to time revise a list of sufficient number of persons of good character and adequate education, liable to serve as jurors in his Court.

(2) All male persons between the ages of twenty-one and sixty whose names are not in the Common Jury list of the High Court, shall, subject to the exemptions mentioned in Section 320 of the Code of Criminal Procedure 1898, be liable to serve as jurors in the Coroners Court.

(3) Whenever any person has been duly summoned to appear as a juror by a Coroner, and fails or neglects to attend at the time and place specified in the summons, the Coroner may cause him to be openly called in his Court three times to appear and serve as a juror, and upon the non-appearance of such person, and proof that such summons has been served upon him or left at his usual place of abode, may impose such fine upon the defaulter, not exceeding fifty rupees as to the Coroner seems fit :

Provided that the Coroner may, in his discretion, remit any fine so imposed.

—Bombay Act XIII of 1930, Section 4.

32. The Coroner shall make out and sign a certificate, containing the name and surname, the residence and trade or calling of every person so making default, together with the amount of the fine so imposed, and the cause of such fine,

and shall send such certificate to one of the Magistrates of the place of which he is the Coroner,

and shall cause a copy of such certificate to be served upon the person so fined, by having it left at his usual place of residence, or by sending the same through the Post Office, addressed as aforesaid and registered.

33 Thereupon such Magistrate shall cause the fine to be levied in the same manner as if it had been imposed by himself.

34. Unless in case of necessity, no person who has appeared, or has been summoned to appear as a juror on an inquest, and has not made default, shall, within one year after such appearance of summons, be summoned to appear as a juror under this Act.

35. When an inquest is held on the body of a prisoner dying within a prison, no officer of the prison and no prisoner confined therein shall be a juror on such inquest.

CHAPTER V.

RIGHTS AND LIABILITIES OF CORONERS.

36. Every Coroner shall be entitled to such salary for the performance of the duty of his office as is prescribed in that behalf by the ^a[Provincial Government.]

[a] Substituted by A. O. for "Local Government", which words had been substituted by the Devolution Act, 1920 [38 [XXXVIII] of 1920, S. 2 and Sch. I, for "Governor General in Council".

37. All disbursements duly made by a Coroner for fees to medical witness, hire of rooms for the jury and the like, shall be repaid to him by the ^a[Provincial Government.]

[a] Substituted by A. O. for "Local Government".

38. Every Coroner may from time to time, with the previous sanction of the ^a[Provincial Government] appoint by writing under his hand, a proper person to act for him as his deputy in the holding of inquests. ^b[* * * *]

All inquests taken and other acts done by any such deputy, under or by virtue of any such appointment, shall be deemed to be the acts of the Coroner appointing him :

Provided that no such deputy shall act for any such Coroner except during the illness of the said Coroner, or during his absence for any lawful and reasonable cause.

Every such appointment may at any time be cancelled and revoked by the Coroner by whom it was made.

[a] Substituted by A. O. for "Local Government". [b] The words "and such, deputy shall take and subscribe before one of the Judges of the High Court, an oath that he will faithfully discharge the duties of office" were repealed by the Indian Oaths Act, 1873 (18 [XVIII] of 1873).

39. No Coroner or Deputy Coroner shall be liable to serve as a juror.

40. Coroners and Deputy Coroners shall be privileged from arrest while engaged in the *Privilege from arrest.* discharge of their official duty.

41. Any Coroner or Deputy Coroner failing to comply with the provisions of this Act, or *Penalty for failure to* otherwise misconducting himself in the execution of his office, shall be *comply with Act.* liable to such fine as the Chief Justice of the High Court, upon summary examination and proof of the failure or misconduct, thinks fit to impose.

42. No proceedings for anything done under this Act, or for any failure to comply with its *Limitation of suits.* provisions, shall be commenced or prosecuted, ^a after tender of sufficient amends

[a] The words "after the expiration of three months from such fact or failure nor" were repealed by the Indian Limitation Act, 1871 (9 [IX] of 1871).

FIRST SCHEDULE.—[Enactments Repealed]. *Repealed by the Repealing Act, 1873 (12 [XII] of 1873).*

SECOND SCHEDULE.

FORM OF INQUISITION.

An Inquisition taken at _____ on the _____ day of _____ 187 _____, before *E F*, Coroner of _____
^a[in the case of *A B* deceased,] upon the oath of *G H*, *I J*, *K L* and *M N*, then and there duly sworn and charged to enquire when, how, and by what means the said *A B* came to his death.

We, the said jurors, find unanimously [or by a majority of _____] that the death of the said *A B* was caused, on or about the _____ day of _____ 187 _____, by (*here state the cause of death as in the following examples*)—

1. [*Cases of homicide*]—a blow on the head with a stick inflicted on him by *C D*, under such circumstances that the act of *C D* was justifiable [or accidental] homicide.
 —a stab on the heart with a knife inflicted on him by *C D*, under such circumstances that the act of *C D* was culpable homicide not amounting to murder [or culpable homicide amounting to murder or a rash or negligent act not amounting to culpable homicide.]
2. [*Cases of accident*]—falling out of a boat into the river Hughly whereby he was drowned.
 —a kick from a horse which fractured his skull and ruptured blood vessels in his head.
3. [*Cases of suicide*]—shooting himself through the head with a pistol.
 —arsenic, which he voluntarily administered to himself.
4. [*Cases of sudden death by means unknown*]—disease of the heart.
 —apoplexy.
 —sunstroke.

And so say the jurors upon their oath aforesaid.

Witness our hands *E F*, Coroner of
G H, *I J*, *K L*, *M N*, *O P* [jurors.]

[a] *Substituted by the Coroners (Amendment) Act, 1908 (4 [IV] of 1908), S. 12, for "on view of the body of A B then and there lying dead."*

PROVINCIAL AMENDMENT.

BOMBAY.

Substitute for the original second schedule the following, namely—

"SECOND SCHEDULE.

Form of Inquisition.

(*See section 24*)

An inquisition taken at _____ on the _____ day of _____ 19 _____ before *E F*,
 Coroner of _____ (in the case of *A B*, deceased) upon the oath of *G H*, *I J*, *K L* and *M N*, then and there duly sworn and charged to enquire when, how and by what means the said *A B* came to his death.

We, the said jurors, find unanimously that the death of the said *A B* was caused, on or about the _____ day of _____ 19 _____, by

1. *Cases of homicide* — a blow on the head with a stick inflicted on him by *C D* under such circumstances that the act of *C D* was justifiable (or accidental) homicide.
 a stab on the heart with a knife inflicted on him by *C D* under such circumstances that the act of *C D* was culpable homicide not amounting to murder.
2. *Cases of suicide* — shooting himself through the head with a pistol. Drowning himself in a tank, river or sea. Opium-arsenic, which he voluntarily administered to himself. Cutting his throat with a razor or any sharp instrument.
3. *Cases of infanticide*—strangling to death a newly-born child by its mother.
 by exposure caused by *C D* with the knowledge that it would necessarily result in the death of *A B*, a newly-born child.
4. *Cases of accident* —falling out of a boat into any river, whereby he was drowned.
 a kick from a horse which fractured his skull and ruptured blood-vessels in his head.
5. *Cases of poisoning* —opium or arsenic which was administered to the said *A B* by *C D* with the intention of killing him.
6. *Cases of death caused by machinery* —while working in a mill or a workshop being caught in moving machinery.

7. *Cases of death arising*—the wheel of a motor car or a heavy cart which was negligently driven by *C D* passing out of the use of a over his chest and causing death.
vehicle

8. *Cases of death from*—disease of the heart.
any other cause apoplexy.
sunstroke or any other disease.

And so say the jurors upon their oath aforesaid.

Witness our hands.

E F, Coroner of
G H, I J, K L, M N, O P (jurors).
—Bombay Act XIII of 1930, Section 5.

[THE INDIAN] COTTON CESS ACT, 1923.

(ACT XIV of 1923.)

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STATEMENT OF OBJECTS AND REASONS.

"The Indian Cotton Committee of 1917-18 drew attention to the necessity for more scientific research for the improvement of cotton-growing, and recommended that a cess of eight annas per bale on the commercial cotton crop should be levied to meet the cost of their proposals. They also advised the constitution of a permanent Central Cotton Committee in order to secure co-ordination and co-operation in all matters relating to cotton and to act as an advisory body to Government and the trade on all matters connected with cotton, to act as a centre for the dissemination of information regarding cotton and to assist the Agricultural Departments through its Technologist.

The Central Cotton Committee, constituted by Government Resolution No. 404/22 of March 31st, 1921, have urged the imperative necessity of agricultural and technological research for the improvement of Indian cotton, both in respect to quality and agricultural yield. They have represented that this is of vital importance both to the well-being of the grower and to the continued progress of the Indian Mill industry. Following the suggestion of the Indian Cotton Committee, they have advised the levy of a cotton cess in order to form a

central research fund for cotton improvement. The proposal to levy a cess has been supported by all Local Governments, Chambers of Commerce and Millowners' Associations.

The Central Cotton Committee have examined a number of the more urgent problems requiring solution, many of which are of more than provincial importance and require fundamental research and have made definite proposals to that end. A central agricultural research institute for cotton may ultimately prove to be necessary, but the Committee propose, in the first place, to subsidize Agricultural Departments and other institutions which, with such assistance, can undertake specific investigations of more than local importance. In advising a cess of only four annas per bale, they have been guided by the estimates prepared of the cost of the investigation immediately required. It is proposed to levy the cess only on the commercial cotton crop, i. e., on cotton exported by sea or consumed in Indian mills. It is estimated that this will produce eight to nine lakhs of rupees per annum."

—Gazette of India, 1923, Part V, page 59.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Acts 1 of 1924; 18 of 1925; 14 of 1929; 5 of 1939; 34 of 1939; 32 of 1940.

—Adapted by A. O.

[THE INDIAN] COTTON CESS ACT, 1923

(ACT XIV OF 1923.)^a

[16th March, 1923]

An Act to provide for the creation of a fund for the improvement and development of the growing, marketing and manufacture of cotton in India.

WHEREAS it is expedient to provide for the creation of a fund to be expended by a Committee specially constituted in this behalf for the improvement and development of the growing marketing and, manufacture of cotton in India; It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1923, Pt. V, p. 59; and for Report of Joint Committee, see *ibid.*, 1923, Pt. V, p. 97.

Short title and extent. 1. (1) This Act may be called the Indian Cotton Cess Act, 1923.

(2) It extends to the whole of British India (including British Baluchistan and the Sonthal Parganas), ^a[and including also Berar].

[a] *Substituted by A. O. for "except Aden."*

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context —

(a) "Collector" means, in reference to cotton consumed in a mill in British India, the Collector of the district in which the mill is situated ^a[or any other officer appointed by the ^b[Central Government] to perform the duties of a Collector under this Act];

(b) "the Committee" means the Indian Central Cotton Committee constituted under this Act;

(c) "cotton" means raw cotton, whether baled or loose, which has been ginned;

(d) "Customs-collector" and "customs-port" mean respectively a Customs-collector and a customs-port as defined in section 3 of the Sea Customs Act, 1878;

(e) "mill" means any place which is a factory as defined in section 2 of the Indian Factories Act, 1911^c and in which cotton is converted into yarn or thread either for sale as such or for conversion into cotton goods as defined in section 3 of the ^dCotton Duties Act, 1896; ^e[^f]

(f) "prescribed" means prescribed by rules made under this Act.

^f[(g) a reference to British India includes a reference to Berar.]

[a] *Inserted by the Indian Cotton Cess (Amendment) Act, 1924 (1 [I] of 1924), S. 2. [b] Substituted by A. O. for 'Local Government' [c] See now the Indian Factories Act, 1934 (25 [XXV] of 1934), S. 2 (j) [d] Repealed by the Indian Finance Act, 1926 (19 [XIX] of 1926), S. 3. [e] The word 'and' at the end of clause (e) was omitted by the Indian Cotton Cess (Amendment) Act, 1939 (5 [V] of 1939) S. 2 [17-2-1939]. [f] Inserted, *ibid*.*

^a[3. (1)] There shall be levied and collected on all cotton produced in India and either *Imposition of cotton* exported from any customs port to any port outside British India or *cess.* consumed in any mill in British India a cess at the rate of two annas per standard bale of four hundred pounds avoirdupois, or, in the case of unbaled cotton, of six pies per hundred pounds avoirdupois :

Provided that the cess shall be levied and collected at double the above rates until the expiry of three years from the commencement of this Act.

^b[(2) The ^c[Central Government] may, by notification^d in the ^e[Official Gazette], direct that the cess referred to in sub-section (1) shall be levied and collected on all cotton produced in India and exported by land from British India to any foreign territory outside India which may be specified in the notification.]

[a] *Re-numbered by the Indian Cotton Cess (Amendment) Act, 1924 (1 [I] of 1924), S. 3. [b] Inserted, *ibid* [c] Substituted by A. O. for "Governor-General in Council." [d] For such notification, see General statutory Rules and orders, Vol. V, p. 318. [e] Substituted by A. O. for "Gazette of India."*

OBJECTS AND REASONS.

"We discussed at length the question whether the cess should be levied on cotton exported by sea as well as on cotton consumed in mills in British India, and it was decided by a majority that the provision made in the Bill as introduced, imposing the cess in both the cases, should be maintained. As regards the amount of the cess, we consider, with one dissentient, that a rate of two annas on each four

hundred pounds of cotton should be sufficient to provide funds for the activities of the Indian Central Cotton Committee except during the first three years when capital expenditure on a somewhat large scale will be necessary; and we have amended the clause accordingly in such a manner as to make it clear that the higher rate is only an exceptional provision."—Joint Committee Report.

Constitution of Indian Central Cotton Committee. 4. As soon as may be after the commencement of this Act, the ^a[Central Government] shall cause to be constituted a Committee consisting of the following members, namely : —

(i) ^b[the Vice-Chairman of the Imperial Council of Agricultural Research];

^c(ia) the ^d[Agricultural Commissioner with the Government of India.] ^e[* * *]

^f[(ii) six persons to be nominated by the Central Government to represent respectively the Agricultural Departments of the Provincial Governments of Madras, Bombay, Sind, the United Provinces, the Punjab, and the Central Provinces and Berar;]

(iii) the Director General of Commercial Intelligence;

- (iv) nine persons nominated, respectively, by the East India Cotton Association, the Bombay Millowners' Association, the Bombay Chamber of Commerce, the Indian Merchants' Chamber, Bombay, the Karachi Chamber of Commerce, the Ahmedabad Millowners' Association, Tuticorin Chamber of Commerce, the Upper India Chamber of Commerce, and the Empire Cotton Growing Corporation ;
- ^a[(v) four persons nominated by the Central Government to represent the cotton manufacturing or cotton ginning industry, of whom two shall be nominated to represent the industry in the Central Provinces and Berar, one to represent the industry in Madras and one to represent the industry in the Punjab ;]
- (vi) one person nominated by ^b[the Central Government to represent] Bengal ;
- (vii) one person having knowledge of co-operative banking nominated by the ^a[Central Government] ;
- ^a[(viii) ⁱ[eleven] persons nominated by the Central Government to represent the cotton growing industry of whom two shall be nominated to represent the industry in Madras, two to represent the industry in the United Provinces, two to represent the industry in the Punjab, two to represent the industry in the Central Provinces and Berar, ⁱ[two] to represent the industry in Bombay and one to represent the industry in Sind ;]
- (ix) three persons nominated, respectively, by the Government of His Exalted Highness the Nizam of the Hyderabad State, by the Durbar of the Baroda State and by the Durbar of the Gwalior State ;
- (x) one person nominated jointly by the Durbars of the Indian States in Rajputana and Central India ; and
- (xi) such additional persons as the ^a[Central Government] may, by notification in the ^j[Official Gazette], appoint :

Provided that, if within the period prescribed in this behalf, any authority or other person fails to make any nomination which it or he is entitled to make under this section, the ^a[Central Government] may ^k[itself] appoint a member or members, as the case may be, to fill the vacancy or vacancies.

[a] *Substituted* by A. O. for 'Governor General in Council'. [b] *Substituted* by the Indian Cotton Cess (Amendment) Act, 1929 (14 [XIV] of 1929), S. 2 for 'the Agricultural Adviser to the Government of India'. [c] *Inserted, ibid.* [d] *Substituted* by the Repealing and Amending Act, 1939 (84 [XXXIV] of 1939), S. 2 and Sch. I for 'Expert Adviser to the Imperial Council of Agricultural Research'. [28-9-1939]. [e] The words 'in agricultural matters' were repealed by the Repealing and Amending Act, 1940 (82 [XXXII] of 1940), S. 3 and Sch. II. [f] *Substituted* by A. O. for the original clause. [g] *Substituted* by A. O. for the original clause. [h] *Substituted* by A. O. for the 'Local Government of'. [i] These words have been *Substituted* for 'ten' and 'one' respectively by the Indian Cotton Cess (Amendment) Act, 1939 (5 of [V] of 1939), S. 3 [17-2-1939]. [j] *Substituted* by A. O. for 'Gazette of India'. [k] *Substituted* by A. O. for 'himself.'

5. (1) The Committee so constituted shall be a body corporate by the name of the Indian Incorporation of Central Cotton Committee, having perpetual succession and a common seal *the Committee.* with power to acquire and hold property both moveable and immoveable and to contract, and shall by the said name sue and be sued.

(2) ^a[The Vice-Chairman of the Imperial Council of Agricultural Research] shall be *ex-officio* President of the Committee.

(3) The Secretary of the Committee shall be a person, not being a member of the Committee, appointed by the ^b[Central Government].

[a] *Substituted* by the Indian Cotton Cess (Amendment) Act, 1929 (14 [XIV] of 1929), S. 3, for "The Agricultural Adviser to the Government of India". [b] *Substituted* by A. O. for "Governor-General in Council."

6. (1) The owner of every mill shall furnish to the Collector, on or before the seventh day *Delivery of monthly returns.* of each month, a return stating the total amount of cotton consumed or brought under process in the mill during the preceding month, together with such further information in regard thereto as may be prescribed :

Provided that no return shall be required in regard to cotton consumed or brought under process before the commencement of this Act.

(2) Every such return shall be made in such form and shall be verified in such manner as may be prescribed.

Collection of cess by Collector. 7. (1) On receiving any return made under section 6, the Collector shall assess the cotton cess payable in respect of the period to which the return

relates, and if the amount has not already been paid shall cause a notice to be served upon the owner of the mill requiring him to make payment of the amount assessed within ten days of the service of the notice.

(2) If the owner of any mill fails to furnish in due time the return referred to in section 6 or furnishes a return which the Collector has reason to believe is incorrect or defective, the Collector shall assess the amount payable by him in such manner, if any, as may be prescribed, and the provisions of sub-section (1) shall thereupon apply as if such assessment had been made on the basis of a return furnished by the owner :

Provided that, in the case of a return which he has reason to believe is incorrect or defective, the Collector shall not assess the cess at an amount higher than that at which it is assessable on the basis of the return without giving to the owner a reasonable opportunity of proving the correctness and completeness of the return.

(3) A notice under sub-section (1) may be served on the owner of a mill either by post or by delivering it or tendering it to the owner or his agent at the mill.

^a[S. (1)] In respect of cotton exported by sea, the cess shall be assessed and levied by the Collector at the customs-port of export and, subject to the provisions of this Act and of any rules made thereunder, shall, for all or any of the purposes of the Sea Customs Act, 1878, be deemed to be a duty of customs.

^b[(2) In respect of cotton exported by land on which the cess is leviable—

(a) where the cotton is exported to any territory which is foreign territory as defined in the Land Customs Act, 1924, the cess shall be assessed by such authorities and in such manner as may be prescribed, and shall, subject to the provisions of this Act and of any rules made thereunder, for all or any of the purposes of the Land Customs Act, 1924, be deemed to be a duty of land customs leviable under section 5 of the Indian Tariff Act, 1894; and

(b) in any other case, the cess shall be assessed and levied by such authorities and in such manner as may be prescribed.

(3) The Central Board of Revenue constituted under the Central Board of Revenue Act, 1924, may make rules^c providing, on such conditions as may be specified in the rules, for—

(a) the refund of the cess levied where cotton is exported by land and subsequently imported into India;

(b) the export by land, without payment of the cess, of cotton which is subsequently to be imported into India.]

[^a] The original S. 8 was re-numbered as sub-s. (1) of that section by the Indian Cotton Cess (Amendment) Act, 1924 (1 [I] of 1924), S. 4. [^b] Substituted by the Indian Cotton Cess (Amendment) Act, 1925 (18 [XVIII] of 1925), S. 2, for the original sub-s. (2) which was inserted by Act 1 [I] of 1924, S. 4. [^c] For such rules, see General Statutory Rules and Orders, Vol. V, p. 818.

OBJECTS AND REASONS.

Sub-section (1) — "We have provided in this clause that, in the case of cotton exported by sea, the cess shall be recoverable as if it were a customs duty recoverable in accordance with the provisions of the Sea Customs Act, 1878, as we think it will

be convenient to provide a ready-made machinery for its collection and thus to obviate any delay which might occur owing to the necessity for the framing of special rules."

— Joint Committee Report.

Finality of assessment and recovery of unpaid cess.

9. (1) An assessment made in accordance with the provisions of section 7 or section 8 shall not be questioned in any Court.

(2) Any owner of a mill who is aggrieved by an assessment made under section 7 may, within three months of service of the notice referred to in sub-section (1) of that section, apply to the ^a[Central Government] for the cancellation or modification of the assessment and, on such application, the ^a[Central Government] may cancel or modify the assessment and order the refund to such owner of the whole or part, as the case may be, of any amount paid thereunder.

(3) Any sum recoverable under section 7 may be recovered as an arrear of land revenue.

[^a] Substituted by A. O. for "Local Government."

Power to inspect mills and take copies of records and accounts.

any part of any mill.

10. (1) The Collector or any officer empowered by general or special order of the ^a[Central Government] in this behalf shall have free access at all reasonable times during working hours to any mill or to

(2) The Collector or any such officer may at any time, with or without notice to the owner, examine the working records, sale records and accounts of any mill and take copies of or extracts from all or any of the said records or accounts for the purpose of testing the accuracy of any return or of informing himself as to the particulars regarding which information is required for the purposes of this Act or any rules made thereunder.

(3) Where any officer other than the Collector proposes to examine under sub-section (2) any record or account containing the description or formulae of any trade process, the owner of the mill may give to the said officer, for transmission to the Collector, a written notice of objection and the officer shall thereupon seal up the record or account pending the orders of the Collector.

[a] Substituted by A. O. for "Local Government."

11. (1) All such copies and extracts and all information acquired by a Collector or any other officer from an inspection of any mill or warehouse or from any return submitted under this Act shall be treated as confidential.

Information acquired to be confidential.

(2) If the Collector or any such officer discloses to any person other than a superior officer any such information as aforesaid without the previous sanction of the ^a[Central Government], he shall be punishable with imprisonment which may extend to six months and shall also be liable to fine :

Provided that nothing in this section shall apply to the disclosure of any such information for the purposes of a prosecution in respect of the making of a false return under this Act.

[a] Substituted by A. O. for "Local Government."

12. (1) On the last day of each month, or as soon thereafter as may be convenient, the proceeds of the cess recovered during that month shall, after deduction of the expenses, if any, of collection and recovery, be paid to the Committee.

Application of proceeds of cess.

(2) Subject to such conditions as may be prescribed, the said proceeds and any other monies received by the Committee shall be applied to meeting the expenses of the Committee and the cost of such measures as it may, with the previous approval of the ^a[Central Government], decide to undertake for promoting agricultural and technological research in the interests of the cotton industry in India.

[a] Substituted by A. O. for "Governor-General in Council."

^a[12A. As soon as may be after the first day of April, 1937, the Committee shall pay to the Government of Burma, for the promotion of agricultural and technological research in the interests of the cotton industry in Burma, the sum of rupees forty-two thousand and sixty-six.]

[a] Inserted by A. O.

13. No act done or proceeding taken under this Act shall be questioned on the ground merely of the existence of any vacancy in or any defect in the constitution of the Committee or the Standing Finance Sub-Committee, if any.

14. The ^a[Central Government] may, by notification in the ^b[Official Gazette], declare that, with effect from such date as may be specified in the notification, the Committee shall be dissolved, and on the making of such declaration all funds and other property vested in the Committee shall vest in His Majesty ^c[for the purposes of the Central Government] and this Act shall be deemed to have been repealed.

[a] Substituted by A. O. for "Governor-General in Council". [b] Substituted by A. O. for "Gazette of India".

[c] Inserted by A. O.

Power of the Central Government to make rules.

15. (1) The ^a[Central Government] may make rules^b for the purpose of carrying into effect all or any of the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) for prescribing the time within which nominations shall be made under section 4 whether in the first instance or on the occurrence of vacancies ;

(b) for prescribing the term of office of the members of the Committee ;

(c) for prescribing the circumstances in which and the authority by which any member may be removed ;

- (d) for the holding of a minimum number of meetings of the Committee during any year ;
- (e) for the maintenance by the Committee of a record of all business transacted and the submission of copies of such records to the ^a[Central Government] ;
- (f) for the definition of the powers of the Committee and of the Secretary to enter into contracts which shall be binding on the Committee, and the manner in which such contracts shall be executed ;
- (g) for the regulation of the travelling allowances of members of the Committee and of their remuneration, if any ;
- (h) for the definition of the powers of the Committee and the Secretary in respect of the appointment, promotion and dismissal of officers and servants of the Committee, and in respect of the creation and abolition of appointments of such officers or servants ;
- (i) for the regulation of the grant of pay and leave to officers and servants of the Committee, and the payment of leave allowances to such officers and servants, and the remuneration to be paid to any person appointed to act for any officer or servant to whom leave is granted ;
- (j) for the regulation of the payment of pensions, gratuities, compassionate allowances and travelling allowances to officers and servants of the Committee ;
- (k) for prescribing the establishment and maintenance of a provident fund for the officers and servants of the Committee, and for the deduction of subscriptions to such provident fund from the pay and allowances of such officers and servants, other than Government servants whose services have been lent or transferred to the Committee ;
- (l) for prescribing the preparation of budget estimates of the annual receipts and expenditure of the Committee and of supplementary estimates of expenditure not included in the budget estimates, and the manner in which such estimates shall be sanctioned and published ;
- (m) for defining the powers of the Committee, the Standing Finance Sub-Committee, if any, the President and the Secretary, respectively, in regard to the expenditure of the funds of the Committee, whether provision has or has not been made in the budget estimates or by reappropriation for such expenditure, and in regard to the reappropriation of estimated savings in the budget estimates of expenditure ;
- (n) for prescribing the maintenance of accounts of the receipts and expenditure of the Committee and providing for the audit of such accounts ;
- (o) for prescribing the manner in which payments are to be made by or on behalf of the Committee, and the officers by whom orders for making deposits or investments or for withdrawals or disposal of the funds of the Committee shall be signed ;
- (p) for determining the custody in which the current account of the Committee shall be kept, and the bank or banks at which surplus monies at the credit of the Committee may be deposited at interest, and the conditions on which such monies may be otherwise invested ;
- (q) for prescribing the preparation of a statement showing the sums allotted to Provincial Departments of Agriculture or institutions not under the direct control of the Committee for expenditure on research, the actual expenditure incurred, the outstanding liabilities, if any, and the disposal of unexpended balances at the end of the year ;
- (r) the assessment, levy, and payment of the cotton cess in respect of cotton exported by sea ^a[or by land]; and
- (s) any other matter which is to be or may be prescribed.

[a] *Substituted* by A.O. for "Governor-General in Council". [b] For such rules, *see* General Statutory Rules and Orders, Vol. V, p. 319. [c] *Inserted* by the Indian Cotton Cess (Amendment) Act, 1924 (1 [I] of 1924), S. 5.

16. The Committee may, with the previous sanction of the ^a[Central Government], make *Power of the Committee to make rules.* rules^b consistent with this Act and with any rules made under section 15 to provide for all or any of the following matters, namely :—

- (a) for the appointment of a Standing Finance Sub-Committee and the delegation thereto of any powers exercisable under this Act by the Committee ;

- (b) for prescribing the method of appointment, removal and replacement and the term of office of members of the Standing Finance Sub-Committee, and for the filling of vacancies therein ;
- (c) for the appointment of the dates, times and places for meetings of the Committee and the Standing Finance Sub-Committee, and for regulating the procedure to be observed at such meetings ;
- (d) for determining the circumstances in which security may be demanded from officers and servants of the Committee, and the amount and nature of such security in each case ;
- (e) for determining the times at which, and the circumstances in which, payments may be made out of the provident fund and the conditions on which such payments shall relieve the fund from further liability ;
- (f) for determining the contribution, if any, payable from the funds of the Committee to the provident fund ;
- (g) for regulating generally all matters incidental to the provident fund and the investment thereof ;
- (h) for defining the powers and duties of the Secretary of the Committee.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] For such rules, *see* General Statutory Rules and Orders, Vol. V. pp. 327-336.

17. All rules made under section 15 or section 16 shall be published in the "[Official Gazette] Publication of rules." and, on such publication, shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Gazette of India".

[THE] COTTON CLOTH ACT, 1918.

(ACT XXIII of 1918).

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STATEMENT OF OBJECTS AND REASONS.

"Owing to the great rise in the price of cotton piece-goods caused by the war, considerable distress has been caused to the poorer classes. It is accordingly proposed to take power to appoint one or more Controllers, with whom will be associated Advisory Committees of persons having expert knowledge of the trade. The Controllers will have authority to require the mills in India to manufacture certain standard varieties of cloth which

are in common use amongst the poorer classes. The standard cloth will be manufactured at controlled prices, which will be so fixed as to allow the mills a reasonable margin of profit; and, in order to ensure that the benefit of these prices reaches the general public, the sale of the cloth will be effected under licences granted and at prices fixed by the Local Governments."

— Gazette of India, 1918, Part V, page 58.

[THE] COTTON CLOTH ACT, 1918

(ACT XXIII OF 1918)^a

[26th September, 1918.]

An Act to take powers, to provide for the cheap supply of cotton cloth to the poorer classes of the community.

WHEREAS it is expedient to take powers for the purpose of encouraging or maintaining the supply, at reasonable rates, to the poorer classes of the community, of cotton cloth manufactured in this country; It is hereby enacted as follows:—

[a] For Report of Select Committee, *see* Gazette of India, 1918, Pt. V, p. 77; and for Proceedings in Council, *see* *ibid.*, 1918, Pt. VI, pp. 754, 953, 1000 and 1147.

Short title.

1. This Act may be called the COTTON CLOTH ACT, 1918.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "Controller" means a Controller appointed under this Act;
- (b) "cotton cloth" means cotton cloth manufactured in this country: and
- (c) "standard cloth" means any kind of cotton cloth which a Controller may, from time to time, declare to be standard cloth.

3. The ^a[Provincial Government] may, by notification^b in the ^c[Official Gazette], appoint one or more persons as ^d[it] may think fit to be Controllers for the purposes of this Act, and shall specify in any such notification the area in which any Controller so appointed shall exercise his powers.

[a] *Substituted by A. O. for "Governor-General in Council."* [b] For a notification issued by the Governor-General in Council, see Gazette of India, 1918, Pt. I, p. 1558. [c] *Substituted by A. O. for "Gazette of India".* [d] *Substituted by A. O. for "he".*

4. (1) Whenever it appears to a Controller that such a course is necessary or expedient for the purpose of encouraging or maintaining the supply of standard cloth, at reasonable rates to the poorer classes of the community, he may (subject to this Act and the rules made thereunder and to the control of the ^a[Provincial Government]) make general or special orders regulating or giving directions within the area in which he is empowered, with respect to the manufacture, transport, distribution and sale or purchase of, or other dealings in cotton cloth.

(2) Without prejudice to the generality of the foregoing power, orders may be made by a Controller—

- (a) declaring and defining the classes of standard cloth;
- (b) prescribing distinctive indications which shall be woven into, impressed or otherwise displayed upon, different classes of standard cloth;
- (c) requiring any person, who ordinarily manufactures cotton cloth, to manufacture, or provide for the manufacture of, standard cloth in such quantity, of such quality and by such date as the Controller may direct; and
- (d) fixing the prices to be paid to the manufacturer for standard cloth or for any particular class of standard cloth, and providing for the payment thereof on delivery:

Provided that in fixing prices the Controller shall have regard to the cost of production and to the allowance of a reasonable profit, without necessarily taking into consideration the market-price, and if the Controller is satisfied that the manufacturer has incurred actual loss arising out of forward contracts entered into before the commencement of this Act, and that such loss is immediately attributable to an order under this Act, he may take such loss into account:

Provided further that the Controller may fix different prices in the case of different localities or, if special reasons exist, in respect of different manufacturers in the same locality.

[a] *Substituted by A. O. for "Governor-General in Council."*

5. Where a Controller is appointed in exercise of the power conferred by section 3, the ^a[Provincial Government] shall appoint a Committee consisting of such number of persons having knowledge of the cotton or cotton cloth trade as ^b[it] thinks fit to assist the Controller with their advice in the performance of his duties. Before a Controller issues any order declaring and defining the classes of standard cloth or fixing the prices to be paid to the manufacturer, he shall consult the Committee, and he may consult the Committee on any other matter connected with his duties:

Provided that, if the opinion of the majority of members of the Committee who are present at any meeting is adverse to the issue of any order, the Controller shall, if he does not accept the Committee's advice, refer the matter for the decision of the ^a[Provincial Government].

[a] *Substituted by A. O. for "Governor-General in Council."* [b] *Substituted by A. O. for "he."*

6. Where, by an order made in the exercise of powers conferred by section 4, the Controller has directed a manufacturer to manufacture, or provide for the manufacture of, standard cloth and has fixed the price therefor, the manufacturer shall deliver the same at such time and place and in such manner as the Controller may specify from time to time, and the Controller shall pay or cause to be paid to the manufacturer the said price, together with the freight, if any, actually paid by the manufacturer.

7. Subject to the control of the ^a[Provincial Government], a Controller may, from time to time by order in writing, delegate all or any of his powers subject to such conditions and restrictions as may be prescribed therein.

[a] *Substituted* by A. O. for "Governor-General in Council."

8. If any person acts in contravention of, or without reasonable cause, fails to comply with, the provisions of any order made under section 4, or counterfeits upon any cloth a distinctive indication prescribed by the Controller, such person shall be punishable with imprisonment which may extend to six months, or with fine or with both.

9. (1) The ^a[Provincial Government] shall, if standard cloth is sold in the Province, by order in writing which shall be notified in the ^b[Official Gazette], fix the price at which alone standard cloth or any class of standard cloth shall be sold to the public.

(2) Orders may be made fixing different prices for different localities or for different methods of sale.

(3) Every such order shall be published in such manner as the ^a[Provincial Government] may consider to be best adapted for bringing the prices so fixed to the notice of the poorer classes.

[a] *Substituted* by A. O. for "Local Government." [b] *Substituted* by A. O. for "local official Gazette."

10. (1) No person shall sell or keep, offer or expose for sale to the public, standard cloth otherwise than at such price as may be fixed by the ^a[Provincial Government] and in accordance with the terms and conditions of a licence issued in this behalf.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine or with both.

[a] *Substituted* by A. O. for "Local Government."

11. A licence for the sale of standard cloth shall be granted by such authority, in such form and subject to such conditions as the ^a[Provincial Government] may prescribe by rules made under this Act.

[a] *Substituted* by A. O. for "Local Government."

Rule-making power. 12. (1) The ^a[Provincial Government] may make rules—

(a) prescribing the powers and duties of the Controller,

(b) prescribing the manner in which the Controller's orders shall be published or served, as the case may be, and

(c) generally giving effect to the provisions of this Act.

(2) The ^b[Provincial Government] shall, if standard cloth is sold in the Province, make rules prescribing the authority by which, the form in which and the conditions under which, any licence or class of licences for the sale of standard cloth shall be granted.

(3) Rules made under this Act shall be published in ^c[^{*} ^{*} ^{*}] the ^d[Official Gazette], ^e[^{*} ^{*} ^{*}] and on such publication shall have effect as if enacted in this Act.

[a] *Substituted* by A. O. for "Governor-General in Council." [b] *Substituted* by A. O. for "Local Government." [c] The words "the Gazette of India or" were *repealed* by A. O. [d] *Substituted* by A. O. for "local official Gazette." [e] The words "as the case may be" were *repealed* by A. O.

Protection for acts done under the Act. 13. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

14. All powers given by this Act shall be in addition to and not in derogation of any other powers conferred by or under any enactment, and all such powers may be exercised in the same manner and by the same authority as if this Act had not been made.

(ACT XII OF 1925)

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10. Liability of officers of a company.
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12. Power of the Central Government to make rules.
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14. Power to reject unmarked bales in fulfilment of contracts.
15. Protection for acts done under Act.

STATEMENT OF OBJECTS AND REASONS.

"The Indian Cotton Committee which was appointed in 1917, in Chapter XVI of their Report recommended certain measures, including the licensing of cotton ginning and pressing factories, to prevent such malpractices as damping, mixing and adulteration, which are injurious to the quality and reputation of Indian cotton. The recommendations of the Committee, however, involved an excessive amount of official interference. The object of the present Bill is to put the trade in a position to protect itself by providing for the marking of bales and the record of ownership, and by providing

further that unmarked bales are not tenderable in fulfilment of a contract, if marked bales are demanded by the purchaser.

The Bill also makes provision for the maintenance of registers for statistical returns, for the use of correct scales and weights, and for the structural improvement of ginning and pressing factories. The Bill is based on the recommendations of the Indian Central Cotton Committee, and is supplementary to the Cotton Transport Act, 1923."

— Gazette of India, 1924, Part V, page 115.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

- Amended by Acts 14 of 1939; 9 of 1942.
- Adapted by A. O.
- Amended in
Bombay and Sind by Bom. Act 4 of 1936.

- Bombay by Bom. Act 20 of 1938.
- Central Provinces by C. P. Act 24 of 1936.
- Punjab by Punj. Act 12 of 1941.
- United Provinces by U. P. Act 15 of 1941.

[THE] COTTON GINNING AND PRESSING FACTORIES ACT, 1925

(ACT XII OF 1925)^a

[18th March, 1925.]

An Act to provide for the better regulation of cotton ginning and cotton pressing factories.

WHEREAS it is expedient to provide for the better regulation of cotton ginning and cotton pressing factories; It is hereby enacted as follows:—

[a] For Report of Select Committee, see Gazette of India, 1925, Pt. V, p. 59.

This Act has been amended in its application to—

- (a) Bombay and Sind by Bom. Act 4 of 1936; (b) Bombay by Bom. Act 20 of 1938; (c) Central Provinces by C. P. Act 24 of 1936; (d) Punjab by Punjab Act 12 of 1941, S. 40 (a); (e) United Provinces by U. P. Act 15 of 1941.

Short title, extent and commencement.

1. (1) This Act may be called the COTTON GINNING AND PRESSING FACTORIES ACT, 1925.

(2) It extends to the whole of British India^a [* * *] including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date^b as the^c [Central Government] may, by notification in the^d [Official Gazette], appoint.

[a] The words and brackets "(except Burma)" were repealed by A. O. [b] 8th August, 1925; see General Rules and Orders, Vol. V, p. 625. [c] Substituted by A. O. for "Governor-General in Council." [d] Substituted by A. O. for "Gazette of India."

PROVINCIAL AMENDMENT.

BOMBAY.

Sub-section (2) of section 1 of the Cotton Ginning and Pressing Factories (Bombay Amendment) Act, 1936 (Bom. Act IV of 1936), runs as follows:—

"(2) This Act shall extend in the first instance to the Province of Sind or such area in the said Province with effect from such date as the Provincial Government may by notification in the official Gazette appoint. The Provincial Government may by notification in the official Gazette extend the provisions of this Act to any other area with effect from such date as the Provincial Government may appoint in the said notification."

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

- (a) "bale" means any pressed package of cotton of whatever size or density ;
- (b) "cotton" means ginned or unginned cotton, or cotton waste ;
- (c) "cotton ginning factory" means any place where cotton is ginned or where cotton fibre is separated from cotton seed by any process whatever involving the use of steam, water or other mechanical power or of electrical power ;
- (d) "cotton pressing factory" means any factory as defined in the Indian Factories Act, 1911, in which cotton is pressed into bales ;
- (e) "cotton waste" means droppings, strippings, fly and other waste products of a cotton mill or of a cotton ginning factory or of a cotton pressing factory, but does not include yarn waste ;
- (f) "Indian Central Cotton Committee" means the Indian Central Cotton Committee constituted under the Indian Cotton Cess Act, 1923, and includes any sub-committee appointed by it to perform any function of the Indian Central Cotton Committee under this Act ; and
- (g) "occupier" includes a managing agent or other person authorised to represent the occupier ;
- (h) "prescribed" means prescribed by or under rules made under this Act.

[a] See now the Indian Factories Act, 1934 (25 [XXV] of 1934), S. 2 (j).

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND.

In Section 2—

- (i) after the word, comma and dash 'context,—' the following shall be *inserted*, namely—
" (aa) 'admixture of cotton' means a prescribed mixture of different varieties of cotton ;"
- (ii) after clause (f) the following clause shall be *inserted*, namely —
" (ff) 'licence' means a licence granted under section 2A ;" and
- (iii) after clause (h) the following clause shall be *inserted*, namely—
" (i) 'season' means such period as may from time to time be prescribed."

— Bombay Act IV of 1936, Section 2.

CENTRAL PROVINCES.

Exactly same as that of Bombay and Sind. — C. P. Act XXIV of 1936, Section 2.

UNITED PROVINCES.

In Section 2 after clause (h) the following clause shall be *added*, namely —

- " (i) 'season' means such period as may from time to time be prescribed."

— U. P. Act XV of 1941, S. 2. [1-8-1942.]

SECTION 2A.

BOMBAY AND SIND.

After Section 2, the following section shall be *inserted*, namely —

"2A. (1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee, as may be prescribed.

(2) (a) A licence for which the prescribed fee has been paid shall be liable to be refused only on the ground that the owner or person in charge of a cotton ginning or cotton pressing factory in respect of which a licence is applied for has been convicted of an offence punishable under this Act.

(b) A licence shall be liable to be suspended, withdrawn or cancelled only on the ground that the owner or person in charge of the cotton ginning or cotton pressing factory in respect of which a licence was granted has been convicted of an offence punishable under this Act :

Provided that no licence shall be suspended, withdrawn or cancelled under this clause until after the expiration of the season in which the said owner or person has been so convicted.

(3) If any person works a cotton ginning or cotton pressing factory in respect of which a licence has not been granted or has been suspended, withdrawn or cancelled, such person shall be punishable —

(a) on a first conviction, with fine which may extend to five hundred rupees and, if the offence has continued for more than one day, with an additional fine which may extend to one hundred rupees for every day subsequent to the first day during which the offence has continued ; and

(b) on every subsequent conviction, with fine which may extend to fifteen hundred rupees and, if the offence has continued for more than one day, with an additional fine which may extend to two hundred rupees for every day subsequent to the first day during which the offence has continued."—Bom. Act IV of 1936, S. 3.

CENTRAL PROVINCES.

After Section 2, the following section shall be *inserted*, namely —

"2A. (1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee, as may be prescribed.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with fine which may extend to five hundred rupees or, if he has previously been convicted of an offence under sub-section (1), to fifteen hundred rupees.

(3) No licence for which the prescribed fee has been paid shall be refused, suspended or cancelled except on the ground that the owner or person in charge of the factory concerned has been convicted for the contravention of the provisions of Section 3A :

Provided that no licence shall be suspended or cancelled under this sub-section until after the expiration of the season in which the said owner or person has been so convicted."—C. P. Act XXIV of 1936, S. 3.

3. (1) The owner of every cotton ginning factory shall cause to be maintained at the factory *Maintenance of registers.* in such form, if any, as may be prescribed, a ginning register containing a record of all cotton ginned in the factory and of the names of the persons for whom and the dates on which the cotton has been ginned and of the amount ginned for each person.

(2) The owner of every cotton pressing factory shall cause to be maintained at the factory in such form, if any, as may be prescribed, a press register containing a daily record of the number of bales pressed in the factory, the serial number of each bale, and the name of the person for whom it has been pressed.

(3) The owner or the person in charge of a cotton ginning or cotton pressing factory shall be bound to produce any ginning register or press register maintained under this section when required to do so by any person appointed by the "[Provincial Government] in this behalf, and the owner or person in charge of any cotton pressing factory shall be bound to furnish to the Indian Central Cotton Committee, if so required by it in writing, a copy, certified as correct by the owner or person in charge of the factory, of the entry in any press register maintained at the factory relating to any specified bale.

(4) No register required to be maintained by this section shall be destroyed until after the expiration of three years from the date of the last entry therein.

(5) If—

- (a) in any factory any register required by this section to be maintained is not maintained or is maintained in any form other than the form, if any, prescribed for the purpose, or
- (b) any entry in any such register is proved to be false in any material particular, or
- (c) any such register is destroyed before the expiration of the period referred to in sub-section (4),

the owner of the factory shall be punished with fine which may extend to fifty rupees or, if he has previously been convicted of any offence under this sub-section, to five hundred rupees.

(6) If the owner or the person in charge of any factory fails to produce any register, or to furnish a certified copy of any entry, when required to do so under sub-section (3), or furnishes a certified copy of an entry knowing or having reason to believe such copy to be false, he shall be punished with fine which may extend to fifty rupees or, if he has previously been convicted of any offence under this sub-section, to five hundred rupees.

[a] Substituted by A. O. for "Local Government".

OBJECTS AND REASONS.

Sub-section (1)—"It will be more convenient for the owner to maintain not a daily record of the amount of cotton ginned on each day but a record of the dates on which cotton received from any indi-

vidual was ginned and the total amount ginned for the individual, as the process of ginning may continue for some days."

— S. C. R.

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND.

(i) In sub-section (2) of section 3,

(1) the word 'and' shall be *omitted*, and

(2) the following words shall be *added* at the end—

"and the prescribed particulars as supplied by such person of the cotton ginning factory where it has been ginned."

— Bom. Act IV of 1936, S. 4.

(ii) In sub-sections (5) and (6) of section 3, for the words "shall be punished" the words "shall, on conviction, be punishable" shall be *substituted*.

— Bom. Act IV of 1936, S. 12.

CENTRAL PROVINCES.

Same as that of Bombay and Sind (i).

— C. P. Act XXIV of 1936, S. 4

PROVINCIAL AMENDMENTS.

SECTIONS 3A TO 3C.

BOMBAY AND SIND.

After section 3, the following new sections shall be *inserted*, namely —

"3A. (1) The Provincial Government may by notification in the Official Gazette declare that in any area *Prohibition against watering, etc., of cotton.* specified in such notification and to which this Act has been extended, no cotton which is ginned or pressed in a cotton ginning or cotton pressing factory shall contain any admixture of cotton.

(2) Any owner of a cotton ginning or cotton pressing factory or any person in charge of such factory —

(a) who knowing or having reason to believe that any cotton is watered or contains seed in excess of the prescribed proportion or contains any foreign substance, gins or presses or allows such cotton to be ginned or pressed in such factory, or

(b) who in any area specified in the notification under sub-section (1) gins or presses or allows to be ginned or pressed any cotton which he knows or has reason to believe to contain an admixture of cotton,

shall, on conviction, be punishable with fine which may extend to five thousand rupees.

(3) Any owner of cotton who knowingly waters any cotton which is ginned and which is being, or is intended to be, pressed in a cotton pressing factory, or mixes seed or foreign substance with such cotton, or in any area specified in sub-section (1) makes any admixture of cotton, or abets or knowingly allows or connives at any such watering, mixing or admixture of cotton, shall, on conviction, be punishable with fine which may extend to five thousand rupees.

Explanation. — For the purposes of this section, cotton shall not be deemed to be watered, unless such cotton contains moisture in excess of the normal quantity. The normal quantity of moisture in any given quantity of cotton is the amount of moisture that such cotton is reasonably expected to have, regard being had to the place or places at or to which, and the time or times of the year in which, such cotton has been picked, collected, stored, conveyed, left, ginned or pressed. A certificate given by the prescribed authority as to the normal quantity of moisture that a given quantity of such cotton should have and the quantity of moisture that it possesses shall be evidence of such matters, until the contrary is proved; and if the latter quantity exceeds the former it shall be evidence, until the contrary is proved, that the cotton is watered."

— Bom. Act IV of 1936, S. 5.

"3AA. Any owner of cotton who knowingly makes or causes to be made any cotton which is ginned and *Penalty for making any cotton wet.* which is being or is intended to be pressed in a cotton pressing factory, wet, or mixes or causes to be mixed seed, foreign substance or cotton waste with such cotton, or in any area specified in sub-section (1) of section 3A makes any admixture of cotton, or abets or knowingly allows or connives at any such act shall, on conviction, be punishable with fine which may extend to five thousand rupees."

— Bom. Act XX of 1938, S. 3. [21-11-1938]

"3B. (1) The Provincial Government or any gazetted official authorised by it in this behalf may on its or *Examination of cotton, packages or bales.* his own motion or on receipt of a complaint that there has been a contravention of the provisions of section 3A or section 3AA in respect of any cotton, package or of any bale and in the case of a complaint, on payment of the prescribed fee by the complainant, cause such cotton or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person after examination of the contents of any bale under sub-section (1) shall be admissible in evidence and be presumptive proof of the facts mentioned therein, until the contrary is proved.

3C. (1) The Provincial Government may authorise any gazetted officer to enter into and inspect, at any *Entry and inspection.* reasonable time, any cotton ginning or cotton pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act or of any rule made thereunder or of any of the conditions subject to which a licence has been granted in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton ginning or cotton pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall, in every instance, be permitted to attend during the inspection and the things seized during such inspection shall be sealed in the prescribed manner."

— Bom. Act IV of 1936, S. 5.

CENTRAL PROVINCES.

After section 3, the following sections shall be *inserted*, namely —

Prohibition against watering, etc., of cotton. "3A. (1) The Provincial Government may, by notification, declare that in any area specified in such notification, no cotton which is ginned or pressed in a cotton ginning or cotton pressing factory shall contain any admixture of cotton.

(2) Any owner of a cotton ginning factory or any person in charge of such factory who knows or has reason to believe that any cotton ginned in such factory contains seed in excess of the prescribed proportion or contains any foreign substance shall, on conviction, be punishable with fine which may extend to fifteen hundred rupees.

(3) Any owner of a cotton pressing factory or any person in charge of such factory who knowing or having reason to believe that any cotton is watered or contains seed in excess of the prescribed proportion or contains any foreign substance, presses or allows such cotton to be pressed in such factory shall, on conviction, be punishable with fine which may extend to fifteen hundred rupees.

(4) Any owner of a cotton ginning or cotton pressing factory or any person in charge of such factory who in any area specified in the notification under sub-section (1) gins or presses or allows to be ginned or pressed any

cotton which he knows or has reason to believe to contain an admixture of cotton shall, on conviction, be punishable with fine which may extend to fifteen hundred rupees.

(5) Any owner of cotton who knowingly waters any cotton which has been ginned and which is being, or is intended to be, pressed in a cotton pressing factory, or mixes seed or foreign substance with such cotton, or in any area specified in sub-section (1) makes any admixture of cotton, or abets or knowingly allows or connives at any such watering, mixing or admixture of cotton, shall, on conviction, be punishable with fine which may extend to fifteen hundred rupees.

Explanation. — For the purposes of this section, cotton shall not be deemed to be watered, unless such cotton contains moisture in excess of the normal quantity. The normal quantity of moisture in any given quantity of cotton is the amount of moisture that such cotton is reasonably expected to have, regard being had to the place or places at or to which, and the time or times of the year in which, such cotton has been picked, collected, stored, conveyed, left, ginned or pressed. A certificate given by the prescribed authority as to the normal quantity of moisture that a given quantity of such cotton should have and the quantity of moisture that it possesses shall be evidence of such matters, until the contrary is proved; and if the latter quantity exceeds the former it shall be evidence, until the contrary is proved, that the cotton is watered.

3-B. (1) The Provincial Government or any gazetted officer authorized by it in this behalf may on its or his own motion or on receipt of a complaint that there has been a contravention of the provisions of section 3-A in respect of any cotton, package or of any bale and in the case of a complaint, on payment of the prescribed fee by the complainant, cause such cotton or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person or body after examination of the contents of any bale under sub-section (1) shall be admissible in evidence and be presumptive proof of the facts mentioned therein until the contrary is proved.

3-C. (1) The Provincial Government may authorise any gazetted officer to enter into and inspect, at any reasonable time, any cotton ginning or cotton pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act or of any rule made thereunder or of any of the conditions subject to which a licence has been granted in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton ginning or cotton pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall, in every instance, be permitted to attend during the inspection and the things seized during such inspection shall be sealed in the prescribed manner."

— C. P. Act XXIV of 1936, S. 5.

4. (1) The owner of every cotton pressing factory shall cause every bale pressed in the factory to be marked in such manner as may be prescribed, before it is removed from the press-house, with a serial number and with the mark prescribed for the factory.

(2) If any bale is removed from the press-house of any cotton pressing factory without having been marked as required by sub-section (1), the owner of the factory shall be punished with fine which may extend to fifty rupees.

PROVINCIAL AMENDMENT.

BOMBAY AND SIND.

In sub-section (2) of section 4 for the words "shall be punished" the words "shall, on conviction, be punishable" shall be substituted. — Bom. Act 4 [IV] of 1936, S. 12.

5. (1) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(2) The ^a[Provincial Government] shall compile from the weekly returns, and shall publish in such manner as ^b[it thinks fit], a statement showing the total number of bales pressed in the Province during the week and from the commencement of the season to the end of the week, to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(3) If default is made in submitting any return as required by sub-section (1), the owner of the factory shall be punished with fine which may extend to fifty rupees.

(4) Where the owner of a cotton pressing factory has notified to the prescribed authority that the work of pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) until such work has been resumed.

Explanation.—In this section "season" means the period notified in this behalf by the ^a[Provincial Government] in the ^c[Official Gazette].

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for "the Governor-General in Council may direct". [c] Substituted by A. O. for "local official Gazette".

OBJECTS AND REASONS.

"The return required is a weekly and progressive return for the season, . . . The weight to be shown is the average net weight of the bales pressed in that week. We have also made it clear that the owner is not obliged to submit a blank return when the factory is

closed, if he has given due notice of the fact. The amount of the fine has been reduced to Rs. 50, as the offence is no more serious than other offences for which the same penalty has been inflicted."

— S. C. R.

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND.

For section 5, the following shall be *substituted*, namely,—

"5. (1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time *Returns.* and in such form, as may be prescribed, monthly returns showing the quantity of cotton ginned in the factory during the preceding month and from the commencement of the season to the end of that month.

(2) The Provincial Government shall compile from the monthly returns submitted under sub-section (1), and shall publish in such manner as the Central Government may direct, a statement showing the total quantity of cotton ginned in the province during the month and from the commencement of the season to the end of the month to which the returns relate :

Provided that the quantity of cotton ginned in an individual factory shall not be published.

(3) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(4) The Provincial Government shall compile from the weekly returns submitted under sub-section (3), and shall publish in such manner as the Central Government may direct, a statement showing the total number of bales pressed in the province during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(5) If default is made in submitting any return as required by sub-section (1) or sub-section (3), the owner of the factory shall, on conviction, be punishable with fine which may extend to fifty rupees.

(6) Where the owner of a cotton ginning or cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (3) until such work has been resumed."

—Bom. Act IV of 1936, S. 6.

CENTRAL PROVINCES.

For section 5, the following section shall be *substituted*, namely,—

"5. (1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such *Returns.* time and in such form, as may be prescribed, weekly returns showing the quantity of cotton ginned in the factory during the preceding week and from the commencement of the season to the end of that week.

(1-A) The Provincial Government shall compile from the weekly returns submitted under sub-section (1), and shall publish, in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the province during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the quantity of cotton ginned in any individual factory shall not be published.

(2) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(3) The Provincial Government shall compile from the weekly returns submitted under sub-section (2), and shall publish, in such manner as it thinks fit, a statement showing the total number of bales pressed in the province during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(4) If default is made in submitting any return as required by sub-section (1), or sub-section (2) the owner of the factory shall be punishable with fine which may extend to fifty rupees.

(5) Where the owner of a cotton ginning factory or a cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (2) until such work has been resumed."

—C. P. Act XXIV of 1936, S. 6.

UNITED PROVINCES.

For section 5, the following section shall be *substituted*, namely,—

"5. (1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such *Returns.* time and in such form, as may be prescribed, monthly returns showing the quantity of cotton ginned in the factory during the preceding month and from the commencement of the season to the end of that month.

(2) The Provincial Government shall compile from the monthly returns submitted under sub-section (1), and shall publish in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the province during the month and from the commencement of the season to the end of the month to which the returns relate :

Provided that the quantity of cotton ginned in any individual factory shall not be published.

(3) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the

preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(4) The Provincial Government shall compile from the weekly returns submitted under sub-section (3), and shall publish in such manner as it thinks fit, a statement showing the total number of bales pressed in the province during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(5) If default is made in submitting any return as required by sub-section (1) or sub-section (3), the owner of the factory shall, on conviction, be punishable with fine which may extend to fifty rupees.

(6) Where the owner of a cotton ginning or cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (3) until such work has been resumed."

— U. P. Act XV of 1941, S. 3. [1-8-1942.]

Returns from cotton ginning factories.

^a[5A. (1) This section shall be in force in Chief Commissioners' Provinces only; but the Provincial Government of any other Province may, by notification in the official Gazette, bring this section into force in the Province.

(2) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form as may be prescribed, weekly returns showing the quantity of cotton ginned in the factory during the preceding week and from the commencement of the season to the end of that week.

(3) The Provincial Government shall compile from the weekly returns so submitted, and shall publish in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the Province during the week and from the commencement of the season to the end of the week, to which the returns relate :

Provided that the quantity of the cotton ginned in any individual factory shall not be published.

(4) If default is made in submitting any return as required by sub-section (2), the owner of the factory shall be punished with fine which may extend to fifty rupees.

(5) The provisions of sub-section (4) of section 5 apply to cotton ginning factories and the returns referred to in sub-section (2) of this section as they apply to cotton pressing factories and the returns referred to in sub-section (1), of section 5, and "season" in this section means the season as notified for the purposes of section 5.]

[a] This section was inserted after S. 5 by the Cotton Ginning and Pressing Factories (Amendment) Act, 1942 (9 [IX] of 1942), S. 2. [14-3-1942]

6. (1) No scales or weights shall be used in any cotton ginning or cotton pressing factory other than the scales or weights, if any, prescribed by the ^a[Central Government] as standard for the district in which the factory is situated.

(2) If in any factory any scale or weight is used in contravention of the provisions of sub-section (1), the owner of the factory shall be punished with fine which may extend to fifty rupees or, if he has been previously convicted of any offence under this sub-section, to five hundred rupees.

[a] Substituted by A. O. for "Local Government" cf. the Government of India Act, 1935, Sch. VII, List I, entry 51.

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND.

(i) In sub-section (1) of section 6, after the words 'other than' the words and figures 'the standard weights and measures, weighing and measuring instruments authorised under the Bombay Weights and Measures Act, 1932, in districts or areas in which Parts II, III, V and VI of that Act are in force or elsewhere other than' shall be inserted.

(ii) In sub-section (2) of section 6, for the words 'shall be punished' the words 'shall, on conviction, be punishable' shall be substituted.

— Bom. Act IV of 1936, Ss. 7 and 12.

PUNJAB.

For section 6, the following section shall be deemed to be substituted, namely —

"(6) The scales or weights used in any cotton ginning or cotton pressing factory shall be those prescribed by the Provincial Government under the Punjab Weights and Measures Act, 1941."

— Punjab Act XII of 1941, S. 40 and Sch. II.

7. (1) Where the owner of a cotton ginning or pressing factory has leased the factory for a period of not less than one month in the case of a cotton ginning factory, or three months in the case of a cotton pressing factory, and the lessor retains no interest in the management or profits of the factory and notice of the lease has been given by the lessor and the lessee to the prescribed authority, the lessee shall be deemed to be the owner of the

Liability of lessee as owner.

factory, from the date of the notice and for the period of the continuance of the lease, for the purposes of section 3, in respect of the registers maintained or to be maintained from that date and for that period, and for the purposes of sections 4, 5, ^a[5A] and 6.

(2) On the termination of the lease the lessee shall hand over to the lessor the registers maintained under section 3, and the lessor shall forthwith report to the prescribed authority any default of the lessee in complying with the provisions of this sub-section or in maintaining the registers in accordance with the provisions of section 3.

(3) If default is made in handing over any register or making any report as required by this section, the lessor or the lessee, as the case may be, shall be punished with fine which may extend to fifty rupees.

[a] Figure "5A" was inserted by the Cotton Ginning Pressing Factories (Amendment) Act, 1942 (9 [IX] of 1942), S. 3. [14-3-1942].

OBJECTS AND REASONS.

Where the owner has leased his factory and has nothing to do with the management thereof, the responsibility of maintaining and producing registers is on the lessee during the period of the lease. This section accor-

dinally throws the responsibility on the lessee and makes due provision for the transfer of the registers at the end of the lease. The owner is still responsible for producing the old registers.—See S. C. R.

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND.

(i) In sub-s. (1) of S. 7, after the words "for the purpose of sections" insert the figures and letters '3A, 3C.'

(ii) In sub-s. (3) of S. 7, for the words "shall be punished" the words "shall, on conviction, be punishable" shall be substituted. —Bombay Act IV of 1936, Ss. 8, 12.

CENTRAL PROVINCES.

Same as that of Bombay and Sind (i). —C. P. Act XXIV of 1936, S. 7.

8. (1) On a transfer of the ownership of a cotton ginning or pressing factory, the transferor *Liability on transfer of ownership* shall hand over to the transferee the registers maintained under section 3, and the transferee shall forthwith report to the prescribed authority any default of the transferor in complying with the provisions of this sub-section or in maintaining the registers in accordance with the provisions of section 3.

(2) If default is made in handing over any register or making any report as required by sub-section (1), the transferor or the transferee, as the case may be, shall be punished with fine which may extend to fifty-rupees.

PROVINCIAL AMENDMENT.

BOMBAY AND SIND.

In sub-s. (2) of S. 8, for the words "shall be punished" the words "shall, on conviction, be punishable" shall be substituted. —Bom. Act IV of 1936, S. 12.

Structural requirements for factories.

9. (1) In the case of cotton ginning factories the construction of which is commenced after the commencement of this Act —

(a) gin-houses shall be provided with separate entrances and exits for the bringing in of unginced and the taking out of ginned cotton respectively, and

(b) the factories shall be constructed in accordance with plans and specifications approved by the prescribed authority :

Provided that nothing in this sub-section shall apply to any factory in which only roller gins are used where the number of such gins is not more than four.

^a["(1A) In any cotton ginning factory, whether erected before or after the commencement of this Act —

(a) no structural alterations or additions, the construction of which commenced after the 27th day of February 1939, shall be made so as to minimise the degree of compliance of the factory as a whole with the requirements set forth in clauses (a) and (b) of sub-section (1), and

(b) every structural addition (whether actually attached to any existing structure in the factory or not), the construction of which commenced after the last mentioned date, shall be constructed in accordance with plans and specifications approved by the prescribed authority :

Provided that nothing in this sub-section shall apply to any factory in which, after any alteration or addition has been made, only roller gins are used where the number of such gins is not more than four."]

(2) Within such period after the commencement of this Act as may be prescribed, the owner of every cotton pressing factory in which cotton is handled on the ground floor shall cause the press-house to be paved or provided with other suitable flooring to the satisfaction of the prescribed authority.

(3) If the owner of any factory fails to comply with any provision of this section which is applicable to the factory, he shall be punished with fine which may extend to one hundred rupees.

(4) (a) Where the owner of a factory has been convicted under sub-section (3), the prescribed authority may serve on the owner of the factory an order in writing directing that such alterations shall be made in the factory, before a specified date, as in the opinion of the said authority are necessary to secure compliance with the provisions of sub-section (1), ^a[sub-section (1A)] or sub-section (2), as the case may be.

(b) Where the alterations are not made in accordance with the order served under clause (a) of this sub-section, the prescribed authority may serve on the owner and on the occupier, if any, of the factory an order in writing directing that the work of ginning or pressing cotton in such factory shall be suspended until the alterations have been made in accordance with the order served under clause (a) of this sub-section and the owner and the occupier, if any, shall be jointly and severally liable to fine which may extend to fifty rupees for each day on which cotton is ginned or pressed in the factory in contravention of the order served under this clause.

[a] *Inserted* by the Cotton Ginning and Pressing Factories (Amendment) Act, 1939 (14 [XIV] of 1939), S. 2, [28-3-1939.]

PROVINCIAL AMENDMENT.

BOMBAY AND SIND.

In sub-section (3) of section 9, for the words "shall be punished" the words "shall, on conviction, be punishable" shall be substituted.

— Bombay Act IV of 1936, S. 12.

10. Where the person guilty of an offence under this Act is a company, every director, *Liability of officers of a company.* manager, secretary and other officer thereof who is knowingly a party to the default shall also be guilty of the like offence and liable to the like punishment.

11. (1) No prosecution under this Act shall be instituted except by or with the previous *Cognizance of offences.* sanction of the District Magistrate or a Chief Presidency Magistrate or a Magistrate of the first class specially empowered in this behalf by the ^a[Provincial Government].

(2) No offence punishable under this Act shall be tried by any Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class.

[a] *Substituted* by A. O. for "Local Government".

PROVINCIAL AMENDMENT.

SECTION 11A.

BOMBAY AND SIND.

After section 11 the following new section shall be inserted, namely, —

"11A. Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898, *Power of Magistrate to pass sentence.* Presidency Magistrate or a Magistrate of the First Class may pass any sentence provided for any offence punishable under this Act and the provisions of the said Code shall be deemed to have been amended accordingly."

— Bom. Act IV of 1936, S. 9.

Power of the Central Government to make rules.

12. The ^a[Central Government] may make rules^b to provide for —

(a) the allotment of a special mark to be used by each pressing factory for the purpose of the marking of bales;

(b) the manner in which bales shall be marked; and

^c[(c) the standard weights and scales to be used in cotton ginning and cotton pressing factories in any part of British India and the inspection of the same];

[a] *Substituted* by A. O. for "Governor-General in Council." [b] For such rules, see General Rules and Orders. Vol. V, p. 625. [c] *Substituted* by A. O. for the original clause.

Power of the Provincial Government to make rules.

13. The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], make rules consistent with this Act to provide for all or any of the following matters, namely:—

(a) the forms in which registers, records and returns are to be maintained or submitted, and the inspection of records and registers;

(b) the appointment of the authority to whom and the time within which the returns required by ^c[sections 5 and 5A] shall be made;

d[* * * * * * * *]

- (d) the appointment of authorities for the purposes of sections 7, 8 and 9 ;
- (e) the manner of service of orders made under section 9 ;
- (f) the powers of entry and inspection which may be exercised by District Magistrates or by any officer specially empowered in this behalf by the ^a[Provincial Government];
- (g) any other matter which is to be or may be prescribed or for which provision is necessary in order to carry out the purposes of this Act.

[a] *Substituted* by A. O. for the "Local Government". [b] *Substituted* by A. O. for "local official Gazette".
 [c] *Substituted* for "section 3" by the Cotton Ginning and Pressing Factories (Amendment) Act, 1942 (9 [IX] of 1942), S. 4. [14-3-1942.] [d] Clause (c) was repealed by A. O. See now cl. (c) of S. 12.

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND.

(1) In Section 13, after Clause (a) the following clauses shall be *inserted*, namely:—

- "(aa) What shall constitute an admixture of cotton;
- (ab) the period which shall from time to time constitute a season;
- (ac) the authority by whom, the form in which, the conditions subject to which and the fees on payment of which, a licence may be granted under sub-section (1) of section 2A;
- (ad) the particulars of the cotton ginning factory to be entered in the register maintained under sub-section (2) of section 3;
- (ae) the proportion of seed which may be contained in cotton;
- (af) the person authorised to give a certificate regarding the quantity of moisture contained in any cotton and other matters specified in section 3A;
- (ag) the person authorised to examine bales under section 3B;
- (ah) the procedure for making a complaint and causing the contents of a bale to be examined and the fee for examination of the contents of a bale under sub-section (1) of section 3B;
- (ai) the manner in which the things seized shall be sealed under section 3C."
- (ii) Section 13 shall be *renumbered* as sub-section (1) of that section and after the sub section so renumbered, the following sub-sections shall be *added*, namely:—

"(2) The rules to be made under sub-section (1) shall be subject to the condition of previous publication.

(3) Rules made under sub-section (1) shall as soon as they are made be laid before each of the Chambers of the Provincial Legislature for a period of one month and shall be liable to be modified or rescinded by a resolution passed by each of the Chambers during the session thereof immediately following the expiry of the said period; such rule shall, after notification in the Official Gazette, be deemed to have ~~been modified or rescinded accordingly~~.

Provided that when, in the opinion of the Provincial Government, such modification or rescission is likely to defeat or frustrate any of the purposes of this Act, the Provincial Government may, by notification in the Official Gazette, declare that the modification or rescission shall have no effect and thereupon the rule shall remain in force as if it had not been modified or rescinded."

—Dom. Act IV of 1936, S. 10.

CENTRAL PROVINCES.

(1) In section 13 after clause (a), the following clauses shall be *inserted*, namely:—

- "(aa) what shall constitute an admixture of cotton;
- (ab) the period which shall from time to time constitute a season;
- (ac) the authority by whom, the form in which, the conditions subject to which and the fee on payment of which, a licence may be granted under sub-section (1) of section 2A;
- (ad) the particulars of the cotton ginning factory to be entered in the register maintained under sub-section (2) of section 3;
- (ae) the proportion of seed which may be contained in cotton;
- (af) the person authorized to give a certificate regarding the quantity of moisture contained in any cotton and other matters specified in section 3A;
- (ag) the person or body authorized to examine bales under section 3B;
- (ah) the procedure for making a complaint and causing the contents of a bale to be examined and the fee for examination of the contents of a bale under sub-section (1) of section 3B;
- (ai) the manner in which the things seized shall be sealed under section 3C."
- (ii) Section 13 shall be *renumbered* as sub-section (1) of that section and after the sub-section so renumbered, the following sub-sections shall be *added*, namely:—

"(2) The rules to be made under sub-section (1) shall be subject to the condition of previous publication.

(3) A copy of the draft of the proposed rules shall be laid on the table of the Legislative Assembly of the Province. The Provincial Government shall give the Assembly an opportunity of discussing them, and shall take into consideration any resolution concerning the same which may be passed by the Assembly before finally publishing them in the Official Gazette."

—C. P. Act XXIV of 1936, Ss. 8 and 9.

14. ^a[(1)] After the expiration of one year from the commencement of this Act, any person who has made a contract for the purchase of baled cotton may require that no bales other than bales marked ^b[with the mark prescribed under section 4 for the factory in which they were pressed] shall be supplied in fulfilment of such contract, and, if he does so require, no bale not so marked shall be tenderable in fulfilment of the contract ;

^c[* * * * *]

^a[(2)] Any bale marked in accordance with the provisions of section 4 shall, within the meaning of the Indian Evidence Act, 1872, be presumed for all purposes as between the parties to a contract for the purchase of baled cotton, to have been so marked before leaving the factory in which it was pressed.]

[a] Section 14 was re-numbered as sub-section (1) of S. 14 and sub-section (2) was added to it by the Cotton Ginning and Pressing Factories (Amendment) Act, 1939 (14 [XIV] of 1939), S. 3. [28-3-1939]. [b] Substituted for the words "in accordance with section 4," *ibid.* [c] Proviso to section 14 was omitted; *ibid.*

Protection for acts - 15. No suit or other legal proceeding shall be instituted against any person in respect of anything which is in good faith done or intended to be done under this Act.

SECTION 16

PROVINCIAL AMENDMENTS.

BOMBAY AND SIND

After Section 15 the following section shall be added, namely:—

Penalty. "16. Whoever contravenes any of the provisions of this Act or any rule made thereunder or any of the conditions subject to which a licence has been granted to him shall, on conviction, if no other penalty is already provided in this Act for such contravention, be punishable with fine which may extend to five hundred rupees or, if he has previously been convicted of an offence under this Act or any rule made thereunder, with fine which may extend to fifteen hundred rupees." [Bombay Act IV of 1936, S. 11.]

CENTRAL PROVINCES

After Section 15, the following section was added, namely :—

Penalty. "16. Whoever contravenes any of the provisions of this Act or any rule made thereunder or any of the conditions subject to which a licence has been granted to him shall, on conviction, if no other penalty is already provided in this Act for such contravention, be punishable with fine which may extend to five hundred rupees, or, if he has previously been convicted of an offence under this Act or any rule made thereunder, with fine which may extend to fifteen hundred rupees." [C. P. Act XXIV of 1936, S. 10.]

SECTION 17

BOMBAY AND SIND

After Section 16 the following section shall be added, namely :—

Compounding offences, etc. "17. (1) The District Magistrate may accept from any person whose licence is liable to be suspended, withdrawn or cancelled under this Act, or who is reasonably suspected of having committed an offence under this Act, a sum of money in lieu of such suspension, withdrawal or cancellation or by way of composition for the offence which may have been committed, as the case may be.

(2) On payment by such person of such sum to the District Magistrate, such person if in custody shall be set at liberty and if criminal proceedings shall have been instituted against such person, the composition shall be held to amount to an acquittal."

— Bombay Act IV of 1936, S. 11.

[THE] COTTON INDUSTRY (STATISTICS) ACT, 1926.

(ACT XX OF 1926).

CONTENTS.

SECTIONS.

1. Short title and extent.
2. Definitions.
3. Delivery of monthly returns of goods and yarn manufactured by mill-owners.
4. Power to inspect mills and take copies of records.

SECTIONS.

5. Publication of returns.
6. Power to make rules.
7. Penalties.
8. Exemption.
9. Protection for acts done under this Act.

STATEMENT OF OBJECTS AND REASONS.

"The Cotton Duties Act, 1896, provides, in addition to the collection of the duty, for the submission of returns of the quantities of cotton goods produced in mills in British India. These statistics of

production have been systematically compiled for the last 30 years, and have proved of great assistance in studying the development and vicissitudes of the industry.

It is proposed to repeal the Cotton Duties Act of 1896 by a clause in the Finance Bill, and unless the preparation and submissions of these statistical returns are provided for by another Act, there will be a break in the continuity of these useful statistics.

The Bombay Millowners' Association have been consulted and are in favour of the continuance and preparation

of these returns for quantities of yarn and cotton goods manufactured in India.

It is, therefore, proposed to render compulsory the preparation and submission of such returns by a Cotton Industry Statistics Bill. This Bill will be proceeded with *pari passu* with the Finance Bill."

— Gazette of India, 1926, Part V, page 100.

[THE] COTTON INDUSTRY (STATISTICS) ACT, 1926.

(ACT XX OF 1926).

[25th March 1926.]

An Act to provide for the regular submission of returns of quantities of cotton goods manufactured and cotton yarn spun in British India.

WHEREAS it is expedient, notwithstanding the repeal of the Cotton Duties Act, II of 1896, to provide for the regular submission of returns of the quantities of cotton goods manufactured and cotton yarn spun in British India; It is hereby enacted as follows:

Short title and extent. 1. (1) This Act may be called the COTTON INDUSTRY (STATISTICS) ACT, 1926
(2) It extends to the whole of British India.

Definitions. 2. For the purposes of this Act, unless there is anything repugnant in the subject or context,—

- (a) "cotton goods" or "goods" includes all tissues and other articles (except yarn and thread) woven, knitted or otherwise manufactured wholly or partly from cotton yarn;
- (b) "cotton yarn" or "yarn" means yarn wholly or partly composed of cotton fibres;
- (c) "mill" means any building or place where cotton goods are woven, knitted or otherwise manufactured, or where cotton yarn is spun, by machinery moved otherwise than by manual labour, and includes every part of such building or place;
- (d) "owner", in relation to any mill, includes the managing agent or other principal officer of the mill; and
- (e) "prescribed" means prescribed by rules made under this Act.

3. (1) The owner of every mill shall each month prepare and deliver, or cause to be prepared and delivered, to the prescribed officer a return of all cotton goods manufactured and all cotton yarn spun in the mill during the preceding month by machinery moved otherwise than by manual labour, and shall subscribe a declaration of the truth of the return at the foot thereof.

(2) Save as may be otherwise prescribed, every such return shall state, in respect of each description of goods and of yarn, the quantity manufactured during the period to which the return relates, and shall contain such further information, and be in such form and be subject to such conditions as to verification and otherwise, as may be prescribed.

(3) Every such return shall be delivered to the prescribed officer or posted to his address within seven days after the end of the month to which it relates.

4. (1) Any officer authorised by the ^a[Provincial Government] by order in writing in this behalf shall have free access at all reasonable times during working hours to any mill and may at any time, with or without notice to the owner, examine and take copies of, or extracts from, the records of the mill for the purpose of testing the accuracy of any return made under section 3, or of informing himself as to any particulars regarding which information is required for the purposes of this Act or any rules made thereunder:

Provided that no officer not especially empowered by the ^a[Provincial Government] in this behalf shall be entitled to inspect any record containing the description or formulæ of any trade process.

(2) All copies and extracts and all information acquired by any officer in the inspection of any mill under this section shall be treated as strictly confidential.

[a] Substituted by A. O. for "Local Government".

5. The ^a[Provincial Government] shall, from the returns delivered under section 3, cause to be compiled and published, in such form as ^b[it] may direct, statements

showing for each month the total quantities of goods manufactured and of yarn spun in mills in [the Province].

[a] *Substituted* by A. O. for "Governor General in Council". [b] *Substituted* by A.O. for "he". [c] *Substituted* by A. O. for "British India".

6 (1) The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], make Power to make rules. rules^c consistent with this Act to carry out the purposes thereof.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

- (a) the form of any return required under this Act, the particulars to be contained therein, and the manner in which the return shall be verified ; .
- (b) the nature of the records to be maintained by the owners of mills ;
- (c) the powers and duties, in regard to the inspection of mills under this Act, of the officers authorised to make such inspections ; and
- (d) any other matter which may be or is to be prescribed.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

[c] For such rules, see Gazette of India, 1926, Pt. I, p. 463.

Penalties.

7. (1) Any person who —

- (a) knowingly falsifies any record of manufacture or production kept in a mill, or .
- (b) being required to deliver a return under section 3, knowingly delivers a false return, or
- (c) omits to make any return required by section 3, or refuses to sign or complete the same, or
- (d) knowingly does any act, not otherwise punishable under this Act, in contravention of the provisions of any rule made under this Act,

shall be punishable with fine which may extend to five hundred rupees.

(2) Any person who discloses any particulars or other information acquired by him in the inspection of any mill under this Act shall be punishable with fine which may extend to one thousand rupees :

Provided that nothing in this sub-section shall apply to the disclosure—

- (a) of any such particulars or information for the purpose of a prosecution under section 193 of the Indian Penal Code or under this Act, in respect of any return kept or record made for the purposes of this Act,
- (b) of any such particulars or information to any person acting in the execution of any duty imposed upon him by this Act, where the disclosure is necessary for the purposes of this Act.

8. The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], exempt *exemption.* from the operation of this Act or of any specified provision thereof any mill or class of mills, or any goods or class of goods, specified in the notification.

[a] *Substituted* by A. O. for "Governor-General in Council". [b] *Substituted* by A. O. for "Gazette of India".

9. No suit or other legal proceeding shall be instituted against any person in respect of any- thing which is in good faith done or intended to be done under this *Protection for acts done* Act.
under this Act.

[THE] COTTON TRANSPORT ACT, 1923.

(ACT III OF 1923)

CONTENTS.

SECTIONS.

1. Short title and extent.
2. Definitions.
3. Power to issue notification prohibiting import of cotton into protected area.
4. Refusal to carry unlicensed cotton.
5. Procedure where cotton arrives at notified area.

SECTIONS.

6. Penalties.
7. Power to make rules.
8. Previous approval of Provincial Legislature to issue of notifications and rules.
9. Protection for acts done under Act.

STATEMENT OF OBJECTS AND REASONS.

"The Indian Cotton Committee, which was appointed in 1917, brought to notice (1) that the practice of adulterating long staple cotton with short staple was very prevalent at the gins and press-houses in certain long staple areas, the object being to secure for the mixture the higher prices offered for long staple; (2) that, owing to the consequent mixture of seed, there was considerable deterioration in the cultivation of many of the superior varieties of cotton; (3) that soft cotton waste was also used for the purpose of adulteration with "*Kapas*" (the natural floss); and (4) that short staple cotton was frequently railed to a long staple area and re-booked thence, even without mixing, as long staple cotton.

2. As instances of (1) and (2), the Committee quoted the imports of short staple cotton into the Broach tract, the result of which has been that Broach cotton has largely lost its former reputation. Other superior varieties of cotton are threatened with the same fate. The practice described under (4) above is facilitated by the trade custom whereby cotton is bought and sold on the name and reputation of the area where it purports to have been grown; i. e., on the name of the railway station from which the bales are last booked.

3. These malpractices are exercising so serious and dangerous an influence on the industry as a whole, that

the necessity of taking Governmental action has become a matter of immediate importance. The Bill provides a remedy by enabling Local Governments to prevent inferior cotton or cotton-waste, as defined, from being imported, except under licence, into areas which it is desired to protect.

The principal provisions of the Bill are as follows:—

1. Local Governments are empowered, with the previous consent of the Provincial Legislation, to define the areas and to notify the stations which should be regarded as protected. Consignments of cotton are not allowed to any such notified station except from other notified stations in the same area.

2. It is necessary to make certain exceptions to the prohibition in favour, for instance, of millowners within the area requiring extraneous cotton and of purchasers of cotton waste for industrial purposes. Local Governments are accordingly empowered to frame rules for a licensing system and to appoint the authorities for the issue of licenses.

3. Station masters or other railway servants responsible for the delivery of goods or parcels are prohibited under penalties from delivering cotton improperly consigned to their stations."

—Gazette of India, 1922, Part V, page 213.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

—Amended by Act 34 of 1925.

—Adapted by A. O.

[THE] COTTON TRANSPORT ACT, 1923.

(ACT III OF 1923.)

[23rd February, 1923.]

An Act to provide for the restriction and control of the transport of cotton in certain circumstances.

WHEREAS it is expedient for the purpose of maintaining the quality and reputation of the cotton grown in certain areas in British India to enable the restriction and control of the transport by rail and the import of cotton into those areas; It is hereby enacted as follows:

OBJECTS AND REASONS.

"*The preamble.* — As one of the objects of the Bill is to check the practice of sending pressed bales from one cotton tract to another, ordinarily producing a better quality of cotton, so that it may be re-booked from a railway station in that tract and thereby appear as if it were cotton grown in that area of better quality, we think the purpose of the Bill would be more correctly

stated as the maintenance of the quality and reputation of the cotton grown in British India, and we have amended the Preamble accordingly. This also removes any difficulty which might arise in interpreting the terms inferior and superior varieties."

—Joint Committee Report, 1923.

1. (1) This Act may be called the Cotton Transport Act, 1923. (2) It extends to the whole of Short title and extent. British India.

Definitions.
context,—

2. In this Act, unless there is anything repugnant in the subject or

- (a) "certified copy," in relation to a licence, means a copy of the licence certified in the manner described in section 76 of the Indian Evidence Act, 1872, by the authority by which the licence was granted;
- (b) "cotton" means every kind of unmanufactured cotton, that is to say, ginned and unginned cotton, cotton waste and cotton seed;
- (c) "cotton waste" means droppings, strippings, fly and other waste products of a cotton-mill other than yarn waste;
- (d) "licence" means a licence granted under this Act;
- (e) "notified station" means a railway station specified in a notification under section 3;
- (f) "prescribed" means prescribed by rules made under this Act; and

(g) "protected area" means an area into which the import of cotton or of any kind of cotton has been prohibited ^a[wholly or partly] by a notification under section 3.

[a] *Inserted by the Cotton Transport (Amendment) Act, 1925 (34 [XXXIV] of 1925), S. 2.*

OBJECTS AND REASONS.

"We have made it clear in the definition of the expression "cotton" contained in sub-clause (b) that the enumeration of the various kinds of cotton referred to is exhaustive. We have also made a slight alteration in

this sub-clause and in sub-clause (g) in connection with the proposal to which we refer in our remarks on clause 5."

— *Joint Committee Report.*

3. (1) The ^a[Provincial Government] may, for the purpose of maintaining the quality or reputation of the cotton grown in any area in the Province, by notification in the ^b[Official Gazette], prohibit the import of cotton or of any specified kind of cotton into that area ^c[by rail, road, river and sea, or by any one or more of such routes] save under, and in accordance with the conditions

Power to issue notification prohibiting import of cotton into protected area.

of, a licence :

Provided that no such notification shall be deemed to prohibit the import into any protected area of packages containing any kind of cotton and not exceeding ten pounds avoirdupois weight.

(2) Any such notification may prohibit the delivery to, and the taking of delivery by, any person, at any specified railway station situated in the protected area, of any cotton, the import of which ^c[by rail] into that area is prohibited when such cotton has been consigned from a railway station not situated in that area, unless such person holds a licence for the import ^c[by rail] of the cotton into that area.

[a] *Substituted by A. O. for "Local Government."* [b] *Substituted by A. O. for "local official Gazette."*

[c] *Inserted by the Cotton Transport (Amendment) Act, 1925 (34 [XXXIV] of 1925), S. 3.*

OBJECTS AND REASONS.

"We are impressed with the necessity of enabling a Local Government to prohibit the import into protected areas of all or any of the kinds of cotton specified in clause 2. In famine times it might, for instance, be necessary for a Local Government to permit the import into such an area of cotton seed which is extensively used as cattle food. This decision necessitates a considerable number of consequential alterations throughout the Bill, e. g., in sub-clause (2) of this clause and in clauses 4, 5 and 7, in addition to those in clause 2 referred to above.

We have further provided in sub-clause (1) of this clause for the exemption from the provisions of the Act of all cotton which is consigned in packages not exceeding ten pounds in weight. This alteration is intended to secure the free movement of samples of cotton. The Upper India Chamber of Commerce advocated the exemption from the Bill of small parcels such as are ordinarily sent as samples and might in fact be despatched by parcel post."

— *Joint Committee Report, 1923.*

4. (1) Notwithstanding anything contained in the Indian Railways Act, 1890, or any other

Refusal to carry unlicensed cotton.

law for the time being in force, the station master of any railway station or any other railway servant responsible for the booking of goods or parcels at that station may refuse to receive for carriage at, or to forward or allow to be carried on the railway from, that station any cotton consigned to a notified station, being cotton of a kind of which the delivery at such notified station has been prohibited unless both stations are in the same protected area, or unless the consignor produces a certified copy of a licence for the import of the cotton ^a[by rail] into the protected area in which such notified station is situated.

(2) Every certified copy of a licence when so produced shall be attached to the invoice or way-bill, as the case may be, and shall accompany the consignment to its destination, and shall there be dealt with in the prescribed manner.

(3) Where by or under any law in force in the territories of any State in India the import ^a[by rail] into any area, or the delivery at any railway station, of cotton or of any kind of cotton has been prohibited, the ^b[Central Government] may, by notification in the ^c[Official Gazette], declare that the provisions of sub-section (1) shall apply in respect of cotton consigned to any such station as if such area and such station were respectively a protected area and a notified station, and as if any licence granted under such law were a licence granted under this Act.

[a] *Inserted by Cotton Transport (Amendment) Act, 1925 (34 [XXXIV] of 1925), S. 4.* [b] *Substituted by A. O. for "Governor-General in Council."* [c] *Substituted by A. O. for "Gazette of India".*

5. (1) Where any cotton, the import of which ^a[by rail] into any protected area has been

Procedure where cotton arrives at notified station.

prohibited, has been consigned to and arrives at a notified station in any such protected area, the station master or other railway servant res-

possible for the receipt and delivery to the consignee of goods or parcels, as the case may be, at that station shall, unless both the notified station and the railway station from which the cotton has been consigned are situated in the same protected area, refuse to deliver the cotton until he is satisfied that the consignee holds a licence for the import of the cotton ^a[by rail] into the protected-area in which such notified station is situated; and, if he is not so satisfied, or if within fourteen days the consignee or some person acting on his behalf does not appear in order to take delivery, shall return the cotton to the railway station from which it was consigned, together with an intimation that delivery of the cotton has been refused or has not been taken, as the case may be.

(2) Any station master or other railway servant receiving any cotton returned under sub-section (1), or returned with a like intimation from a railway station specified in a notification under sub-section (3) of section 4, shall cause to be served on the consignor in any manner authorised by section 141 of the Indian Railways Act, 1890, a notice stating that the cotton has been so returned and requiring the consignor to pay any rate, terminal or other charges due in respect of the carriage of the cotton to and from the railway station to which it was consigned, and such charges shall be deemed to be due from the consignor for all the purposes of section 55 of that Act.

[a] *Inserted by the Cotton Transport (Amendment) Act, 1925 (34 [XXXIV] of 1925), S. 5.*

OBJECTS AND REASONS.

"We are of opinion that fourteen days is a sufficient period to allow for the removal of the consignee from the station of destination of cotton which is covered by a licence."—*Joint Committee Report, 1923.*

6. Any person who, in contravention of the provisions of this Act or of any ^anotification or *Penalties.* rule made hereunder, knowingly takes delivery of any cotton from a notified station or imports, or attempts to import, any cotton into a protected area, and any station master or other railway servant who, in contravention of the provisions of sub-section (1) of section 5, without reasonable excuse, the burden of proving which shall lie upon him, delivers any cotton to a consignee or other person, shall be liable to a fine not exceeding one thousand rupees, and upon any subsequent conviction to imprisonment which may extend to three months, or to fine which may extend to five thousand rupees, or to both.

[a] For such notifications, see General Statutory Rules and Orders, Vol. V, p. 90.

OBJECTS AND REASONS.

"We have made it clear that an innocent contravention of the Act is not to be punishable.

We have further considered with care the proposal supported by the Local Government of Bombay and others that the Bill should provide for the confiscation of cotton in respect of which an offence under this clause has been committed, and we have by a majority . . . decided not to make any alteration in this res-

pect. We think that the difficulties which would arise in connection with the seizure and identification of cotton after its arrival at a press or other place of destination would result in any such provision proving ineffectual, unless powers are given to the police and other officials which are disinclined to provide until experience shows that they are necessary."

—*Joint Committee Report, 1923.*

7. (1) The ^a[Provincial Government] may, by notification in the ^b[Official Gazette], make *Power to make rules.* rules to provide for any of the following matters, namely :—

- (a) the prevention of the import into a protected area by road, river or sea, save under and in accordance with the conditions of a licence, of cotton the import of which into that area has been prohibited ^c[wholly or partly] by a notification under section 3;
- (b) the terms and conditions to be contained in licences and the authorities by which they may be granted; and
- (c) the manner in which licences and certified copies thereof shall be dealt with on and after the delivery of the cotton to which they relate.

(2) Any such rules may provide that any contravention thereof or of the conditions of any licence, not otherwise made punishable by this Act, shall be punishable with fine which may extend to five hundred rupees.

[a] *Substituted by A. O. for "Local Government."* [b] *Substituted by A. O. for "local official Gazette."* [c] *Inserted by the Cotton Transport (Amendment) Act, 1925 (34 [XXXIV] of 1925), S. 6.*

8. No notification under section 3 or rule under section 7 shall be issued by the ^a[Provincial Government] of any Governor's Province, unless it has been laid in draft before ^b[the Legislative Assembly of the Province], and has been approved by a Resolution ^c[of that Assembly] either with or without *Previous approval of Provincial Legislature to issue of notifications and rules.*

modification or addition, but upon such approval being given the notification or rule, as the case may be, may be issued in the form in which it has been so approved :

^d[Provided that if the Provincial Legislature has two Chambers, the notification must be laid in draft before, and be approved by Resolutions of, both Chambers, either without modifications or additions, or with modifications or additions approved by both Chambers.]

[a] *Substituted* by A. O. for "Local Government." [b] *Substituted* by A. O. for "the Legislative Council of the Province." [c] *Substituted* by A. O. for "of the Legislative Council." [d] *Inserted* by A. O.

Protection for acts done under Act.

9. No suit or other legal proceeding shall be instituted against any person in respect of anything which is in good faith done or intended to be done under this Act.

[THE] COURT OF CHANCERY ACT, 1851.

(14 & 15 Vict., c. 83)

An Act to improve the Administration of Justice in the Court of Chancery and in the Judicial Committee of the Privy Council.

* * * * *

16. ^a[So much of the Act of the Session holder in the third and forth years of King William the Fourth, chapter forty-one, as provides that no matter shall be heard, nor shall any order, report, or recommendation be made by the Judicial Committee of the Privy Council, in pursuance of that Act, unless in the presence of at least four members of the said Committee shall be repealed; and] no matter shall be heard, nor shall any order, report, or recommendation be made, by the ^b[] Judicial Committee, in pursuance of ^b[] any ^b[] Act, unless in the presence of at least three members of the said Committee, exclusive of the Lord President of Her Majesty's Privy Council for the time being.

[a] This portion was *repealed* in the United Kingdom by 38 & 39 Vict., c. 66. It is spent. [b] The words 'said', 'the said Act or' and 'other' were *repealed* by 55 & 56 Vict., c. 19.

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Overlooking of Precedents leads to Erroneous Decisions

“Ignorance of the Judge is the misfortune of the innocent.” *Latin Maxim.*

(1943) 30 A. I. R. 1943 Privy Council 189 (191).— In an appeal from Allaha. had the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: “The decision of the Board in 46 I. A. 228 was not cited in either of the Courts in India The application now before the Board invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution . . . by the method laid down in 46 I. A. 228 For this purpose the case must go back to the Court of the Subordinate Judge. . . .”

(1922) 9 A. I. R. 1922 Privy Council 11 (12) = 43 All. 469 (475) (PC). — Section 89, T.P. Act, 1882, ended after providing for the decree “and thereafter the defendants’ right to redeem and the security shall both be extinguished.” These words do not occur in either the foreclosure section of the Act of 1882 or the corresponding rule of O. 34, Civil P. C.

“The difficulty which had arisen as to these words in several cases, e.g., *Vanmika. linga v. Chidambara*, (1905) I. L. R. 29 Mad. 37 — which case, it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram’s case*, (1918) 45 I. A. 130—therefore no longer arises”

(1948) 35 A. I. R. 1948 Nagpur 382 (384) (DB). — “The decree [of the District Judge] was set aside and the decree of the trial Court was restored by Gruer J. in Second Appeal No. 108 of 1938 on 7-11-1940. It is against this decree that the present appeal has been filed If the above decision [namely, 1939 Rang. L. R. 358] had been placed before Gruer J. he would not have reached the conclusion he did.”

(1947) 34 A. I. R. 1947 Bombay 430 (431).—*Per Kania J.* — “My attention has been drawn to two judgments in this connection. One is my own judgment in (1943) 45 Bom. L. R. 400 At that time my attention was not drawn to the judgment of the Appeal Court in (1938) 40 Bom. L. R. 676.”

(1947) 34 A. I. R. 1947 Madras 405 (407) (DB). — “We now come to the first case referred to in the order of reference, namely, 1943-2 M. L. J. 180. There Horwill J. held that the right of a legal representative was merely to file a fresh application to sue *in forma pauperis* or institute a separate suit. No reference was made in the judgment to the decision in (1935) 58 Mad. 169 This decision is not only in conflict with the judgments in (1928) 51 Mad. 697 and (1935) 58 Mad. 169, but it ignores the fact . . .

(1947) 34 A. I. R. 1947 Oudh 180 (190) (FB).—*Thomas C. J.* — “The learned counsel for the plaintiffs-respondents has strongly relied upon my decision in A.I.R. 1936 Oudh 340 relying on 55 I. A. 139 wherein I held But now having regard to the argument advanced, and the fact my attention was not drawn to the decision of their Lordships of the Privy Council in (1876) 4 I. A. 228, I entertain serious doubt as to the correctness of that decision. Nor was 4 I. A. 228 brought to the notice of Ashworth J. in (1926) 3 O. W. N. 321.”

(1947) 34 A. I. R. 1947 Oudh 232 (233) (DB).—“No doubt in 1940 O. W. N. 561 a Bench of this Court entertained an application in revision against the order of a District Judge and set aside that order but the attention of the learned Judges does not seem to have been drawn to the Full Bench decision to which we have referred [namely, a decision of five Judges reported in (1929) 4 Luck. 589], nor was the point as to the maintainability of an application in revision considered.”

(1945) 32 A. I. R. 1945 Lahore 260 (261) (FB). — *Per Achhru Ram J.* (in the Order of Reference) — “He (i. e., Patanjali Sastri, J. in A. I. R. 1942 Mad. 13) does not, however, appear to have noticed one of the Division Bench judgments of his own Court reported in A. I. R. 1920 Mad. 177 which also dealt with the same subject and took just the opposite view from that taken by him.”

(1945) 32 A. I. R. 1945 Madras 139 (141) (FB). — “The decisions in which the contrary view has been expressed are: 45 Mad. 468, A. I. R. 1919 Mad. 220, A. I. R. 1928 Mad. 440 and 1941-2 M. L. J. 754.” In the first of these cases “the Court did not, however, consider the case in 5 Mad. 141 In none of the other cases was any reason given for the view expressed and in no case was 5 Mad. 141 mentioned or considered We consider that 5 Mad. 141 should be followed.”

A. I. R. Commentaries Judicially Noticed.



(1945) 32 A. I. R. 1945 Calcutta 298 (299). — "The view that we are taking of sub-r. (2), R. 1 of O. 40 finds support from the decision of all the other High Courts and even from some earlier decisions of the Allahabad High Court itself. Those decisions are noted at the foot-note to para. 49 of Chitaley and Rao's Commentaries on the Code of Civil Procedure, vol. 3, page 2924." (Now see 4th Edn., page 2968.)

(1938) 25 A. I. R. 1938 Calcutta 730 (733) = I.L.R. (1939) 1 Cal. 112 (120). — "The expression 'other cause of a like nature' has been the subject of various decisions, most of which will be found mentioned in Chitaley's Limitation Act [1st (1938) Edn.], pp. 567 to 572."

(1938) 25 A. I. R. 1938 Calcutta 287 (289 & 290) = I.L.R. (1938) 1 Cal. 53 (58 & 60). — "In the Note to Messrs. Chitaley and Annaji Rao's Code of Civil Procedure, [2nd (1935) Edn.] at p. 1388, I find the following comment: 'The first . . . parties.'

'The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred, appear to me to sum up in a few words the substance of the decisions'."

(1948) 35 A. I. R. 1948 Allahabad 19 (24, 25) (FB). — *Per Raghubar Dayal J.* — "Circumstances requiring remand of a case can be many and need not be exhaustively imagined at a time. A good number of such circumstances are noted under Note 20, O 41, R. 28, Civil P. C., in Chitaley's Civil P. C. 4th (1944) Edn. . . . I find that two other High Courts, the Madras High Court and the Lahore High Court, have given very wide powers to the appellate Court to remand the suits. These amendments are given in Chitaley's Code of Civil Procedure, 4th Edn."

(1948) 35 A. I. R. 1948 Nagpur 142 (145). — *Hidayatullah J.* — "In Chitaley's Civil Procedure Code, vol. II (1944 Edn) it is said: 'But a mortgagee may be estopped by his conduct from setting up the mortgage provided the auction-purchaser has actually bought without notice of the mortgage. (p. 2246)' The same view is expressed on the same page in respect of charges in the following words: 'In the case of a *charge* . . . he has not notice of such charge.' The charge in favour of the decree-holder had to be mentioned in the sale proclamation to bind the auction-purchaser."

(1948) 35 A. I. R. 1948 Oudh 36 (37) (DB). — "Chitaley and Annaji Rao in their Limitation Act, [2nd (1912) Edn.], vol. I, at p. 136 have discussed the questions which might arise where a particular provision relating to the law of limitation is repealed by another Act. According to them the following positions may arise: '(1) Where at the time of the new Act . . . (2) Where the suit is . . . (3) Where the suit is . . . (4) Where the suit is . . . comes into force at once.'" [This is followed by a summary of the commentary of the authors printed on pages 137, 138 and 139.]

(1947) 34 A. I. R. 1947 Allahabad 31 (32). — *Yorke J.* — "The general impression I derive from Art. 39, from the notes to Art. 39 in Chitaley's Commentary on the Indian Limitation Act, vol. II [2nd (1942) Edn.] and the quotations from Salmond on Torts which he reproduces In the passage quoted from Salmond on Torts trespass to immovable property is defined [p. 1225] Another passage quoted in Chitaley runs as follows [p. 1225] In the same section of his notes Chitaley quotes from a Madras decision It appears to me that the upshot of all these clearly is that the present suit is not a suit for compensation for trespass upon immovable property."

(1947) 34 A. I. R. 1947 Bombay 345 (350) (SB). — *Per Sen J.* — "Chitaley in his Code of Criminal Procedure, 1941 edition, has pointed out at page 1294 that there is not specific provision enabling the Court to try the case where the accused pleads guilty and the Court does not accept the same and that in England where the Court does not think it expedient to act upon the accused plea of guilty, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty. Chitaley has further pointed out that in this country the general trend of opinion is that the accused may be treated in such cases as if he had pleaded not guilty, and that the trial may be proceeded with in the ordinary way, and he has referred to several authorities in support of this view." [View approved]

47) 34 A. I. R. 1947 Lahore 409 (409).—*Per Bhandari J.*—“In Chitaley’s Commentary on S. 141, Civil P. C. [4th (1944) Edn. Note 2 p. 1174], the learned author is that proceedings under the Guardians and Wards Act 1590, have been held to be matters of the nature contemplated by this section.” [This view is approved.]

947) 34 A. I. R. 1947 Oudh 122 (125, 126). — *Kidwar J.* — “I have come to conclusion that on both the points the decision must be in the appellant’s favour” [See Note 43 to S. 60, T. P. Act [2nd (1915) Edn., p. 1067], summarises the law and note supports the case of the appellants.”]

(1947) 34 A. I. R. 1947 Oudh 98 (100). — *Kaul J.* — “As observed by Chitaley in Note 114 on S. 11 [Civil P. C. 4th (1944) Edn.] an estoppel by consent decree can only when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. The question in all such cases, as the learned author says, would be whether the parties did intend that the question at issue should be finally settled between them by the consent decree and whether the consent decree did actually settle that question.”

(1947) 34 A. I. R. 1947 Oudh 74 (76) (DB). — “On the third head we should like, first of all, to note that a mere question of law was not decided in the present case : the question was as to the correct interpretation of the words of a deed. No question as to any principle of law or the interpretation or application of any statute is involved. We are of the opinion that, at any rate the decision of such a point does operate as *res judicata*. This aspect of the matter is discussed in Chitaley’s Commentary on the Code of Civil Procedure, Vol. I, note No. 11 to S. 11” [4th (1944) Edn. p. 163]

(1947) 34 A. I. R. 1947 Peshawar 15 (18) (DB). — “All the authorities bearing on the point were examined and the result of the examination was thus stated in the Indian Limitation Act by Chitaley etc., 2nd (1942) Edn. page 1937 : ‘It would seem to appear from an examination of cases a fresh cause of action and time would run from that date.’ It is obvious that according to this view a fresh invasion of title would constitute a new cause of action for a suit from which limitation should commence to run.”

(1946) 33 A. I. R. 1946 Allahabad 333 (347, 348) (FB). — *Per Bennett J.* — “There can also be no doubt that the weight of legal authority is in favour of this view. Against it there is the authority of were overruled in 17 Lahore 523 : *vide* Chitaley’s Commentary on section 514 of the Code, Note 10.” (See Criminal P. C. 3rd (1946) Edn., Vol. III, pages 2708 and 2709.)

(1946) 33 A. I. R. 1946 All. 89 (92, 93) (F. B.). — *Per Iqbal Ahmad C. J.* — “It has been held in a series of cases that the word appeal in S. 115, Civil P. C., is not restricted to a first appeal but also includes a second appeal . . . I do not desire to encumber my judgment by a detailed reference to these cases which will be found noted at page 1086 of Vol. I of Chitaley’s Code of Civil Procedure, Edn. 3” (Now see 4th (1944) Edn., page 1087).

(1946) 33 A. I. R. 1946 Lahore 280 (282) (FB).—*Per Teja Singh J.* in the ratio of Reference : “It is unnecessary to refer to the decisions of other Courts. They are all summed up at page 222 of Chitaley’s Court-fees Act, Edn. 1944, and it has been pointed out that while the view of”

(1946) 33 A. I. R. 1946 Nagpur 277 (293).—“There is an apparent conflict of views as to whether and how far a decision on an issue of law is *res judicata* as between the same parties in subsequent suits and Chitaley has at pages 163-166 of Vol. I of his ‘The Code of Civil Procedure (V of 1908), 1944 Edn.,’ exhaustively analysed them and reached the following conclusion which is one with which we are in agreement : ‘In order to understand and solve no conflict among them.’”

(1946) 33 A. I. R. 1946 Nagpur 277 (292).—“Then there is Chitaley’s observation at page 487 of Vol. I of his ‘The Indian Limitation Act’ Edn. 2, that it is a fundamental principle that limitation always implies an existing cause of action and that unless a cause of action for a suit has arisen, limitation for such suit cannot begin to run.” [referred with approval.]

(1945) 32 A. I. R. 1945 Oudh 183 (184).—“As regards the last case it is sufficient to refer to the following note in Chitaley’s Code of Civil Procedure at page 3261 [4th (1944) Edn., Vol. III]. — ‘In Bombay O. 48, R. 1 (w) has been deleted . . . falls under this rule.’ On consideration of these authorities, we hold that the preliminary objection suc-